

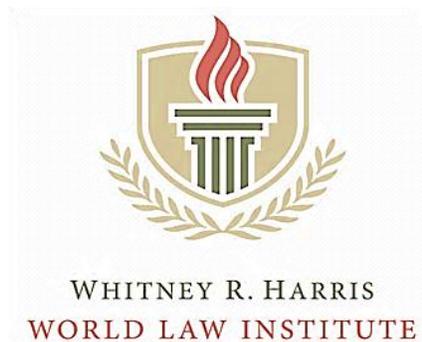
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Crimes Against Humanity Initiative

**Fulfilling the Dictates of Public Conscience:
Moving Forward with a Convention on Crimes Against Humanity**

May 16-17, 2014 | Villa Moynier | Geneva, Switzerland





International experts, members of the United Nations International Law Commission and members of the Crimes Against Humanity Initiative Steering Committee assembled at the Villa Moynier in Geneva, Switzerland, on May 16, 2014.

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Fulfilling the Dictates of Public Conscience: Moving Forward with a Convention on Crimes Against Humanity

Report

Leila Nadya Sadat and Douglas J. Pivnichny

I. INTRODUCTION TO THE GENEVA CONFERENCE

1. On May 16-17, 2014, forty experts, including twenty members of the United Nations International Law Commission, gathered in Geneva for a conference entitled “Fulfilling the Dictates of Public Conscience: Moving Forward with a Convention on Crimes Against Humanity.” The meeting was held at the Villa Moynier, home to the Geneva Academy of International Humanitarian Law and Human Rights.¹
2. The program was opened by Professors Paola Gaeta and Andrew Clapham, co-directors of the Geneva Academy, and Professor Leila Nadya Sadat, Chair of the Steering Committee of the Crimes Against Humanity Initiative and Director of the Whitney R. Harris World Law Institute at Washington University School of Law. The conveners noted the historic importance of the Villa Moynier to the development of International Humanitarian Law. Once home to Gustave Moynier, drafter of the 1864 Geneva Convention and the Statutes of the International Committee of the Red Cross (ICRC), the Villa Moynier later served as the headquarters of the ICRC, which conducted its operations from there during the Second World War. It was also observed that holding this meeting in the *Salle Antonio Cassese* was particularly appropriate, as Judge Cassese had endorsed the idea of a new global convention on crimes against humanity very shortly before his death.

¹ The Conference Agenda and a list of those participating are found in Annexes A and B to this Report.

3. It was observed that effective mechanisms to prevent and to punish crimes against humanity remain elusive in spite of the important advances of the past twenty years, including the establishment of the International Criminal Court. The commission of these crimes continues to plague nearly every corner of the globe.² For this reason, the Crimes Against Humanity Initiative, begun in 2008 under the leadership of Professor Sadat and directed by a distinguished international Steering Committee, had concluded that a new treaty on crimes against humanity was needed and had undertaken the preparation of a model treaty, the *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*.³ More than 75 of the most distinguished scholars and practitioners of international criminal justice expressed support for a new convention on crimes against humanity in the *Washington Declaration* adopted on March 12, 2010,⁴ 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 November 13, 2009, and the *Fourth Chautauqua Declaration* adopted on August 31, 2010.⁵

4. It was recalled that the International Law Commission has traditionally had an important role in the codification of customary international law and the progressive development of international criminal law and that it was especially well-placed to take up the question of a new convention at this time. The decision taken by the Commission to add the topic to its long-term programme of work was applauded, and Mr. Kirill Gevorgian was congratulated

² See, e.g., M. Cherif Bassiouni, "Crimes Against Humanity": The Need for a Specialized Convention, 31 COLUM. J. TRANSNAT'L L. 457, 491-493 (1994); Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT'L L. 334, 337-40 (2013).

³ As used in this text, "Proposed Convention" refers to the *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity* adopted by the Steering Committee of the Crimes Against Humanity Initiative in August 2010. The text of the *Proposed Convention* is found in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (Leila Nadya Sadat ed., 2d ed. 2013) on page 359 in English, on page 403 in French and on page 503 in Spanish. These texts, as well as Arabic, Chinese, German and Russian translations, are also available at crimesagainsthumanity@wustl.edu.

⁴ *Declaration on the Need for a Comprehensive Convention on Crimes Against Humanity*, reprinted in FORGING A CONVENTION, *supra* note 3, at 579.

⁵ *Kigali Declaration of the Fifth Colloquium of Prosecutors of International Criminal Tribunals*, reprinted in FORGING A CONVENTION, *supra* note 3, at 588; *The Fourth Chautauqua Declaration*, *id.* at 591.

on his election as Chairman. It was noted that the inclusion of the topic on the long-term programme of work was discussed in the Sixth Committee at the sixty-eighth session of the United Nations General Assembly, with States' responses ranging from enthusiastic to cautious.⁶ It was further observed that the Commission could move the topic to its active agenda and appoint a Special Rapporteur as early as its current session.

5. The two-day meeting included six panels, each of which addressed a particular set of challenges facing a new convention on crimes against humanity, as follows: “The Historical Movement toward Codification of Crimes Against Humanity;” “The Core Elements of a Convention;” “What Provisions for Avoiding Impunity;” “What Provisions for Promoting Inter-State Cooperation;” “Should There Be Any Institutional Mechanisms;” and “The Political Path Forward: What Prospects for Governmental Adoption of a Well-Crafted Convention.”
6. On Friday evening, the group was addressed by Ambassador Patricia O'Brien, Permanent Representative of Ireland to the United Nations and other International Organizations at Geneva and former Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations. Ambassador O'Brien spoke in support of the Initiative, highlighting the importance of prosecuting atrocity crimes and noting the real risk that a peace without justice will be an unsustainable peace.
7. On Saturday afternoon, Ambassador Hans Corell, former Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations and Member of the Initiative's Steering Committee, offered concluding remarks, reflecting upon the two days of discussions and emphasizing the need for true statesmanship to address the recurring challenge of crimes against humanity.

⁶ For example, Austria welcomed the topic's inclusion. U.N. GAOR, 68th Sess., 6th Comm., 17th mtg., at ¶ 74, U.N. Doc. A/C.6/68/SR.17 (Nov. 8, 2013). France asked whether a new convention is necessary, *id.* at ¶ 106, and China encouraged the Commission “to deal with it in a prudent manner and avoid any predetermined results.” U.N. GAOR, 68th Sess., 6th Comm., 19th mtg., at ¶ 61, U.N. Doc. A/C.6/68/SR.19 (Nov. 13, 2013).

II. DISCUSSION OF ISSUES RAISED DURING THE PROCEEDINGS

a) *Why Conclude a New Convention on Crimes Against Humanity*

8. Participants expressed varying levels of enthusiasm for a new convention on crimes against humanity. Some argued it was urgently needed. Others supported the adoption of a new convention in general, the *Proposed Convention* in particular and more generally the work of the International Law Commission on “crimes against humanity.” Conversely, some expressed doubts either regarding the need for a new convention, the political feasibility of States accepting a new convention or the timing of the initiative.
9. Several points were raised in support of a new convention. First, many participants noted the need to remedy gaps in the coverage of the Genocide Convention, as shown by the judgment of the International Court of Justice in *Bosnia-Herzegovina v. Serbia & Montenegro*.⁷ The lack of jurisdiction over crimes against humanity in that case was cited as a problem which, in future cases, a new convention might and ought to remedy. Similarly, participants evoked the absence of social and political groups from the protection offered by the Genocide Convention, which had led to the conclusion that the Khmer Rouge did not commit the crime of genocide in the 1970s, but “only” crimes against humanity.⁸ It was suggested that elevating the status of crimes against humanity with a new convention could permit and encourage a stronger international response to similar crimes in the future.
10. Additionally, several participants noted a need for a mechanism to ensure that all perpetrators of crimes against humanity, whether heads of state or low-ranking military officers, are subject to justice. It was observed that the focus of the International Criminal Court on high-ranking officials left the prosecution of low- and mid-level perpetrators to domestic courts. Additionally, the gravity threshold of Article 17(1)(d) of the Rome Statute was invoked as a factor limiting the ability of the International Criminal Court to prosecute

⁷ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn.-Herzegovina v. Serb. & Montenegro*), 2007 I.C.J. 43 (Feb. 26); *see also* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

⁸ Genocide Convention, *supra* note 7, art. II.

all offenders.⁹ It was suggested that a new convention would enable States to more effectively prosecute all perpetrators, even in situations not meeting the gravity threshold of the Rome Statute.

11. The need to oblige States to prohibit crimes against humanity in their domestic penal codes was also raised.¹⁰ Several participants noted that the Rome Statute defers to domestic prosecutions for crimes against humanity but imposes no obligation on its parties to adopt special penal legislation for these crimes, although the Preamble implies that States should do so. One participant noted that, as a consequence, fewer than two-thirds of the States Parties to the Rome Statute appear to have domestic legislation prohibiting crimes against humanity.¹¹ Support was voiced for the possibility that a new convention could impose an obligation to criminalize and fill this gap, both among States Parties to the Rome Statute and non-States Parties.
12. In this regard, several participants referred to the difficulties States have faced in enacting crimes against humanity legislation without a convention. One example cited was Sweden. Although Sweden adopted an ICC cooperation statute in 2002 and acts constituting crimes against humanity have long been prohibited under the Swedish criminal code, Sweden only adopted a specific criminal prohibition on crimes against humanity, aligning its code with the Rome Statute, in 2014.¹² A second example raised was the U.S. experience with the Crimes

⁹ Rome Statute of the International Criminal Court, art. 17(1)(d), July 17, 1998, 2187 U.N.T.S. 3; *see also* WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS 82-83 (2012).

¹⁰ *See, e.g.*, RICHARD J. GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR 131 (2000).

¹¹ INT'L HUMAN RIGHTS CLINIC, THE GEORGE WASHINGTON UNIV. LAW SCHOOL, COMPARATIVE LAW STUDY AND ANALYSIS OF NATIONAL LEGISLATION RELATING TO CRIMES AGAINST HUMANITY AND EXTRATERRITORIAL JURISDICTION 3 (2013).

¹² *See* Lag om straff för folkmord, brott mot mänskligheten och krigsförbrytelser (Svensk författningssamling [SFS] 2014:406) (Swed.); Lag om samarbete med Internationella brottmålsdomstolen (Svensk författningssamling [SFS] 2002:329) (Swed.).

Against Humanity Act of 2009, which stalled in Congress and has not yet been adopted.¹³ It was suggested that a new convention on crimes against humanity could guide States in adopting domestic legislation and could expedite this process.

13. The potential added value of a new convention in enhancing inter-state cooperation on crimes against humanity prosecutions was also evoked. A new convention could provide the basis for inter-state cooperation on evidentiary questions, extradition and transfer of proceedings. The importance of such cooperation was noted in light of the factual complexity of crimes against humanity cases and the large volume of evidence typically required to prove such charges.
14. Likewise, a new convention could clarify the content of the obligation to prosecute or extradite (*aut dedere aut judicare*) with respect to crimes against humanity. Participants suggested that a convention should establish an unambiguous obligation to prosecute or extradite and that surrender to the International Criminal Court satisfies this obligation.
15. Several participants observed that a new convention could expand the global reach of crimes against humanity prosecutions beyond just the States Parties to the Rome Statute or to a new convention itself. It was noted that if a new convention established 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. Additionally, a State that prohibits crimes against humanity pursuant to a new convention would be able to use existing legal tools to pursue cooperation with non-States Parties to the convention. In this way, participants suggested, a new convention could be broadly effective in combatting impunity.
16. Participants also discussed the reasons for concluding a convention on crimes against humanity at this time. One was the persistence of crimes against humanity at a time when the international capacity for criminal justice is diminishing. With the winding up of the ad hoc international criminal tribunals, participants noted, the International Criminal Court will

¹³ See S. 1346, 111th Cong. (as reported by S. Comm. on the Judiciary, July 21, 2010).

soon stand alone as the sole international tribunal competent to address serious crimes, and does not have the resources to prosecute such crimes comprehensively. While participants applauded the work of the International Criminal Court, several expressed concern that without further support for domestic trials of crimes against humanity, most perpetrators will go unpunished.

17. Finally, the existence of a corpus of well-developed jurisprudence on crimes against humanity was raised as a factor favoring the adoption of a new convention at this time. Because the International Criminal Court and the ad hoc international criminal tribunals have now heard hundreds of crimes against humanity cases, a substantial body of jurisprudence exists to guide States in domestic prosecutions of these crimes. In light of this, participants suggested that it is now appropriate to adopt a convention enabling States to prosecute these crimes more effectively.
18. Those skeptical of the need for a new convention raised concerns regarding the possibility of fragmentation inherent in adopting a convention on crimes against humanity alongside the Rome Statute. In response, it was noted that for genocide and war crimes, parallel conventions to the Rome Statute already exist in the form of the Genocide Convention and the Geneva Conventions.¹⁴ It was also noted that, unlike these instruments, a new convention on crimes against humanity could be written specifically to complement the Rome Statute with the goal of avoiding prejudice to the work of the International Criminal Court.

¹⁴ See Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts, June 8, 1977, 1125 U.N.T.S. 609; Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the amelioration of the shipwrecked members of armed forces at sea, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention relative to the treatment of prisoners of war, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention relative to the protection of civilian persons in times of war, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; Genocide Convention, *supra* note 7.

19. One participant raised a concern that a non-State Party to the Rome Statute might invoke its ratification of a new convention before the United Nations Security Council to avoid referral of a situation in its territory to the International Criminal Court. It was asked whether this could weaken the Court. In response, it was noted that ratification of a new convention could not be a legal bar to a Security Council referral under Article 13(b) of the Rome Statute.¹⁵

b) A Human Rights Treaty or a Technical Convention

20. Many participants noted that previous treaties on crimes of international concern have been elaborated following one of two models: broad human rights treaties or technical conventions. The Genocide Convention was offered as an example of a human-rights model treaty because of its conciseness and focus on definitions and general obligations.¹⁶ The United Nations Convention against Corruption was cited as an example of a technical treaty that establishes detailed rules and procedures applicable to transnational efforts to combat crime.¹⁷ The Torture Convention and the new Convention on Enforced Disappearance combine elements of both models.¹⁸ Although a consensus emerged that a similar combination of the two models could be appropriate for a new convention on crimes against humanity, some participants suggested that a technical convention might attract more ratifications than a broad, human rights convention. Others observed that a simple or streamlined approach might garner more support.

c) Minimum Standard or Maximum Protection

21. Along similar lines, the question of whether a convention should aim to establish a minimum standard or to achieve maximum protection from crimes against humanity was discussed.

¹⁵ Rome Statute, *supra* note 9, art. 13(b).

¹⁶ Genocide Convention, *supra* note 7.

¹⁷ United Nations Convention against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41.

¹⁸ International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, U.N. Doc. A/61/448, 2715 U.N.T.S. ___; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

Several participants noted that, in this regard, the drafters of a convention would face a tension between aiming for a maximalist convention that risks low ratification and a minimalist, universally acceptable convention that risks ineffectiveness. Additionally, some participants voiced concern that a convention that is too minimalist might have the effect of crystallizing a minimalist standard in customary international law. At the same time, it was observed that by setting a reasonable “floor” below which States could not fall in penalizing crimes against humanity, a new convention would still permit States to innovate and incorporate elements into their domestic law which could expand the definition of crimes against humanity and enhance its effective prosecution. Finally, it was suggested that appropriate institutional mechanisms for the revision of a convention could reduce the risk of crystallization as States Parties would be able to adjust the treaty to increase protection over time.

d) The Importance of Consistency with the Rome Statute

22. Throughout the discussions, participants raised the need for any new convention on crimes against humanity to enhance and complement the work of the International Criminal Court and the Rome Statute system. Several participants stressed that a new convention could support the complementarity principle by enabling domestic prosecutions of crimes against humanity. It was noted that a new convention could be useful to strengthen complementarity even if the Rome Statute achieved universal ratification.
23. Participants noted the need to carefully consider how best to promote a new convention relative to the Rome Statute. The potential for the process of elaborating a new convention to create or undermine political will was emphasized. It was suggested that States not party to the Rome Statute might need reassurance that ratifying a new convention would not automatically subject them to the jurisdiction of the International Criminal Court. It was further noted that should support from States not party to the Rome Statute be too strong, a new convention might be perceived as a threat to the Rome Statute.
24. Some participants expressed concern that a new treaty could weaken the Rome Statute, especially in light of the recent debate regarding immunity *ratione personae*. It was noted that an amendment to the Rome Statute giving States the means to request a deferral of an

investigation or prosecution has been proposed.¹⁹ It was proposed that any new convention should contain a provision explicitly providing that such a convention would not prejudice the obligations of States Parties under the Rome Statute so as to reassure ICC States Parties as to the compatibility of any new treaty with the Rome Statute system.

25. Finally, it was remarked that a future convention should address the relationship between surrender to the International Criminal Court and the obligation to prosecute or extradite (*aut dedere aut judicare*). It was noted that Article 9(2) of the *Proposed Convention* does this by clarifying that surrender to the International Criminal Court satisfies this obligation.

e) The Definition of Crimes Against Humanity

26. With regard to the definition of crimes against humanity, participants discussed the relationship between the definition in a new treaty and Article 7 of the Rome Statute.²⁰ It was noted that Article 3 of the *Proposed Convention* makes no substantive changes from the Rome Statute. There was virtually unanimous support for this choice as both practical and necessary. First, the definition in the Rome Statute has already received wide acceptance by States, and is increasingly seen as representing customary international law.²¹ Second, adopting a different definition would fragment rather than consolidate international criminal law. Indeed, one participant suggested that it might be useful for the International Law Commission itself to opine on the status of Article 7 of the Rome Statute as customary international law.
27. A few participants suggested that a new convention could depart from the Rome Statute in certain aspects.²² It was noted that the definition of crimes against humanity has differed between tribunals. As examples, the inclusion of a discrimination element at the Extraordinary Chambers in the Courts of Cambodia and the exclusion of the policy element

¹⁹ *Report of the Working Group on Amendments*, Annex V, I.C.C. Doc. ICC-ASP/10/32 (Dec. 9, 2011).

²⁰ Rome Statute, *supra* note 9, art. 7.

²¹ *See* Sadat, *supra* note 2, at 373.

²² *Id.*, art. 7(2)(a).

at the Special Panels of the Dili District Court and the International Criminal Tribunals for the former Yugoslavia and for Rwanda were raised.²³ Some participants noted that the inclusion of the policy element adds confusion to the question of when non-state actors are liable for crimes against humanity. Additionally, it was argued that crimes against humanity should not need a policy element when the crime of genocide does not have one.²⁴ Other participants suggested removing the element of civilian population contained in Articles 7(1) and 7(2)(a) of the Rome Statute from a new convention.²⁵ It was proposed that doing so would expand protection to resistance movements and combatants.

28. It was observed that although similar concerns had been raised during the process of elaborating the *Proposed Convention*, more than 250 experts had been consulted, and had overwhelmingly settled upon the need to align any new convention with Article 7 of the Rome Statute. Indeed, it seemed clear that the International Law Commission itself was proceeding on the assumption that no changes in Article 7 would be made by a new crimes against humanity convention.²⁶
29. A general concern was raised that enshrining any definition in a new convention could be problematic as a new convention might crystallize as customary international law whatever definition it contains. The Genocide Convention, with its inability to accommodate crimes intended to destroy political and social groups, was raised as an analogy. In response, it was

²³ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 5 (Oct. 27, 2004) (Cambodia); Regulation No. 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses § 5, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000) (Timor-Leste); Statute of the International Tribunal for Rwanda art. 3, S.C. Res. 955, annex, U.N. Doc. A/RES/955 (Nov. 8, 1994); Statute of the International Tribunal art. 5, *in Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, annex, U.N. Doc. S/25704 (May 3, 1993).

²⁴ Genocide Convention, *supra* note 7, art. II.

²⁵ Rome Statute, *supra* note 9, art. 7(1), (2)(a).

²⁶ *Report of the International Law Commission on the work of its sixty-fifth session*, at 142, U.N. Doc. A/68/10 (“The key elements that would appear necessary are to . . . [d]efine the offence of “crimes against humanity” for purposes of the Convention as it is defined in Article 7 of the Rome Statute”).

suggested that a new convention need not necessarily entail the establishment of a new customary international law rule and that nothing in a new treaty could prevent States from adopting a broader, more expansive definition of crimes against humanity in their national legislation, as some have already done vis-à-vis the Rome Statute.

f) Questions of State Responsibility

30. The question of State Responsibility for the commission of crimes against humanity was raised at several junctures during the discussions. Participants observed that the International Court of Justice had found that violations of the Genocide Convention could give rise to State Responsibility in *Bosnia-Herzegovina v. Serbia and Montenegro*, although that conclusion was not unanimous. Moreover, the Court in that case had found that in general, the specific intent element of genocide had not been “conclusively shown,” meaning that liability did not attach.²⁷ Some participants observed that placing a provision on State Responsibility in a new convention might worry some governments and could reduce ratifications; others were favorable to the idea but thought that a more elaborate or separate provision on the question might be useful, rather than combining individual and State responsibility in one provision, as Article 1 of the *Proposed Convention* does.
31. In terms of substantive obligations, participants agreed that, in line with the International Court of Justice’s interpretation of the Genocide Convention, a new convention could incorporate State responsibility for the commission of crimes against humanity.²⁸ The question of how best to attribute acts to States and determine when a State had committed a crime against humanity was raised. The participants debated what obligations to impose on States with respect to prevention and whether these obligations should be of conduct or result. It was additionally discussed whether an obligation of due diligence would apply only to State organs or also to non-state actors. One participant raised the question of to what extent States should be responsible under a convention for omissions. The option of requiring States to develop a plan to prevent crimes against humanity was also proposed.

²⁷ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn.-Herzegovina v. Serb. & Montenegro), 2007 I.C.J. 43, 193 (Feb. 26).

²⁸ *Id.* at 114.

Participants noted the flexibility provided to the drafters of a convention by the preamble and that both the International Court of Justice and domestic courts have read preambles as giving rise to obligations imposed on States.

32. With regard to implementing State Responsibility, recent trends in human rights litigation before the International Court of Justice were discussed. One participant suggested that the Court seemed hesitant to hear or reach strong conclusions in cases concerning human rights and international criminal law. However, participants also noted the increasing willingness of States to seize the Court with human rights and international criminal law cases.
33. With particular reference to a future convention, the need for care in drafting a compromissory clause was raised. Article IX of the Genocide Convention was offered as an example to be emulated and Article 22 of the Convention on the Elimination of all Forms of Racial Discrimination (CERD) as one to be avoided.²⁹ It was noted that the International Court of Justice interpreted the reference to negotiation in Article 22 of CERD as establishing a “precondition[] to be fulfilled before the seisin of the Court” and determined that this requirement had not been met in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*.³⁰
34. One participant remarked that a compromissory clause might not be essential to a new convention in light of substantial overlap between the States accepting Article IX of the Genocide Convention and compulsory jurisdiction under Article 36(2) of the ICJ Statute. It

²⁹ Compare Genocide Convention, *supra* note 7, art. IX (“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”) with International Convention on the Elimination of All Forms of Racial Discrimination art. 22, March 7, 1966, 660 U.N.T.S. 195 (“Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.”).

³⁰ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.)*, 2011 I.C.J. 70, 128, 140 (Apr. 1).

was suggested that, in light of this, a compromissory clause might not expand the jurisdiction of the International Court of Justice substantially. Other participants strongly disagreed, noting that a core element of a new Convention should be to confer jurisdiction upon the International Court of Justice in cases involving the commission of crimes against humanity by States.

g) Whether and How Legal Persons Should be Made Liable

35. The discussion of whether and how a new convention on crimes against humanity should address the liability of legal persons focused on the value of subjecting legal persons to liability for crimes against humanity and technical questions of substance and drafting. In particular, contempt charges against two corporations before the Special Tribunal for Lebanon were evoked as an example of the potential utility of imposing liability on legal persons in international criminal cases.³¹ It was also recalled that liability for legal persons was proposed (but ultimately rejected) at the Rome Diplomatic Conference establishing the International Criminal Court.³²
36. Many participants voiced support for the idea that legal persons should be liable for the commission of crimes against humanity. In particular, the preventive and deterrence value of imposing liability upon legal persons was noted, and it was observed that many States already do so. It was suggested that the possibility of facing both the reputational cost of being tried for crimes against humanity and the financial cost of being sentenced to a fine or reparation would give corporate counsel strong incentives to ensure their clients do not risk committing crimes against humanity. Additionally, it was noted that the liability of legal persons raises the possibility of ordering the restructuring of such an organization so as to reduce the

³¹ Case against Akhbar Beirut S.A.L. & Ibrahim Mohamed al Amin, Case No. STL-14-06/I/CJ/, Redacted Version of Decision in Proceedings for Contempt with Orders in lieu of an Indictment, 29 (Jan. 31, 2014); Case against New TV S.A.L. & Karma Mohamed Thasin al Khayat, Case No. STL-14-05/I/CJ/, Redacted Version of Decision in Proceedings for Contempt with Orders in lieu of an Indictment, 29 (Jan. 31, 2014).

³² See, e.g., *Draft Statute for the International Criminal Court* art. 23(5), in *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998).

likelihood of criminal activity. In this regard, a potential South African prosecution of members of Zanu-PF, the governing party of Zimbabwe, for crimes against humanity in connection with a raid on opposition party offices was raised as an example. While litigation continues concerning whether the South African National Prosecuting Authority is obligated to investigate these allegations, the group was invited to consider the facts of this example.³³ It was suggested that were the liability of legal persons for crimes against humanity firmly established, a South African court might prosecute Zanu-PF directly and order a restructuring of the organization so as to avoid future crimes.

37. Several technical questions were also raised. These included how one might define “legal person” in a multilateral convention. It was suggested that the drafters should emulate Article 1(d) of the Council of Europe Criminal Law Convention on Corruption, which defines “legal person” by reference to domestic law and explicitly excludes States and international organizations.³⁴ The challenge of attributing actions to corporations was also evoked. It was noted that norms for determining corporate responsibility for individuals’ acts have not yet emerged in customary international law. It was suggested that the law of State Responsibility was one potential model for attributing actions to corporations, but not the only one.
38. Finally, the question arose as to how one might define the nationality of legal persons for purposes of a new convention. It was proposed that the definition in Article 9 of the ILC *Draft Articles on Diplomatic Protection* might be most appropriate because it allows corporate nationality to be determined on the basis of effective, rather than solely formal, nationality.³⁵

³³ See Nat’l Comm’r of the S. Afr. Police Serv. v. S. Afr. Human Rights Litig. Ctr., directions dated 3 February 2014 (CCT 02/14); Nat’l Comm’r of the S. Afr. Police Serv. v. S. Afr. Human Rights Litig. Ctr. (485/2012) [2013] ZASCA 168 (Nov. 27, 2013) (S. Afr.).

³⁴ Criminal Law Convention on Corruption art. 1(d), Jan. 27, 1999, 2216 U.N.T.S. 225.

³⁵ *Draft Articles on Diplomatic Protection* art. 9, in *Report of the International Law Commission on the work of its fifty-eighth session*, ¶ 49, U.N. Doc. A/61/10.

b) How Should a Convention Address Modes of Liability

39. Participants discussed how a convention on crimes against humanity should address modes of liability. It was noted that Articles 4 and 5 of the *Proposed Convention* draw upon the modes of liability set forth in Article 25 and Article 28 of the Rome Statute, respectively.³⁶
40. Much of the discussion concerned the application of modes of liability to three types of subjects: States, natural persons and legal persons. For example, it was noted that Article 16 of the ILC *Articles on Responsibility of States for Internationally Wrongful Acts* codifies a knowledge standard for establishing a State's responsibility for aiding or assisting an internationally wrongful act.³⁷ In contrast, it was noted that the standard for an individual's international criminal liability for aiding and abetting under Article 25(3)(c) of the Rome Statute requires the purpose of committing a crime.³⁸ Regarding legal persons, one participant raised the hypothetical case of an arms-manufacturing company selling weapons to persons it knows are committing crimes against humanity. It was argued that, assuming that the aim of an arms manufacturer is only to make a profit, a purpose standard would presumably exclude the manufacturer's liability; conversely, a knowledge standard could render the company liable. It was suggested that if a convention sought to impose criminal responsibility upon legal persons, a bifurcated standard for modes of liability could be desirable.
41. The possibility was raised that a future convention might not prescribe specific modes of liability to be applied in national crimes against humanity prosecutions. It was noted that international criminal law standards might seem unfamiliar and overly complex to national judges, who would likely be more comfortable applying the modes of liability already present in their national criminal law. It was suggested that a convention might complement these domestic-law standards by requiring certain generic forms of secondary liability without prescribing specific standards.

³⁶ Rome Statute, *supra* note 9, art. 25.

³⁷ *Articles on Responsibility of States for Internationally Wrongful Acts* art. 16, in *Report of the International Law Commission on the work of its fifty-third session*, U.N. Doc. A/56/10, reprinted in [2001] 2 Y'book Int'l L. Comm'n 31, U.N. Doc. A/CN.4/SER.1/2001/Add.1.

³⁸ Rome Statute, *supra* note 9, art. 25(3)(c).

i) Preventing Crimes Against Humanity

42. Participants agreed that preventing crimes against humanity should be a central focus of any new convention. The inclusion of an obligation to prevent in Article I of the Genocide Convention was raised as an example in this regard.³⁹ The obligation to take effective measures to prevent torture in Article 2(1) of the Torture Convention was also cited.⁴⁰ Participants raised questions concerning the content of an obligation to prevent and the challenge of making prevention effective. Whether the obligation should be one of conduct or result was asked. It was noted that States would be more likely to accept prevention obligations that require non-legal rather than legal measures, such as a requirement that they conduct training programs for military and civilian police forces as well as educate the general public in combating the commission of crimes against humanity. Additionally, it was suggested that States might be obliged to develop a plan to prevent crimes against humanity. It was noted that the inclusion of an obligation to prevent in the Genocide Convention had not become an impediment to criminalization. One participant opined that an obligation to prevent might not be necessary considering that States are not generally under an obligation to prevent other crimes, for example murder or theft.

j) Statutes of Limitation

43. The participants generally agreed that a convention on crimes against humanity should prohibit the application of statutes of limitations to the crime. Several noted that this prohibition is included in Article 7 of the *Proposed Convention*, which draws upon Article 29 of the Rome Statute. Others noted its consistency with Article 1 of the 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity.⁴¹

³⁹ Genocide Convention, *supra* note 7, art. I.

⁴⁰ Torture Convention, *supra* note 18, art. 2(1).

⁴¹ Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity art. 1(b), Nov. 26, 1968, 754 U.N.T.S. 73.

k) Amnesties

44. Several participants recommended that a convention on crimes against humanity should prohibit amnesties that could prevent prosecutions for such crimes. The consistency of this proposition with the statutes of the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL) was noted.⁴² Article 10 of the SCSL Statute, for example, provides that “[a]n amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in Articles 2 to 4 of the present Statute shall not be a bar to prosecution.”⁴³ Similarly, Article 6 of the STL Statute provides that “[a]n amnesty granted to any person for any crime falling within the jurisdiction of the Special Tribunal shall not be a bar to prosecution.”⁴⁴
45. Others noted, however, that even though it might be agreed that amnesties were not proper for crimes against humanity, it might be wiser to omit a provision on this point given the difficulties negotiating such an article could engender.⁴⁵ An effort to place a provision to this effect into the new Convention on Enforced Disappearance had not been successful.⁴⁶ Additionally, to the extent that a prohibition on amnesty for crimes against humanity was already part of customary international law, a concern was raised that the explicit inclusion of such a provision could cast doubt upon its customary international law status.⁴⁷

⁴² Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon annex, Feb. 6, 2007, 2461 U.N.T.S. 257 [hereinafter STL Statute]; Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (with Statute) annex, Apr. 12, 2002, 2178 U.N.T.S. 138 [hereinafter SCSL Statute].

⁴³ SCSL Statute, *supra* note 42, art. 10.

⁴⁴ STL Statute, *supra* note 42, art. 6.

⁴⁵ See also Juan E. Méndez, *Transitional Justice, Peace, and Prevention*, 40 U. BALTIMORE L. REV. 365, 370-72 (2011)

⁴⁶ Diane Orentlicher, *Immunities and Amnesties*, in FORGING A CONVENTION, *supra* note 3, at 220-21.

⁴⁷ See *id.* at 218, 222.

l) Should a Convention Provide for Universal Jurisdiction

46. Participants voiced support for the inclusion of a provision on universal jurisdiction in a convention on crimes against humanity, recommending that a convention provide the widest possible scope of jurisdiction. Some suggested that a convention should require States to take measures to exercise universal jurisdiction. The consistency of this position with both Article 8 of the 1996 ILC *Draft Code of Crimes against the Peace and Security of Mankind* and Article 10(3) of the *Proposed Convention* was noted.⁴⁸ This exercise of universal jurisdiction could be permissive, rather than mandatory, allowing States the choice whether to try or extradite a particular offender. This might be more politically palatable to States. Finally, the importance of ensuring that civilians not be tried in military courts was noted.

m) How Should a Convention Address Immunities

47. In discussions about how a convention on crimes against humanity could address the question of immunities, three options were presented. First, the convention could explicitly prohibit any invocation of immunities (the solution proposed in Article 6 of the *Proposed Convention*); second, it could incorporate language that might contemplate certain immunities but not others; finally, it could simply be silent on the question of immunities, leaving the matter to customary international law. A consensus emerged that in a new convention, consistent with past practice, inclusion of some proviso was probably desirable, rather than simply leaving the matter to customary international law.
48. Some participants voiced support for removing all immunities in a proposed convention, and underlined the importance of developing a realistic plan to ensure that all perpetrators, even heads of state, may be brought to justice. Several participants noted with approval that this is the option chosen in Article 6 of the *Proposed Convention*. The consistency of this provision with Article 27 of the Rome Statute, Article 3 of the 1954 ILC *Draft Code of Offences*

⁴⁸ *Draft Code of Crimes against the Peace and Security of Mankind* art. 8, in *Report of the International Law Commission on the work of its forty-eighth session*, U.N. Doc. A/51/10, reprinted in [1996] 2 Y^book Int'l L. Comm'n 17, U.N. Doc. A/CN.4/SER.1/1996/Add.1 [hereinafter *Draft Code of Crimes*].

against the Peace and Security of Mankind and Article 7 of the 1996 ILC *Draft Code of Crimes against the Peace and Security of Mankind* was also noted.⁴⁹

49. One participant suggested that the complete lifting of immunities in Article 27 of the Rome Statute and States' response to it merited careful consideration. The description of this provision by Prince Zeid Ra'ad Zeid Al-Hussein, now UN High Commissioner for Human Rights-elect, as "the simplest and most profound article ever to be written into a multilateral treaty" was recalled.⁵⁰ At the same time, it was noted that several States Parties to the Rome Statute, particularly African States, were questioning the value of the complete removal of immunity by Article 27 of the Rome Statute, and that these concerns warranted attention in considering the question of immunities in a new convention on crimes against humanity.
50. Finally, it was suggested that a future convention might remove immunity *ratione materiae* but not immunity *ratione personae*. It was noted that, in most cases, this would delay prosecution of high state officials for crimes against humanity, yet still provide for such proceedings in due course. One observer noted that it might indeed be possible to have a new convention without any provision on immunities and still have an effective system of international criminal justice, as there had been very few individuals tried before the ad hoc international criminal tribunals who would have benefited from immunities in any event.

n) *Aut dedere aut judicare*

51. The importance of including a clear provision on the obligation to prosecute or extradite—*aut dedere aut judicare*—was emphasized during the meeting. It was noted that this would be consistent with Article 9 of the 1996 ILC *Draft Code of Crimes against the Peace and Security of Mankind*.⁵¹ One participant reminded the group of paragraph 94 of the judgment of the

⁴⁹ Rome Statute, *supra* note 9, art. 27, July 17, 1998, 2187 U.N.T.S. 3; Draft Code of Crimes, *supra* note 48, art. 7; *Draft Code of Offenses against the Peace and Security of Mankind* art. 3, in *Report of the International Law Commission on the work of its sixth session*, U.N. Doc. A/2693, reprinted in [1954] 2 Y'book Int'l L. Comm'n 140, U.N. Doc. A/CN.4/SER.1/1954/Add.1.

⁵⁰ Ambassador Zeid Ra'ad Zeid Al-Hussein, *For the Love of Country and International Criminal Law*, 102 AM. SOC'Y INT'L L. PROC. 3, 7 (2008).

⁵¹ Draft Code of Crimes, *supra* note 48, art. 9.

International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite*, in which the Court held that the Torture Convention “requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect.”⁵² It was suggested that a convention reflect this understanding of the obligation to prosecute or extradite. Additionally, participants noted the importance of clarifying that surrender to a competent international tribunal, for example the International Criminal Court, satisfies the obligation to prosecute or extradite, as Article 9 of the *Proposed Convention* does.

o) Inter-State Cooperation: Extradition and Mutual Legal Assistance

52. Much of the discussion concerned the need for stronger provisions for inter-state cooperation in the prosecution of crimes against humanity. One participant noted that only 52 States Parties to the Rome Statute have domestic legislation providing for inter-state cooperation on serious international crimes.⁵³ Additionally, the importance of further enabling States to cooperate with ICC prosecutions was raised. In this regard, it was suggested that some of the most important contributions of the *Proposed Convention* are its provisions on inter-state cooperation. The structure of the *Proposed Convention*, which contains general obligations in its text and detailed cooperation procedures in its annexes, was cited with approval.
53. With regard to extradition, participants noted that any new convention should provide States with a legal basis for extradition. This is the case with the Genocide and Geneva Conventions, although the provisions in these conventions are more rudimentary than those in subsequent international criminal law instruments, such as the Torture Convention and the Convention on Enforced Disappearance.⁵⁴ A strong extradition provision would obviate

⁵² *Questions relating to the Obligation to Prosecute or Extradite* (Belg. v. Sen.), 2012 I.C.J. 422, 456 (July 20).

⁵³ See Olympia Bekou, *Crimes at Crossroads: Incorporating International Crimes at the National Level*, 10 J. INT'L CRIM. JUST. 677, 678 n. 5 (2012).

⁵⁴ See Convention on Enforced Disappearance, *supra* note 18, art. 13; Torture Convention, *supra* note 18, art. 8; Additional Protocol I, *supra* note 14, art. 88; First Geneva Convention, *supra* note 14, art. 49; Second Geneva Convention, *supra* note 14, art. 50; Third Geneva Convention, *supra* note 14, art.

the need for bilateral treaties to obligate States to extradite offenders. One participant suggested that a provision on extradition could 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. Bartle* was cited as 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.⁵⁵ Additionally, it was suggested that a new convention should ensure that crimes against humanity are not considered political offenses for extradition purposes. It was noted that Annex 2, paragraph 5 of the *Proposed Convention* accomplishes this.

54. With regard to evidence, one participant suggested that a new convention should not exclude evidence gathered illegally from use in prosecutions of crimes against humanity. An exception, however, prohibiting the use of evidence gathered by means of torture was proposed in line with Article 15 of the Torture Convention.⁵⁶
55. Additionally, one participant voiced approval for the provision on transfer of criminal proceedings for crimes against humanity in Article 14 of the *Proposed Convention*. It was noted that such a provision would provide States with flexibility in determining the most appropriate forum for domestic prosecutions.
56. A proposal by the governments of Argentina, Belgium, the Netherlands and Slovenia introduced at the UN Commission on Crime Prevention and Criminal Justice in Vienna to elaborate a convention on mutual legal assistance in domestic prosecutions of serious international crimes was brought to the attention of the group.⁵⁷ Although that proposal had

129; Fourth Geneva Convention, *supra* note 14, art. 146; Genocide Convention, *supra* note 7, art. VII.

⁵⁵ *R., ex parte Pinochet v. Bartle*, [1999] UKHL 17 [55]-[56] (Eng.); *see* Torture Convention, *supra* note 18, art. 8.

⁵⁶ Torture Convention, *supra* note 18, art. 15.

⁵⁷ International cooperation in the fight against the crime of genocide, crimes against humanity and war crimes, draft resolution, U.N. Doc. E/CN.15/2013/L.5 (March 28, 2013).

yet to be taken up in Vienna, it was explained that the proposal focused solely on inter-state cooperation and had the potential to elaborate standards and procedures for cooperation in great detail. It was noted that the *Proposed Convention* and the proposal in Vienna are complementary, rather than mutually exclusive, and could in principle move forward at the same time. One participant suggested that the Vienna proposal would be insufficient if the goal of a new convention was a holistic treatment of crimes against humanity in parallel with the Genocide Convention.⁵⁸ The withdrawal of the draft resolution concerning the Vienna proposal was also noted.⁵⁹

p) Capacity-Building Measures

57. The importance of capacity-building measures and positive complementarity was observed by several participants. One participant noted the challenge of prosecuting factually and legally complex crimes against humanity cases, particularly in the context of a post-conflict State with diminished police and judicial capacity. In this regard, the inclusion of an explicit provision on capacity-building in Article 8(19) of the *Proposed Convention* was cited with approval. However, it was suggested that the pool of potential providers of capacity-building measures be expanded in a future convention to explicitly include inter-governmental and non-governmental organizations.
58. Participants noted several challenges in making capacity-building measures effective. For example, States might be too proud to admit their need for capacity-building. In connection with this, the need for a forum for States to report capacity-building needs was cited. Additionally, the importance of ensuring that capacity-building measures are delivered efficiently and effectively was raised. In particular, a historical trend of the duplication of capacity-building measures was noted. Duplicative gender violence training for judges in the Democratic Republic of the Congo was cited as an example. Finally, the importance of developing a mechanism to prioritize capacity-building needs was raised.

⁵⁸ Genocide Convention, *supra* note 7.

⁵⁹ U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Crime Prevention & Crim. Just., *Report on the twenty-second session*, ¶ 64, U.N. Doc. E/CN.15/2013/27.

59. With regard to capacity-building institutions in the *Proposed Convention*, some participants expressed skepticism as to how the institutional mechanisms proposed would be of assistance. In particular, a question was raised concerning how the proposed Secretariat would provide technical assistance to States under Article 19(11)(b) of the *Proposed Convention*. The Voluntary Trust Fund suggested by Article 19(14) of the *Proposed Convention* was cited with approval.

q) Possible Institutional Mechanisms

60. During the panel on Institutional Mechanisms, three possible paths a convention might take emerged. First, a convention might establish new institutional mechanisms, as the *Proposed Convention* does. Second, a convention might seek to build on existing institutions. Third, a convention might remain silent. It was suggested that in drafting a new convention, emphasis should be placed on developing innovative mechanisms that deliver value. The need for institutional mechanisms to bring life to a new convention was expressed. In this regard, the lack of institutional mechanisms attached to the Genocide Convention was cited as a model to be avoided.

61. With respect to the possibility of new institutional mechanisms, the need to think carefully about their organization and operation was discussed. Regular meetings of the States Parties would be required to ensure that a new convention could evolve. In this respect, it was suggested that the three-year interval established by Article 19(2) of the *Proposed Convention* might be too long. It was also recommended that new institutional mechanisms for incentivizing State compliance might be useful. An inter-state complaint mechanism before a non-judicial body similar to that established in Article 41 of the International Covenant on Civil and Political Rights was suggested.⁶⁰ Alternative models proposed were the compliance mechanisms established in Article 8(2) of the Anti-Personnel Mine Ban Convention and

⁶⁰ International Covenant on Civil and Political Rights art. 41, Dec. 16, 1966, 999 U.N.T.S. 171.

Article 8(2) of the Convention on Cluster Munitions.⁶¹ Indeed, even the threat of a UN compliance review might induce States to comply with a new convention.

62. One participant voiced concern that the role of the Conference of States Parties detailed in Article 19(A) of the *Proposed Convention* might be too vague; the more detailed provisions in Articles 11 and 12 of the Convention on Cluster Munitions and Articles 11 and 12 of the Anti-Personnel Mine Ban Convention were raised as possible alternatives.⁶² It was additionally recommended that Article 19 of the *Proposed Convention* might benefit from further elaboration of the relationship between the proposed Conference of States Parties and the proposed Committee.
63. The need for careful consideration of any new institutional mechanisms was illustrated by analogy to the many institutional mechanisms in the Geneva Conventions, for example the system of protecting powers, which remain unused. It was noted, with the example of a joint Swiss/ICRC proposal, that States were now developing an interest in amending these institutional mechanisms in order to make them more effective.⁶³
64. It was also noted that the United Nations Office of the High Commissioner for Human Rights and the United Nations human rights treaty bodies were increasingly turning their attention to situations involving the commission of crimes against humanity. The desire of the international community to improve the functioning of the human rights treaty body system was noted, with an April 2014 United Nations General Assembly resolution offering

⁶¹ Convention on Cluster Munitions art. 8(2), May 30, 2008, 2688 U.N.T.S. ____; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction art. 8(2), Sept. 18, 1997, 2056 U.N.T.S. 211 [hereinafter Anti-Personnel Mine Ban Convention].

⁶² Convention on Cluster Munitions, *supra* note 61, arts.11-12; Anti-Personnel Mine Ban Convention, *supra* note 61, arts. 11-12.

⁶³ See Swiss Fed. Dep't of Foreign Affairs, Joint Initiative of Switzerland and the International Committee of the Red Cross (ICRC) on Strengthening Compliance with International Humanitarian Law (IHL) (June 3, 2014), <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/icrc.html> (last visited July 8, 2014).

a streamlined compliance procedure cited as an example.⁶⁴ However, it was suggested that building on the human rights treaty system might not be States' preferred institutional mechanism for crimes against humanity as there is already a sense among States that the existing human rights reporting requirements are overly burdensome and complex.

65. Finally, the possibility that the convention could remain silent on institutional mechanisms was considered. This was the situation with the International Covenant on Economic, Social and Cultural Rights which, as drafted, had no treaty body but acquired one by ECOSOC Resolution 1985/17.⁶⁵ The example of renewed interest in the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict after the creation of the Committee for the Protection of Cultural Property in the Event of Armed Conflict was also raised.⁶⁶ It was suggested that a new convention might follow this path and allow the international community time to determine what institutional mechanisms would be most appropriate.

r) Should a Convention Allow for Reservations

66. There was much discussion concerning whether a convention on crimes against humanity should permit reservations. Article 23 of the *Proposed Convention* provides that “[n]o reservations may be made to the present Convention” consistent with Article 20 of the Rome Statute.⁶⁷ It was debated whether this was the right approach.
67. The tension between protecting the integrity of a convention by prohibiting reservations and encouraging ratifications by permitting reservations was widely discussed. Participants agreed that reservations had the potential to undermine the effectiveness of a convention as a

⁶⁴ G.A. Res. 68/268, U.N. Doc. A/RES/68/268 (Apr. 21, 2014).

⁶⁵ E.S.C. Res. 1985/17, ¶ (a), U.N. ESCOR, 1985 Sess., Supp. No. 1, at 15, U.N. Doc. E/1985/85 (May 15).

⁶⁶ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 24, March 26, 1999, 2253 U.N.T.S. 172; *see also* Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215.

⁶⁷ Rome Statute, *supra* note 9, art. 20.

whole, but acknowledged that allowing them might encourage more States to ratify a convention, as it could be tailored to each State's particular needs and preferences. Participants raised four options a convention might take with respect to reservations: explicitly allowing reservations, prohibiting reservations, allowing reservations to some provisions but not others and silence.

68. It was noted that reservations to more technical provisions of a convention, particularly any regarding extradition and mutual legal assistance, might be necessary in order to allow more States to ratify a convention while maintaining consistency with their domestic laws. As an example, it was noted that Annex 2 of the *Proposed Convention* does not allow States to deny extradition requests for their own nationals. Participants discussed potential conflicts between this and States' national constitutions and laws. A particular example raised was that of the Netherlands, which may only extradite its nationals if the requesting State will allow the accused to serve a sentence of imprisonment in the Netherlands.⁶⁸ The possibility that such a reservation could be used to shield nationals from extradition could be coupled with a clear obligation for the requested State to prosecute the accused itself to prevent impunity. Participants noted that a convention covering extradition and mutual legal assistance risks losing ratifications if not flexible enough, either in its text or by permitting reservations, to accommodate these domestic laws.
69. The option of following the Genocide Convention and remaining silent on the question of reservations was raised by participants.⁶⁹ The possibility of seizing the International Court of Justice to determine the validity of a reservation to a convention on international criminal law was recalled.⁷⁰

⁶⁸ Stb. 1986 464, art. 70 (Sept. 10, 1986) (Neth.).

⁶⁹ *E.g.*, Genocide Convention, *supra* note 7.

⁷⁰ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, advisory opinion, 1951 I.C.J. 15 (May 28).

70. Finally, concern was raised that even if a convention were to prohibit reservations, States might nonetheless use declarations to achieve a similar result. It was suggested that the drafters of a convention consider what challenges to the integrity of a convention such declarations might pose.

III. THE WAY FORWARD

a) Building Political Support for a New Convention

71. The final panel discussed the potential political obstacles to the adoption of a new convention on crimes against humanity by States and considered how those difficulties could be overcome. A first set of issues concerned the timing of a new convention. It was recommended that those supporting the negotiation of a new convention pay careful attention to the current political environment. For example, one participant voiced a sense that States are not currently looking to further develop international law in this area, but that this could change. It was suggested that the consideration of the topic by the International Law Commission might help in this regard. Another participant emphasized the importance of patience in promoting a new convention. However, it was also stressed that the supporters of a convention must be ready to seize any opportunities that may present themselves.
72. A second set of issues broadly concerned the text of a new convention itself. One participant stressed the importance of a new convention being well written, likening a convention to a product to be sold. Another participant suggested that a new convention should be streamlined and innovative so as not to overly complicate the field while still enhancing protection. Finally, a tension emerged in discussions concerning how progressive a new convention should be. It was noted that too progressive a proposal might not attract many ratifications while too conservative a proposal might miss an opportunity to protect the humanitarian goals the convention hoped to promote.
73. Participants suggested a variety of ways to build support for a comprehensive convention on crimes against humanity. One participant noted that support would be necessary from States, the professional public and the general public. It was suggested that the drafters of a new

convention might wish to focus on elements that States will like, such as provisions on capacity-building and non-legal prevention measures.

74. The importance of building a coalition of friendly States able to provide diplomatic support was also emphasized. It was recommended that small States should be approached first, as they would be more likely to ratify a new convention. Additionally, it was suggested that a new convention must attract attention outside of the West to avoid the appearance that the convention is a Western product. Finally, it was noted that for a new convention to be successful, a number of important ICC non-States Parties would need to be encouraged to support and ratify the convention early in the process, as well as States Parties to the Rome Statute.⁷¹
75. Participants emphasized the difficulties involved in convincing skeptical governments of the need to ratify a new convention. It was noted that the biggest risk to a new convention would be a low number of ratifications. In this regard, it was suggested that the doubts of States that are not convinced of the need for a convention be actively addressed. The perspective of officials in States' foreign and defense ministries, who will be among the people deciding whether to ratify a new convention, will also need to be taken into account. These actors might view themselves as potential future defendants and could accordingly resist a move from soft to hard law in this field.
76. It was suggested that education and awareness campaigns would be important to build support for a new convention with the general public. In particular, one participant recommended that conferences with a clear emphasis on the topic of a new convention be held around the world, bringing together friends of a convention, civil society representatives and academics. Another participant stressed the importance of building a diverse group of supporters with a carefully chosen leader.
77. Much of the discussion addressed the relationship between a new convention and the International Criminal Court. Concern was voiced that a new convention might end up

⁷¹ See also Hans Corell, *Reflections on International Criminal Justices: Past, Present and Future*, 12 WASH. U. GLOBAL STUD. L. REV. 621, 628 (2013).

weaker than the Rome Statute and that this could diminish the effectiveness of both the International Criminal Court and a new convention. Some participants worried that the process of promoting a new convention might weaken the International Criminal Court. It was suggested that those supporting a new convention avoid references to weaknesses of the International Criminal Court or lacunae in the Rome Statute. Additionally, the wisdom of avoiding the perception of a new convention as “ICC light” was noted given the temptation for some States Parties to leave the Rome Statute and fears that future Rome Statute ratifications may slow. In particular, it was suggested that the supporters of a new convention be mindful of the concerns several African governments and the African Union have expressed regarding the International Criminal Court.

b) The Role of the International Law Commission in Elaborating a Convention

78. 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 Nürnberg 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.”⁷² 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.
79. Finally, it was observed that there was some support in the International Law Commission to move the topic of crimes against humanity from the Commission’s Long-term Programme of Work to its active agenda, and appoint a Special Rapporteur. This would allow the Commission’s work to proceed expeditiously with the possibility that the topic could be completed within as little as four years. However, it was also noted that work on the topic could take considerably longer. The importance of permitting members of civil

⁷² *Report of the International Law Commission on the work of its second session*, at para. 123, U.N. Doc. A/1316, reprinted in [1950] 2 Y.B. Int’l L. Comm’n 364, U.N. Doc. A/CN.4/SER.A/1950/Add. 1.

society to participate in the dialogue between the Commission and the General Assembly as work on the topic proceeds was highlighted by participants as well.

Washington University School of Law

Whitney R. Harris World Law Institute Crimes Against Humanity Initiative

Fulfilling the Dictates of Public Conscience: Moving Forward with a Convention on Crimes Against Humanity

May 16-17, 2014

ANNEX A: CONFERENCE AGENDA

Friday, May 16, 2014

15:00-15:15 **Welcome Remarks**

- **Professor Andrew Clapham** and **Professor Paola Gaeta**, Directors of the Geneva Academy of International Humanitarian Law and Human Rights
- **Professor Leila Nadya Sadat**, Director, Whitney R. Harris World Law Institute, Washington University School of Law

15:15-16:30 **Panel 1: Historical Movement toward Codification of Crimes Against
Humanity**

- **Chair: Ambassador Hussein A. Hassouna**, UN International Law Commission
- **Professor M. Cherif Bassiouni**, Emeritus Professor of Law; President Emeritus of the International Human Rights Law Institute, DePaul University College of Law
- **Professor Sean D. Murphy**, UN International Law Commission
- **Professor Leila Nadya Sadat**, Washington University School of Law

16:45-18:00 **Panel 2: The Core Elements of a Convention**

- **Chair: Ms. Marie G. Jacobsson**, UN International Law Commission
- **Professor Diane Marie Amann**, Emily and Ernest Woodruff Chair in International Law, University of Georgia School of Law
- **Professor Vera Gowlland-Debbas**, Honorary Professor, Graduate Institute of International and Development Studies and University College London
- **Judge O-Gon Kwon**, Judge and former Vice-President, International Criminal Tribunal for the former Yugoslavia

19:00 **Dinner at la Perle du Lac, Salon Orangerie**

Crimes Against Humanity and International Criminal Justice – reflections on a journey from Nuremberg to Rome and beyond

Ambassador Patricia O'Brien, Permanent Mission of Ireland to the United Nations, Geneva; former Under-Secretary General for Legal Affairs and Legal Counsel of the United Nations

Saturday, May 17, 2014

9:30-10:45 **Panel 3: What Provisions for Avoiding Impunity**

- **Chair: Mr. Mahmoud D. Hmoud**, UN International Law Commission
- **Professor Andrew Clapham**, Director, Geneva Academy of International Humanitarian Law and Human Rights
- **Mr. Hugo Relva**, Legal Adviser, Amnesty International
- **Professor Hervé Ascensio**, University of Paris 1, Panthéon-Sorbonne

11:00-12:15 **Panel 4: What Provisions for Promoting Inter-State Cooperation**

- **Chair: Ambassador Kirill Gevorgian**, UN International Law Commission
- **Professor Olympia Bekou**, Professor of Public International Law, University of Nottingham School of Law
- **Professor Larissa van den Herik**, Professor of Public International Law, Leiden Law School
- **Professor Darryl Robinson**, Queen's University Faculty of Law

13:00-14:15

Panel 5: Should There Be Any Institutional Mechanisms

- **Chair: Mr. Eduardo Valencia-Ospina**, UN International Law Commission
- **Mr. Jean-Marie Henckaerts**, Legal Adviser, International Committee of the Red Cross
- **Ms. Mona Rishmawi**, Chief of the Rule of Law, Equality and Non-Discrimination Branch, UN Office of the High Commissioner for Human Rights
- **Professor William A. Schabas**, Professor of International Law, Middlesex University, London

14:30-15:45

Panel 6: The Political Path Forward: What Prospects for Governmental Adoption of a Well-Crafted Convention

- **Chair: Dr. Ernest Petrič**, UN International Law Commission
- **Ambassador Tiina Intelmann**, President, Assembly of States Parties to the Rome Statute of the International Criminal Court; former Permanent Representative of Estonia to the UN
- **Professor Nicolas Michel**, Geneva University Law Faculty and the Geneva Graduate Institute of International and Development Studies; former Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations
- **Professor Jane Stromseth**, Deputy to U.S. Ambassador-At-Large for War Crime Issues, Office of Global Criminal Justice, U.S. Department of State

15:45

Closing Remarks

- **Ambassador Hans Corell**, former Under-Secretary General for Legal Affairs and Legal Counsel of the United Nations

Washington University School of Law

Whitney R. Harris World Law Institute Crimes Against Humanity Initiative

Fulfilling the Dictates of Public Conscience: Moving Forward with a Convention on Crimes Against Humanity

May 16-17, 2014

ANNEX B: LIST OF PARTICIPANTS

STEERING COMMITTEE MEMBERS

Chair: Leila Nadya Sadat, Washington University School of Law; Director, Whitney R. Harris World Law Institute

Professor M. Cherif Bassiouni, DePaul University College of Law; President Emeritus of the International Human Rights Law Institute

Ambassador Hans Corell, Former Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations

Professor William A. Schabas, Middlesex University, London

EXPERT PARTICIPANTS

Professor Diane Marie Amann, University of Georgia School of Law

Professor Hervé Ascensio, University of Paris 1, Panthéon-Sorbonne

Professor Olympia Bekou, University of Nottingham School of Law

Mr. Lucius Caflisch, UN International Law Commission

Professor Andrew Clapham, Geneva Academy of International Humanitarian Law and Human Rights

Ambassador Pedro Comissário Afonso, UN International Law Commission

Ms. Concepción Escobar-Hernández, UN International Law Commission

Mr. Mathias Forteau, UN International Law Commission

Professor Paola Gaeta, Geneva Academy of International Humanitarian Law and Human Rights

Ambassador Kirill Gevorgian, UN International Law Commission

Professor Vera Gowlland-Debbas, Graduate Institute of International and Development Studies

Ambassador Hussein A. Hassouna, UN International Law Commission
Mr. Jean-Marie Henckaerts, Legal Adviser, International Committee of the Red Cross, Geneva
Professor Larissa van den Herik, Leiden Law School
Mr. Mahmoud D. Hmoud, UN International Law Commission
Ambassador Tiina Intelmann, President, Assembly of States Parties, International Criminal Court
Ms. Marie G. Jacobsson, UN International Law Commission
Mr. Maurice Kamto, UN International Law Commission
Judge O-Gon Kwon, International Criminal Tribunal for the former Yugoslavia
Professor Nicolas Michel, Geneva University Law Faculty and the Geneva Graduate Institute of International and Development Studies
Mr. Shinya Murase, UN International Law Commission
Professor Sean D. Murphy, UN International Law Commission
Professor Georg Nolte, UN International Law Commission
Ambassador Patricia O'Brien, Permanent Mission of Ireland in Geneva
Mr. Ki Gab Park, UN International Law Commission
Mr. Ernest Petrič, UN International Law Commission
Mr. Hugo Relva, Legal Adviser, Amnesty International
Ms. Mona Rishmawi, Chief of the Rule of Law, Equality and Non-Discrimination Branch, OHCHR
Professor Darryl Robinson, Queen's University Faculty of Law
Professor Jane Stromseth, Deputy to U.S. Ambassador-At-Large for War Crime Issues, U.S. Department of State
Mr. Pavel Šturma, UN International Law Commission
Mr. Eduardo Valencia-Ospina, UN International Law Commission
Ambassador Marcelo Vázquez-Bermúdez, UN International Law Commission
Ambassador Gilberto Vergne Saboia, UN International Law Commission
Mr. Amos S. Wako, UN International Law Commission
Ambassador Nugroho Wisnumurti, UN International Law Commission

RAPPOREURS

Ms. Evelyn Chuang, Whitney R. Harris World Law Institute, Washington University School of Law
Mr. Ilya Nuzov, Geneva Academy of International Humanitarian Law and Human Rights
Mr. Douglas J. Pivnichny, Graduate Institute of International and Development Studies

OTHER ATTENDEES

Ms. Jennifer Babaie, George Washington University Law School

Ms. Gwendelynn Bills, George Washington University Law School

Mr. Trent Buatte, George Washington University Law School

Mr. Matthias Lippold, New York University School of Law

Ms. Maria Zabolotskaya, Legal Department of the Ministry of Foreign Affairs, Russian Federation

CONFERENCE COORDINATOR

Ms. Bethel Mulugeta Mandefro, Whitney R. Harris World Law Institute, Washington University
School of Law