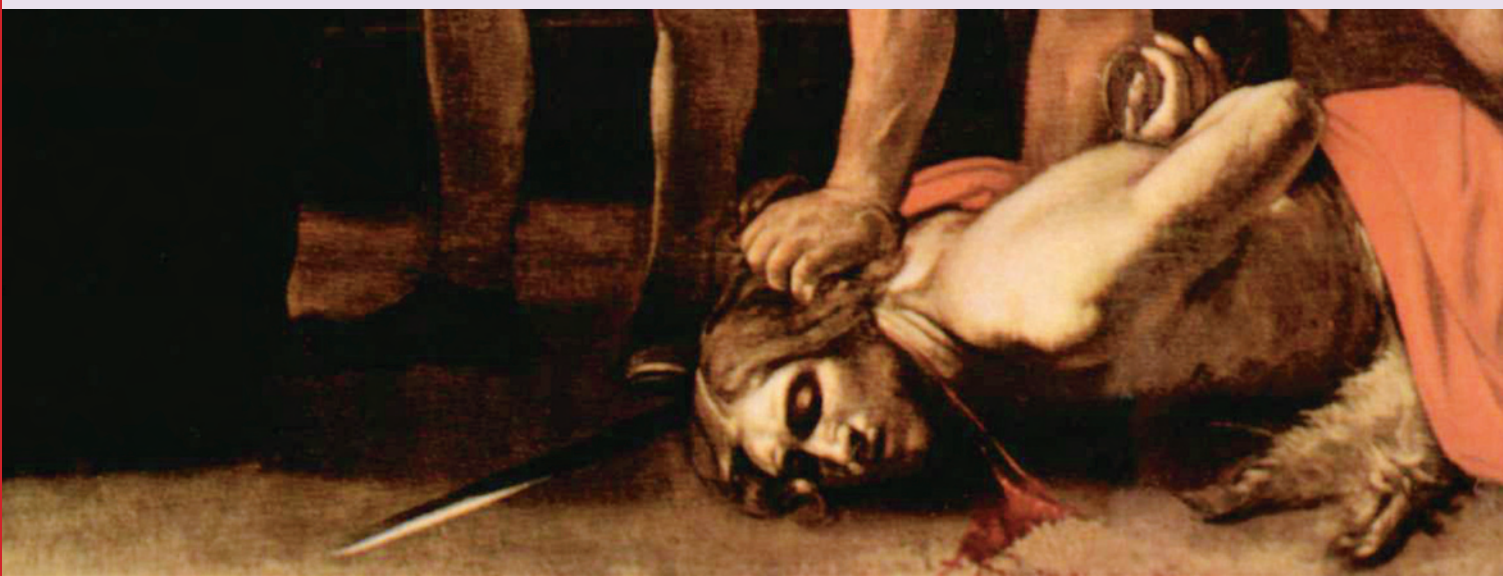




On the Proposed Crimes Against Humanity Convention

Morten Bergsmo and SONG Tianying (editors)



E-Offprint:

Tessa Bolton, “The Proposed Convention on the Prevention and Punishment of Crimes Against Humanity: Developments and Deficiencies”, in Morten Bergsmo and SONG Tianying (editors), *On the Proposed Crimes Against Humanity Convention*, FICHL Publication Series No. 18 (2014), Torkel Opsahl Academic EPublisher, Brussels, ISBN 978-82-93081-96-8. First published on 12 December 2014.

This publication and other TOAEP publications may be openly accessed and downloaded through the website www.fichl.org. This site uses Persistent URLs (PURL) for all publications it makes available. The URLs of these publications will not be changed. Printed copies may be ordered through online distributors such as www.amazon.co.uk.

© Torkel Opsahl Academic EPublisher, 2014. All rights are reserved.

The Proposed Convention on the Prevention and Punishment of Crimes Against Humanity: Developments and Deficiencies

Tessa Bolton*

Never send to know for whom the bell tolls; it tolls for thee.

– John Donne (1624)

To commit crimes against humanity ('CAH') is to divest the individual of essential dignity of personhood, cheapening the worth of being, and hence disenfranchising the human whole. Each regime of widespread and systematic attacks not only claims personal victims in unbearable numbers, it also victimizes humankind, barbarising and brutalising our nature and extending the realm of our potential cruelty. Wherever the occurrence, crimes against humanity are made universal by the "common conscience of mankind. They are *jus cogens*".¹

It is therefore difficult to acknowledge that there remains, still, no international convention aimed solely at defining, preventing, and prosecuting CAH, even 60 years after the crime of genocide was accordingly codified. There exist several reasons that necessitate the creation of such a convention, and I shall attempt to detail some of them below.

In the first section, I shall ask why there is a necessity for a convention regarding crimes against humanity, including issues of *nullum crimen*

* **Tessa Bolton** works as a U.K. Government lawyer. She holds a master's degree from the University of British Columbia and an LL.B. from King's College London, spending a year at the Centre for Transnational Legal Studies. She has been a criminal paralegal at the Centre for Human Rights, Education, Advice and Assistance in Malawi, interned for Justice Africa, a post-conflict NGO, and researched victims of crime in PEI, Canada. Views expressed in this chapter are not necessarily those of the U.K. Government. All Internet references were last accessed on 14 September 2014.

¹ Gregory H. Stanton, "Why the World Needs an International Convention on Crimes Against Humanity", in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, Cambridge University Press, Cambridge, 2011, p. 347.

sine lege, the high occurrence rate of CAH, ineptitudes of the ICC Statute, and the Responsibility to Protect ('R2P') principle. I shall also ask whether a specialized convention is the preferred mechanism for the prevention and punishment of CAH, and bars to the establishment of such a convention.

In the second section, I shall consider the Proposed Convention on the Prevention and Punishment of Crimes Against Humanity ('Proposed Convention') as drafted by the Crimes Against Humanity Initiative, and critique its current form. I will look at issues in defining CAH, including the nexus with an armed conflict, gender and sexuality-based crimes, and terrorism. I shall look at obligations created by the Proposed Convention, including R2P and the prohibition of hate speech. I shall finally consider procedural issues within the Proposed Convention, including immunities and universal jurisdiction.

But first it is required to recognise the work of Leila Nadya Sadat, M. Cherif Bassiouni, and other experts of the Crimes Against Humanity Initiative whose tireless labour has brought the world closer than it has ever been to a multilateral convention on CAH. The Initiative has worked for over ten years with the aim of exploring the law on CAH and elaborating its first ever comprehensive specialized convention. With the aid of a Steering Committee led by Sadat, almost 250 experts contributed to seven major revisions of the draft, culminating in the creation of the final Proposed Convention on Crimes Against Humanity in August 2010.

14.1. Anticipating a Proposed Convention

14.1.1. "Nothing Less Than Our Common Humanity is at Stake"²: Why the World Needs a Convention on Crimes Against Humanity

14.1.1.1. *Nullum Crimen Sine Lege*

During the Nuremberg trials, prosecutions of CAH were often the most controversial, as "its foundations in international law were so fragile".³ CAH became tainted with the perception of 'victor's justice' – the accusation that Allied Powers had orchestrated convictions based on law formu-

² Gareth Evans, "Crimes Against Humanity and the Responsibility to Protect", in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, *op. cit.*, p. 7.

³ Richard J. Goldstone, "Foreword", in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, Cambridge University Press, *op. cit.*, p. XIX.

lated for their convenience.⁴ After so long, an attempt to redeem CAH as authentic law should be made through the definitive enshrinement of its elements. Such an exercise will add legitimacy to the punishment of CAH in both past and future conflicts.

CAH has been critiqued as opportunistic in part because its definition is so untraceable. Twelve multilateral formulations of the offence have been articulated since 1947,⁵ and each definition seems to differ. Even the statutes of the International Criminal Tribunals for the Former Yugoslavia ('ICTY') and Rwanda ('ICTR') and International Criminal Court ('ICC') are "different and arguably contradictory".⁶ Establishing a majority-ratified international convention specifically on crimes against humanity could provide an overarching definition.

Three benefits would result. Firstly, the principles of legality and due process would be upheld in enforcing the law. Prosecuting an individual for a crime for which there is no widely accepted definition could undermine certainty in law. As Bassiouni puts it: "Concern for legality is never to be taken lightly, no matter how atrocious the violation or how abhorrent the violator".⁷ The lasting harm of "an uncurbed spirit of revenge and retribution" is to reduce critical judgements to arbitrary declarations of "higher motives"⁸ which are no more infallible than those often espoused by perpetrators of grave and widespread crimes.

Secondly, solidifying the definition of CAH internationally would provide a "strong counterforce against erosion and watering down of the definitions by advocates of 'national security', 'counterinsurgency', and the 'war on terror'".⁹ To preserve and retain the worth of CAH prosecutions, it must not be the case that powerful States are free to redefine the offence in situations beneficial to themselves.

⁴ Francis M. Deng, "Review", in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, *op. cit.*

⁵ M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press, 2011, pp. 732–733.

⁶ Goldstone, 2011, p. XXII, see *supra* note 3.

⁷ Bassiouni, 2011, p. 731, see *supra* note 5.

⁸ United States Supreme Court, *In Re Yamashita*, Judgment, 4 February 1946, 327 US 1 (Justice Rutledge).

⁹ Stanton, 2011, p. 556, see *supra* note 1.

Thirdly, a conventional definition could address the sense that there is a normative *lacuna* surrounding CAH. While a convention exists to deal with Genocide and the Geneva Conventions enshrine the prohibition of war crimes, this is not the case for CAH. The progression of normative societal views of CAH, and the consequential growth of customary law, can be enhanced through treaties which “help guide and construct our thinking”.¹⁰

14.1.1.2. The Continuing Problem of Crimes Against Humanity

Crimes against humanity remain an ongoing concern in the international community. Between 1945 and 2008, 313 documented conflicts took place worldwide, resulting in between 92 and 101 million casualties, or twice the combined number of victims from the two World Wars.¹¹ Perhaps one of the strongest ways in which the world as a whole can respond to such travesty is through a treaty which describes the offence and defines the role of individuals, States, and international institutions in preventing, investigating, and prosecuting these offences. The Genocide Convention is an example, but it is insufficient. Cases in the Khmer Rouge tribunal of the Extraordinary Chambers in the Courts of Cambodia have demonstrated the need for a clear, treaty-based definition of CAH. Despite the fact that between 1.7 and 2.5 million Cambodians were killed between 1975–1979, most crimes were directed towards political and economic groups, and thus did not fall under the remit of the Genocide Convention.¹² The definition of genocide “just does not reach many of the cases we morally want it to”,¹³ thus “the international community reached for the Nuremberg precedent only to find that it had failed to finish it”.¹⁴

A specialized convention could respond to crimes against humanity in a number of ways. First, it might act to individually deter potential perpetrators. An example is the NATO bombings in Kosovo in 1999, during which “commanders went to extraordinary lengths to avoid civilian casualties” due in part to their knowledge of the existence and scope of the

¹⁰ Leila Nadya Sadat, “A comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity”, in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, *op. cit.*, p. 489.

¹¹ Bassiouni, 2011, p. 735, see *supra* note 5.

¹² Stanton, 2011, p. 535, see *supra* note 1.

¹³ Evans, 2011, p. 3, see *supra* note 2.

¹⁴ Goldstone, 2011, p. XXII, see *supra* note 3.

ICTY Statute.¹⁵ A public and generally accepted repudiation and treaty-based criminalisation of CAH would at least render unequivocal the international community's mandate to oppose such crimes:

[Evil] tends to emerge more harmfully when external controls are reduced and inducements offered. Impunity is certainly one of these inducements, as is the prospect of indifference.¹⁶

As such, a convention could also work towards the alleviation of indifference in the global community, which currently leads to impunity for criminals. Hitler reportedly asked in 1939, “who after all is today speaking about the destruction of the Armenians?”.¹⁷ Expressing global reprobation and denunciation of crimes against humanity not only affirms our humanitarian values, it also has a role in deterring those who believe their crimes will go unheeded. Currently, too many crimes of international concern have “regrettably elicited only the most superficial reactions from the international community”.¹⁸ Declaring specifically, universally, and finally that crimes against humanity are unacceptable to the world community is the very least we should do to fulfill our oft-forgotten promise of ‘never again’.

14.1.1.3. Taking It Further than the ICC Statute

In Article 7, the ICC Statute offers the most recent and comprehensive definition of ‘crimes against humanity’, a definition applicable to all States who are party to the ICC. However this Statute has limits, and can be no substitute for a specific Convention on the Prevention and Punishment of CAH. Only 122 States have ratified the ICC Statute,¹⁹ leaving more than half of the world's population unprotected. The ICC Statute also refers jurisdiction to the ICC only, and as recent cases have showed, this Court has a very limited scope regarding the number of offenders it can prosecute. Secondly, the ICC Statute does not provide for a specific

¹⁵ Sadat, 2011, p. 473, see *supra* note 10.

¹⁶ M. Cherif Bassiouni, “Accountability for International Crime and Serious Violations of Fundamental Human Rights: Searching for Peace and Achieving Justice: The Need for Accountability”, in *Law and Contemporary Problems*, 1996, vol. 9, p. 22.

¹⁷ Reported in Bassiouni, 2011, p. 737, see *supra* note 5.

¹⁸ *Ibid.*, p. 737.

¹⁹ The Rome Statute of the International Criminal Court, 1 July 2002.

State obligation to prevent CAH, which a specialized convention could. Thus, unlike the ICC Statute, a specialized convention could not only contribute to more adequate prosecution of CAH at the national level, but also enhance their prevention. Thirdly, the ICC Statute does not confer any direct obligations on States Parties to provide for the domestic outlawing of international crimes. Only 55 States have domestically criminalised CAH.²⁰ To enhance the principle of complementarity and the overall effectiveness of CAH legislation, States should have an obligation to adopt measures to prevent such crimes, and build up their capacity to prosecute them.²¹

Lastly, there is no explicit mechanism in current international law for holding States to account for the commission of, or complicity in, crimes against humanity.²² In the case of *Bosnia and Herzegovina v. Serbia and Montenegro* before the ICJ, CAH was held to be outside the jurisdiction of the Court: it was limited to providing remedial damages for genocide alone. Thus of the 200,000 deaths, 50,000 rapes and 2.2 million displaced, only the genocidal massacre of 8,000 at Srebrenica was held to have been proven.²³ The ICC Statute is insufficient in its scope regarding crimes against humanity.

Some argue that a protocol to the ICC Statute would be preferable to a new CAH treaty, as this would be a quicker and more efficient way of achieving the same ends, and would furthermore demonstrate support for the workings of the ICC Statute.²⁴ However the drawbacks of such an approach outweigh its benefits. States that are not party to the ICC, though able to ratify a separate protocol, would potentially be barred from contributing on an equal footing to early rounds of its negotiation. Secondly, such a protocol could not include provisions on State responsibility or impose duties on States to prevent the occurrence of CAH.²⁵

²⁰ Bassiouni, 2011, p. 660, see *supra* note 5.

²¹ Goldstone, 2011, p. XVII, see *supra* note 3.

²² Sadat, 2011, p. 347, see *supra* note 10.

²³ Goldstone, 2011, p. XVI, see *supra* note 3.

²⁴ Sadat, 2011, p. 464, see *supra* note 10.

²⁵ Goldstone, 2011, p. XVII, see *supra* note 3.

14.1.1.4. Enhancing the ‘Responsibility to Protect’ Principle

An emerging principle of international law is the State’s ‘Responsibility to Protect’ civilians from international crimes. It points to growing co-operation between States in turbulent times, including the potential for intervention to protect vulnerable populations in certain situations. However, “a necessary condition precedent to the invocation of the Responsibility to Protect is a clear definition of the event which triggers that responsibility”.²⁶ It is clear that the relationship between this new and growing principle and the Proposed Convention will be significant and may be momentous, as I shall discuss further below.

In sum, there are several important reasons for which “the adoption of a comprehensive international instrument on crimes against humanity is both urgently required and eminently feasible”.²⁷

14.1.2. “The Politics of Furthering Impunity”²⁸: Bars to a Convention on CAH

That a convention preventing and punishing CAH would benefit global society does not necessarily entail that it will be effective. Two current factors which may prevent the progress of the Proposed Convention are a lack of political will, furthered and enabled by a dearth of public interest. Political indifference is enhanced by States’ fear of restraints on sovereignty and imposed duties to prevent, protect and intervene regarding CAH. State leaders in particular may fear a loss of immunity that would lead to greater threat of prosecution and a diminution of their power and freedom.

The public indifference towards CAH, however, is more nuanced. There exists a certain apathy towards the semantics of ‘crimes against humanity’, particularly when read, as it often is, in comparison with genocide, the “crime of crimes”.²⁹ Genocide has wide public concern, in part due to its especially egregious reduction of human diversity: “Genocide is

²⁶ Sadat, 2011, p. 458, see *supra* note 10.

²⁷ *Ibid.*, p. 501.

²⁸ Bassiouni, 2011, p. 734, see *supra* note 5.

²⁹ International Criminal Tribunal for Rwanda, *Prosecutor v. Kambanda*, Case No. ICTR-97-23-A, Appeal Judgment, 4 September 1998, para. 16.

like extinction of a species”;³⁰ but also due to the historical pull of the Holocaust: “the public invocation of the term genocide represents an attempt to make a connection with that unique catastrophe for human dignity and a statement that that is the point at which intervention is morally imperative”.³¹ By comparison, CAH suffers perhaps from a perception problem, viewed not just as a different, but as “less egregious”,³² less noteworthy, crime. The struggle for advocates of a CAH Convention is to increase the status of crimes against humanity, bringing them to the public table, so that they become perceived as a “resonating legal concept [...] and not just a kind of after-thought category”.³³

14.2. Taking a Closer Look at the Proposed Convention on the Prevention and Punishment of Crimes Against Humanity

14.2.1. Concerns in Defining Crimes Against Humanity

14.2.1.1. Requirement of a Nexus with an International Armed Conflict

The Proposed Convention omits the necessity of a connection with international armed conflict. Though the ICTY Statute upheld the nexus requirement for an international armed conflict, the Rwandan situation did not have an international aspect as such, yet in *Tadić* it was recognised that the law regarding crimes against humanity had progressed to include crimes committed outside of international conflicts.³⁴ The ICC Statute upheld this notion. The Proposed Convention, with the definition of CAH almost a carbon-copy of that in the ICC Statute, retains the omission.

14.2.1.2. Gender Crimes

Article 3(1)(h) and (3) of the Proposed Convention provides that,

“crimes against humanity” means any of the following acts
[...]. Persecution against any identifiable group or

³⁰ Stanton, 2011, p. 347, see *supra* note 1.

³¹ Steven R. Ratner, “Can We Compare Evils? The Enduring Debate on Genocide and Crimes Against Humanity”, in *Washington University Global Studies Law Review*, 2007, vol. 6, p. 588.

³² Sadat, 2011, p. 476, see *supra* note 10.

³³ Evans, 2011, p. 3, see *supra* note 2.

³⁴ ICTY, *The Prosecutor v. Duško Tadić*, Case No.IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds.

[...]

For the purposes of the present Convention, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.

When defining CAH, the drafters of the Proposed Convention lifted almost the exact definition from the ICC Statute, in order to complement the ICC and not undermine it.³⁵ In doing so, some imperfections and unresolved issues were also transplanted. Particularly, the section on gender and gender crimes has been regarded as insufficient. The definition of gender in Article 3(3) of the Proposed Convention is disputed. Admittedly controversial, this definition was the only one with which drafters of the ICC Statute could get all parties to agree;³⁶ nevertheless it is “opaque and circular”.³⁷ Oosterveld argues that gender is an elusive social structure which defies definition, and as such should be left undefined in the Convention. Some note that the principle of legality may require the inclusion of a clarified definition, however the ICC Statute version is unsatisfying due to its inherent tautology and failure to encompass the social and variable aspects of gender.³⁸ The definition focuses too exclusively on biological traits. It is notable that the French version of the ICC Statute translates “gender” as “*sexe*”.³⁹ This conception of gender is too narrow. It does not adequately reflect social and cultural implications, and may foreseeably prevent a persecution being deemed as CAH due to discriminatory categorisations that are not applicable under the Convention. One example might be persecutions or other CAH based on transgender status, or on not conforming to particular societal conventions pertaining to gender norms. With a limited definition of gender, such crimes could not be prosecuted under international criminal law.

³⁵ Sadat, 2011, p. 481, see *supra* note 10.

³⁶ Julia Martinez Vivancos, “LGBT and the International Criminal Court”, 2010, available at <http://www.amicc.org/docs/LGBTandICC.pdf>.

³⁷ Valerie Oosterveld, “Gender-Based Crimes Against Humanity”, in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, *op. cit.*, p. 82.

³⁸ *Ibid.*, p. 83.

³⁹ Sadat, 2011, p. 482, see *supra* note 10.

Further to the incomplete definition of gender, the Proposed Convention neglects to include certain gender-based acts as crimes against humanity. In particular, forced marriage is a crime which has been proven to have occurred, distinctly from sexual slavery, in emerging cases in the Special Court for Sierra Leone.⁴⁰ The Court provided a definition of the crime, and noted specific resulting injuries including physical, sexual, and emotional abuse, the contraction of STIs, forced pregnancy, and long-term social stigma after the events.⁴¹

The crime of forced marriage is by no means reducible to the Sierra Leone conflict. During the reign of Joseph Kony and the LRA in northern Uganda, thousands of girls were abducted to be used as ‘wives’ or ‘sisters’ of LRA troops,⁴² suffering from both sexual slavery and the trappings of marital relations, including being required to reside with their abusers and provide domestically for them.⁴³ Such events lead to a pandemic of forced pregnancy amongst the girls, with 800 babies reportedly being born to LRA ‘wives’ during the 1990s in the Jabelein LRA camp alone.⁴⁴ Young women and girls who had fallen prey to Kony’s troops also faced stigma on their return, as up to 83% of husbands subsequently rejected victims of rape.⁴⁵ In the conflict in Darfur, too, gender-based crimes went beyond prevalent and continual rape. In some cases, the “intention (was) to change the race of the offspring” and the women involved, with victims reporting being raped, branded and told, “You are now Arab wives”.⁴⁶ These incidents are not captured within the prohibition of “sexual slavery”; they require a greater emphasis and level of elucidation within the Proposed Convention. Nevertheless, forced marriage

⁴⁰ Special Court for Sierra Leone, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-A, Appeal Judgment, 22 February 2008.

⁴¹ Oosterveld, 2011, p. 97, see *supra* note 38; *Prosecutor v. Brima et al.*, *op. cit.*, paras. 187–196.

⁴² Press Conference, International Criminal Court, Statement by Chief Prosecutor Luis Moreno Ocampo (14 October 2005), p. 6.

⁴³ *Ibid.*, p. 5.

⁴⁴ Payam Akhavan, “The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court”, in *American Journal of International Law*, 2005, vol. 99, no. 2, p. 408.

⁴⁵ Ruddy Doom and Koen Vlassenroot, “Kony’s Message: A New Koine? The Lord’s Resistance Army in Northern Uganda”, in *African Affairs*, 1999, vol. 98, p. 27.

⁴⁶ John Hagan and Wenona Rymond-Richmond, “The Collective Dynamics of Racial Dehumanization and Genocidal Victimization in Darfur”, in *American Sociological Review*, 2008, vol. 73, p. 889.

has been omitted from the Proposed Convention, and may only be prosecuted under the category of “other inhumane acts” in Article 3(1)(k). This wording does not reflect the true experiences of many survivors, nor does it emphasize the progressive, updated version of international criminal law which the Proposed Convention ought to emulate.

Secondly, Oosterveld argues that forced abortion or forced miscarriage could be considered as a discrete CAH, due in particular to its similarity to sterilization, a listed crime.⁴⁷ The *Lubanga* case adduced evidence in 2009 as to this conduct,⁴⁸ although it was not specifically charged. Thus while many acts of sexual violence are included within the definition of CAH in the Proposed Convention, there is scope for the inclusion of other gender, but not necessarily sex-based, acts.⁴⁹

14.2.1.3. Persecution Based on Sexual Orientation

The Proposed Convention omits the crime of persecution based on grounds of sexual orientation. Given the history of continued repression and overt incidents of crimes against humanity on grounds of homosexuality, and in light of the emerging and vulnerable status of empowerment of homosexual people throughout the world, such an omission is at this stage glaring and wrong.

The persecution of people based on their sexual orientation has both historical and contemporary relevance. The most notable and heinous crimes against homosexuals were possibly those committed during the Nazi Holocaust. From 1933 to 1945, between 50,000 and 100,000 individuals were arrested and convicted for homosexuality in Nazi Germany.⁵⁰ In the notorious concentration camps, between 5,000 and 15,000 inmates wore the Pink Triangle, designating their status as sexual deviant,⁵¹

⁴⁷ Oosterveld, 2011, p. 99, see *supra* note 37.

⁴⁸ Beth Van Schaack, “Forced Marriage: A ‘New’ Crime Against Humanity?”, in *Northwestern Journal of International Human Rights*, 2009, vol. 8, p. 53.

⁴⁹ Oosterveld, 2011, p. 100, see *supra* note 37.

⁵⁰ Robert Plant, *The Pink Triangle: The Nazi War Against Homosexuality*, Holt Paperbacks, New York, 1986, p. 149; Robert Franklin, “Warm Brothers in the Boomtowns of Hell: The Persecution of Homosexuals in Nazi Germany”, in *Hohonu Journal of Academic Writing*, 2011, vol. 9, p. 56.

⁵¹ Rüdiger Lautmann, “The Pink Triangle: Homosexuals as ‘Enemies of the State’”, in Michael Berenbaum and Abraham J. Peck (eds.), *The Holocaust and History: The Known, the*

with such inmates suffering one of the worst death rates, at around 60%.⁵² Designated homosexual camp inmates were also sometimes subject to castration and experimental medical operations,⁵³ while those outside the camps spent years renouncing their desires and living in fear.⁵⁴ Similarly repulsive was the fact that immediately after the conclusion of the war, there was no prosecution of crimes based on sexuality at Nuremberg, and no reparations granted to such victims,⁵⁵ many of them being forced to serve the remainder of their prescribed sentences in jail.⁵⁶

Contemporarily, many countries retain the death penalty for convictions of homosexuality,⁵⁷ while up to 76 States criminalize same sex relations, often with extremely long jail terms.⁵⁸ Less formal crimes occur frequently against people based on sexual orientation, including police harassment,⁵⁹ involuntary institution and curative ‘treatments’ such as electroshock,⁶⁰ government inaction in response to systematic criminal assaults,⁶¹ ‘corrective’ lesbian rape,⁶² and prohibition of collaboration and

Unknown, the Disputed, and the Reexamined, Indiana University Press, Bloomington, 1998, p. 348.

⁵² *Ibid.*, p. 348; Franklin, 2011, p. 56, see *supra* note 50.

⁵³ “Homosexuals – Victims of the Nazi Era 1933-1945”, United States Holocaust Memorial Museum, p. 4, available at <http://www.chgs.umn.edu/pdf/homosbklt.pdf>.

⁵⁴ Plant, 2011, p. 112, see *supra* note 50; Lautmann, 1998, p. 354, see *supra* note 51.

⁵⁵ “Homosexuals – Victims of the Nazi Era”, p. 6, see *supra* note 54.

⁵⁶ Franklin, 2011, p. 57, see *supra* note 50.

⁵⁷ “International Lesbian, Gay, Bisexual, Trans and Intersex Association Map”, reported in *The Independent*, 25 February 2014: States include Iran, Saudi Arabia, Yemen, southern Somalia, northern Nigeria, and Mauritania.

⁵⁸ “Free & Equal: UN for LGBT Equality” Fact Sheet, available at https://unfe-uploads-production.s3.amazonaws.com/unfe-34-UN_Fact_Sheets_v6_-_Criminalization.pdf. Sentences extend from between 14 years to life imprisonment.

⁵⁹ Suzanne Goldberg, “Give me Liberty or Give me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men”, in *Cornell International Law Journal*, 1993, vol. 26, no. 2, p. 605.

⁶⁰ *Ibid.*, p. 605.

⁶¹ *Ibid.*

⁶² ActionAid, *The Rise of ‘Corrective Rape’ in South Africa*, London, 2009.

demonstrations.⁶³ There has been a perturbing broadening of existing anti-homosexuality laws in recent years, particularly in Africa.⁶⁴

International criminal law could be a suitable forum in which to address these crimes. The mechanism is powerful and trans-State, capable of transcending cultural partiality and protecting vulnerable groups from systematic persecution. It also retains undeniable rhetoric power. While many argue that States ought to retain the autonomy to determine their social policy, this ability cannot supersede the liberty of individuals and groups to enjoy their most basic rights and protections. We should not ignore crimes meted out against innocent people whom it is simply not convenient to protect.

Under the CAH definitions, ‘persecution’ appears to be the crime which most directly applies to the situations of life suffered by many LGBT individuals and groups around the world. Justice Ponsor, in a recent non-binding pre-trial statement in the U.S. District Court of Massachusetts case of *Sexual Minorities Uganda v. Scott Lively*, stated that “widespread, systematic persecution of LGBT people constitutes a crime against humanity that unquestionably violates international norms”.⁶⁵

As it stands, there remains no explicit inclusion of sexual orientation as a protected ground under the persecution definition of CAH in the ICC Statute. A convention on CAH should attempt to include it, for the avoidance of doubt, and as a symbolic statement that progress has been made to the extent that such persecution should no longer be tolerated.

Short of specifically including sexual orientation as grounds for persecution within the definition of CAH, there exist at least two mechanisms through which jurisdiction over crimes against humanity committed on the basis of sexual orientation may arise.

The first is through an expansive interpretation of the definition of “gender” in Article 3(3). As discussed above, the definition is vague and

⁶³ Amnesty International, *Making Love a Crime: Criminalization of Consensual Same-Sex Behaviour in Sub-Saharan Africa*, London, 2013, p. 7.

⁶⁴ E.g., in Nigeria and Uganda, see The Anti-Homosexuality Act (Nigeria), 2014; The Anti-Homosexuality Act (Uganda) 2014; Al Chukwuma Okoli, “Betwixt Liberty and National Sensibility: Implications of Nigeria’s Anti-Gay Law”, in *International Affairs and Global Strategy*, 2014, vol. 19.

⁶⁵ Justice Ponsor, *Sexual Minorities Uganda v. Scott Lively*, District Court of Massachusetts, Memorandum and Order denying Defendant’s Motion to Dismiss, 14 August 2013, p. 20.

there is no consensus as to whether it provides for persecution on the grounds of sexual orientation.⁶⁶ Some argue that it was left open for the courts to decide, case-by-case, whether particular persecution was “gender”-based,⁶⁷ whereas others say this aspect of the statute purposefully omitted persecution on the grounds of sexual orientation. Martinez contends that “conceptions of gender and sexual orientation are linked [...]”. The term ‘gender’ must be broad enough to capture any group challenging traditional defined gender roles”.⁶⁸

Key to the argument is Article 21(3) of the ICC Statute, and to a similar extent Article 25 of the Proposed Convention, both of which purport to include the necessity to interpret provisions consistent with “internationally recognised human rights” norms. As such, when facing this ambiguity of definition, a judge ought to take into account international human rights norms. Previously, deference to Article 21(3) has included references to the ICCPR and ECHR rulings.⁶⁹ It is notable that these and other international institutions are becoming increasingly vocal in their support of protections for vulnerable groups defined by their sexual orientation. The European Court of Human Rights has in several cases promoted the rights of homosexual individuals and groups,⁷⁰ as have key U.S. courts⁷¹ and the U.N. Human Rights Committee dealing with the ICCPR⁷². The Organisation of American States and the U.N. Human Rights Committee have both issued declarations of support for LGBT rights,⁷³ while a U.N. General Assembly Statement in 2008 was supported by 66

⁶⁶ Vivancos, 2010, p. 2, see *supra* note 36.

⁶⁷ Oosterveld, 2011, p. 96, see *supra* note 37.

⁶⁸ Vivancos, 2010, p. 3, see *supra* note 36.

⁶⁹ See, e.g., International Criminal Court, *Prosecutor v. Lubanga*, Judgment Pursuant to Article 74, 14 March 2012, para. 604.

⁷⁰ See, e.g., European Court of Human Rights, *Dudgeon v. UK*, Judgment, 22 October 1981, rendering anti-homosexuality laws illegal; and European Court of Human Rights, *L and V v. Austria*, 9 January 2003, equalising sexual ages of consent for homosexual and heterosexual relations.

⁷¹ See, e.g., *United States v. Windsor*, USSC 2013, modifying the Defence of Marriage Act and dissolving federal blocks to same-sex marriage; and *Lawrence v. Texas*, USSC 2003, prohibiting anti-sodomy laws.

⁷² See in particular *Toonen v. Australia* (488/1992) HRC, declaring prohibitions on homosexual behaviour to be in violation of the ICCPR.

⁷³ See Organisation of American States AG/RES. 2435 (XXXVIII-O/08) OAS 2008; U.N. HRC Resolution, 14 July 2011, 34th meeting on 17 June 2011.

States.⁷⁴ The non-legal Yogyakarta Principles, too, detailed comprehensive rights of LGBT individuals and groups in 2006-7.⁷⁵

Secondly, persecution on grounds of sexual orientation may be incorporated as a CAH through the absorption clause of Article 3(1), as an example of “other grounds that are universally recognised as impermissible under international law”. However, this threshold is higher than the previous. International law “has not yet universally recognized (sexual orientation) as a prohibited ground of discrimination”.⁷⁶ There are some examples of international recognition of the adverse potential for persecution on sexual grounds, for example in the Convention Relating to the Status of Refugees, “international law recognizes a well-founded fear of persecution on the basis of sexual orientation as a basis for refugee status”.⁷⁷ In this case the U.N. High Commissioner for Refugees interpreted “social group” to include those grounded on LGBT delineations.⁷⁸ However, international law is not yet at a sufficiently consolidated level to permit this ambiguity being resolved in favour of protecting vulnerable groups.

The ‘constructive ambiguities’ of the definition of CAH in the Proposed Convention are, in this instance, insufficient. The rights of vulnerable LGBT groups would be inadequately protected by a convention that has taken too regressive an outlook. Though the international community may find it controversial and, for some, unacceptable, the addition of persecution on grounds of sexual orientation in the Proposed Convention would at least bring this neglected issue to the fore of global debate. Such an inclusion “is not only desirable, but also necessary to prosecute the kind of homophobic persecution that had occurred in World War II”.⁷⁹

14.2.1.4. Terrorism and CAH

There is no inclusion of terrorist acts specifically within the definition of CAH in the Proposed Convention. Terrorist activities often consist of

⁷⁴ UNGA Statement on Sexual Orientation and Gender Identity, 2008.

⁷⁵ Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, U.N. Human Rights Council, 2007.

⁷⁶ Vivancos, 2010, p. 3, see *supra* note 36.

⁷⁷ Douglas Sanders, “Human Rights and Sexual Orientation in International Law”, in *International Journal of Public Administration*, 2002, vol. 25, no. 1, p. 14.

⁷⁸ Vivancos, 2010, p. 3, see *supra* note 36.

⁷⁹ Oosterveld, 2011, p. 96, see *supra* note 37.

CAH, and are intrinsically linked with them in many ways. Nevertheless, this seems overall a correct conclusion of the drafters. Though there is a proliferation of treaties dealing with terrorist activities, some argue that the Proposed Convention ought to include a CAH of terrorism to fill gaps between peacetime terrorism conventions,⁸⁰ to entail “uniformity of jurisdiction and prosecutorial obligation”,⁸¹ and to enable prosecution of these crimes by the ICC.⁸² Scharf and Newton demonstrate that, for example, the terrorist attacks in the U.S. on 11 September 2001 could have fulfilled the common elements of CAH. The attacks were “widespread and systematic” in that they resulted in almost 3,000 deaths, were “part of a string of attacks” (including bombings of the World Trade Center in 1993 and in Saudi Arabia in 1995-1996), and “constituted a systematic attack” on at least three separate targets.⁸³ It is also clear that the high number of terrorism treaties has failed to abate “the persistence of transnational terrorism as a feature of the international community”.⁸⁴ It seems that more international co-operation and effort are required.

Inclusion of terrorism as a CAH would face difficulties in particular due to the absence of international consensus regarding a definition of the crime.⁸⁵ The concept is “caught in a kaleidoscope of conflicting sociological, political, psychological, moral, and yes, legal perspectives”.⁸⁶ The term ‘terrorism’, too, is deemed politicised and emotive; it thus lacks legal certainty and would undermine the value of existing prohibitions.⁸⁷ Furthermore, the existing patchwork of norms and prohibitions regarding ‘terrorism’ means that most specific crimes are already covered. Terrorist acts could fall within the scope of the Proposed Convention under “murder” in Article (3)(1)(a) or “other inhumane acts” in Article (3)(1)(k). The determination of whether a specific act comes under the Proposed Convention is perhaps best decided judicially on a case-by-case basis, rather

⁸⁰ Michael P. Scharf and Michael A. Newton, “Terrorism and Crimes Against Humanity”, in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, *op. cit.*, p. 273.

⁸¹ *Ibid.*, p. 277.

⁸² *Ibid.*, p. 278.

⁸³ *Ibid.*, p. 274.

⁸⁴ *Ibid.*, p. 263.

⁸⁵ Sadat, 2011, p. 469, see *supra* note 10.

⁸⁶ Scharf and Newton, 2011, p. 266, see *supra* note 80.

⁸⁷ *Ibid.*

than through a casuistic legislative process seeking to identify a universal definition of “terrorist acts”.

14.2.2. Obligations Created by the Proposed Convention

14.2.2.1. The Responsibility to Protect

Articles 2(1), (2)(a), and 8(1) and (13) of the Proposed Convention provide:

The States Parties to the present Convention undertake to prevent crimes against humanity and to investigate, prosecute, and punish those responsible for such crimes.

[...]

each State Party agrees: To cooperate, pursuant to the provisions of the present Convention, with other States Parties to prevent crimes against humanity.

[...]

Each State Party shall enact necessary legislation and other measures as required by its Constitution or legal system to give effect to the provisions of the present Convention and, in particular, to take effective legislative, administrative, judicial and other measures in accordance with the Charter of the United Nations to prevent and punish the commission of crimes against humanity in any territory under its jurisdiction or control.

[...]

States Parties may call upon the competent organs of the United Nations to take such action in accordance with the Charter of the United Nations as they consider appropriate for the prevention and punishment of crimes against humanity.

The ‘Responsibility to Protect’ is an emerging principle of international law which has evolved as a result of an international Commission which in 2000 aimed at finding “a conceptual and practical answer”⁸⁸ to respond to and prevent core international crimes. The culmination of the Commission’s work was the U.N. General Assembly’s endorsement of

⁸⁸ Evans, 2011, p. 2, see *supra* note 2.

the Responsibility to Protect in a resolution at the 2005 World Summit.⁸⁹ In its essence, R2P is “the logical extension of the concept of popular sovereignty”.⁹⁰ It re-defines sovereignty as the duty of States to protect civilians within and beyond their territorial borders.⁹¹ R2P provides that States are required to “affirmatively intervene to protect vulnerable populations from nascent or continuing international crimes”⁹² in specific situations.

International criminal law has a significant role to play in the establishment and fulfilment of R2P. Of the four categories of core international crimes, R2P is most relevant to CAH, because they are systematic, typically take place over a long period of time, and likely become known to the outside community before or during their perpetration, often unlike crimes of genocide.⁹³

Paragraph 138 of the U.N. Resolution states that “each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity”.⁹⁴ Paragraph 139 goes further:

the international community [...] also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means [...] to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action [...] through the Security Council [...] should peaceful means be inadequate.⁹⁵

Article 8(1) of the Proposed Convention obliges States to protect civilians within their territory or within territory under their jurisdiction or control, but unlike the U.N. Resolution does not provide an explicit duty to protect all vulnerable populations of the world.⁹⁶ It is nevertheless

⁸⁹ United Nations General Assembly, “World Summit Outcome Document”, 24 October 2005, see particularly paras. 138–139.

⁹⁰ Stanton, 2011, p. 357, see *supra* note 1.

⁹¹ Evans, 2011, p. 2, see *supra* note 2.

⁹² Sadat, 2011, p. 458, see *supra* note 10.

⁹³ *Ibid.*, pp. 494–495.

⁹⁴ United Nations General Assembly, “World Summit Outcome Document”, 2005, see *supra* note 89.

⁹⁵ Sadat, 2011, pp. 494–495, see *supra* note 10.

⁹⁶ *Ibid.*

broad than the ICC Statute. The Proposed Convention, unlike the ICC Statute, does not explicitly forbid the interference of foreign States in the internal affairs or territorial integrity of another State.⁹⁷ The R2P is also more fully realised by the call in Article 8(13) for States to call upon the U.N. in dealing with CAH, rather than operating a unilateral ‘State v. State’ approach.⁹⁸

There is, however, debate on whether the Proposed Convention should go further in promoting the R2P principle, including a clause of collective responsibility to intervene where early-warning systems indicate that CAH may occur imminently. States “should not wait until the eleventh hour to intervene”.⁹⁹ Furthermore, States may be held responsible before the ICJ for failing to adequately intervene for reasons of negligence in situations where citizens are harmed. Such intervention need not necessarily be military or by physical force, but may involve economic or political measures.¹⁰⁰ Such an obligation is so comprehensive and complex that the Proposed Convention on CAH may be the wrong forum. The complex duty of intervention in territories outside the State’s jurisdiction requires a much stronger legal basis and a separate process of negotiation and exploration.

14.2.2.2. Prohibiting Hate Speech

Article 8(12) of the Proposed Convention provides:

Each State Party shall endeavour to take measures in accordance with its domestic legal system to prevent crimes against humanity. Such measures include, but are not limited to, ensuring that any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law.

Requiring States to domestically prohibit incitement and hate speech is controversial. It conflicts with fundamental rights to freedom of expression and, because it is difficult to prove a direct link between incitement and later events, is open to abuse and prejudicial use.¹⁰¹ It is no-

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, p. 497.

¹⁰¹ *Ibid.*

table that, in negotiating the ICC Statute, States refused to include the prohibition of incitement for CAH, but limited such prohibition to genocide.¹⁰² There is, however, strong precedent for including incitement clauses in human rights conventions. The International Convention on the Elimination of All Forms of Racial Discrimination specifically prohibits incitement¹⁰³ and has 177 States Parties.¹⁰⁴ The International Covenant on Civil and Political Rights (‘ICCPR’) provides that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.¹⁰⁵ It is from this language that Article 8(12) of the Proposed Convention was drafted.¹⁰⁶

Whether Article 8(12) will survive the negotiation process depends on the willingness of States to move towards the progress achieved in other international treaties. A brief review of State practice in implementing provisions prohibiting incitement may shed some light on the potential reception of proposed Article 8(12).

The general picture suggests that States have applied these prohibitions haphazardly, incompletely, or not at all. There is a marked “absence of the legal prohibition of incitement to hatred in many domestic legal frameworks around the world”.¹⁰⁷ Researchers have found that “the legislation of a number of States Parties did not include the provisions envisaged in Article 4 (a) and (b) of the Convention [on the Elimination of All Forms of Racial Discrimination]”,¹⁰⁸ while “States vary greatly in their

¹⁰² *Ibid.*

¹⁰³ International Convention on the Elimination of All Forms of Racial Discrimination, 4 January 1969, Article 4.

¹⁰⁴ United Nations Treaty Collection Database, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en.

¹⁰⁵ International Covenant on Civil and Political Rights, 19 December 1966, Article 20(2).

¹⁰⁶ Sadat *et al.*, “Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity (explanatory notes)”, in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, *op. cit.*

¹⁰⁷ “Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence: Conclusions and Recommendations Emanating from the Four Regional Expert Workshops Organised by OHCHR, in 2011, and Adopted by Experts in Rabat, Morocco on 5 October 2012”, p. 3.

¹⁰⁸ Atsuko Tanaka with Yoshinobu Nagamine, “The International Convention on the Elimination of All Forms of Racial Discrimination: A Guide for NGOs”, Minority Rights Group International and IMADR, 2001, p. 26, available at <http://www.minorityrights.org/894/guides/icerd-a-guide-for-ngos.html>.

approach to and interpretation of the obligation set out in Article 20(2) of the ICCPR”.¹⁰⁹ Legislation, where it exists, often does not follow the precise prescription of either instrument, using instead “variable terminology (which) is often inconsistent”¹¹⁰ with the instruments’ aims. Frequently, “domestic laws fail to refer to ‘incitement’ as such, using comparable terms such as ‘stirring up’ (the U.K.), ‘provocation’ (Spain) or ‘threatening speech’ (Denmark)”.¹¹¹ There is a lack of “conceptual discipline or rigour” in States’ judicial interpretations,¹¹² and concern for the potential adverse effects of over-expansive interpretations in restricting rights to freedom of expression.¹¹³

It is highly likely that the requirements in proposed Article 8(12) may face both resistance and inconsistent application at the domestic level. Drafters should clarify the elements and steps required for an incitement to occur, both to aid domestic implementation and to prevent potential overreach of anti-incitement laws. The 2012 ‘Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence’ provides a useful framework for assisting States in adopting and utilising laws which prohibit incitement.¹¹⁴

Another alternative that may both render the draft Article more effective, and provide a level of added value outside of already-existing anti-incitement protocols, may be to remove “by law” and instead allow an expansion of methodologies for domestic approaches to incitement. Such flexibility may increase ultimate State compliance with the Proposed

¹⁰⁹ Article 19: Policy Brief, “Prohibiting Incitement to Discrimination, Hostility or Violence”, December 2012, p. 25, <http://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf>.

¹¹⁰ Rabat Plan of Action, 2012, p. 3, see *supra* note 107.

¹¹¹ Article 19 Global Campaign for Free Expression, “Towards an Interpretation of Article 20 of the ICCPR: Thresholds for the Prohibition of Incitement to Hatred” (A study prepared for the regional expert meeting on article 20, organised by the Office of the High Commissioner for Human Rights, Vienna, 8–9 February 2010), p. 3, available at <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP7Callamard.pdf>.

¹¹² Article 19: Policy Brief, 2012, p. 25, see *supra* note 109.

¹¹³ See, e.g., “Statement of the Special Rapporteur on Freedom of Religion or Belief”, Heiner Bielefeldt, during the 25th session of the Human Rights Council, 11 March 2014, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14398&LangID=E>.

¹¹⁴ Rabat Plan of Action, 2012, see *supra* note 107.

Convention. One author notes that, regarding Article 20 of the ICCPR, “[w]hile the overall goal is to preserve freedom, a particular course of conduct, that is the adoption of legislation prohibiting propaganda for war, is mandated”.¹¹⁵ This approach potentially limits the freedom of States to find more culturally and socially appropriate responses to incitement, and is reflected in draft Article 8(12).

Secondly, the Proposed Convention could expand the grounds on which incitement is prohibited outside of “national, racial, or religious” hatred. It is laudable that the proposed Article already contains the “not limited to” non-exhaustion clause, but the phrasing could go further to include, for example, prohibitions of hatred based on gender, sexual orientation, or disability. Indeed, the ICCPR has already been criticised for not extending its reach far enough towards encompassing all forms of hate speech.¹¹⁶ Expansion to further grounds would demonstrate a recognition of progress and advancement in the international legal sphere.

14.2.3. Procedural Issues within the Proposed Convention

14.2.3.1. Immunities

Article 6(1) and (2) of the Proposed Convention provide:

The present Convention shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government [...] shall in no case exempt a person from criminal responsibility
[...]

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar a court from exercising its jurisdiction over such a person.

In the Explanatory Note to the Proposed Convention, it is stated that Article 6(2) “draws upon the dissenting opinion of Judge Van den Wyngaert from the ICJ’s judgement in the Case Concerning the Arrest

¹¹⁵ Anja Seibert-Fohr, “Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its Article 2 Para. 2”, in *Max Planck United Nations Law*, 2001, vol. 5, p. 402, footnote 10.

¹¹⁶ Office of the High Commissioner for Human Rights, “Draft General Comment 34”, October 2010, para. 54.

Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), 14 February 2002, and supports a different and more expansive principle than Article 27(2) of the Rome Statute”.¹¹⁷ However, in looking at the ICC Statute, Article 27(2) uses almost identical wording:

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

The only distinction is changing of the words “the Court” in the ICC Statute to “a court” in the Proposed Convention. In removing immunities for all courts, not just the ICC, the scope of the Convention is expanded in a simple but distinct way. By ratifying such a provision, States would abrogate the immunities *rationae personae* that their officials would otherwise enjoy, not just before the ICC, but all national and international courts and tribunals with jurisdiction over cases of CAH.¹¹⁸

In Judge Van den Wyngaert’s dissent, she stated that

there is no rule of customary international law protecting incumbent Foreign Ministers against criminal prosecution. International comity and political wisdom may command restraint, but there is no obligation under positive international law on States to refrain from exercising jurisdiction in the case of incumbent Foreign Ministers suspected of war crimes and crimes against humanity.¹¹⁹

Judge Van den Wyngaert also discussed the “the general tendency toward the restriction of immunity of the State officials (including even Heads of State)”,¹²⁰ and the “recent movement” in favour of “the principle of individual accountability for international core crimes”.¹²¹

While applauding the noble intentions of the drafters of the Proposed Convention to incorporate this development in the theory of inter-

¹¹⁷ Sadat *et al.*, “Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity (explanatory notes)”, 2011, see *supra* note 106.

¹¹⁸ Diane Orentlicher, “Immunities and Amnesties”, in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, *op. cit.*, p. 216.

¹¹⁹ International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Dissenting Opinion of Judge Van den Wyngaert, 14 February 2002, para. 10.

¹²⁰ *Ibid.*, para. 23.

¹²¹ *Ibid.*, para. 27.

national criminal law, it is also important to note reservations regarding the likelihood of State acceptance. State officials have suffered considerable assaults on their immunity during the evolution of international criminal law, and are generally reticent about tolerating further diminution.¹²² States' trepidation is revealed in the International Law Commission's study on the immunity of State officials from foreign criminal jurisdiction.¹²³

This ambition of the Proposed Convention is a departure from the current state of international law, and runs against recent attempts to shore up the definition and scope of head of State immunity by the International Law Commission.¹²⁴ There remains significant disagreement as to whether the "overall objective to avoid impunity for atrocity crimes [... ultimately supersedes] the desire to allow for the peaceful conduct of international relations between senior government officials".¹²⁵

The international community appears to have come to the fragile consensus that immunity *ratione personae* generally no longer applies in the context of international criminal tribunals. The rationale for this shift, though, very much stems from the status of these venues as being outside of the usual State diplomatic and political functions. Immunity *ratione personae* has traditionally been conferred because of the 'representative' nature of the individual as "the personal embodiment of the state itself"¹²⁶ (responding to the legal metonymy: "*L'État, c'est moi*").¹²⁷ Whereas the 'functional' need for such an individual requires immunity as a means of ensuring inter-state sovereign equality,¹²⁸ such logic does not apply under

¹²² Orentlicher, 2011, p. 217, see *supra* note 118.

¹²³ United Nations General Assembly, "Immunity of State Officials from Foreign Criminal Jurisdiction", 31 March 2008.

¹²⁴ Sean D. Murphy, "Immunity *Ratione Personae* of Foreign Government Officials and Other Topics: The Sixty-Fifth Session of the International Law Commission", in *American Journal of International Law*, 2014, vol. 108, no. 1, pp. 41 and 42, discussing the ILC's recent 2013 preliminary adoptions of three draft articles confirming head of State immunity from criminal jurisdiction.

¹²⁵ *Ibid.*, p. 47.

¹²⁶ Lord Millett, Judgment of the House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (U.K.), 1999, para. 49.

¹²⁷ David Luban, "State Criminality and the Ambition of International Criminal Law", in Tracy Isaacs and Richard Vernon (eds.), *Accountability for Collective Wrongdoing*, Cambridge University Press, Cambridge, 2011, p. 68.

¹²⁸ HUANG Huikang, "On Immunity of State Officials from Foreign Criminal Jurisdiction", in *Chinese Journal of International Law*, 2014, vol. 13, p. 2.

the purview of international criminal tribunals. It has been argued that “concerns of sovereign equality are irrelevant before international tribunals [... because such] courts derive their mandate from the international community which safeguards against unilateral judgment by one state”.¹²⁹ The eminent immunity justification *par in parem non habet imperium* as such “has no application to international tribunals”.¹³⁰

Such a justification for removing immunity does not apply, however, to the context of national jurisdictions attempting to try international crimes. It “remains unclear” whether the new vitiation of immunity *ratione personae* has been extended to the national level,¹³¹ in particular since the traditional fears of destabilising sovereign equality stands in this context. Even the ICC, in a Pre-Trial Chamber Decision in the Al Bashir case, declined to suggest that an exception to such immunity existed anywhere except “when *international* courts seek a Head of State’s arrest for the commission of international crimes”.¹³² With regards to immunities, international criminal justice already “mounts a dramatic challenge to the prevailing idolatry of the state”.¹³³ It is highly likely that this expansive attempt may be a leap too far, too soon.

Nevertheless, these issues do not diminish the need for a strong non-immunity declaration within the Proposed Convention. Taking a strong stand against immunities allows States negotiation space so that the provisions may retain their strength after watering down during the process.¹³⁴ It is also important to recall that the crimes at hand violate *jus cogens* norms, and as such immunity ought not to apply,¹³⁵ yet the time for such an advancement may not yet be here. Hopefully, in the future, international lawyers and commentators will have greater sympathy for the

¹²⁹ Jessica Needham, “Protection or Prosecution for Omar Al Bashir? The Changing Face of Immunity in International Criminal Law”, in *Auckland Law Review*, 2011, vol. 17, p. 231.

¹³⁰ Luban, 2011, p. 69, see *supra* note 127.

¹³¹ HUANG Huikang, 2014, p. 3, see *supra* note 128.

¹³² International Criminal Court, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision Pursuant to Article 87(7) of the ICC Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01.09, 12 December 2011, para. 43 (emphasis added).

¹³³ Luban, 2011, p. 70, see *supra* note 127.

¹³⁴ Sadat, 2011, p. 497, see *supra* note 10.

¹³⁵ Needham, 2011, p. 230, see *supra* note 129.

removal of such immunity in the cases of vast international crimes, and we will see more spectacles of heads of State facing criminal justice where, “strikingly, they stand revealed as bodies natural, not bodies politic”.¹³⁶

14.2.3.2. Universal Jurisdiction

Article 10(3) of the Proposed Convention provides:

Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offense of crimes against humanity when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.

The importance of filling the jurisdictional *lacuna* for CAH is evident considering the gargantuan length and cost of trials in the ICTY, ICTR and ICC.¹³⁷ Furthermore, the normative incongruence between universal jurisdiction regarding different international crimes creates uneasiness in the operation of international law. Crimes of torture and war crimes, by virtue of the Torture Convention and the Geneva Conventions respectively, entail obligation of prosecution by the State where a suspected criminal is present; crimes against humanity do not. This manifests a “significant loophole” in international law.¹³⁸

Customary law, and to an extent international conventions, have certainly been moving towards the establishment of a duty of exercising universal jurisdiction, but they have not yet accomplished that goal. The ICC Statute pronounces a duty of States to exercise jurisdiction in the preamble, but such duty is not addressed in the operative provisions. Therefore, beyond the two situations where the conduct occurred on the territory of the State, or where the person accused is a national of the State, “mere custody of a person accused of CAH does not entail any ob-

¹³⁶ Luban, 2011, p. 70, see *supra* note 127.

¹³⁷ Payam Akhavan, “The Universal Repression of Crimes Against Humanity before National Jurisdictions: The Need for a Treaty-Based Obligation to Prosecute”, in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, *op. cit.*, p. 30.

¹³⁸ *Ibid.*, p. 31.

ligations under the Rome Statute”.¹³⁹ Customary law seems to support the view that States have a right to exercise universal jurisdiction in CAH cases, but not the obligation to do so.¹⁴⁰ Judges in the ICJ, however, spoke recently of the “clear indications pointing to a gradual evolution” of universal jurisdiction for CAH.¹⁴¹

The value of the inclusion of universal jurisdiction obligations in the Proposed Convention cannot be overstated. In Article 10(3), the Proposed Convention effectively imposes a duty on States to prosecute individuals accused of CAH whenever that person is under the country’s control, and thus significantly expands the State’s remit for prosecution. Obliging States to operate universal jurisdiction is substantially more powerful than the option to do so. For instance, despite their ‘no safe haven’ policy, Canadian courts have demonstrated that the cost and difficulty of obtaining convictions in international CAH cases remarkably reduces the incentive to prosecute crimes with no direct connection to the State.¹⁴² Moreover, Akhavan has discussed the benefits of crystallising and entrenching current ‘soft law’ into an established international norm, with the Proposed Convention having a “profound impact on expediting this process of convergence”.¹⁴³ The ambitious effort of drafters of the Proposed Convention has finally instigated “a first step in a long and tortuous road to universal accountability”.¹⁴⁴

14.3. Concluding Remarks

Crimes Against Humanity are patently heinous, and the need for providing an international convention to deal with them is strong. While individual aspects of the Proposed Convention may be criticised, the negotiation process is unpredictable. The preservation of individual tenets cannot be guaranteed. I particularly hope that this opportunity is grasped by legislators to offer a more in-depth definition of ‘crimes against humanity’

¹³⁹ *Ibid.*, p. 33.

¹⁴⁰ *Ibid.*, p. 31.

¹⁴¹ International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Joint Separate Opinion of Judges Higgins, Koojimans and Buerghental, 14 February 2002, para. 52.

¹⁴² Akhavan, 2011, p. 32, see *supra* note 137.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

with regard to gender crimes and, to an even greater extent, persecution on the grounds of sexuality. While far from perfect, the Proposed Convention represents a milestone and building block on the road to ending impunity for core international crimes and, ultimately, preventing such crimes.

Law, like blueprints written on paper, must be built into the structures of human life. The nations of the world must enact the provisions of this international Convention into their national laws. Using national courts, the nave and the transept of the cathedral of international criminal law will be built, block by national block. And someday, after our lifetimes, great windows will light it, not with the colour of human blood, but with the green of the grass, the blue of the sky, and the gold of the sun.¹⁴⁵

¹⁴⁵ Stanton, 2011, p. 358, see *supra* note 1.

FICHL Publication Series No. 18 (2014):

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, María 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.

ISBN 978-82-93081-96-8

effective legislative, administrative, judicial and other measures in accordance with the Charter of the United Nations to prevent and punish the commission of crimes against humanity in any territory under its jurisdiction or control.

A. Crimes against humanity

TOAEP

Torkel Opsahl
Academic EPublisher

Torkel Opsahl Academic EPublisher

E-mail: info@toaep.org

URL: www.toaep.org

CILRAP

Centre for International
Law Research and Policy

Each State Party shall adopt such legislative and other measures as may be necessary to establish crimes against humanity as serious offenses under its criminal law, as well as its military law, and make such offenses punishable by appropriate penalties which take into account the grave nature of those offenses, the harm committed, and the individual circumstances of the offender. In addition, such a person may be barred from holding public rank or office, be it military or