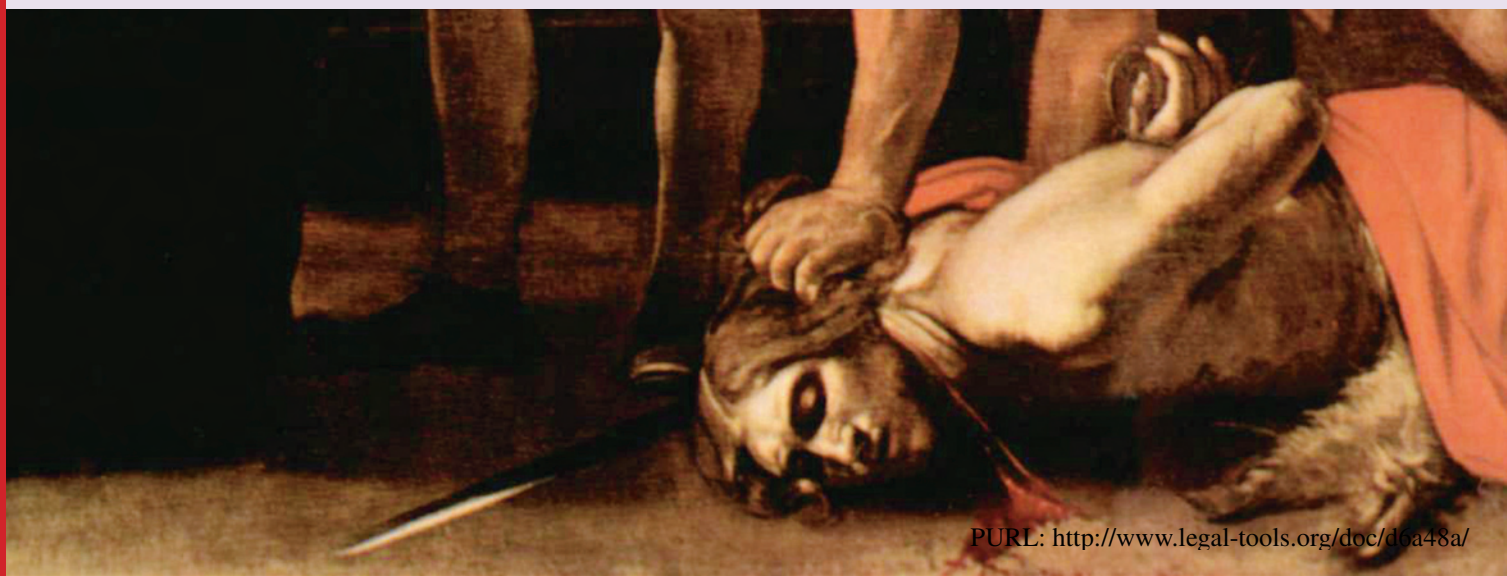




On the Proposed Crimes Against Humanity Convention

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State Obligation to Punish Core International Crimes and the Proposed Crimes Against Humanity Convention

Julie Pasch^{*}

7.1. Introduction

The Proposed Convention on the Prevention and Punishment of Crimes Against Humanity ('Proposed Convention') is intended to create a legal instrument to address one of the major international crimes not yet covered by a specialized convention. Should it be adopted, the Proposed Convention would take its place alongside the 1949 Geneva Conventions and their 1977 Additional Protocols¹ and the Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention')² in regulating State action regarding serious human rights violations, in particular, 'core' international crimes.

State action to suppress core international crimes can take many forms. Aspects of a convention focusing on prevention may include provisions addressing domestic legislation, State action and humanitarian

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¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (respectively Geneva Conventions I–IV); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (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 (Additional Protocol II).

² Convention on the Prevention and Punishment of the Crime of Genocide, in UNTS, vol. 78, p. 277, entered into force on 12 January 1951 (<http://www.legal-tools.org/doc/498c38/>).

intervention. Important factors with regard to prosecution may include jurisdiction and referral provisions. This chapter will explore one aspect of State obligations to prevent and punish international human rights violations under the aforementioned conventions and the Rome Statute of the International Criminal Court ('ICC Statute'), by focusing on jurisdiction and the attendant State obligations or rights.

This chapter first outlines existing State obligations to punish genocide and war crimes and their implementation at the national level. It then examines the mechanism provided by the ICC in punishing core international crimes and accompanying State obligations. Throughout the above analysis, the chapter considers the impact of the existing practice on the formation, interpretation and application of the obligation to punish in the Proposed Convention. It contemplates to what extent the Proposed Convention would crystalize and develop State obligations to repress core international crimes at national and international level, some sixty years after World War II and the Holocaust.

7.2. State Obligation to Punish Genocide

State obligations concerning genocide are part of customary international law.³ This status determines the obligations of States even if they are not parties to the Genocide Convention. The wide acceptance of the convention's definition of genocide is evidenced by the Statutes of the ICC and the *ad hoc* tribunals.⁴ There is also evidence that the prohibition of genocide has become a *jus cogens* norm.⁵

In Article I of the Genocide Convention, States undertake to "prevent and punish" genocide. Article V requires States to enact the necessary legislation to effectuate the Genocide Convention, and to provide effective penalties for persons found guilty of genocidal acts.

³ Steven Ratner and Jason Abram, *Accountability For Human Rights Atrocities In International Law: Beyond The Nuremberg Legacy*, Oxford University Press, 2001, p. 41.

⁴ See, e.g., Rome Statute of the International Criminal Court, 1 July 2000, Article 6 (<http://www.legal-tools.org/doc/7b9af9/>); Statute of the International Criminal Tribunal for the Former Yugoslavia (as of September 2009), adopted on 25 May 1993, Article 4 (<http://www.legal-tools.org/doc/b4f63b/>); Statute of the International Criminal Tribunal for Rwanda as Amended on 1 January 2007, Article 2.

⁵ Ratner and Abrams, 2001, see *supra* note 3. See also International Court of Justice, *Barcelona Traction, Light and Power Company (Belgium v. Spain)*, Judgment, 5 February 1970, para. 34.

Article VI confers jurisdiction. Jurisdiction for trials is limited to a tribunal of the State where the act was committed or an international penal tribunal if the appropriate States have accepted its jurisdiction. Under Article VI of the Genocide Convention, States must punish acts of genocide that occur on their territory. The Convention does not address any obligations toward acts of genocide occurring extraterritorially.⁶ Although the *Ad Hoc* Committee and the Sixth Committee explicitly rejected a universal jurisdiction provision that appeared in one of the drafts, most States considered the convention as non-exclusive regarding jurisdiction and not precluding extraterritorial jurisdiction.⁷ Many States Parties to the Genocide Convention have enacted legislation creating universal jurisdiction over genocide.⁸

National courts subsequently interpreted Article VI of the Genocide Convention as not prohibiting the application of the principle of universal jurisdiction to genocide.⁹ The European Court of Human Rights in upholding Germany's exercise of universal jurisdiction over genocide, recognizes that pursuant to Article I of the Genocide Convention, States Parties are under an *erga omnes* obligation to prevent and punish genocide, the prohibition of which forms part of the *jus cogens*. In view of this, the European Court reasons that the purpose of the Genocide Convention, as expressed notably in Article I, does not exclude extraterritorial jurisdiction for the punishment of genocide under national law.¹⁰ Similarly, Judge Lauterpacht of the International Court of Justice ('ICJ') holds that Article I of the Genocide Convention is intended "to permit parties, within the domestic legislation that they adopt, to assume universal jurisdiction over the crime of genocide", in his Separate Opinion to Order of 13 September

⁶ Genocide Convention, Article VI.

⁷ Report of the Ad Hoc Committee on Genocide, 1948, U.N. Doc. E/794/Corr.1, pp. 11–12; Report of the Sixth Committee, Genocide: Draft Convention and Report of the Economic and Social Council, 1948, 3rd Sess., U.N. Doc A/760.

⁸ See the summary made by the European Court of Human Rights, *Case of Jorgić v. Germany (Application no. 74613/01)*, Judgment, 12 July 2007, para. 53. These States are: Spain, France, Belgium, Finland, Italy, Latvia, Luxembourg, the Netherlands, Austria, Denmark, Estonia, Poland, Portugal, Romania, Sweden and Switzerland, Russia, the Slovak Republic, the Czech Republic, and Hungary.

⁹ William Schabas, *Genocide in International Law: Crime of Crimes*, Cambridge University Press, 2009, pp. 426–443.

¹⁰ European Court of Human Rights, *Case of Jorgić v. Germany (Application no. 74613/01)*, Judgment, 12 July 2007, para. 68.

1993 in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))* ('*Bosnia and Herzegovina case*').¹¹

In the 2007 judgment of the *Bosnia and Herzegovina case*, the ICJ clarifies the extraterritorial reach of the prevention aspect of State obligations under Article I of the Genocide Convention. The ICJ held that under the Genocide Convention, Yugoslavia should ensure that any military units and organizations and people within its control did not commit any acts of genocide. It further clarified that the obligation is one of "conduct" rather than result: a State cannot be under an obligation to *succeed* in preventing genocide.¹² The obligation to prevent, and the duty to act arises when the State learns (or should have learned) of the existence of a serious risk that genocide will be committed.¹³ At that time, if States have a means of deterrent, they are under a duty to use those means as circumstances allow. The obligation to prevent varies from State to State, and depends upon the State's capacity to influence persons likely to commit genocide.¹⁴ Interestingly, in 1993, Bosnia declared its intention to begin proceedings against the UK for failing in its obligation to prevent genocide.¹⁵ The case (or more appropriately, the idea) was subsequently dropped, but it does indicate that States had contemplated that the obligation to prevent in the Genocide Convention extended beyond the State's territory.

Against this background, it can be said that under Article I, while States Parties have an extraterritorial *obligation* to prevent genocide, they have discretion to exercise other grounds of jurisdiction over genocide than what is mandated under Article VI, such as the universal jurisdiction – it is a *right*, not an obligation. As will be discussed below, this is a more

¹¹ International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Provisional Measures, Order of 13 September 1993, Separate Opinion of Judge Lauterpacht, p. 443.

¹² International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 456.

¹³ *Ibid.*, para. 430.

¹⁴ *Ibid.*, para. 461.

¹⁵ Statement of Intention by the Republic of Bosnia and Herzegovina to Institute Legal Proceedings Against the United Kingdom Before the International Court of Justice, 15 November 1993, U.N. Doc. A/48/659-s/26806, 47 UNYB 465.

limited view of jurisdiction than what is found in the Proposed Convention.

Article VIII allows States Parties to call on the U.N. to take appropriate action to suppress genocide. It provides for a possible forum to challenge a State's inaction towards punishing genocide.

The evolution of the obligation to punish genocide illustrates experience and lessons learnt for punishing core international crimes in general. In this sense, the Proposed Convention draws on and amplifies what is envisaged in the Genocide Convention; the latter is substantially shorter and does not go into as much detail.

7.3. State Obligation to Punish War Crimes

Similar to the Genocide Convention, the Geneva Conventions and their 1977 Additional Protocols reflect customary law of State obligations to prevent and punish war crimes.

7.3.1. Jurisdiction over 'Grave Breaches' and Other Violations of IHL

The Geneva Conventions and Additional Protocol I explicitly set out State obligation to exercise universal jurisdiction over 'grave breaches' of those instruments.¹⁶ States Parties are obliged to enact necessary legislation to provide effective penal sanctions for persons committing grave breaches. States also have an obligation to search for persons alleged to have committed grave breaches, and either to bring them before their own courts or to hand them over for trial in another State, even if the individual is *not* located in the State's territory: "When engaging troops in military operations abroad, States have a duty to use their military personnel thus deployed to search for individuals accused of war crimes".¹⁷ Prior to the 1990s there were no prosecutions based solely on the universality princi-

¹⁶ Articles 49, 50, 129, 146 respectively of the Geneva Conventions I–IV, Article 85 of Additional Protocol I; for acts constituting grave breaches, see Articles 50, 51, 130, 147 respectively of the Geneva Conventions I–IV, Article 85 of Additional Protocol I.

¹⁷ Laurence Boisson de Chazournes and Luigi Condorelli, "Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests", in *International Review of the Red Cross*, No. 837, 2000.

ple, but since then the pattern has changed, with prosecutions proceeding without protest from other States.¹⁸

Regarding other violations of the Geneva Conventions or Additional Protocol I than grave breaches and violations of the Additional Protocol II, there are no requirements for prosecution or extradition. It is possible that customary law would recognize universal jurisdiction for other war crimes beyond grave breaches.¹⁹ According to the International Committee of the Red Cross ('ICRC'), States must take whatever measures necessary to prevent and suppress all violations of international humanitarian law ('IHL'). Such measures may include military regulations, administrative orders and other regulatory measures. However, criminal legislation is deemed the most appropriate and effective means of dealing with all serious violations of IHL.²⁰

The differences in State jurisdiction for 'grave breaches' and other violations have given rise to interesting questions regarding whether international law can be read to give States universal jurisdiction over all war crimes. A number of States have already enacted criminal law to punish violations of Article 3 common to the Geneva Conventions and Additional Protocol II which apply to non-international armed conflict. States have recently been more willing to prosecute atrocities committed abroad, even when crimes were not committed by or against their citizens. After the creation of the International Criminal Tribunals for Yugoslavia ('ICTY') and Rwanda ('ICTR'), States started to prosecute perpetrators found in their territory on the basis of domestic statutes implementing the Geneva Conventions.²¹ Processes in many of these States have led to convictions and thus affirmative findings of jurisdiction.²²

¹⁸ Ratner and Abrams, 2001, p. 164, see *supra* note 3.

¹⁹ See, e.g., Sonja Boelaert-Suominen, "Grave Breaches, Universal Jurisdiction and Internal Armed Conflicts: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for all Armed Conflicts?", in *Journal of Conflict and Security Law*, 2000, vol. 5, no 1, p. 63; and Cedric Ryngaert, "Universal Jurisdiction over Genocide and Wartime Torture in Dutch Courts: An Appraisal of the Afghan and Rwandan Cases", in *Hague Justice Journal*, 2007, vol. 2, no. 2, p. 13.

²⁰ ICRC Advisory Service on International Humanitarian Law, "Penal Repression: Punishing War Crimes", available at http://www.icrc.org/eng/assets/files/other/penal_repression.pdf.

²¹ Ratner and Abrams, 2001, p. 180, see *supra* note 3.

²² *Ibid.*

In the Dutch case against *Abdullah F.*, the Hague District Court considered the question of whether a bystander State, having no connection with the alleged violations except the presence of the accused, could exercise jurisdiction.²³ The Court concluded that it could, basing its reasoning on a resolution from 17th Commission of the *Institut de Droit International* that stated in part:

Universal jurisdiction may be exercised over crimes identified by international law as falling within that jurisdiction in matters such as genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions for the protection of war victims or other serious violations of international humanitarian law committed in international or non-international armed conflict.²⁴

The Dutch court's approach allows universal jurisdiction over all war crimes, not just grave breaches.²⁵ Though the court's response is by no means the only possible one on this issue, it does acknowledge the development of customary law and add to it with this decision.²⁶

States have also relied on universal jurisdiction to charge some of the former leaders of South and Central American regimes, notably Augusto Pinochet in Spain. These cases, particularly when they involve foreign nationals accused of Common Article 3 violations, indicate a move toward universal jurisdiction for all war crimes, and the general lack of international outcry over the States' unilateral actions suggests that States tacitly agree that such jurisdiction is proper. According to the ICRC, States have the *right* to vest universal jurisdiction in their national courts over war crimes other than grave breaches, not an obligation.²⁷

State obligation to provide judicial assistance in criminal matters is specifically considered in Article 88(1) of Additional Protocol I, which stipulates that "the High Contracting Parties shall afford one another the

²³ LJN: BA9575, District Court The Hague, 09/750001-06, case against Abdullah F., 25 June 2007.

²⁴ Resolution of the Seventeenth Commission, Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, 26 August 2005, para. 3(a); cited in Ryngaert, 2007, p. 17, see *supra* note 19.

²⁵ Ryngaert, *ibid.*

²⁶ For discussion of the *Abdullah F.* case, see Ryngaert, *ibid.*

²⁷ ICRC Customary International Humanitarian Law Study, Rule 157, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule157.

greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol”. Article 89 of Additional Protocol I further states that in the event of serious violations of the Protocol, States parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the Charter of the United Nations. Although for violations of IHL other than grave breaches, customary law does not establish an absolute obligation to co-operate, but rather an expectation that States should make every effort to do so, in good faith and to the extent possible.²⁸

7.3.2. State Obligation to “Ensure Respect”

Common Article 1 of the 1949 Geneva Conventions provides that States parties undertake to “ensure respect for the present Convention”. The same provision is repeated in Article 1 (1) of Additional Protocol I in relation to respect for the provisions of that Protocol. It seems that State obligations to punish war crimes go beyond the situation where the State itself is party to a conflict. In the commentary to common Article 1, the ICRC states that the obligation to “ensure respect” is “not limited to behaviour by parties to a conflict, but includes the requirement that States do all in their power to ensure that international humanitarian law is respected universally”.²⁹ However, no specific course of action is identified.

Historically, two peaceful methods have been adopted in this respect: diplomatic protest and collective measures.³⁰ Diplomatic protests have taken multiple forms, but generally materialize as bilateral protests, protests in international fora, or through resolutions of international organizations. Though diplomatic protests do not always specifically relate to violations of the Geneva Conventions, they have on occasion referred

²⁸ ICRC Advisory Service on International Humanitarian Law, “Cooperation in Extradition and Judicial Assistance in Criminal Matters”, available at <http://www.icrc.org/eng/assets/files/2014/cooperation-in-extradition-and-judicial-assistance-in-criminal-matters-icrc-eng.pdf>.

²⁹ ICRC Customary International Humanitarian Law Study, Rule 144, available at http://www.icrc.org/customary-ihl/eng/print/v1_cha_chapter41_rule144#refFn_11_2, citing Jean S. Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, Geneva, 1960, p. 18; Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 45.

³⁰ *Ibid.*

to common Article 1 and the duty of States to ensure respect for international humanitarian law.³¹

Collective measures have included such actions as “holding international conferences on specific situations, investigating possible violations, creating *ad hoc* criminal tribunals and courts, creating the International Criminal Court, imposing international sanctions and sending of peace-keeping or peace-enforcement troops”.³² In 1990, U.N. Security Council called on States Parties to the Fourth Geneva Convention to ensure respect by Israel for its obligations, in accordance with Article 1 of that Convention.³³ In relation to the same conflict, the U.N. General Assembly has adopted several resolutions to the same effect.³⁴ Other international organizations have likewise called on their Member States to respect and ensure respect for international humanitarian law, in particular the Council of Europe, North Atlantic Treaty Organization, the Organization of African Unity and the Organization of American States.³⁵ These examples cover a wide range of State involvement and demonstrate that States may interpret their obligations to be quite different depending on the specifics of the situation.³⁶

The way universal jurisdiction to prosecute war crimes has expanded and State obligation to “ensure respect” of IHL unfolded over time sheds lights on how State obligations to suppress crimes against humanity under the Proposed Convention may take shape. It is important to note that in the fairly recent past, Common Article 1 was seen as a “stylistic” clause, “devoid of real legal weight”.³⁷ The Proposed Convention will cer-

³¹ *Ibid.*

³² *Ibid.*

³³ U.N. Security Council Res. 681.

³⁴ U.N. General Assembly, Res. 32/91 A, Res. 37/123 A, Res. 38/180 A and Res. 43/21.

³⁵ ICRC Customary International Humanitarian Law Study, Rule 144, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule144#Fn_44_6, citing Council of Europe, Parliamentary Assembly, Res. 823, Res. 881, Res. 921 and Res. 948; Council of Europe, Committee of Ministers, Declaration on the Rape of Women and Children in the Territory of Former Yugoslavia; NATO, Parliamentary Assembly, Resolution of the Civilian Affairs Committee; OAU, Conference of African Ministers of Health, Res. 14 (V); OAS, General Assembly, Res. 1408 (XXVI-O/96).

³⁶ For discussion of the possible State actions, see Umesh Palwankar, “Measures available to States for fulfilling their obligation to ensure respect for international humanitarian law”, in *International Review of the Red Cross*, 1994, No. 298, p. 9.

³⁷ Boisson de Chazournes and Condorelli, 2000, footnote 4, see *supra* note 17.

tainly benefit from the historical development of State obligations under the Geneva Conventions, and similarly, it is also likely that some elements of the Proposed Convention will develop more weight than initially contemplated as time progresses.

7.4. State Obligations under the ICC Statute

7.4.1. The Jurisdiction of the ICC

The creation of the ICC provided another forum to adjudicate international crimes. The ICC Statute creates jurisdiction over ‘core’ crimes – genocide, crimes against humanity, war crimes and, yet to be finalized, aggression. Amendment provisions allow for other crimes to be added at a later date. The decision to limit the court’s jurisdiction to the ‘core’ crimes was in many ways political: those crimes are generally of great concern and benefit from a clear status under customary international law, and the drafters believed that adding other crimes might impede acceptance of the ICC Statute.³⁸ Generally the definitions of the core crimes are consistent with those found in international law, though in certain incidences they reflect progression in defining gender-related offenses as crimes and expanding the definition of war crimes.

The ICC may only exercise jurisdiction if the State where the offense occurred or the State of which the person committing the crime was a national is a party to the ICC Statute or has accepted the ICC’s jurisdiction for the specific crime.³⁹ This notably gives the ICC jurisdiction over nationals of non-party States if the State where the offense occurred has consented, which was one of the main reasons the United States refused to ratify the ICC Statute.⁴⁰ It has been argued, however, that this jurisdiction is not overreaching because the crimes covered by the ICC Statute are subject to universal jurisdiction.⁴¹ The ICC may also exercise jurisdiction over a situation referred to the Prosecutor by a State Party or by the U.N.

³⁸ *Ibid.*, p. 212.

³⁹ ICC Statute, Article 12.

⁴⁰ John P. Cerone, “Dynamic Equilibrium: The Evolution of US Attitudes Toward International Criminal Courts and Tribunals”, in *The European Journal of International Law*, 2007, vol. 18, no. 2, pp. 292 and 296.

⁴¹ Compare Leila Nadya Sadat and Richard Carden, “The New International Criminal Court: An Uneasy Revolution”, in *Georgetown Law Journal*, 2000, vol. 88, p. 381, with Alfred P. Rubin, “A Critical View of the Proposed International Criminal Court”, in *Fletcher Forum of World Affairs*, 1999, vol. 23, p. 139.

Security Council acting under Chapter VII of the U.N. Charter, or the Prosecutor has initiated an investigation on his or her own accord.⁴² The Security Council referral is of particular importance because Chapter VII resolutions are binding on all U.N. Member States; allowing the ICC to exercise jurisdiction in those cases arguably extends jurisdiction to all U.N. Member States regardless of their membership to the ICC Statute.⁴³ Non-party States are only obligated to co-operate with the ICC if they enter into *ad hoc* or other co-operation agreements.⁴⁴ However, the Security Council referral may lead to an obligation to co-operate of all U.N. Member States if the Security Council resolution “specifically requires” so.⁴⁵

7.4.2. The Principle of Complementarity

The principle of complementarity governs the relations between national jurisdictions of States Parties and jurisdiction of the ICC. The preamble of the ICC Statute states that effective prosecution of international crimes must be ensured by taking measures at the national level, and that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. Both the preamble and Article 1 declare the ICC’s jurisdiction “shall be complementary to national criminal jurisdictions”. The ICC Statute also lays down conditions relating to the exercise of jurisdiction, as concrete means of implementation of the principle of complementarity. Under Articles 17 and 18, a case will be inadmissible if a State having jurisdiction is investigating or prosecuting the case, or has declined to prosecute, unless the State is unwilling or unable genuinely to carry out the prosecution. Finally, a case is inadmissible if a prosecution would constitute double jeopardy or if the case “is not of sufficient gravity” to justify prosecution before the court.

⁴² ICC Statute, Articles 12–15.

⁴³ Tiffany de Wayneourt-Steele, “The Contribution of the Statute of the International Criminal Court to the Enforcement of International Law in the Light of the Experiences of the ICTY”, in *South African Yearbook of International Law*, 2002, vol. 27, p. 29. As of June 2014, the Security Council has referred two situations to the ICC Prosecutor: Darfur, Sudan and Libya. Neither Sudan nor Libya is State Party to the ICC Statute.

⁴⁴ *Ibid.*, de Wayneourt-Steele.

⁴⁵ *Ibid.*, de Wayneourt-Steele cites the U.N. Security Council Resolution establishing the International Criminal Tribunal for the former Yugoslavia as an example: S/RES/821, 28 April 1993.

This distinguishes the ICC from the ICTY and the ICTR in terms of jurisdiction – the latter have primacy over national courts. The ICC Statute recognizes that States have the first responsibility and right to prosecute international crimes. The principle of complementarity is based both on respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings. This affirmative duty to implement domestic legislation is a significant obligation for States. It is important in the context of jurisdiction because the ICC relies so heavily on complementarity; whereas the Geneva Conventions and the Genocide Convention allow for either a State or an appropriate international body to take jurisdiction, the ICC Statute is much more specific about when the ICC may and may not take jurisdiction.

7.4.3. States Parties' Obligation to Provide International Co-operation

In addition to a general duty to exercise national jurisdiction over core international crimes, States Parties also undertake to provide international co-operation for cases before the ICC. The duty to co-operate generally is noted in Article 86: "States Parties shall, in accordance with the provisions in this Statute, cooperate fully with the Court [...]". States are required to adopt domestic laws that permit co-operation with the ICC.⁴⁶ In addition, specific provisions, such as those covering the arrest and surrender of individuals, govern acts of co-operation. States bear obligations to aid the ICC Prosecutor's investigations. Upon receiving arrest requests, States must take steps to arrest the person in accordance with the national law and the ICC Statute. After ensuring that the warrant applies to the individual and that the proper procedures have been followed and rights respected, the State must promptly deliver the person to the ICC.⁴⁷ The ICC can request any evidence necessary to determine the truth. But the ICC Statute also contains provisions for the protection of information that the State believes would prejudice its national security interests, including an

⁴⁶ ICC Statute, Article 88. For a discussion of how various States have implemented their obligations to co-operate into domestic law, see Valerie Oosterveld, Mike Perry, and John McManus, "The Cooperation of States with the International Criminal Court", in *Fordham International Law Journal*, 2001, vol. 25, no. 3, p. 767.

⁴⁷ ICC Statute, Article 59.

obligation that the ICC consult with the State concerned and allowing for the use of *in camera* or *ex parte* proceedings.⁴⁸

Despite the specific circumstances envisaged in the ICC Statute, understanding of the court's jurisdiction is still evolving, and likely will continue to evolve as more situations are referred to the Court and those that have already been referred move through the judicial process. One such evolution will likely be the determination of when a State is "unwilling" or "unable" to prosecute under Article 17(3). Demonstrating that a State is unwilling to prosecute requires a substantial showing. The State must either shield the accused from criminal responsibility, delay the proceedings unjustifiably, or conduct biased proceedings.⁴⁹ Similarly, the standard for inability to prosecute is a high one: substantial collapse or unavailability of the judicial system.⁵⁰ Given this high threshold, States' limitations in resources (a common problem in many States just emerging from conflict) may become a basis for the ICC to expand its jurisdiction while continuing to adhere to the principle of complementarity.⁵¹

The ICC Statute is an interesting juxtaposition with the Geneva Conventions and the Genocide Convention because it implements an alternate jurisdiction for investigating and prosecuting core international crimes. It does not purport to challenge the jurisdiction of States (in most cases) to prosecute crimes domestically; instead, it offers an alternative court through which States may exert their obligations to punish violations of international criminal law.

7.5. State Obligation to Punish Crimes Against Humanity under the Proposed Convention

Prior to the drafting of the Proposed Convention, the international definitions and State responsibility toward crimes against humanity mainly developed through customary international law.⁵² The modern idea of crimes against humanity was first set out in the Charter of the International Military Tribunal ('IMT Charter'), which defined crimes against hu-

⁴⁸ ICC Statute, Articles 69 and 72.

⁴⁹ Anja Seibert-Fohr, "The Relevance of the ICC Statute of the International Criminal Court for Amnesties and Truth Commissions", in A. von Bogdandy and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, Koninklijke Brill N.V., 2003, p. 18.

⁵⁰ ICC Statute, Article 17(3).

⁵¹ For discussion of these issues, see de Waynecourt-Steele, p. 16, see *supra* note 43.

⁵² Ratner and Abrams, 2001, p. 47, see *supra* note 3.

manity only “in connection with” other crimes.⁵³ Crimes against humanity have slowly developed an identity separate from war crimes – the U.N. Human Rights Commission approved a definition without the nexus, followed by two General Assembly Committees.⁵⁴ The link was not found in the statutes of the ICTR or the ICC.⁵⁵ The Proposed Convention retains this separation by specifically recognizing that “crimes against humanity may be committed in time of armed conflict and in time of peace”.⁵⁶

Under the Proposed Convention, States have a clear obligation not to commit crimes against humanity themselves. States are also obligated *not* to provide aid or assistance to facilitate the commission of crimes against humanity by another State.⁵⁷ Violation of those prohibitions may give rise to the responsibility of States for internationally wrongful acts.⁵⁸ This obligation is similar to the ones regarding genocide and war crimes.⁵⁹

State obligations in prosecuting crimes against humanity begin in the preamble to the Proposed Convention, where the commitment to prosecute and punish the perpetrators is “emphasiz[ed]”.⁶⁰ It declares that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, including crimes against humani-

⁵³ Article 6(c) of the IMT Charter defines crimes against humanity as:

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

⁵⁴ United Nations Commission on Human Rights, Report on the Twenty-Third Session, UN ESCOR, 42d Sess., Supp. No. 6, U.N. Doc. E/4322-E/CN.4/940, para. 144.

⁵⁵ ICTR Statute, Article 3; ICC Statute, Article 7.

⁵⁶ Proposed Convention, Article 1, Explanatory Note.

⁵⁷ Proposed Convention, Article 8, Explanatory Note; see also *Bosnia and Herzegovina Case*, Judgment, paras. 425–438, see *supra* note 12.

⁵⁸ Proposed Convention, Preamble; Explanatory Note 1 of Article 8.

⁵⁹ *Bosnia and Herzegovina Case*, Judgment, para. 166, where the ICJ states that “the effect of Article I is to prohibit States from themselves committing genocide”, see *supra* note 12; International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, para. 46, where the ICJ states that the United States was “under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions”.

⁶⁰ Proposed Convention, Preamble, para. 5.

ty”.⁶¹ The Explanatory Note cross-references several other international treaties and instruments, including the ICC Statute, indicating that in many instances the ideals stated in the preamble are not far removed from those already existing in international law.⁶²

The punishment of crimes against humanity under the Proposed Convention comprises similar aspects with those in the Genocide Convention and Geneva Conventions, such as national legislation, scope of jurisdiction and international co-operation. But the Proposed Convention entails greater details and certainty for those obligations.

Article 2, addressing the object and purposes of the Proposed Convention, outlines State obligation to punish crimes against humanity. Paragraph 1 declares that “the States Parties to the present Convention undertake to prevent crimes against humanity and to investigate, prosecute, and punish those responsible for such crimes”. Paragraph 2 formulates several obligations: co-operation with other States, fair and effective investigations, prosecutions, and punishments, co-operation with the ICC and other tribunals, and assistance to other States in fulfilling their obligations.

Article 8 requires States to enact necessary legislation and undefined “other measures” to give effect to the Proposed Convention. The ensuing obligations require States to make crimes against humanity a criminal offense as well as a military one, provide for appropriate punishments, and ensure military commanders and superiors are held responsible in accordance with other provisions of the Proposed Convention.⁶³ States are also responsible to ensure through both legislation and administrative measures that victims have access to justice and the right to appropriate reparations.⁶⁴

States also have investigation and prosecution obligations under Article 8. When States receive information that a person who has committed or is alleged to have committed crimes against humanity may be present in its territory, the State is required to investigate. It is not stated what level of certainty is necessary to trigger an investigation, although based on the repeated references to “measures under domestic law” it would be logical to assume that the information must meet the minimum standards

⁶¹ *Ibid.*, para. 9.

⁶² Proposed Convention, Preamble, Explanatory Note.

⁶³ Proposed Convention, Article 5.

⁶⁴ *Ibid.*, Article 8(5).

set out in domestic law. States are required to take this action, though the measures taken can be mitigated by the domestic law of the State concerned. Once the investigation is completed and the alleged perpetrator is located, States are required to ensure that the person will be available for prosecution or extradition where necessary. The remainder of the investigation and prosecution obligations addresses matters such as the protection of witnesses and access to justice for victims.

The Proposed Convention explicitly recognizes universal jurisdiction as an obligation – “[e]ach State Party shall take necessary measures to establish its competence to exercise jurisdiction over crimes against humanity when the alleged offender is present in any territory under its jurisdiction”.⁶⁵ Article 10 also lists other grounds of jurisdiction, including territorial jurisdiction, positive and negative personal jurisdictions. States Parties may only be relieved of the obligation to prosecute by extraditing the alleged offender to another State or to the ICC or other recognized international criminal tribunals, pursuant to the principle *aut dedere aut judicare*.⁶⁶ The Explanatory Note points out that States not party to the ICC Statute do not have an obligation to extradite to the ICC, but may co-operate.⁶⁷ It should be noted that where there is no request for extradition from another State, and extradition to an international court is not possible, States parties are *obligated* to exercise universal jurisdiction over crimes against humanity.

Back in 1995, the Appeals Chamber of the ICTY has already declared in the *Tadić* case that “universal jurisdiction [is] nowadays acknowledged in the case of international crimes”.⁶⁸ Likewise, the Trial Chamber of the ICTY in the *Furundžija* case found that:⁶⁹

It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in *Eichmann*, and echoed by a USA court in *Demjanjuk*, “it is the universal

⁶⁵ *Ibid.*, Articles 9(1) and 10(3).

⁶⁶ *Ibid.*, Articles 8(9).

⁶⁷ *Ibid.*, Article 9, Explanatory Note.

⁶⁸ ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 62.

⁶⁹ ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, para. 156.

character of the crimes in question [i.e. international crimes]
which vests in every State the authority to try and punish
those who participated in their commission”.

The affirmation of universal jurisdiction by the Proposed Convention seems to be a progressive development of international law. The movement from ‘right’ to ‘obligation’ is not only significant for the punishment of crimes against humanity, it is symbolic to the punishment of core international crimes in general.

In terms of State obligation to co-operate in the punishment of crimes against humanity, the Proposed Convention includes concrete provisions dealing with evidence, extradition, mutual legal assistance, transfer of criminal proceedings and enforcement of punishment.⁷⁰

Article 25 addresses interpretation, stating that terms in the Proposed Convention should be interpreted “in the light of internationally recognized human rights standards and norms”. While the Explanatory Note references only the Vienna Convention and the regional human rights conventions, it also notes that interpretation should be in accordance with specific obligations established by treaties regarding different human rights conventions. With this provision, it becomes possible to look to the other human rights treaties for evidence of how certain aspects of the Proposed Convention should be interpreted, if not specifically stated in the text.

For those who believe State obligations in these areas already exist under customary international law, the Proposed Convention serves the important purpose of codification. Depending on how the Proposed Convention is received and used by States and international judicial organs, it is possible that the provisions regarding State obligation to punish crimes against humanity could eventually become binding on States not party to the Convention.

Though the drafters of the Proposed Convention drew on the existing instruments to punish international crimes, such as the Genocide Convention and ICC Statute, for inspiration, in many respects the Proposed Convention expands State obligations to punish. This can partially be attributed to the passage of time; a new Genocide Convention would likely take into account lessons learned from the genocide in Rwanda, for example. Perhaps most importantly, interpretation of the Proposed Conven-

⁷⁰ Proposed Convention, Article 8(D).

tion can benefit from the subsequent State practice and interpretations of international judicial organs.

7.6. Conclusion

The Proposed Convention builds on the State obligations to punish already codified in the Genocide Convention, the Geneva Conventions and their 1977 Additional Protocols, and the ICC Statute. Its very existence indicates the solidifying of the customary law regarding crimes against humanity. Crimes against humanity have long been considered one of the core crimes of international concern (and are referred to as such in the ICC Statute); the Proposed Convention would be the most formal indication that States must take them as seriously as they do war crimes and genocide.

The Genocide Convention and the Geneva Conventions, written and adopted in the years after World War II, contain more generalized requirements and often leave it to States Parties to determine the best methods of compliance. The Proposed Convention, though still leaving room for the differences in States' domestic legal systems, has more exacting requirements, similar to those found in the ICC Statute. This is hardly surprising, as the Explanatory Notes to the Proposed Convention indicate that the drafters drew on a number of international human rights instruments.⁷¹

Developments of jurisdiction for genocide and war crimes following the adoption of relevant treaties show that international law is moving slowly toward expanding jurisdiction to punish human rights violations. The Proposed Convention confirms this trend. Universal jurisdiction seems to be developing in a way that allows it to cover more crimes or 'less serious' crimes (to the extent that any international human rights violation can be considered 'less serious'). The international community has also allowed States with more limited connections to international crimes to exercise jurisdiction, for example by allowing countries to prosecute foreign nationals located in the State's territory for crimes committed elsewhere, and to which the State has no connection. It is possible that as customary law and case law develop, universal jurisdiction for serious

⁷¹ See, e.g., Proposed Convention, Preamble, Explanatory Note, which references the Genocide Convention, the ICC Statute, and the Enforced Disappearance Convention, among others. Other international instruments are referenced throughout the text.

human rights violations may become a firmly established facet of international law.

State actions regarding crimes against humanity have been covered by customary law and other instruments for some time now – the Proposed Convention is a welcome addition to the ever-expanding body of international human rights law and international criminal law. The focus on State obligations in the Proposed Convention, particularly compared to differing focuses in the other instruments, indicates that the role of States in punishing serious human rights violations has become perceptively more prominent in the years since World War II. Though the obligation to prosecute is limited by the lack of humanitarian intervention provisions in the Proposed Convention and other instruments, it can only be hoped that the gradual strengthening of State responsibility will lead to fewer international human rights violations.

Other measures within the existing legal framework have been taken to address failure to punish international crimes. Such measures include diplomatic protests and collective actions, as illustrated by the interpretation of the obligation to “ensure respect” for IHL. Mere statement of an obligation to punish core international crimes is insufficient; efforts should be made to seek appropriate fora to challenge State inaction when there is an international obligation to punish.

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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.

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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

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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