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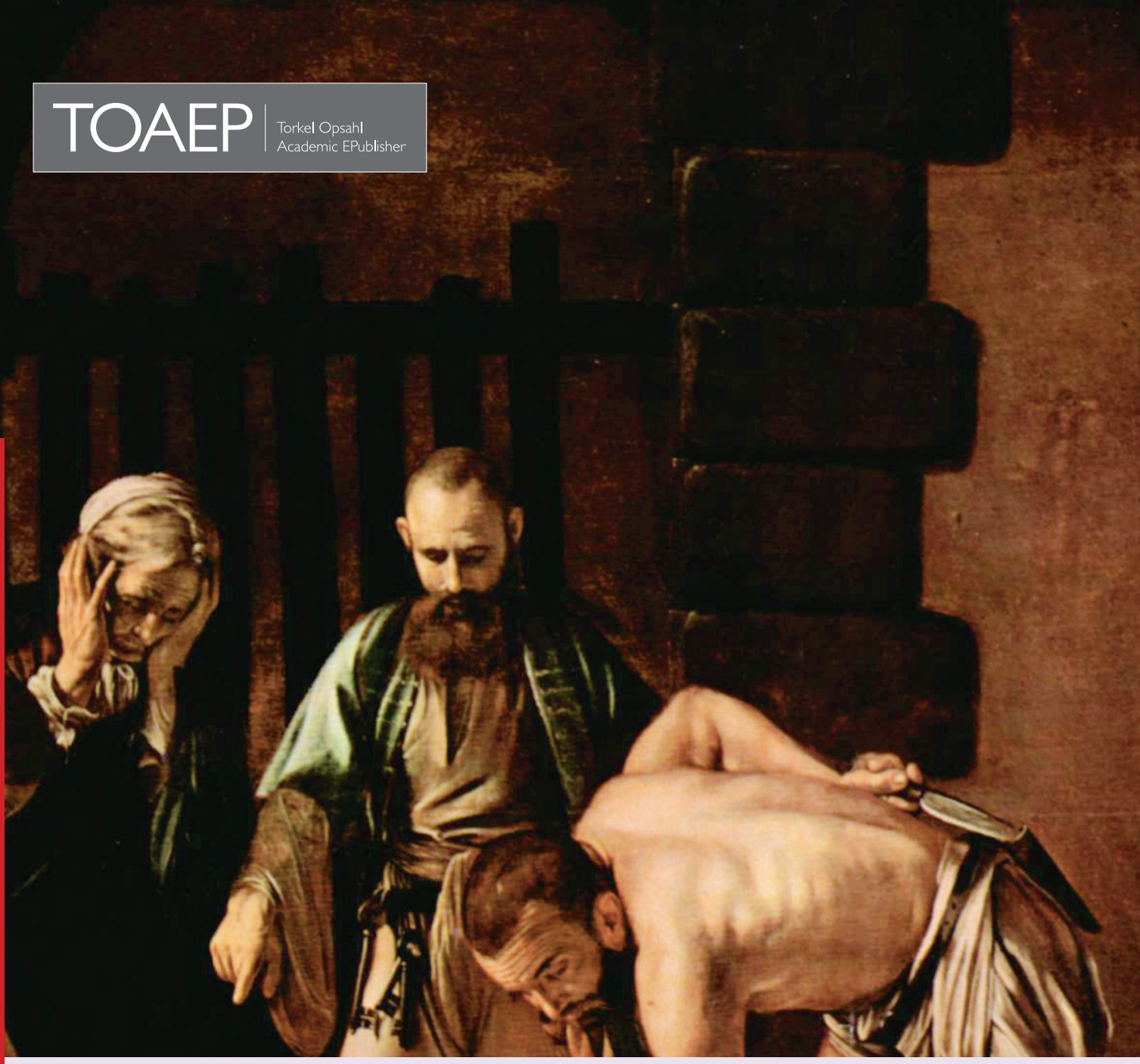
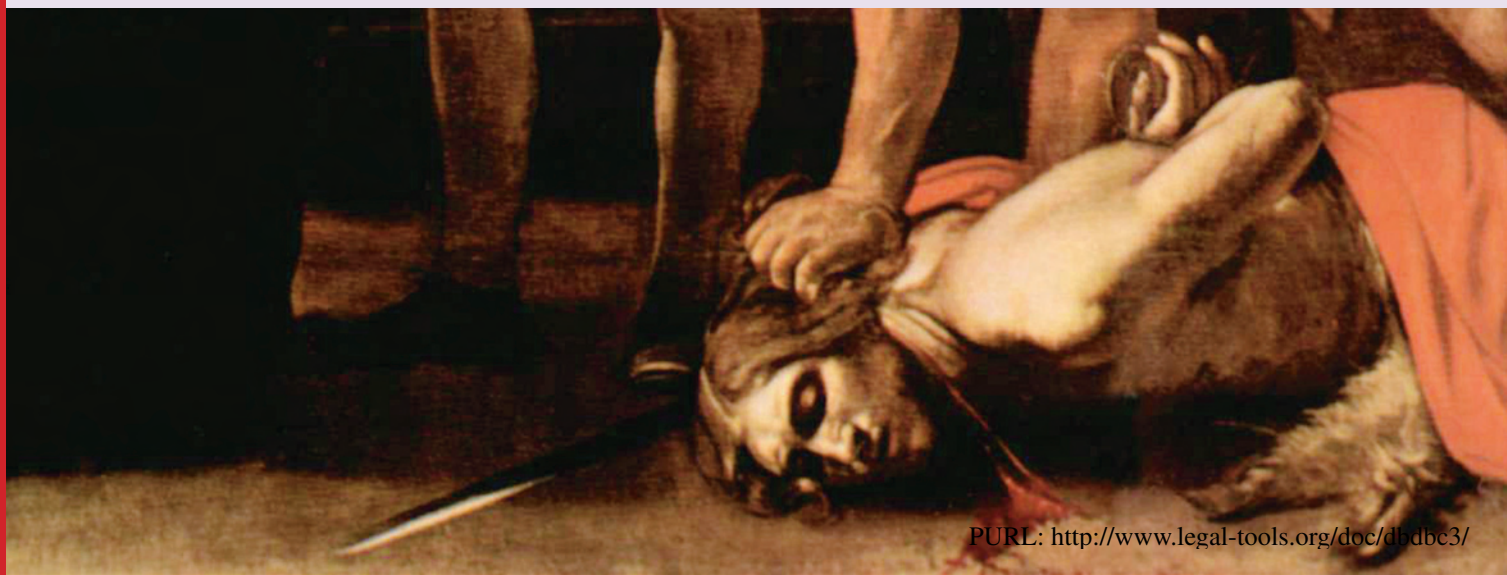


On the Proposed Crimes Against Humanity Convention

Morten Bergsmo and SONG Tianying (editors)



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Beyond Territory, Jurisdiction, and Control: Towards a Comprehensive Obligation to Prevent Crimes Against Humanity

María Luisa Piqué[*]

5.1. Introduction and Overview

This chapter considers the scope of the obligation to prevent crimes against humanity that the proposed International Convention on the Prevention and Punishment of Crimes Against Humanity[1] ('Proposed Convention') would impose on States Parties were it to become law.

The scope of States' positive obligations pursuant to the text of the Proposed Convention is mainly regulated by Article 8(1), according to which such obligations are meant to be observed within each State Party's "territory under its jurisdiction or control".

In the first part of the chapter, I address in turn why there should be a specialized Convention on Crimes Against Humanity, the relationship between international human rights law and international criminal law,

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[1] This Proposed Convention is the result of the project to study the need for a comprehensive convention about crimes against humanity, which started in the spring of 2008 within the Whitney R. Harris World Law Institute of Washington University School of Law and it was named "the Crimes against Humanity Initiative". For more details see Chapter 2 of this volume. The text of the Proposed Convention is reproduced in Annex 1.

and the positive and negative obligations of States created by international criminal law. Then, I deconstruct the phrase "territory under its jurisdiction or control" and analyse the way it impacts the scope of States' obligations under the Proposed Convention, particularly in their obligation to prevent crimes against humanity.

The chapter next describes how this provision would represent progress regarding the prevention of crimes against humanity, particularly because it would reach situations in which States currently are not under the obligation to prevent those crimes. However, I also explain how that progress would be outweighed by the negative consequences such a provision could have – meaning those that involve a restrictive interpretation of the obligation to prevent crimes against humanity.

Finally, I argue that the obligation to prevent crimes against humanity should not be territory-centred. Rather, it should encompass persons, facilities or situations under the jurisdiction or control of States, and be constructed in a similar fashion to the obligation to prevent genocide, according to the International Court of Justice's ('ICJ') interpretation of the Convention for the Prevention and Punishment of the Crime of Genocide of 1948 ('Genocide Convention') in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* ('*Genocide* case').[2]

5.2. Why Should There be a Specialized Convention on Crimes Against Humanity?[3]

The condemnation of crimes against humanity is not novel. It can be traced to Article 6(c) of the Charter of the International Military Tribunal that sat at Nuremberg ('Nuremberg Charter') and to the Genocide Convention that followed.[4] Those precedents paved the way for further inter-

[2] ICJ, Judgment, 26 February 2007, para. 166.

[3] This account stems from Leila Nadya Sadat, *A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes against Humanity*, Washington University Law, 2010, available at http://law.wustl.edu/ harris/CAH/docs/CompHistoryFinal12-01-10.pdf.

[4] Although it is still unknown how the actual denomination of crimes against humanity was selected by the drafters of the Nuremberg Charter, it is worth noting that in 1915, France, Great Britain and Russia denounced the Armenian genocide committed by the Ottoman government as "crimes against civilization and humanity". That same phrase appeared in 1919 within a failed proposal to try the perpetrators of the Armenian genocide. See David

national treaties that condemned specific manifestations of crimes against humanity[5] and declared the non-applicability of statutory limitations in the investigation and prosecution of acts falling within that category.[6]

The Nuremberg Charter articulated the international community's repudiation of war crimes, crimes against humanity and crimes against peace committed by major war criminals of the European Axis countries during World War II. The Genocide Convention, in turn, was the first international treaty of general application that systematized atrocious crimes and obliged its contracting parties to punish and prevent them.[7]

However, those steps in the struggle against mass atrocity turned out to be insufficient. Not only are some groups left unprotected (such as those based on political or cultural affiliations, or gender distinctions, see Chapter 8 below), but also the scope of the obligations imposed on States is restrictive.[8] As a result, "only a fraction of the millions of victims over the past six decades has benefited from the provisions of the Genocide Convention".[9]

As of 2011, the most comprehensive codification of crimes against humanity can be found in Article 7 of the Rome Statute of the International Criminal Court ('ICC Statute'). However, the application of Article 7 is limited to situations within the jurisdiction of the ICC.[10] Furthermore,

Luban, "A Theory of Crimes Against Humanity", in *Yale Journal of International Law*, 2004, vol. 29, p. 85.

5 At the international level, the treaties that have entered into force are the "International Convention on the Suppression and Punishment of the Crime of Apartheid" ('Apartheid Convention'), adopted and opened for signature, ratified by General Assembly (UNGA) resolution 3068 (XXVIII) of 30 November 1973, entered into force 18 July 1976; the "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" ('Torture Convention'), UNGA resolution 39/46 of 10 December 1984, entered into force 26 June 1987; and the "International Convention for the Protection of All Persons from Enforced Disappearance" ('Enforced Disappearance Convention'), UNGA Resolution A/RES/61/177 of 20 December 2006, entered into force on 23 December 2010 (Doc. A/61/488. C.N.737.2008). There are also other treaties at the regional level.

6 "Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity", UNGA resolution 2391, entered into force on 11 November 1970, U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968).

7 Sadat, 2010, p. 3, para. 7, *supra* note 3.

8 *Ibid*.

9 *Ibid*.

10 For instance, extermination, imprisonment, persecution and widespread sexual violence including rape, sexual slavery, enforced prostitution and forced pregnancy. See *ibid*.

apart from the obligations of co-operation that States Parties to the ICC Statute have *vis-à-vis* the ICC, they are not obligated by the Statute to prevent crimes against humanity.

It is especially interesting to notice that expert consultations held regarding the Proposed Convention[11] underscored the fact that sometimes it is difficult to get the attention of the international community to react against the commission of crimes against humanity.[12] Particularly, the experts agreed that "unless a crime was described as 'genocide,' its commission somehow seemed less of a problem and required no international response".[13] Thus, many participants in those discussions felt frustrated with the "semantic indifference" to the commission of crimes against humanity, which has taken the lives of millions of persons.[14]

With those evils in mind, the drafters acknowledged that it would be very important for the Convention to be, on the one hand, an instrument for the prosecution and punishment of those responsible for the commission of crimes against humanity and, on the other hand, an instrument recognizing the importance of prevention.[15] As regards prevention, it was suggested that a focus on education and capacity-building among States could be a starting point in "operationalizing" the 'Responsibility to Protect' norm ('R2P').[16]

Codifying crimes against humanity and prescribing attendant State obligations, with an ambition of universality, represent significant progress propelled by past struggles and future prevention. As such, the Proposed Convention deserves dedicated commitment to its development, in the interest of eradication of crimes against humanity.

5.3. Relationship Between International Human Rights Law and International Criminal Law

International criminal law and human rights law are closely tied together. Clarifying their relationship, in particular, their similarities and differences, is important to discerning the nature and scope of State obligations

11 Regarding those discussions, and which experts were invited, see Sadat, *supra* note 3.

12 *Ibid*., p. 8, para. 24.

13 *Ibid*.

14 *Ibid*.

15 *Ibid*., para. 56.

16 *Ibid*., para. 57.

in each of these two areas of law, as well as the beneficiaries of those obligations.

The development of human rights law has eroded the international law paradigm according to which international law was only concerned about the relations among States. Now, international law is also concerned with the way States treat their own citizens and subjects,[17] and human rights treaties are meant to reflect that concern and limit State action.

In a similar fashion, the surfacing of international criminal law reflects the international community's view that some grave violations of human rights, or "gross violations",[18] deserve specific, and harsher, treatment. In fact, not all human rights violations are international crimes,[19] international criminal law is the last resort for the protection of human rights.

What are, then, the criteria to differentiate between human rights violations that amount to international crimes, and those that do not? According to David Luban, the condemnation, at least intuitively, stems from the need to distinguish between "civilized and uncivilized conduct", and to claim that whereas some "torments and humiliations" cross the line,[20] others, such as the suppression of the free press or the denial of the

[17] Luban, 2004, pp. 34−35, *supra* note 4.

[18] For instance, according to Bassiouni, the proscription against crimes against humanity protects the following rights: life, liberty, and personal security; freedom from torture and from cruel, inhuman or degrading treatment or punishment; freedom from slavery and forced labor; freedom from arbitrary arrest and detention; a fair criminal trial; equal treatment; freedom of movement, religion, opinion, expression, and association; the right to a family; and recognition as a person before the law. See M. Cherif Bassiouni, "The Proscribing Function of International Criminal Law in the Process of International Protection of Human Rights", in *Yale Law Journal of World Public Order*, 1982, vol. 9, pp. 200−201.

[19] None of the three most important human rights instruments – the "Universal Declaration of Human Rights" ('UDHR') (adopted by the UNGA on 10 December 1948), the "International Covenant on Civil and Political Rights" ('ICCPR') (adopted and opened for signature, ratification and accession by UNGA resolution 2200A (XXI) of 16 December 1966, and entered into force 23 March 1976), and the "International Covenant on Economic, Social and Cultural Rights" ('ICESCR') (adopted and opened for signature, ratification and accession by UNGA resolution 2200A (XXI) of 16 December 1966, and entered into force 3 January 1976) − contain criminal enforcement provisions. See David Luban, Julie O'Sullivan and David Stewart, *International and Transnational Criminal Law*, Aspen Publishers, 2010, p. 34.

[20] Luban, 2004, p. 101, *supra* note 4.

right to own real property, do not.[21] In Luban's words, "[t]he atrocities and humiliations that count as crimes against humanity are, in effect, the ones that turn our stomachs, and no principle exists to explain what turns our stomachs".[22]

Whereas all the rights enshrined in human rights conventions are applicable within a State's territory, it is not always the case when the State is operating abroad. In situations like that, the spectrum of enforceable rights "may be limited by the scope of the State's authority or control in the circumstances".[23] These differences in the scope of obligation, depending on where the State is acting, also have to do with the scope of beneficiaries of human rights treaties, which is usually restricted to persons within a State's territory or subject to its jurisdiction.

The extraterritorial applicability of human rights treaties has, thus, proven to be more problematic and controversial. One reason for this is that not all those rights established by the human rights treaties were, by their nature, intended to be applicable extraterritorially.[24] Whereas some fundamental principles must always be respected,[25] other provisions – such as States' obligation to respect free press – are not suitable for their extraterritorial application.

Notwithstanding that debate, there seems to be a general consensus that States are prohibited to do abroad what they are barred from committing within their own territories under human rights treaties, particularly if that entails gross violations of human rights.

This approach to an extraterritorial application of human rights treaties has been recognized by international and regional human rights bodies such as the Human Rights Committee ('HRC'), the European Court of Human Rights ('ECtHR'), the International Court of Justice ('ICJ'), and the Inter-American Commission of Human Rights ('IACHR').

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21 *Ibid*.

22 *Ibid*.

23 John Cerone, "Jurisdiction and Power: The Intersection of Human Rights Law and the Law of Non-International Armed Conflict in an Extraterritorial Context", in *Israel Law Review*, 2007, vol. 40, footnote 72, p. 437.

24 Theodor Meron, "Extraterritoriality of Human Rights Treaties", in *American Journal of International Law*, January 1995, vol. 89, p. 80.

25 According to Meron, among those fundamental principles would be the prohibition of the arbitrary taking of life, the duty of humane treatment of persons in detention, the prohibition of inhuman or degrading treatment or punishment, and essential due process, see *ibid*.

For instance, the HRC interpreted Article 2 of the International Covenant on Civil and Political Rights ('ICCPR'), according to which States Parties are obligated to respect and ensure human rights "to all individuals within its territory and subject to its jurisdiction" in the context of complaints concerning the kidnapping, torture and imprisonment in a clandestine detention centre in Argentina of Uruguayan citizens, perpetrated by Uruguayan officials during the late 1970s.[26] The HRC stated that Uruguay could be held accountable for "violations of rights under the Covenant which its agents commit upon a territory of another State".[27] The reason for this was that it would be "unconscionable" to interpret Article 2 as barring States Parties from violating the rights protected in the Covenant on their own territory, but allowing them to violate them on the territory of another State.[28]

This position was later reaffirmed by the HRC in the General Comment No. 31, entitled 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant',[29] where it Stated that a State Party was compelled to respect and ensure human rights "to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party".[30]

In turn, the ECtHR has taken a similar approach, although its application was somewhat erratic. In the *Cypriot* cases[31] the Court had to de-

[26] *Sergio Rubén López Burgos v. Uruguay*, Communication No. 52/1979, 6 June 1979, CCPR/C/13/D/52/1979 para. 176; and *Lilian Celiberti de Casariego v. Uruguay*, Communication No. 56/79, CCPR/C/13/D/76/1976, both views were adopted on 29 July 1981.

[27] See *Sergio Rubén López Burgos v. Uruguay*, *ibid*., paras. 12.1. and 12.3.

[28] *Ibid*.

[29] Adopted on 29 March 2004 (2187th meeting), CCPR/C/21/Rev.1/Add.13 (General Comments).

[30] *Ibid*., para. 10.

[31] By "Cypriot cases" I mean those cases concerning human rights violations in Northern Cyprus after Turkey's invasion, 20 July 1974. In short, as a result of those military operations, Turkey seized a significant part of Cyprus' territory (around 40%). In November 1983, the Turkish Republic of Northern Cyprus ('TRNC') was proclaimed in the territories occupied by Turkey – although it was condemned and not recognized by the international community. Turkey, however, did not lose control over the territory of Northern Cyprus when the TRNC was proclaimed. That control was still exercised both directly (by Turkish soldiers on duty in Cyprus) and indirectly through the government of the TRNC which was a "puppet government" dependent on Turkey (see Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, Intersentia, 2009, pp. 126−131).

termine whether human rights violations in Northern Cyprus were capable of falling within the 'jurisdiction' of Turkey under the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') even though they had occurred outside its national territory. The ECtHR held that the responsibility of States Parties could be involved, on the one hand, due to acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory and, on the other hand, when as a consequence of military action – whether lawful or unlawful – a particular State Party exercises effective control of an area outside its national territory. In that case, the controlling State is under the obligation to secure, in such an area, the rights and freedoms protected by the ECHR.[32]

Regarding the ICJ, it has concluded that the ICCPR is applicable "in respect of acts done by a State in the exercise of jurisdiction outside its own territory".[33]

Finally, within the Inter-American System of Human Rights, the IACHR has noted that, occasionally, "the exercise of its jurisdiction over acts with an extra-territorial locus will not only be consistent with, but

[32] ECtHR, *Loizidou v. Turkey*, Preliminary Objections, 23 March 1995, Series A, No. 310, para. 62. See also, ECtHR, *Case of Cyprus v. Turkey*, Judgment, 10 May 2001, Reports of Judgments and Decisions 2001-IV, para. 77 (maintaining the *Loizidou* precedent and adding that Turkey's jurisdiction over Northern Cyprus should be considered to reach the securing of the entire range of substantive rights protected by the ECHR, and that violations of those rights are imputable to Turkey). But see also the *Banković and others v. Belgium and others*, Admissibility decision, 12 December 2001, Application No. 52207/99, ECHR 2001-XII ('*Banković* case'), which involved a complaint filed against NATO by the victims of a missile launched on 23 April 1999 by a NATO aircraft against the buildings of a Serbian radio station in Belgrade. In that case the ECtHR changed its position. Specifically, it denied the ECHR's protection to the victims of that act because the positive obligation to secure "the rights and freedoms defined in Section I of this Convention" was only extraterritorial in very restricted exceptions, and this case was not one of them. In a later decision, though, (*Issa and others v. Turkey*, Admissibility Decision, 30 May 2000, Application No. 31821/96), the ECtHR implicitly overruled *Banković* and held that a State could be held accountable for violating human rights protected by the ECHR of persons who were in other State's territory, but who also happened to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully − in the latter State. In those circumstances, the ECtHR went on, responsibility stemmed from Article 1 of the ECHR, which could not be interpreted so as to allow a State Party to perpetrate violations of the Convention abroad that they were barred from committing in their own territory.

[33] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 9 July 2004, I.C.J. Reports 2004, p. 136, para. 111.

required by, the norms which pertain […]".[34] Given the fact that every person is entitled to individual rights because of human nature, American States are obliged to "uphold the protected rights"[35] of the American Declaration of the Rights and Duties of Man of any person under its authority and control, even if the State Party is acting beyond its national boundaries.[36]

5.4. Positive and Negative Obligations of States Created by International Criminal Law

States can be subjected to different kinds of obligations under human rights and international criminal law. Some of them are treaty-based, and others can be inferred from international custom. Those obligations can be categorized as 'positive' or 'negative' depending on the kind of State conduct they require (actions or omissions).

In the human rights law field, the negative category obligates States to respect rights or to refrain from encroaching on them, whereas the positive category obligates States to ensure rights, or to take measures in order to secure human rights. While the former are obligations of 'result', the latter are obligations of 'conduct'. Consequently, they are ruled by different standards.[37]

When a State affirmatively violates a human right it is also breaching an obligation of 'result'. Thus, the responsibility for the violation is manifest and immediate. In turn, when such conduct is not attributable to a State but to the action of non-State actors, the question of whether a particular State has breached its positive obligation ("to ensure") under human rights law "will be determined by the quality of the State's response to this conduct, generally governed by the State's 'best efforts' standard".[38]

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[34] IACHR, *Coard et al. v. the United States*, Report No. 109/99, Case No. 10.951, 29 September 1999, para. 37.

[35] *Ibid*., para. 37.

[36] See also, IACHR, *Rafael Ferrer-Mazorra et al.* (United States), Report No. 51/01, Case No. 9903, 4 April 2001, IACHR Annual Report, 2000, OEA/Ser.L/V/II.111, Doc. 20 rev., para. 178; *Saldano case* (Argentina), Report No. 38/99, 11 March 1999, in IACHR Annual Report, 1998, OEA/Ser.L/V/II.102, Doc. 6 rev., paras. 15-20.

[37] See John Cerone, 2007, p. 416, *supra* note 23.

[38] *Ibid*. See also, Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment, 29 July 1988, Ser. C, no. 4 (1988), para. 172: "[I]n principle, any violation of rights recognized by the Convention carried out by an act of public authority or

As for international criminal law conventions, they create obligations with a similar structure to that of human rights treaties. Within the category of negative obligations is the prohibition against committing those crimes in and of themselves. In turn, positive obligations usually compel States Parties to prosecute or extradite those who commit the offences defined therein. Some of them, moreover, impose on States the duty to prevent the commission of those crimes in the first place.[39]

Admittedly, regarding the negative obligation, international criminal law conventions do not expressly include the prohibition to commit those crimes.[40] However, that obligation underlies all of them, notwithstanding where the State is acting (within or beyond its territory). There would be no reason for imposing a "jurisdiction threshold on a negative State obligation to refrain from doing harm".[41] And this is particularly so where international crimes are concerned.

Firstly, this approach was endorsed by the ICJ in the *Genocide* case,[42] where it found that, even if not explicitly, the Genocide Convention prohibits States Parties from committing genocide. That assertion was grounded on the fact that genocide is labelled by Article I of that Convention as "a crime under international law". If States Parties had agreed to such a categorization, they must logically refrain from committing that crime.[43]

by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (*e.g.*, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention".

39 See Articles I and VII, Genocide Convention; Articles IV (a), VI, and VIII, Apartheid Convention; Articles 2.1, 11, and 16, Torture Convention; Articles 12.4, 17, 22, 23, and 25, Enforced Disappearance Convention. See *supra* note 5.

40 For instance, none of the international treaties mentioned in *supra* note 39 provides expressly that States Parties will not commit those international crimes.

41 Marko Milanović, "From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties", in *Human Rights Law Review*, 2008, vol. 8, no. 3, p. 446.

42 See *supra* note 2, paras. 166, 167.

43 *Ibid.*

The ICJ also took into account the obligation to prevent genocide set out in Article I of the Genocide Convention. If States are under the obligation to "employ the means at their disposal […] to prevent persons or groups not directly under their authority from committing an act of genocide"[44], it would be at least "paradoxical" to allow them to commit such acts "through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law".[45]

Secondly, the prohibition against international crimes (such as genocide, war crimes, and crimes against humanity), has *jus cogens* status.[46] That is to say, its hierarchical position is above all other principles, norms and rules of international and domestic law.[47] Consequently, it is a peremptory norm that is accepted by the whole international community as a norm that cannot be derogated from and can only be modified by another law of the same character.[48] Furthermore, the prohibition against the commission of the said crimes is absolute or *erga omnes*,[49] the conse-

44 *Ibid.*

45 *Ibid.*

46 See M. Cherif Bassiouni, *Crimes against Humanity in International Law*, Kluwer Law International, 1999, p. 210; see also Payam Akhavan, "The Origin and Evolution of Crimes Against Humanity: an Uneasy Encounter between Positive Law and Moral Outrage", in Morten Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden. Essays in Honour of Asbjørn Eide*, Martinus Nijhoff Publishers, 2003, p. 3 ("The prohibition against crimes against humanity is, beyond doubt, one of the most fundamental norms of international law. It is widely considered as a part of *ius cogens* […]"). This has also been recognized in international tribunals, see International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Kupreškić et al*., Judgment, 14 January 2000, Case No. IT-95-16-T, para. 520 ("Furthermore, most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character") and all the cases that are quoted there. For a review of the recognition of the norms that have been considered *ius cogens*, see Sandesh Sivakumaran, "Impact on the Structure of International Obligations", in Menno Kamminga and Martin Scheinin (eds.), *The Impact of Human Rights Law on General International Law*, Oxford University Press, 2009, pp. 133−150.

47 Cherif Bassiouni, 1999, p. 210, *supra* note 46.

48 Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969, entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331, Article 53.

49 See ICJ, *Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, 5 February 1970, new application: 1962, ICJ Reports 1970, p. 3 and its famous *obiter dictum* in para. 33. In that case, the ICJ recognized that any State could hold a legal interest in the protection of "principles and rules concerning the basic

quence of which is that any State can claim to have a legal interest in its protection.

Thirdly, this also have been acknowledged by the Restatement (Third) of the Foreign Relations Law of the United States §702 (1987), according to which "[a] State violates international law if, as a matter of State policy, it practices, encourages or condones: a) genocide; b) slavery or slave trade; c) the murder or causing the disappearance of individuals; d) torture or other cruel, inhuman, or degrading treatment or punishment […]".

However, as we shall see, the positive obligations – particularly the obligation to prevent – can become a thorny issue. I will delve into these topics in the following sections.

5.5. The Obligation to Prevent under the Proposed Convention

The negative obligation that implicitly stems from the Proposed Convention is to refrain from committing crimes against humanity, which, as shown above, does not have territorial limits.[50]

The positive obligations that the Proposed Convention would impose on States if it became law can be divided into three groups: (1) the obligation to investigate, prosecute and punish crimes against humanity; (2) the obligation to prevent crimes against humanity; and (3) the obligation to co-operate with other States in the fulfilment of their obligations. This chapter focuses on the obligation to prevent crimes against humanity.

The scope of the obligations is shaped by Article 8(1) of the Proposed Convention.[51] It is important to analyse closely the wording of that

rights of the human person", which include, according to the Court, the prohibition of acts of aggression, of genocide, and the protection from slavery and racial discrimination (the last two are particular manifestations of crimes against humanity).

50 In line with the criteria set by the ICJ in the *Genocide* case, the prohibition to commit crimes against humanity may be inferred from the object and purpose of the Proposed Convention, from some specific provisions regarding State responsibility and the obligation to prevent, and from the characterization of crimes against humanity as "international crimes". In turn, Article 8 imposes on States Parties the obligation to prevent and to punish crimes against humanity. In addition, even if the worldwide scope of the prohibition against crimes against humanity was questioned, those crimes committed by a State acting abroad would, as Professor Luban notes, simultaneously constitute war crimes, and therefore, they would amount to international crimes anyway. Luban, 2004, p. 94, *supra* note 4.

51 Article 8(1) in full provides: "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

provision – particularly, the meaning of the terms 'territory', 'jurisdiction' and 'control', which serve as a threshold requirement regarding the positive obligations of States. I will also delve into the interaction of those words and the way they shape the obligation to prevent crimes against humanity.

The selection of the words 'territory', 'jurisdiction' and 'control' in a provision like this is not random. In fact, many international law conventions and particularly human rights treaties have provisions similar to Article 8(1) shaping the boundaries of the obligations of States under the treaty.[52] Moreover, the way those words have been interpreted within human rights treaties by international, regional and domestic bodies has had a major impact on their extraterritorial applicability.[53]

Bearing in mind the debate that has arisen regarding the interpretation of 'territory', 'jurisdiction', and 'control', it is worth exploring the Proposed Convention in order to see if its wording may give any clues about their possible meaning and reach in Article 8(1).

As for 'territory', the provisions of the Proposed Convention "shall apply to all parts of federal States without any limitations or exceptions".[54]

Regarding 'control', although it is used in other provisions of the Proposed Convention, they do not seem linked with its use in Article 8(1), as they refer to very specific and limited situations: (1) the control of one person towards another in the crime of torture;[55] (2) the responsibility of commanders and other superiors;[56] or (3) the physical control over a person by a State for purposes of prosecution or extradition.[57] Thus, those

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".

52 For a review of all the uses of the word 'jurisdiction' in human rights treaties, see, *e.g.*, Milanović, 2008, pp. 411−448, *supra* note 41. See also Gondek, 2009, *supra* note 31, and in particular, Chapter II.

53 Gondek, 2009, p. 367, *supra* note 31.

54 Article 20, Proposed Convention.

55 *Ibid.*, Article 3(2)(e).

56 *Ibid.*, Article 5(1), (2).

57 *Ibid.*, Article 10(2)(a) , (5).

other uses do not provide any insights into interpreting 'control' or clarifying either of the other two words under study.

In turn, in-depth analysis of the different appearances of the term 'jurisdiction' throughout the Proposed Convention is worthwhile because it may illuminate the meanings that 'jurisdiction' in Article 8(1) is susceptible to.

Article 10 of the Proposed Convention encompasses a general provision about jurisdiction and the extent of States' obligations to prosecute and punish crimes against humanity.[58] 'Jurisdiction' appears many times throughout the article, although with a seemingly different meaning than in Article 8(1):

> 1. Persons alleged to be responsible for crimes against humanity shall be tried by a criminal court of the State Party, or by the International Criminal Court, or by an international tribunal having jurisdiction over crimes against humanity.
> 2. Each State Party shall take the necessary measures to establish its competence to exercise jurisdiction over persons alleged to be responsible for crimes against humanity:
>
> (a) When the offense is committed in any territory under its jurisdiction or onboard a ship or aircraft registered in that State or whenever a person is under the physical control of that State; or
>
> [...]
>
> 3. 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.

[58] In fact, many international human rights treaties include articles similar to Article 10 of the Proposed Convention, obligating States to criminalize and prosecute certain conduct. For a review of all of them, see Milanović, 2008, pp. 426−427, *supra* note 41.

> 4. The present Convention does not preclude the exercise of any other competent criminal jurisdiction compatible with international law and which is exercised in accordance with national law.
> 5. For purposes of cooperation, jurisdiction shall be deemed to exist whenever the person responsible for, or alleged to be responsible for, crimes against humanity is present in the State's territory or the State Party is in a position to exercise physical control over him or her.[59]

In Article 10(2), 'jurisdiction' is used in its general meaning under international law: "The capacity of a State under international law to prescribe or to enforce a rule of law"[60] or, to put it differently, to regulate the conduct of physical and legal persons, and to enforce such regulations.[61]

In line with Article 10(2) of the Proposed Convention, States would be under the obligation to import crimes against humanity into their domestic criminal law, and to establish their competence – through the necessary legislation – in order to investigate, prosecute and punish crimes against humanity whether they are committed in their own territory, or by their nationals, or if the victim is a national of that State.

Moreover, the Proposed Convention does not preclude States from exercising their criminal jurisdiction according to the 'protective principle' or even in a universal fashion, as both of them are compatible with international law.[62]

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[59] Article 10, Proposed Convention. As a matter of fact, the protective principle and universal jurisdiction are already included in Article 10(2)(c), Article 8(8) and Article 9 of the Proposed Convention.

[60] Restatement (Second) of Foreign Relations Law of the United States: Jurisdiction Defined, 2010, § 6.

[61] Gondek, 2009, p. 47, *supra* note 31. Basically, the determination of the principles according to which States may exercise their jurisdiction is based on the functions that they can exercise legitimately: "States consist, at bottom, of territory and people; and so, it will come as no surprise that the two fundamental bases for jurisdiction are territorial and personal – and, thus, giving place to the 'territorial' and 'active personality' principles. In addition, international law recognizes other bases for the legitimate exercise of jurisdiction. As it is acknowledged that States have a legitimate interest in securing their borders and currency, among other interests, the protection of those interests represents another basis for jurisdiction". Lastly, regarding some specific atrocity crimes, international law also recognizes the power of States to assert jurisdiction if the perpetrator is located within its territory. See Luban, O'Sullivan, and Stewart, 2010, p. 171, *supra* note 19.

[62] See Article 10(4), Proposed Convention.

The above-mentioned meaning of 'jurisdiction', however, is not the only one that the term has within some sections of Article 10. Paragraphs one and four of Article 10 do not use 'jurisdiction' as a State's competence to prescribe, adjudicate, or enforce, but rather regarding the competence of the ICC or any other international tribunal created by the international community to try persons alleged to be responsible for crimes against humanity.[63]

In turn, the reference to 'jurisdiction' in Article 8(1) could well be interpreted as serving a different purpose, and thus having a different meaning than 'jurisdiction' as used in Article 10(1), 10(2) and 10(4). The question about what 'jurisdiction' can mean within that context has two possible and mutually exclusive answers.

On the one hand, it could be said that 'jurisdiction', as used in Article 8(1), refers to the meaning that term denotes within general international law – that is to say, the authority to make and enforce the law. In fact, that has been the way that the ECtHR has interpreted a similar clause of the ECHR – Article 1[64] – in the *Banković* case.

On the other hand, it could also be argued that 'jurisdiction' in Article 8(1) has a different meaning, closer to the one that 'jurisdiction' has within human rights conventions, where provisions of the like are very common.

According to the latter viewpoint 'jurisdiction' should not be understood as it is within general international law, but as referring "to a particular kind of factual power, authority or control that a State has over a territory, and consequently over persons in that territory".[65] In that context, 'jurisdiction' serves as a condition for assessing the existence of a particular obligation of a State regarding a particular victim – or potential victim – of a human rights violation because of his or her presence in a certain

[63] In this sense, 'jurisdiction' can be said to be "that which deals only with the scope of application of the supervisory mechanism under a particular treaty, most notably with the competence of a treaty body to examine individual petitions", Milanović, 2008, p. 414, *supra* note 41. I will not delve into this particular meaning of 'jurisdiction' because it is not controversial, and also because it is not relevant for the purpose of my argumentation.

[64] Article 1 of the ECHR provides that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention".

[65] Milanović, 2008, p. 428, *supra* note 41.

territory.[66] Thus, the purpose served by this meaning of jurisdiction is to determine the applicability of a human rights treaty to a particular State conduct, the legality or illegality of that conduct being irrelevant.[67]

Within international human rights law, provisions such as Article 8(1) of the Proposed Convention and Article 1 of the ECHR, containing the "territory under its jurisdiction or control" (or similar wording) requirement, are conditions to be satisfied "in order for treaty obligations to arise in the first place".[68] In other words, the concept of jurisdiction is a tool to establish whether a particular State is obligated under a particular treaty. Once that determination has been made, it is necessary to establish whether that State breached those obligations, in which case the act would be considered internationally wrongful and would entail that State's responsibility.[69]

To sum up, throughout the Proposed Convention, 'jurisdiction' appears many times and it is susceptible to at least three different meanings.[70] What is the meaning of 'jurisdiction' in Article 8(1)?

In Article 8(1), 'jurisdiction' is used as an alternative to 'control'. The conjunction 'or' links the two alternatives. Thus, the drafters were thinking about two different situations: One, a certain territory is under the 'jurisdiction' of a State; and the other, a certain territory is under its 'control'. Thus, 'jurisdiction' and 'control' are presupposed to be mutually exclusive, the main difference between those situations being presence or lack of legal competence (or 'jurisdiction' in the sense used in general international law).

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66 See also Gondek, 2009, p. 16, *supra* note 31, who differentiates between both meanings of 'jurisdiction', one of them being "the legal competence of a State to legislate, adjudicate and enforce the law" ('jurisdiction' as it is understood in international criminal law) and the other being "a given location" ('jurisdiction' as it is used in human rights treaties).

67 *Ibid*., p. 56.

68 Milanović, 2008, p. 416, *supra* note 41.

69 *Ibid*., p. 441.

70 Article 10(3), in fact, is a very good example, as it simultaneously in the same sentence embraces them: (a) 'jurisdiction' as used in general international law, specifically, to prescribe ("Each State Party shall… establish its competence to exercise jurisdiction over […]"); (b) 'jurisdiction' regarding the *rationae materiae, personae, loci* competence of an international court ("an international criminal tribunal whose jurisdiction it has recognized […]"); and (c) 'jurisdiction' as used in human rights law ("[…] when the alleged offender is present in any territory under its jurisdiction […]").

The addition of 'control' to the wording of such a clause is novel. Within human rights treaties, provisions concerning the scope of its applicability refer to 'jurisdiction' (either over persons or over territories, or both, depending on the convention) but none of them include any word alluding to factual power (as opposed to legal competence) such as 'control'.[71]

The addition of 'control' to the language of Article 8(1) of the Proposed Convention can be interpreted as a reaction against some restrictive approaches to the applicability of human rights treaties among some international and regional tribunals. Those restrictive interpretations usually stem from the conflation of 'jurisdiction' as understood in international law and 'jurisdiction' as used in human rights law.[72]

Due to that confusion, it has been asserted – most notably, by the ECtHR – that the obligations of States under human rights treaties are essentially territorial and that the extraterritorial application of those conventions is exceptional.[73] The consequence of that interpretation was that

[71] The "International Convention on the Elimination of All Forms of Racial Discrimination", adopted and opened for signature and ratification by UNGA resolution 2106 (XX) of 21 December 1965, and entered into force on 4 January 1969, states in Article 3 that "States Parties […] undertake to prevent, prohibit and eradicate [racial segregation and apartheid] in territories under their jurisdiction". The ICCPR, in Article 2(1) provides that each State Party undertakes "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant", without discrimination. The Torture Convention, in different provisions confines States Parties' obligations to prevent torture and other cruel treatments to the territory under their 'jurisdiction', see for instance Articles 2, 11, 16(1). For an overview of all the jurisdictional clauses in human rights treaties, see Gondek, 2009, pp. 11–18, *supra* note 31, and Milanović, *supra* note 41.

[72] Most notable by the ECtHR in the *Banković* case, and by the ICJ, 2004, para. 109, *supra* note 34. However, as noted by Milanović, the ICJ, different from its European counterpart, "[…] gave no special significance to this supposedly primarily territorial notion of jurisdiction as warranting a restrictive approach to Article 2(1) of the ICCPR […] [and] found both the ICCPR and the ICESCR, as well as the CRC, applicable to the occupied Palestinian territories". It is important to highlight that one of the judges of the ECtHR, Judge Loucaides, delivered two separate opinions in the cases *Assanidze v. Georgia* (Judgment, 8 April 2004, Application No. 71503/01, Reports of Judgments and Decisions 2004-II) and *Ilaşcu v. Moldova* (Judgment, 8 July 2004, Application No. 48787/99, Reports of Judgments and Decisions 2004-VII), defining 'jurisdiction' – as it is usually used in human rights treaties – as the exercise of State authority.

[73] It is worth noting that this attachment to territory as the main basis for jurisdiction is not obvious. International law recognizes other bases according to which jurisdiction may be exercised. Territoriality is a sole basis only regarding the enforcement jurisdiction, but not legislative or adjudicative jurisdiction. Still, 'territory' as a basis for determining the scope

some applications concerning violations of rights in the ECHR were declared inadmissible with the argument that the alleged violations had not been committed within the jurisdiction of the respondent State or States.[74]

Accordingly, it seems that the drafters of the Proposed Convention recognized that boiling down the concept of 'jurisdiction' to the territory of the obligated State could have undesirable consequences and be understood as a blank check for States to do abroad what they cannot do within their boundaries, and added 'control' as a way of widening the scope of the positive obligations.

At the same time, though, this interpretation entails that, in the Proposed Convention, 'jurisdiction' is used as in general international law. Otherwise it would not have been necessary to add the word 'control' because 'jurisdiction' as understood in human rights law already involves the exercise of factual power over a person or a territory.

Another argument advocating for the interpretation that the Proposed Convention refers to 'jurisdiction' as understood in general international law is the focus on the territory – rather than, for instance, persons, or facilities, or property, or situations – that the Proposed Convention has regarding the positive obligations. In fact, the exercise of jurisdiction to prescribe, to adjudicate and to enforce according to the territorial principle is the epitome of jurisdiction. Nobody can object to a State's regulation or enforcement of its legislation within its own territory.

Consequently, in order to determine whether States are under the obligation to prevent crimes against humanity under the Proposed Convention, 'jurisdiction' in Article 8(1) should be interpreted as it is in gen-

of human rights treaties has been privileged. See Gondek, 2009, pp. 370−371, *supra* note 31.

74 The decision of the ECtHR in the *Banković* case, already mentioned, is considered to be the first case in which such an approach was adopted. See Ralph Wilde, "Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties", in *Israel Law Review*, 2004, vol. 40, p. 515. See also Milanović, p. 423, *supra* note 41, who asserts that:

> In its pre-Banković case law, the Court did not base its interpretation of Article 1 ECHR on the general international law doctrine of jurisdiction. No Oppenheims, Brownlies, Casseses or Pellets were ever cited by the Court, and for good reason − exercising 'effective overall control' over a territory does not mean that the State is necessarily exercising its 'jurisdiction' – as general international law speaks of the term- over the inhabitants of that territory.

eral international law – 'legal competence' – and exclusively according to a territorial basis (because it refers to 'territories' under the 'jurisdiction' or 'control' of States Parties), and 'control' is meant to encompass those situations where States exercise some kind of factual power over a territory without any legal competence.

Nevertheless, is this resolution of the issue of jurisdiction in the Proposed Convention effective in guaranteeing strong protection against crimes against humanity?

5.6. Advantages and Disadvantages of the Wording of Article 8(1), Specifically with the Phrase "Territory within Its Jurisdiction or Control"

At first glance, such an obligation to prevent crimes against humanity represents significant progress, as it would embrace situations in which States typically are not bound by any obligation regarding the prevention of crimes against humanity.

The scope of Article 8(1) reaches situations where States have control over a territory even if they do not have jurisdiction over it (for instance, due to illegal military operations that are being performed in another State's territory) and *vice versa* (cases where States, although having jurisdiction over a territory, do not have control over what is happening there).

The first type of cases (control without jurisdiction) could arise in situations such as the one depicted by the ICJ in the case *Armed Activities on the Territory of the Congo.*[75] In that case, the ICJ found that Uganda was the occupying power in Ituri, DRC, at the relevant time and that it was under the obligation to "secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party".[76] If the Proposed Convention became law, a State Party in Uganda's situation would also be under the obligation to prevent the commission of crimes against humanity against the inhabitants of Ituri, notwithstanding who is perpetrating those crimes.

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[75] ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, I.C.J. Reports 2005, p. 168.

[76] *Ibid*., para. 178.

The other type of cases (jurisdiction without control) could arise in situations such as the one depicted by the ECtHR in its decision in the *Ilaşcu and Others v. Moldova and Russia* case.[77] In that case, the Court acknowledged that the Moldovan government did not exercise authority (control) over one region of the national territory (Transnistria) because of its secession.[78] Even in the absence of effective control over that region, the Court found Moldova to be under a positive obligation "to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the [ECHR]".[79] According to Article 8(1) of the Proposed Convention, Moldova would also be under the obligation to prevent the commission of crimes against humanity in the Transnistrian region independently of who commits the crimes.

Despite the positive consequences that the wording of Article 8(1) of the Proposed Convention would have regarding the obligation to prevent crimes against humanity, the selection of the words 'territory', 'jurisdiction' and 'control', and the interaction among them, could still have unsatisfactory aspects.

First and foremost, 'control' is a tricky concept, as it has been interpreted in many different ways within international law and serves many different purposes.

In Article 8(1) of the Proposed Convention, 'control' is the criterion for determining whether that State is under the obligation to prevent crimes against humanity regarding acts that take place beyond its jurisdiction. This use of 'control' is not unusual within international human rights case law.[80] However, in those cases 'control' has been used as a test in order to determine the State's jurisdiction over territories where human rights violations took place or over victims of those violations. Under that interpretation, 'control' is not a stand-alone concept regarding the limits of States obligations. It is a requisite in order to prove the existence of jurisdiction.[81]

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77 See *supra* note 72.

78 *Ibid*., para. 330.

79 *Ibid*., para. 331.

80 See, for instance, the 'Cypriot cases' of the ECtHR.

81 Still, it is likely that this interpretation of control as a test for determining jurisdiction may have been due to the fact that those human rights treaties at stake have as a threshold requirement 'jurisdiction' over a person or territories, but not 'control'. Thus, it seems that

For instance, the ECtHR has used the 'effective control' test to determine if a State Party to the Convention was under the (positive) obligation to secure the rights and freedoms of the ECHR in an occupied territory.[82] Specifically, the ECtHR applied this test *vis-à-vis* human rights violations in Cyprus, and found that Turkey was indeed exercising "effective control", which could be exercised "directly, through its armed forces, or through a subordinate local administration".[83] In the decision about the merits,[84] the ECtHR maintained this position – although it changed the test slightly to "effective overall control".[85]

At the same time, 'control' has also served as a rule for attributing a wrongful act to a State under the rules of State responsibility. However, that is a different operation than asserting that certain acts fall within the jurisdiction of a certain State. In fact, the former evaluation can only be done after the latter – and only if it has been demonstrated that the State had jurisdiction regarding a specific international obligation.

The ICJ, in the *Nicaragua* case[86] applied two different tests using the word 'control' in order to determine the United States' responsibility over the paramilitary activities of non-State actors (*los contras*) in Nicaragua's territory. The first test was the one of "complete control"[87] by a State of non-State actors, according to which it should be determined whether that State exercises such a level of control over those actors so that the latter could be considered agents of the former.

If that level of control or dependence is not satisfied, the second test is applied: whether a particular obligation perpetrated by a non-State actor was conducted under the 'effective control' of a particular State.[88]

those tribunals were trying to widen the scope of 'jurisdiction' because, as understood in international law, it can be very restrictive.

82 *Loizidou v. Turkey*, Preliminary Objections, see *supra* note 32.

83 *Ibid*., para. 62.

84 *Loizidou v. Turkey*, Judgment, 18 December 1996, Reports 1996-VI.

85 *Ibid*., para. 56.

86 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* ('*Nicaragua* case'), Judgment, 27 June 1986. I.C.J. Reports 1986, p. 14.

87 *Ibid*., para. 109.

88 *Ibid*., para. 115. The ICJ also used these same tests in the *Genocide* case (see *supra* note 2). Bolstering its decision in the *Nicaragua* case (*supra* note 85), it found that the Bosnian-Serbian militias did not completely depend on Serbia, nor did Serbia have complete control over them. Consequently, they could not be equated, for legal purposes, with organs of the Serbia State, or as acting on behalf of Serbia (paras. 391–395). It also found that the

'Control' has also been used for another test, applicable to a different situation. In the *Tadić* case,[89] the Appeals Chamber of the ICTY had to determine in which cases and upon which criteria, forces fighting against the central authority of the same State where they live and operate may be deemed to act on behalf of a foreign power, thereby rendering a seemingly internal armed-conflict, international. This is a very significant issue, as it has many consequences regarding the applicable international humanitarian law rules.

The Appeals Chamber found that, in order to attribute the acts of armed forces to a State, there should be enough evidence regarding the 'overall control' exercised by that State over the group, not only by providing it equipment or financing, but also by "coordinating or helping in the general planning of its military activity".[90] According to the Appeals Chamber, "it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law".[91] In its reasoning, the Appeals Chamber expressly rejected the 'effective control' test crafted by the ICJ in the *Nicaragua* case.[92]

To sum up, different levels of control have been used in international case law as criteria for several (and distinct) determinations in order

perpetrators of the Srebrenica genocide had not acted following instructions, or under direction or 'effective control', of Serbia, in which case those acts could be attributed to Serbia (paras. 400–407).

89 ICTY, Appeals Chamber, *Prosecutor v. Tadić*, Judgment, 15 July 1999, Case No. IT-94-1A.

90 *Ibid*., para. 131.

91 *Ibid*.

92 *Ibid*., paras. 115-130. For an in-depth analysis of this particular aspect of the *Tadić* decision, see Marko Milanović, "State Responsibility for Genocide", in *European Journal of International Law*, 2006, vol. 17, p. 585. According to Milanović, the rational used in that decision was incorrect because the ICTY applied a criterion established for determining State responsibility in order to decide an issue of international humanitarian law (the nature of the armed conflict between Bosnian Serbs and Bosnian Muslims). The ICJ in the *Genocide* case (*supra* note 2, paras. 404-405) also criticized the ICTY's rational in *Tadić*. Specifically, it stated that "[t]he ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only […] the ICTY presented the 'overall control' test as equally applicable under the law of State responsibility for the purpose of determining […] when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive".

to establish jurisdiction of a particular State under human rights treaties *vis-à-vis* a human rights violation, to establish the attribution of a wrongful act to a particular State under the rules of State responsibility, and to determine the international character of an armed conflict.[93] Still, as the ICJ held in the *Genocide* case,[94] even if all those formulations contain the word 'control', logic does not require the same test to be adopted in resolving different issues. The degree and nature of a State's control and authority can very well, and without logical inconsistency, be different depending which issue is at stake. Even with this clarification, the different tests and meanings of control can be conflated and confused, as it happened in the *Tadić* case.

Another unsatisfactory aspect of the wording of Article 8(1) of the Proposed Convention is the selection of the term 'territory'.

Such selection of word seems to be a consequence of the use of 'jurisdiction', when determining the scope of applicability of human rights treaties, as understood in general international law. This focus on territory, however, could limit the reach of the obligation to prevent crimes against humanity in a way that would undermine the spirit and purpose of the Proposed Convention. And even the addition of 'control' is not enough to counterbalance those negative consequences.

One example of situations that would be excluded from the scope of the proposed convention because of the selection of the word 'territory' are the cases of 'extraordinary renditions' – sadly very popular nowadays within the U.S.'s 'Global War on Terror'.[95]

Extraordinary renditions, when committed within the background required by the definition of crimes against humanity (as part of a widespread or systematic attack directed against any civilian population) could be characterized as a specific manifestation of crimes against humanity –

93 Gondek, 2009, p. 168, *supra* note 31.

94 *Genocide* case, para. 168, *supra* note 2.

95 Article 1(3)(e), Proposed Convention. Among the cases that can be mentioned is that of Maher Arar, a Syrian-born, Canadian citizen who was detained during a layover at J.F.K. Airport in September 2002 and, after being held in solitary confinement, was rendered to Syrian intelligence authorities, renowned for the use of torture, under the label of being a member of Al Qaeda. In Syria, Maher Arar was interrogated and tortured, and held without charges. Almost one year later he was released because Syrian authorities could not find connections to terrorism or criminal activities. See the information of the case at the web site of the Center for Constitutional Rights, available at http://ccrjustice.org/ourcases/current-cases/arar-v-ashcroft.

"imprisonment […] in violation of fundamental rules of international law",[96] and torture[97] (if that were the case).

Let us imagine a case where State 'A' renders a prisoner – independently of the legality of his or her imprisonment – to State 'B', where he or she is interrogated under torture by officials of 'B'. Notwithstanding the breach of the (negative) obligation not to commit crimes against humanity by 'A' should the imprisonment be illegal, was 'A' also under the (positive) obligation to prevent the individual from being tortured by officials of 'B'? 'A' could argue, consistent with Article 8(1) of the Proposed Convention, that 'B' is a territory neither under its jurisdiction, nor under its control.

That is why it is important to take into account that in some situations, States should be under the obligation to prevent the commission of crimes against humanity against *persons* under their jurisdiction – even if those crimes were committed in territories which are neither under their jurisdiction, nor under their control.

Other situations that would be excluded from the scope of the Proposed Convention because of the territorial requirement are also inspired by the 'Global War on Terror'.

According to some documents that have been released,[98] many detainees have been subjected to practices in Iraq that could amount to crimes against humanity by their fellow nationals of the Armed and Security Forces. Specifically, those reports document deaths, beatings, burnings, lashings, and other kinds of physical violence that may have been occurring on a regular basis. The American forces in Iraq, however, have rejected the responsibility to investigate those crimes. Particularly, according to America's policy, which was made official by a Pentagon spokesman,[99] American forces were under the sole obligation to immediately report abuses, and to ask the Iraqis authorities to conduct an investigation. However, this strategy was futile. As the article informs,

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96 However, not all cases of extraordinary renditions start as an imprisonment in violation of international law. In fact, it could be stated that Arar's detention was not "in violation of fundamental rules of international law", as he was allegedly detained by American officers in an American airport.

97 Article 3(1)(f), Proposed Convention.

98 See "Detainees Fared Worse in Iraqi Hands, Logs Say", *New York Times*, print edition of 23 October 2010, p. A8.

99 *Ibid*.

> [e]ven when Americans found abuse and reported it, Iraqis often did not act. One report said a police chief refused to file charges "as long as the abuse produced no marks." Another police chief told military inspectors that his officers engaged in abuse "and supported it as a method of conducting investigations."[100]

If this Proposed Convention were in force, and ratified by the U.S., would the American forces be under the obligation to take all the necessary measures in order to prevent those crimes? The answer to this question is not at all easy. Clearly, Iraq is no longer under the jurisdiction of the U.S. But, is it under its control? Although it could be argued that, when those acts took place, the U.S. was exercising some kind of control over the Iraq territory, that is also very debatable, and the burden of proof over victims alleging the U.S.'s violation of the obligation to prevent crimes against humanity would be very difficult to reach.

However, if the Proposed Convention contained other concepts apart from 'territory' – such as persons, facilities, situations – the U.S.'s obligation to prevent crimes against humanity would be easier to defend.

Article 1 of the ECHR can provide an example of alternative language. That article provides that States Parties undertake to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. That is to say, it does not emphasize the national territory of the States Parties, but rather the persons that may be under their jurisdiction. Along these lines, the now-defunct European Commission on Human Rights has stressed the importance of focusing on the jurisdiction or control exercised by officials of a State Party over persons, rather than over territories, when determining the extraterritorial applicability of the ECHR.[101] In the *Cypriot* cases, the Commission suggested a test according to which the ECHR was applicable to persons or property that came "under actual authority and responsibility" of Turkish agents, "not only

[100] *Ibid*.

[101] See European Commission on Human Rights, *Turkey v. Cyprus*, App. No. 8007/77, 13 Eur. Comm'n H.R. Dec. and Rep., p. 85, particularly para. 19, and the reports mentioned there. For a complete overview of that report and, in general, of the Commission's position on the Cyprus cases, see Gondek, 2009, pp. 126–132, *supra* note 31.

when that authority is exercised within their own territory but also when it is exercised abroad".[102]

5.7. In Favour of an Extraterritorial Obligation to Prevent Crimes Against Humanity

The significance of this attempt to promote an international convention condemning and fostering prevention of crimes against humanity is substantial. Whereas since 1948 we have had a treaty dealing with genocide, and genocide prevention,[103] crimes against humanity have "essentially lingered in the fog of customary law",[104] apart from their appearance at the Nuremberg Trials and in some regional prosecutions. Their codification in 1998 in the ICC Statute has represented an important, though limited, development, as the ICC Statute only regulates situations within its jurisdictional boundary.

As a consequence, even when the definition of crimes against humanity covers most of the gravest human rights violations,[105] and it was constructed to describe appalling atrocities such as the Armenian Genocide and the Holocaust, the lack of an international treaty condemning and obligating States to prevent them "meant that the concept was virtually impotent in a legal sense".[106] The want of a special treaty has also contributed to downplaying crimes against humanity when compared to gen-

[102] *Turkey v. Cyprus*, *ibid*., para. 19. Still, the ECtHR, restricted the meaning of Article 1 of the ECHR, resorting to the meaning that 'jurisdiction' has within general international law (which has a strong focus on territory) and thus departing from the wording of Article 1 (that does not mention 'territory' at all). This became crystal clear in the *Banković* decision. Even more, according to that ruling, those exceptional situations in which the ECHR could be applied extraterritorially are also mainly territorial – concretely, the focus is on those territories of another State Party under the control of the respondent State, rather than on the persons who are under the control over the respondent State. See Gondek, 2009, p. 178, *supra* note 31.

[103] In 1948, when States drafted and signed the Genocide Convention, they confirmed that genocide is a crime under international law and undertook the obligation to prevent and punish it (Article I). In addition, the Convention provides a specific mechanism regarding the obligation to prevent: any State Party may appeal to the competent organs of the UN, so that they take the appropriate action under the UN Charter for the prevention and suppression of genocide (Article VIII).

[104] William A. Schabas, "Darfur and the 'Odious Scourge': The Commission of Inquiry's Findings on Genocide", in *Leiden Journal of International Law*, 2005, vol. 18, pp. 883–884.

[105] *Ibid*., p. 884.

[106] *Ibid*.

ocide, and buttressed the idea that genocide "sits at the apex of a pyramid of criminality"[107] whereas crimes against humanity are not as serious crimes.[108]

The creation of an international treaty thus serves the function, among many others, of pronouncing the international community's condemnation of those crimes and their perpetrators, and States' commitment to prevent and eradicate crimes against humanity. Of course, we all know that the creation of an international treaty will not stop those atrocities from one day to the next – as the Genocide Convention failed to prevent or suppress genocides that took place after 1948, and human rights treaties have failed to prevent gross human rights violations. However, a comprehensive treaty on crimes against humanity can provide, at the very least, a crucial advocacy tool for human rights activists, international organizations, potential or current victims of crimes against humanity, and States interested in eradicating those crimes. It can also be a useful tool for setting the agenda, mobilizing and empowering potential and actual victims of crimes against humanity, and litigating against States and individuals that engage in those practices. In other words, the establishment of authoritative principles in an international treaty is "a crucial element in empowering individuals to imagine, articulate, and mobilize as rights holders".[109]

It is true that the legal concept of crimes against humanity and its condemnation as an international crime, already exists through customary international law, and thus, is binding for all nations. Still, an international treaty can be more effective in raising awareness about the gravity of these crimes. As has been said, "[w]hile international custom can have a direct effect even without implementing legislation […] it would be much harder to mobilize domestic audiences to demand implementation of international custom than a ratified treaty".[110] The reason for this is that the ratification of international treaties "provides at least the color of local

[107] William A. Schabas, "Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide", in *Rutgers Law Review*, 2008, vol. 61, p. 191.

[108] According to Schabas, another consequence of the "impunity gap" – or lack of systematization of crimes against humanity − was the "enlargement" of the definition of genocide in order to include conducts that square better in the crimes against humanity definition. *Ibid.*

[109] Beth Simmons, *Mobilizing for Human Rights. International Law in Domestic Politics*, Cambridge University Press, 2009, p. 351.

[110] *Ibid*., p. 364.

ownership of specific human rights obligations".[111] However, that cannot be said about customary international law.

Still, the language of Article 8(1) of the Proposed Convention, and in particular the creation of a territory-limited obligation to prevent, could be read as reinforcing the idea that genocide is the most serious international crime and consequently trivializing crimes against humanity. The reason for this is that, in the midst of the increasing acknowledgment of an extraterritorial obligation to prevent genocide that can be tracked to at least since the turn of the century, the international community would be creating a more restrictive obligation where crimes against humanity prevention is concerned. This disparity could misconstrue the seriousness of crimes against humanity.

Regarding international efforts to prevent genocide, the U.N. Secretary General, on 13 July 2004, appointed a Special Adviser on the Prevention of Genocide, with the mandate of carrying out some activities (such as a careful verification of facts and serious political analyses and consultations) in order to enable the U.N. to act in a timely fashion in order to prevent genocide.[112]

In May 2006, the U.N. Secretary-General appointed an Advisory Committee on Genocide Prevention, integrated by renowned international figures, with the function to assist the Special Adviser on the Prevention of Genocide. On 31 August 2007, the Advisory Committee suggested a modification of the title of the Special Adviser to "Special Advisor on the Prevention of Genocide and Mass Atrocities".[113] However, that attempt failed. The Security Council took several months to respond to the letter

[111] *Ibid.*

[112] See letter dated 12 July 2004 from the Secretary-General addressed to the President of the Security Council, S/2004/567. The specific mandate of the Special Advisory was to (a) collect existing information, in particular from within the UN system, on massive and serious violations of human rights and international humanitarian law of ethnic and racial origin that, if not prevented or halted, might lead to genocide; (b) act as a mechanism of early warning for the Secretary-General, and through him to the Security Council, by bringing to their attention potential situations that could result in genocide; (c) make recommendations to the Security Council, through the Secretary-General, on actions to prevent or halt genocide; (d) liaise with the UN system on activities for the prevention of genocide and work to enhance the UN capacity to analyse and manage information relating to genocide or related crimes.

[113] See William A. Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, 2009, p. 576.

proposing that change, and eventually accepted an upgrade of the Adviser's position (to that of Under Secretary-General level) but maintained its denomination as "Special Adviser on the Prevention of Genocide".[114] The inclusion of 'mass atrocities' would have brought certain crimes against humanity that fall short of genocide, such as the extermination of a civilian population that do not belong to any of the protected groups, within the mandate of the Special Adviser. However, the failure of that attempt can be read as demonstrating that the Security Council upholds the hierarchy among international crimes, with genocide being 'the apex'.

Meanwhile, in the *Genocide* case, the ICJ held that a particular State (Serbia) had failed to comply with the "normative and compelling"[115] international obligation to prevent genocide from being committed in another State's territory (Bosnia), which stems from Article I of the Genocide Convention. That obligation, according to the ICJ, is an extraterritorial one. Thus, it is compelling for a State "wherever it may be acting or may be able to act" in an appropriate manner to comply with it.[116] That is why Serbia could be held responsible for failing to prevent genocide in other countries – Bosnia and Herzegovina.

The ICJ, however, clearly stated the limitations of its decision which, it asserted, did not purport to establish a precedent applicable to all cases where a treaty instrument, or other binding legal norm, creates an obligation for States to prevent certain acts, or to find whether there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law. On the contrary, the Court circumscribed the scope of its decision to determining "the specific scope of the duty to prevent in the Genocide Convention, and to the extent that such a determination is necessary to the

[114] *Ibid*.

[115] *Genocide* case, para. 427, *supra* note 2. The ICJ also addressed the issue regarding compliance, by Serbia, of the obligation to punish genocide.

[116] *Ibid*., para. 183. Still, extraterritorial prevention of genocide is not an absolute, nor a one-size-fits-all obligation. In order to determine whether a State has complied with its duty to prevent, many factors should be taken into account in a case-by-case assessment, because the obligation varies greatly from one State to another, depending on their power to persuade or capacity to influence those persons involved in the commission or the planning of genocide to refrain from that activity. That capacity to influence in a particular case will be measured in accordance with the geographical distance and the political relations and other bonds between the obligated State and the place where the genocide is about to take place. Paras. 430, 433.

decision to be given on the dispute before it". Consequently, the language of the decision does not allow in and of itself the extension of the extraterritorial obligation to prevent genocide to crimes against humanity.

This supposed distinction between genocide and crimes against humanity should be debated and revisited. Although the very nature of the crime of genocide is heinous – the "intentional physical destruction on an ethnic group"[117] – that is not a valid argument in order to treat crimes against humanity more lightly. In many significant ways, crimes against humanity resemble genocide.

To begin with, it is important to look closer at the historical origins of both categories of crimes. At the London Conference, where the procedures for the Nuremberg trials were set, the drafters selected the phrase "crimes against humanity" in order to encompass not only the atrocities that the Nazis had committed against foreign populations, but also against their fellow citizens. At that time, there was a *lacuna* within international humanitarian law because crimes committed by a State against its own citizens were not condemned or prohibited by international norms. In other words, "the idea that a government would use its resources to murder its own people had not been anticipated adequately by the laws of war".[118]

The concept of genocide was conceived approximately at the same time by Raphael Lemkin, a survivor of the Holocaust who made the goal of his life to commit Nations to prevent, suppress and condemn genocide (a word that he coined to describe the Ottoman atrocities against the Armenian and the Nazi atrocities against the Jews). His efforts to have genocide acknowledged as an international crime turned out to be fruitful after the Nuremberg Tribunal's refusal to condemn the Nazi leaders for the crimes committed against their own people before the outbreak of the war. It was, in part, a reaction to the decision that in 1948 States condemned genocide as an international crime "whether committed in time of peace or in time of war" (Article I of the Genocide Convention). Since

[117] *Ibid*. In fact, Schabas is one of the scholars who asserts that the genocide label must be reserved for the "arguably most heinous crimes against humanity", which, according to him, is the intentional physical destruction of an ethnic group (*ibid.*). In that same article, Schabas describes other positions, according to which genocide is not necessarily the most serious international crimes. Of course, by asserting that genocide is more atrocious that other crimes against humanity, by no means does he minimize the latter's gravity. However, the differentiation could contribute to that effect, as it has been showed above.

[118] Luban, 2004, p. 93, see *supra* note 4.

then, and until the 1990s, crimes against humanity and genocide existed in parallel as two different categories of international crimes. Genocide was narrowly defined, but included acts committed in peacetime, whereas crimes against humanity were defined more broadly, but they were restricted by the requirement that they be committed in connection with war.[119]

That being said, the legal concept of crimes against humanity comprises "the most severe and abominable acts of violence and persecution":[120] murder (Article 3(1)(a)), extermination (Article 3(1)(b)), enslavement (Article 3(1)(c)), deportation (Article 3(1)(d)), imprisonment "in violation of fundamental rules of international law" (Article 3(1)(e)), torture (Article 3(1)(f)), sex crimes (including rape, sexual slavery, enforced prostitution, forced pregnancy, and forced sterilization) (Article 3(1)(g)), forced disappearance (Article 3(1)(i)), and the crime of apartheid (Article 3(1)(j)) (these crimes are usually clustered into the shorthand category of 'crimes of the murder type'),[121] and persecution based on political viewpoints, race, national origin, ethnicity, cultural backgrounds, religious beliefs, and gender (Articles 3(1)(h) and 3(3)) (these latter crimes are usually labelled as 'crimes of the persecution type').[122]

All those particular manifestations of crimes against humanity, in order to be characterized as such, have to be committed "as part of a widespread or systematic attack" and have to be directed "against any civilian population" (Article 3(1)).

In turn, the ICC Statute's definition of genocide[123] consists of committing specific acts – killing, seriously harming, inflicting conditions of life calculated to physically destroy, prevent birth and forcibly transferring children – directed against the members of one of the protected

[119] Schabas, 2008, p. 162, *supra* note 107.

[120] Luban, 2004, p. 98, see *supra* note 4. The Proposed Convention's definition of crimes against humanity (Article 3) is exactly like the definition of the ICC Statute (Article 7). From now on, I will refer to it as the Proposed Convention. However, the remarks made in this chapter regarding Article 3 of the Proposed Convention, also apply to Article 7 of the ICC Statute.

[121] *Ibid*.

[122] *Ibid*. According to Luban, whereas "'crimes of the murder type' are the most appalling evils that people have devised to visit on the bodies of others, 'crimes of the persecution type' are the most extreme humiliations to visit on their spirit" (p. 100).

[123] ICC Statute, Article 6.

groups (national, ethnic, racial, or religious groups), provided that they are committed with the specific intent "to destroy, in whole or in part" one of those groups, as such.

From that description, it is possible to pinpoint many similarities between crimes against humanity – at least those acts that belong to the 'murder type' – with genocide. In fact, the differences between both legal definitions can be boiled down to: a) the protected groups; b) the specific intent; and c) the policy element.

First, whereas crimes against humanity protect civilian populations – whatever group the civilians belong to – genocide protects the members of specific groups: national, ethnic, religious or racial groups. Moreover, in the specific case of the crime of persecution, the legal definition of crimes against humanity widens the scope of protected groups, adding political affiliation, culture, and gender. In David Luban's words, while the targets of genocide are "groups viewed as collective entities, with a moral dignity of their own", crimes against humanity target civilian populations "viewed not as unified metaphysical entities but simply as collections of individuals whose own human interests and dignity are at risk and whose vulnerability arises from their presence in the target population".[124]

Secondly, while the crime of genocide requires a specific intent or '*mens rea*' (the intent to destroy in whole or in part one of the protected groups, as such), the definition of crimes against humanity only requires, where '*mens rea*' is concerned, that the perpetrator acts with "knowledge of the attack" (Article 3(1)); his or her internal motives are irrelevant.

Finally, another difference between both legal definitions stems from the requirement that crimes against humanity be committed "as part of a widespread or systematic attack" and "pursuant to or in furtherance of a State organizational policy to commit such attack" (Article 3(2)(a)) – the so-called 'policy element'. Thus, although the material acts of crimes against humanity are necessarily carried out by specific persons, their performance is within a political organization.[125]

In contrast, neither the definition of genocide in the Genocide Convention nor the definition in the ICC Statute encompasses such an element. This difference between crimes against humanity and genocide may be relevant in some situations. As it has been described by David Lu-

[124] Luban, 2004, p. 98, *supra* note 4.

[125] *Ibid*.

ban,[126] a single person can commit genocide if, for instance, he disseminates a deadly disease with specific intent (to destroy, in whole or in part, one of the protected groups). However, as he would be acting on his own, he could not be charged with the crime against humanity of extermination because of the absence of the 'policy element'.[127]

In short, it can be said that while the legal definition of genocide concentrates on the "collective character of the victim", the definition of crimes against humanity emphasizes "the collective character of the perpetrator".[128] Still, those differences are not significant enough to justify disparate treatment regarding prevention.

To illustrate this assertion, consider an extermination of a civilian population (Article 3(1)(b)) that takes place in a particular country, in a widespread or systematic fashion. If the attack is based on ethnic, religious, racial or national categories, objectively, that crime not only amounts to the crime against humanity of extermination, but also to genocide.[129] The missing element would be the lack of the specific intent among the perpetrators, either because the motives of the perpetrators are unknown, ambiguous, or different from the specific intent required by genocide (for instance, the perpetrators do not care about the fate of the group of civilians that they are assaulting, but about gaining more power or more territories).

In such a situation, from the outside the international community most likely will only be aware of the existence of that attack. Although some States may have more details about the underpinnings of the conflict, the real internal motives of the perpetrators are likely to surface once the deeds are committed or even during the post-facto investigations that eventually may be conducted. Even though the special intent of genocide is very significant in relation to the prosecution of individual perpetrators

126 *Ibid*.

127 Luban, *ibid*., in footnote 45, mentions a real-life example, involving Abba Kovner, a Holocaust survivor, resistance fighter in the Vilna ghetto, who in 1945 attempted to poison the Hamburg water supply in revenge for the Holocaust. He confessed that his purpose was to kill six million Germans. He also observes that, unfortunately, "the possibility of a lone terrorist aiming to wipe out a population by introducing biological agents is all too imaginable". Still, some scholars argue that the policy element is also crucial regarding the crime of genocide (see, for instance, Schabas, 2005, pp. 876–877, *supra* note 104).

128 Luban, 2004, p. 98, *supra* note 4.

129 *Ibid*., p. 97.

and to the moral condemnation of his or her conduct, there is no reason to differentiate among crimes against humanity and genocide regarding prevention on that ground. The international community should not be concerned with the reason why criminals are exterminating a civilian population, but only that civilians are being exterminated, period.

Moreover, when an attack against a civilian population is launched, it is hard to know in advance how it will progress. In fact, an attack that starts as a massive illegal detention of civilians for whatever reason could easily evolve into genocide (the killing or extermination of the members of a national group, for instance). However, there is a high risk that, while the attack is taking place, and the real motives of the perpetrators are not clear, the international community will engage in an abstract debate about whether an imminent or actual attack against civilians amounts to genocide, "when the debate *should* be about how to avert or arrest it as soon as possible",[130] regardless of its legal categorization.

Another argument in favour of widening the scope of the obligation to prevent crimes against humanity has to do with the 'policy element' or the 'organized, policy-based decision' to commit the crimes.[131]

One of the main consequences of the policy requirement is that those crimes can only be committed by States (through their agents, or through groups with some kind of State support) or, at most, by a group acting and organized as a State, holding territory and resources under its control.

Given that feature of crimes against humanity, narrowing the obligation to prevent crimes against humanity to territories within the jurisdiction or control of each State would be pointless because States would already be under the obligation not to commit those crimes. Therefore, such an obligation to prevent is redundant, but for very particular situations in which a non-State actor is sufficiently organized and equipped as to be equated to a State. In Michael Reisman's telling metaphor, to obligate States to prevent crimes against humanity within their own territories is like "solemnly assigning the proverbial fox to guard the henhouse, and

[130] W. Michael Reisman, "Acting Before the Victims Become Victims: Preventing and Arresting Mass Murder", in *Case Western Reserve Journal of International Law*, 2007−2008, vol. 40, p. 84.

[131] Luban, 2004, p. 98, *supra* note 4.

then pretending that meaningful measures have been taken to protect the roost".[132]

The "Responsibility to Protect" ('R2P Report'), launched in December 2001 by the International Commission on Intervention and State Sovereignty ('ICISS'), that addresses the question of when, if ever, coercive – and in particular military – action against another State is a proper measure in order to protect people at risk in that other State,[133] is consistent with this idea – that some manifestations of crimes against humanity are as grave as genocide, and that both categories of crimes deserve the attention and reaction from the international community.

In fact, one of the issues dealt with in that report is in what cases military action would be appropriate for dealing with conflicts and mass atrocities, when other means of preventing it have failed. Specifically, the intervention would be justified if its purpose was to halt or avert "*large scale loss of life*, actual or apprehended, *with genocidal intent or not*, which is the product either of *deliberate State action*, or State neglect or inability to act, or a failed State situation" or "*large scale 'ethnic cleansing'* actual or apprehended, whether carried out by *killing, forced expulsion, acts of terror or rape*" (emphasis added).[134]

It is interesting how many elements both descriptions and the Proposed Convention's definition of crimes against humanity have in common; indeed, the former list fits well with the latter. Furthermore, the Commission has expressly stated that those broad situations that might deserve military intervention would typically include crimes against humanity and war crimes involving large-scale killing or ethnic cleansing.[135]

5.8. Concluding Remarks

Notwithstanding the limitations that Article 8(1) would impose on the obligation to prevent crimes against humanity, it cannot be denied that the whole Proposed Convention strongly emphasizes the need to prevent those heinous crimes. That emphasis is significantly relevant if we consider that, until recently, the international community has addressed

[132] Reisman, 2007–2008, p. 62, *supra* note 130.

[133] International Commission on Intervention and State Sovereignty, *Responsibility to Protect*, p. VII, available at http://responsibilitytoprotect.org/ICISS%20Report.pdf.

[134] *Ibid*., p. 32.

[135] *Ibid*., p. 33.

crimes against humanity through punishment of the perpetrators and, in some instances, through compensation to the victims. However, those strategies have failed to deter subsequent episodes of crimes against humanity.[136] Thus, it is particularly important to focus on the need to develop effective strategies to prevent crimes against humanity.

Clearly, any strategy about prevention has to be grounded on the belief that those crimes are preventable. Those crimes do not happen from one day to the next, but rather are the conclusion of a long and usually bloody process. Moreover, mass killings, persecutions, torture, and similar acts, committed within a context of an attack against a civilian population, take time, communication, organization, and resources. Thereby, there are many steps that can be taken in order to deter perpetrators and to address the conflict, that fall short of using force. Acknowledging that prevention of crimes against humanity is feasible is the necessary starting point of any debate on the issue, and one of the most salient merits of the Proposed Convention is that it reinforces and commits to that idea and triggers a much needed debate about the issue.

The limitation of the obligation to prevent crimes against humanity on those territories under the jurisdiction or control of the States Parties could be defended with reasonable arguments, such as the sovereign rights of other States or lack of control of areas beyond their borders.[137] These concerns deserve attention, as each country, in most cases, is the most appropriate entity to deal with its internal conflicts and to reinforce its institutions to foster rule of law and human rights.

However, we also have to take advantage of the space for debate that the Proposed Convention has triggered, in order to link crimes against

[136] Since WWII, that is to say, after the Nazi leaders were convicted in Nuremberg of crimes against humanity, "nearly 50 [genocides and political mass murders] have happened; […] these episodes have cost the lives of at least 12 million and as many as 22 million noncombatants, more than all victims of internal and international wars since 1945". See Barbara Harff, "No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955", in *American Political Science Review*, 2003, vol. 97, no. 1, pp. 57–73. See also, *e.g.*, Reisman, 2007−2008, p. 57, *supra* note 130, arguing that there is no evidence that any prosecution has served to prevent any subsequent mass killing, and that the "international human rights movement has celebrated the trials at Nuremberg as a vindication of human rights and as a milestone on the road to installing a regime for international protection. The celebration tends to obscure the fact that no efforts were made to arrest or prevent the genocide that had led to the Nuremberg Trials".

[137] Gondek, 2009, pp. 57–58, *supra* note 31.

humanity prevention with the rest of the developments within international law and, in particular human rights law, that clearly are intended to obligate States to prevent genocide extraterritorially, to protect civilians from attacks by their own government, and to hold States accountable for the human rights violations committed beyond their territories. Only with this linkage will crimes against humanity be regarded for what they are: heinous international crimes committed against civilians by those (State authorities) that are supposed to take care of them. The international community owes this debate and this acknowledgment not only to itself, but also to the millions of victims of mass atrocities throughout history.

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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 contexual 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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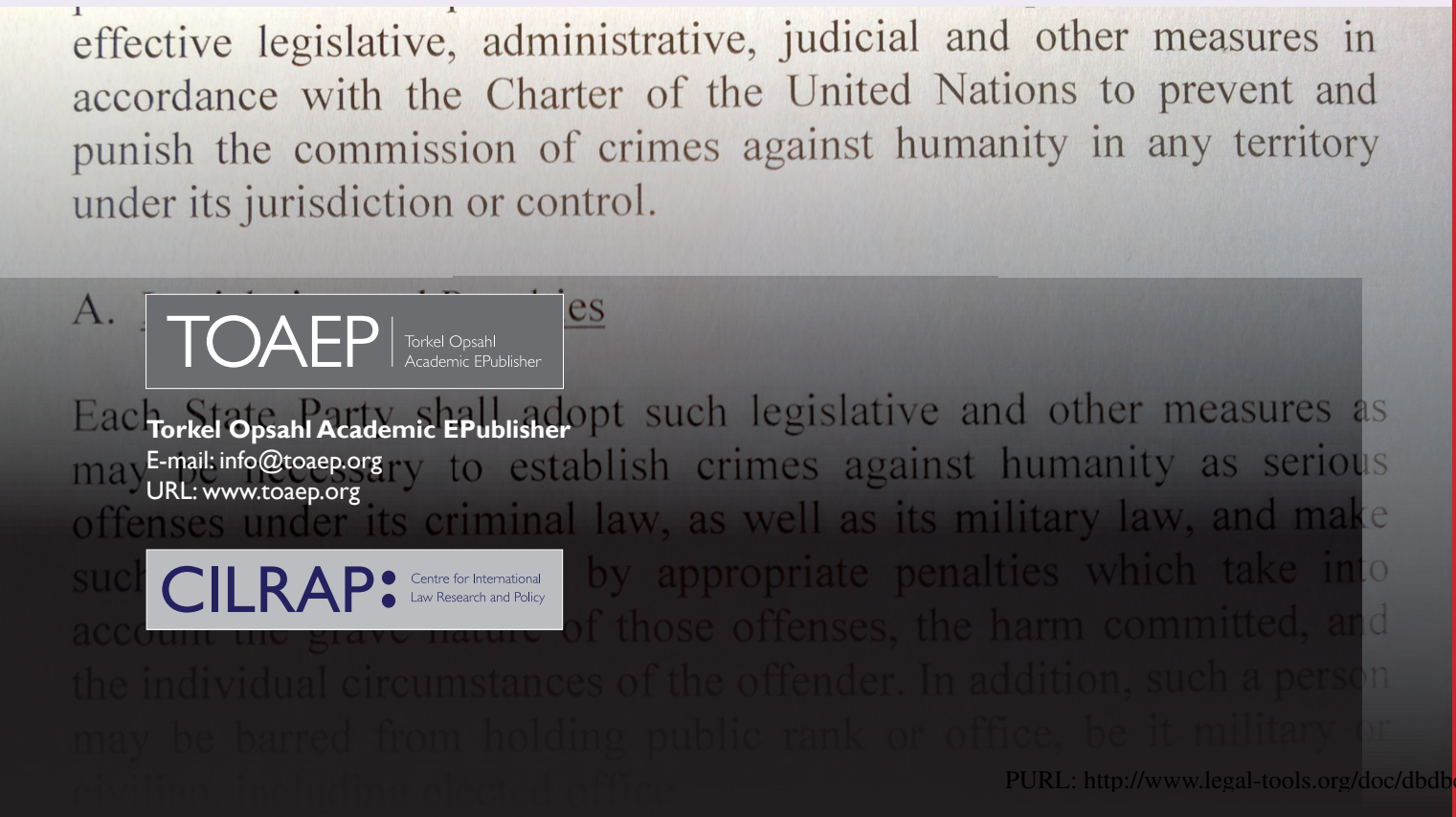

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