

The Birth and Development of the Crimes Against Humanity Convention¹

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The idea of “crimes against humanity” arose from the commission of massive atrocities committed against civilian populations. “Mass murder” failed to capture the enormity of the crimes. So, too, “war crimes”. Its first use arose out of the Armenian slaughter by Turkish soldiers in 1915. In a joint declaration, France, Germany and Great Britain referred to that slaughter as “crimes against humanity and civilisation”.²

In 1945, the phrase commended itself to the drafters of the London Agreement that established the Nuremberg Trials of the Nazi leaders. Three crimes were alleged to have been committed by the defendants: crimes against peace, war crimes and crimes against humanity.³ The latter was defined in Article 6 as follows:

“Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”⁴(My emphasis).

¹ This address was delivered at a seminar held in Johannesburg in February 2019. It was organised by the Human Sciences Research Council together with the Konrad Adenauer Foundation. I relied for much of the material on a special issue of the Journal on International Criminal Justice, Volume 16, No.4 of 4 September 2018. It was edited by Se´vane Garibian and Claus Kreß. In particular I refer to the essay by Leila Nadya Sadat at pages 683 - 704 and the Foreword by Sean D.Murphy at pages 679 - 682.

² See: <https://academic.oup.com/ahr/article/119/1/47/20854>

³ London Agreement: <http://avalon.law.yale.edu/imt/imtchart.asp>

⁴ See Article 6 of the London Agreement: http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.2_Charter%20of%20IMT%201945.pdf

In this way, the definition was interpreted to mean that crimes against humanity could be committed during war, against a civilian population and were organised and systematic. Isolated acts therefore could not constitute crimes against humanity. It also meant that the accused could not be charged with crimes committed prior to the outbreak of war. The persecution of Jews and other people in Germany prior to the outbreak of World War II thus fell outside the jurisdiction of the Nuremberg tribunal. The definition was repeated in the Statute establishing the Tokyo Trial against the Japanese wartime leaders.⁵

Following the Nuremberg trial, on 11 December 1946, the UN General Assembly adopted the “Nuremberg Principles” embodied in the International Military Tribunal Charter and Judgment.⁶ This elevated “crimes against humanity” to a category of offences outlawed by international law for which individuals could be tried and punished.

In May 1993 crimes against humanity was included by the Security Council in the Statute of the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY).⁷ There, too, they were linked to war. In 1994, when the Security Council established the United National International Criminal Tribunal for Rwanda (ICTR), the crimes had not been perpetrated during war. Hence, in the Rwanda Statute, crimes against humanity were not linked to war.⁸

⁵ http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.3_1946%20Tokyo%20Charter.pdf

⁶ <http://www.un-documents.net/a1r95.htm>

⁷ http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf

⁸ http://legal.un.org/avl/pdf/ha/ictr_EF.pdf

It is the view of most leading experts in the field of international criminal law, that by 1993, when the ICTY Statute was drafted, crimes against humanity were no longer necessarily linked to war, and that there was no cause for the Security Council to have made that connection.⁹

In the case of both of the UN tribunals, the crimes of torture and rape were added to the definition of crimes against humanity.¹⁰ The Rwanda Statute also included the requirement that the crimes were committed on discriminatory grounds.¹¹

In the Rome Statute for the ICC, the definition of “crimes against humanity” does not contain a link to war.¹² It also adds to the list of crimes that might constitute the crimes.

The definition, contained in Section 7 of the Rome Statute, reads as follows:

For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

⁹ See: *Categories of International Crimes*, <https://www.britannica.com/topic/international-criminal-law#ref242853>

¹⁰ See footnotes: 7 and 8 above

¹¹ See footnotes 8 above.

¹² Rome Statute for the ICC, Art. 7: https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Atrocity crimes, as they have come to be called, other than crimes against humanity, are reflected in so-called international suppression conventions. War crimes are dealt with in the Geneva Conventions of 1949 as updated in the Additional Protocols of 1973.¹³ Genocide is recognised and defined in the Genocide Convention of 1948.¹⁴

It is also noteworthy that the Genocide Conventions (1948),¹⁵ the Apartheid Convention (1973),¹⁶ the Torture Convention (1984),¹⁷ and the Convention on Enforced Disappearance (2006)¹⁸ all recognize certain offences as constituting crimes against humanity.

In 1994, Professor Cherif Bassiouni, of De Paul University in Chicago, drew attention to the absence of any international instrument on the prevention of

¹³ See ICRC Summary of the Geneva Conventions of 12 August 1949 and their Additional Protocols:
<https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0368.pdf>

¹⁴
https://www.oas.org/dil/1948_Convention_on_the_Prevention_and_Punishment_of_the_Crime_of_Genocide.pdf

¹⁵ Ibid.

¹⁶ International Convention on the Suppression and Punishment of the Crime of *Apartheid*:
<https://treaties.un.org/doc/publication/unts/volume%201015/volume-1015-i-14861-english.pdf>

¹⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:
<https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>

¹⁸ International Convention for the Protection of All Persons from Enforced Disappearances:
<https://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>

crimes against humanity.¹⁹ In 2008, that omission led Professor Leila Sadat to establish, at the Whitney R. Harris World Law Institute at Washington University School of Law, a Crimes Against Humanity Initiative (hereafter referred to as “the Initiative”).²⁰ She invited five other international lawyers to join her in forming the steering committee for the project. It was my privilege to be one of those lawyers. Another of the members of the steering committee was indeed Professor Bassiouni who played a key role in writing the first draft of a convention for crimes against humanity.

To quote the words of Professor Sadat, the Initiative has three primary objectives: (i) to study the current state of the law and sociological reality as regards to the commission of crimes against humanity; (ii) to combat the indifference generated by an assessment that a particular crime is ‘only’ a crime against humanity (rather than a ‘genocide’); and (iii) to address the gap in the current law by elaborating the world’s first global treaty on crimes against humanity.²¹

We are concerned today with the third objective, the drafting of a “Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity”. The first draft was considered in detail at the Initiative’s first meeting in April 2009, held at the Law School of Washington University in St. Louis. During the following three years, the views of almost 250 experts were received and considered. Meetings were held in the United States and in other countries around the world. Between meetings of the Initiative, members of the Steering Committee discussed the submissions and refined the

¹⁹ See M. Cherif Bassiouni, ‘Crimes Against Humanity: The Need for a Specialized Convention’, 31 Columbia Journal of Transnational Law (1994) 457

²⁰ <http://sites.law.wustl.edu/WashULaw/crimesagainsthumanity/about/fact-sheet-about-the-crimes-against-humanity-initiative/>

²¹ L.N. Sadat, ‘A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity’, in L.N. Sadat (ed.) Forging a Convention for Crimes Against Humanity (2nd edn., Cambridge University Press, 2013) 323^344, at xxiii^xxiv.

draft convention. There were seven major revisions of the draft. The final draft was approved by the Steering Committee in August 2010. It has been published by the Initiative in eight languages: Arabic, Chinese, English, French, German, Portuguese, Russian and Spanish.²²

One of the most important and difficult issues that was much debated by the members of the Steering Committee, and the many experts who were consulted by it, was the definition of crimes against humanity. As has already emerged, there were a number of definitions in previous international instruments. The most important of these, as far as the Steering Committee was concerned, was the definition contained in section 7 of the Rome Statute. The members of the Steering Committee were united in their firm support for the International Criminal Court and were determined that its work should in no way detract from the relevance and force of the Rome Statute. For this reason, a number of the cogent criticisms of the Rome Statute definition were not taken aboard. Our chief concern was that there should be no contradiction of substance between the Rome Statute and the proposed new convention. Such a contradiction would have raised problems for States Parties to Rome Statute that wished to adopt the proposed new convention. We were determined that States Parties and non-States Parties to the Rome Statute should feel comfortable in ratifying the new convention. In addition we were cognisant that 123 States Parties to the Rome Statute had accepted the definition contained in Section 7 of the Statute.

I turn to discuss briefly the all-important role of the International Law Commission (ILC). The ILC was established by the United Nations General Assembly in 1948 for the “promotion of the progressive development of interna-

²² These texts are available online at crimesagainsthumanity.wustl.edu

tional law and its codification.”²³ It has 34 members, experts in international law, elected by by the General Assembly from nominations from Member States. They hold office for renewable terms of five years. It meets annually in Geneva.²⁴

During the 70 years of its existence, the ILC has an impressive list of achievements. Amongst others, it has been responsible for a number of important United Nations conventions. These include the 1969 Vienna Convention on the Law of Treaties and the 2001 articles on State responsibility for wrongful acts. Its work formed the basis for the UN Convention on the Law of Sea.²⁵ It was also responsible for the first draft of the Rome Statute for the ICC.²⁶

Professor Sean Murphy, the United States member of the ILC, attended the 2010 meeting of the Initiative. His subsequent report to the ILC identified four key elements that a new convention should have: a definition adopting Article 7 of the ICC Statute; an obligation to criminalise crimes against humanity with national legislation; robust inter-state cooperation procedures; and a clear obligation to prosecute or extradite offenders.²⁷ The report also emphasised how a new treaty would complement the ICC Statute.²⁸ In 2013, three years after the publication of the final draft of the Initiative, the International Law Commission included on its agenda the topic of crimes against humanity.²⁹

²³ Statute of the International Law Commission:

<http://legal.un.org/docs/?path=../ilc/texts/instruments/english/statute/statute.pdf&lang=EF>

²⁴ Ibid.

²⁵ <https://www.un.org/press/en/2018/l3281.doc.htm>

²⁶ Ibid

²⁷ Report of the International Law Commission, Sixty-fifth session (6 May to 7 June and 8 July - 9 August 2013), UN Doc. A/68/10, Annex B, at 142.

²⁸ Ibid., at 142/143.

²⁹ See: http://legal.un.org/ilc/guide/7_7.shtml

Based on a report from Professor Murphy, the topic was placed on the long-term work program.

A further meeting of experts, organised by the Initiative, was held in Geneva in May 2014. Participants included members of the ILC.³⁰ In July 2014, the ILC voted to move the topic of a new treaty on crimes against humanity to its active agenda and appointed Professor Murphy as Special Rapporteur.³¹ Professor Murphy has submitted three reports to the ILC. In the middle of 2017, a draft convention was agreed by the ILC, and transmitted through the Secretary-General of the United Nations to Member States and international organisations for comments and observations. Responses were requested to be submitted to the ILC by 31 December 2018. After considering changes to the draft convention a final version will be agreed by the ILC and transmitted to the General Assembly of the United Nations with a recommendation as to further steps. They are likely to be either that the Assembly itself should agree on a convention or that it should call an international conference of states to consider a convention. It is anticipated that this will happen during the course of the current year.³²

In a Foreword to the recent special edition of the Journal on International Criminal Justice³³, Professor Murphy wrote as follows:

Important questions may be asked at this stage, such as: is such a convention truly needed? If so, are there provisions within the draft articles that

³⁰ See: L.N. Sadat and D.J. Pivnichny, Fulfilling the Dictates of Public Conscience: Moving Forward with a Convention on Crimes Against Humanity, Whitney R. Harris World Law Institute, 17 July 2014, available online at <https://law.wustl.edu/harris/documents/Final-CAHGenevaReport-071714.pdf>

³¹ ILC, 66th Session, Provisional summary record of the 3227th meeting, UN Doc. A/CN.4/SR.3227, 18 July 2014, available online at http://legal.un.org/docs/?path¼../ilc/documentation/english/summary_records/acn4sr3227.pdf&lang¼EF

³² See: Foreword by Professor Sean Murphy, Footnote 1 above.

³³ See fn. 1 above.

should be deleted or modified? Are there issues not addressed that should be included? Ultimately, is such a convention politically feasible, and will states negotiate, adopt, ratify and implement it? And, most importantly, if such a convention is brought into force and widely ratified, will it help deter and punish, if not stop, egregious crimes that exist today across the globe?

Many of these and other complex and important issues are discussed in this excellent edition of the Journal. I commend it to anyone interested in reading more on the draft convention.

These many and complex issues cannot all be considered in any detail in today's short seminar. However, it should lay the foundation for international lawyers in South Africa to debate and write about these important issues.

In closing, I would emphasise that the Convention in no way covers the same ground as the Rome Statute. The latter is concerned only with the establishment of the ICC and its complementary jurisdiction - it is a court of last resort. On the other hand, the purpose of the Convention, in the words again of Professor Murphy, is "to build up national laws and national jurisdiction with respect to crimes against humanity, and to place states parties in a cooperative relationship on matters such as extradition and mutual legal assistance."³⁴

There is no reason to believe that States would not be keen to sign and ratify such a convention. It is no less important than the Genocide Convention. As at 15 February 2019, the status of the Genocide Convention was: 150 parties and 42 signatories.³⁵

³⁴ See Footnote 1 above.

³⁵ See: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=en

I would hope that South Africa would become an African leader in support of the Convention both internationally and on our Continent.