

EDITORIAL

Foreword

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I am very glad that the *African Journal of International Criminal Justice* decided to dedicate this issue to the International Law Commission's 2019 Articles on Prevention and Punishment of Crimes against Humanity. Given that governments are currently contemplating whether to use the articles as the basis for a convention on this topic, now is a propitious time for critical analysis of the articles and of the path forward.

The idea of a global convention focused on crimes against humanity has existed for some time, starting at least in the 1990s¹ and continuing into this century.² The central idea in such a convention 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. While the creation of international criminal courts and tribunals provides one path for punishing (and one hopes preventing) such crimes, a different path focuses on harnessing national institutions towards that end, so as to reinforce preventative means and to develop a worldwide net that provides no refuge for offenders. If successful, a convention on prevention and punishment of crimes against humanity would join sibling conventions addressing genocide³ and war crimes,⁴ and would stand in the tradition of other conventions addressing serious crimes, such as torture⁵ and enforced disappearance.⁶

In 2014, the Commission placed this topic on its program of work and appointed me as special rapporteur.⁷ In 2015, I submitted a first report to the

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1 See M.C. Bassiouni, 'Crimes Against Humanity: The Need for a Specialized Convention', *Columbia Journal of Transnational Law*, Vol. 31, 1994, pp. 457-494.

2 See L.N. Sadat (Ed.), *Forging a Convention for Crimes Against Humanity*, 2nd ed., Cambridge, Cambridge University Press, 2013; M. Bergsmo & S. Tianying (Eds.), *On the Proposed Crimes Against Humanity Convention*, Florence, Torkel Opsahl Academic EPublisher, 2014.

3 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

4 In particular, the four 1949 Geneva Conventions and their protocols, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>.

5 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85.

6 International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, 2716 UNTS 3.

7 Int'l Law Comm'n, *Report on the Work of Its Sixty-Sixth Session*, UN Doc. A/69/10 (2014), p. 265, Para. 266. The original syllabus for the topic may be found at Int'l Law Comm'n, *Report on the Work of Its Sixty-Fifth Session*, UN Doc. A/68/10 (2013), p. 142 (Annex B). Materials of the Commission relating to this topic are available at: https://legal.un.org/ilc/guide/7_7.shtml.

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Commission,⁸ which led to the Commission's adoption of four draft articles with commentary.⁹ In 2016, I submitted a second report,¹⁰ which led to the adoption of an additional six draft articles with commentary.¹¹ In 2017, I submitted a third report,¹² which resulted in adoption of a final five draft articles, a new paragraph for an existing draft article, a draft preamble and a draft annex. Further, my reports to the Commission analysed certain options that may be of use to states if negotiations towards a convention ultimately proceed, such as on the issue of reservations¹³ or on establishing a monitoring mechanism for the convention.¹⁴

Since these various pieces constituted a complete first draft of the project, the Commission in 2017 reviewed the entire text 'on first reading' and approved it.¹⁵ The UN Secretary-General then transmitted the draft articles to governments, international organizations, and others for comments and observations. In the General Assembly's Sixth (Legal) Committee that fall, 52 States (including presentations on behalf of sub-regional groups of countries) spoke out on this topic.¹⁶ Further, written comments were submitted by 40 States, seven international organizations or offices thereof, one treaty body, two UN working groups and a large number of UN special procedures mandate holders.¹⁷ Finally, written comments on the draft articles were also received from or on behalf of approximately 700 non-governmental organizations or individuals.¹⁸ This remarkable outpouring of interest by non-governmental organizations may be

- 8 S. Murphy (Special Rapporteur on Crimes against Humanity), *First Report on Crimes Against Humanity*, UN Doc. A/CN.4/680 (2015).
- 9 Int'l Law Comm'n, *Report on the Work of Its Sixty-Seventh Session*, UN Doc. A/70/10 (2015), at pp. 49-83.
- 10 S. Murphy (Special Rapporteur on Crimes against Humanity), *Second Report on Crimes Against Humanity*, UN Doc. A/CN.4/690 (2016).
- 11 Int'l Law Comm'n, *Report on the Work of Its Sixty-Eighth Session*, UN Doc. A/71/10 (2016), at pp. 241-280.
- 12 S. Murphy (Special Rapporteur on Crimes against Humanity), *Third Report on Crimes Against Humanity*, UN Doc. A/CN.4/704 (2017).
- 13 *See ibid.*, at pp. 140-150.
- 14 *See ibid.*, at pp. 100-113. *See also* Int'l Law Comm'n, *Crimes Against Humanity, Information on Existing Treaty-based Monitoring Mechanisms, which may be of Relevance to the Future Work of the International Law Commission, Memorandum by the Secretariat*, UN Doc. A/CN.4/698 (2016).
- 15 *See* Int'l Law Comm'n, *Report on the Work of Its Sixty-Ninth Session*, UN Doc. A/72/10 (2017), at pp. 9-127. For scholarly analysis of the draft articles as adopted at first reading, *see* 'Special Issue: Laying the Foundations for a Convention on Crimes against Humanity', *Journal of International Criminal Justice*, Vol. 16, No. 4, 2018, pp. 679-961.
- 16 For a general summary of the debate, *see Report of the International Law Commission on the Work of Its Sixty-Ninth Session (2017): Topical Summary of the Discussion held in the Sixth Committee of the General Assembly During Its Seventy-Second Session, Prepared by the Secretariat*, UN Doc. A/CN.4/713 (2018), at Paras. 90-108.
- 17 Int'l Law Comm'n, *Crimes against Humanity: Comments and Observations received from Governments, International Organizations and Others*, UN Doc. A/CN.4/726 (2019); Int'l Law Comm'n, *Crimes Against Humanity: Additional Comments and Observations received from Governments, International Organizations and Others*, UN Doc. A/CN.4/726/Add.1 (2019); Int'l Law Comm'n, *Crimes Against Humanity: Additional Comments and Observations received from Governments, International Organizations and Others*, UN Doc. A/CN.4/726/Add.2 (2019).
- 18 S. Murphy (Special Rapporteur on Crimes against Humanity), *Fourth Report on Crimes Against Humanity*, UN Doc. A/CN.4/725 (2019), Para. 7.

unprecedented in the work of the Commission and highlights the degree to which the project is of interest to civil society.

My fourth and final report to the Commission in early 2019 analysed these comments and suggested revisions to the draft articles based on the comments received.¹⁹ After further debate and discussion within the Commission, it adopted in August 2019 the final version of the Articles on Prevention and Punishment of Crimes against Humanity.²⁰ All told, the articles address: scope (Art. 1); definition of crimes against humanity (Art. 2); general obligations (Art. 3); obligation of prevention (Art. 4); *non-refoulement* (Art. 5); criminalization under national law (Art. 6); establishment of national jurisdiction (Art. 7); investigation (Art. 8); preliminary measures when an alleged offender is present (Art. 9); *aut dedere aut judicare* (Art. 10); fair treatment of the alleged offender (Art. 11); victims, witnesses and others (Art. 12); extradition (Art. 13); mutual legal assistance (Art. 14 and the annex); and settlement of disputes (Art. 15). While the black letter provisions of the articles themselves are central, the commentary provides detailed explanation as to the meaning of those rules and precedent for them in prior treaties addressing other crimes.

In addition to adopting the final version of the articles, the Commission decided to recommend the elaboration of a convention on the basis of the articles, by either the General Assembly itself or an *ad hoc* diplomatic conference.²¹ In the fall of 2019, governments within the Sixth Committee debated the articles and the recommendation.²² Thereafter, the General Assembly expressed its appreciation to the Commission for its work,²³ decided to continue examining the Commission's articles and recommendation, and added the topic to its agenda for its 75th session in 2020-2021.²⁴

As such, scholarly analysis of the Commission's articles is welcome and extremely timely, both as to whether governments should move forward with the negotiation of a convention and, if so, whether the articles could be improved. Thus, important questions arise, such as: is a convention on prevention and punishment of crimes against humanity truly needed? The contributors to this issue appear uniform in answering that question in the affirmative. Given that, are the Commission's articles a good basis for such a convention? Here, too, the contributors take an affirmative view, but then even more challenging questions arise. Are there provisions within the Commission's articles that should be deleted or modi-

19 *Ibid.* An addendum to the report (A/CN.4/725/Add.1) provides a table mapping the Commission's draft articles as completed at first reading onto existing treaty provisions for other crimes.

20 The final version may be found in the Commission's 2019 Annual Report. See Int'l Law Comm'n, *Report on the Work of Its Seventy-first Session*, UN Doc. A/74/10 (2019). For just the text of the articles, see *ibid.*, at pp. 11-21. For the text of the articles with commentary, see *ibid.*, at pp. 22-140.

21 *Ibid.*, at Para. 42.

22 For a general summary of the debate, see *Report of the International Law Commission on the Work of Its Seventy-First Session (2019): Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its Seventy-Fourth session, Prepared by the Secretariat*, UN Doc. A/CN.4/734 (2020), at Paras. 129-42.

23 GA Res. 74/186, 18 December 2019, Para. 2(a).

24 GA Res. 74/187, 18 December 2019, Para. 3.

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fied? Are there issues not addressed that should be included? Would such a convention complement or hinder the International Criminal Court? 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, the egregious crimes that exist today across the globe? The knowledgeable experts convened for this special issue of the *African Journal of International Criminal Justice*, who come from an extraordinary range of backgrounds, regions and expertise, ably tackle these and other questions.