
Toward a Convention on Crimes against Humanity?

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Toward a Convention on Crimes against Humanity?

Sean Murphy

Conférence organisée conjointement par le CENTRE DE DROIT INTERNATIONAL (CEDIN) et le DIPLÔME UNIVERSITAIRE "ORGANISATIONS ET JURIDICTIONS PÉNALES INTERNATIONALES" (DU OJPI) le 11 décembre 2014 à l'Université Paris Ouest-Nanterre la Défense, Propos transcrits par Rebecca MIGNOT-MAHDAVI, doctorante au CREDOF, ancienne étudiante du Maser II Droits de de l'homme et du DU OJPI

- 1 My topic today concerns whether it is time for States to adopt a convention on the prevention and punishment of crimes against humanity. As many of you know, the definition of crimes against humanity contained in Article 7 of the Rome Statute establishing the International Criminal Court defines "crimes against humanity" as certain "acts when committed as part of a widespread or systematic attack directed against the civilian population, with knowledge of the attack". The types of acts that qualify include murder, persecution, and torture. There is no requirement of a connexion to an armed conflict, nor any requirement of a conflict between two States; indeed, such crimes can be occurring solely within a single State.
- 2 We have a 1948 convention focused on genocide. We have 1949 conventions focused on war crimes. But we still don't have a convention dedicated to the prevention of, and inter-State cooperation with respect to, crimes against humanity. In my view, it is time for the drafting and adoption of such a convention.
- 3 One problem in not having such a convention concerns the lack of national laws worldwide on crimes against humanity. My University, George Washington University, has a human rights clinic which I asked to conduct a study about three years ago to identify the national laws of every country in the world on crimes against humanity. It was a big and difficult project, because you have to find the laws, translate the laws, and carefully read the laws, and sometimes it's not just one law but many different laws within the same national system that must be studied. Due to resource constraints, the clinic only managed to analyse about 83 countries, focusing on the ones that prior studies had asserted as possessing laws on crimes against humanity. It found that of

those 83 countries, only 34 actually had a national law on crimes against humanity. In other words, many countries that are reported as having such a law do not actually have one (for instance, the law often deals with war crimes, not crimes against humanity). So, of the countries analysed, only about 40% of them actually had a law on crimes against humanity. Even if you take just the Rome Statute party countries within the sample, which was 58 of those 83 countries, we still found that only 28 of those 58 countries had a national law on crimes against humanity.

- 4 We also looked at exactly what the national law on crimes against humanity said to see if it mirrored the Rome Statute definition of crimes against humanity, which is a very thorough, robust, and detailed definition of crimes against humanity. In essence, we asked whether the national law was repeating the Rome Statute or is it providing for less than the Rome Statute? The clinic found that, of the 34 countries that had a law on crimes against humanity, only 10 of them repeated Article 7 of the Rome Statute. In other words, most of them had a statute which was not as thorough as, or significantly differed from, the Rome Statute definition. So, only 10 out of the 83 countries studied had a national statute that replicated the Rome Statute definition.
- 5 Finally, the clinic asked in what circumstances would the State exercise jurisdiction over persons when applying the national law? As a general matter, many countries only exercise criminal jurisdiction over crimes that occur in the country's territory (territorial jurisdiction), and some countries also exercise jurisdiction over their nationals if they commit crimes abroad (nationality jurisdiction). But often that's all they do, and we were interested in determining how many countries also exercise jurisdiction in situations where the crimes against humanity occur outside its territory, by a non-national, but then the offender comes to the country's territory. We wanted to find out how many countries had such jurisdiction, and the clinic determined that out of the 83 countries, only 21 allow for such jurisdiction. Interestingly, even the State parties to the Rome Statute tend to be focused on crimes occurring in their own territory or by their own nationals, because that matches up with the Rome Statute, whereby a State triggers potential jurisdiction before the ICC when joining the Rome Statute only with respect to crimes occurring in its territory or by its nationals.
- 6 In July 2014, the UN International Law Commission (ILC), which is charged with pursuing projects that seek to codify and progressively develop international law, decided to move forward with a project on crimes against humanity, and to appoint me as special rapporteur for the project. The basic idea is to draft a convention on crimes against humanity that the Commission will present to the UN General Assembly in about four or five years, in the hope that States will decide to move forward with the adoption and ratification of such a convention.
- 7 The exact contours of the project remain to be developed by the Commission, but let me suggest some possibilities. Imagine that we write a treaty that starts out with, as Article 1, a provision that says something like "State Parties confirm that crimes against humanity, whether committed in time of peace or in time of war, are crimes under international law which they undertake to prevent and punish," and further says that "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent crimes against humanity in any territory under its jurisdiction." That could be a useful codification of each State's obligation to prevent crimes against humanity; just as the 1948 Genocide Convention contains such an obligation to prevent genocide. Preventative steps might involve training programs for the military and for

the police; it might involve having some sort of early warning system to help alert a State if something is about to happen. If you've read the 2007 *Bosnia v. Serbia Genocide Case*, much of the International Court of Justice (ICJ)'s ultimate conclusions about what Serbia should have done relates to prevention. Serbia was aware of the possibility of a genocide occurring at Srebrenica, and therefore it should have taken steps to try to prevent the genocide from occurring.

- 8 An Article 2 of the new convention might then contain a definition of crimes against humanity that replicates the definition contained in Article 7 of the Rome Statute. Perhaps Article 3 of the new convention would provide that every State party must adopt a national law that criminalises crimes against humanity. Article 4 of the treaty could provide that every State party must exercise jurisdiction over persons who commit such crimes, certainly if they did it in your territory or if it was your national, but also if it occurs outside your territory and is not your national, but the offender comes to your territory. Article 5 of the treaty could be an "*aut dedere, aut judicare*" obligation, meaning an "extradite or prosecute" obligation. In other words, if one country thinks another country has the offender in its territory, the first country could approach that other country and say "either prosecute that person or extradite them to my country to be prosecuted". Other articles could talk about other inter-State obligations: mutual legal assistance, sharing of evidence, and other ways in which States can cooperate in investigation and prosecuting someone for crimes against humanity. And then there might be other articles as well, such as on dispute resolution. The Genocide Convention says that if there's a dispute between one State and another State regarding the interpretation or application of the treaty, that dispute can be taken to the International Court of Justice. So a convention on crimes against humanity could also have a dispute resolution provision of that kind.
- 9 Now, I often get the question: well, since we already have the Rome Statute creating the International Criminal Court (ICC), do we really need a new convention on crimes against humanity? For me, the answer is "yes," because the Rome Statute is focused on creating the International Criminal Court based in The Hague and on the "vertical" relationship between that Court and States parties. By contrast, the convention I'm talking about is focused on building up the capacity of national legal systems and on the "horizontal" relationship among States on matters such as investigation, prosecution, and extradition. So it's a very different type of treaty.
- 10 Another way to think about the relationship of this new convention to the International Criminal Court concerns the idea of complementarity. The idea of complementarity is that, "yes, we will prosecute major offenders in The Hague but we're not planning on prosecuting everybody in The Hague; most prosecutions need to be undertaken at the national level". There's too many offenders out there, too many conflicts, too many problems in the world and only so much capacity for the ICC. So instead, the Rome Statute is built on the idea of "complementing" the pursuit of prosecutions in national systems. In the first instance, we want national jurisdictions to be investigating and prosecuting these crimes, and it's only when they are unable or unwilling to do so that the matter can end up going at The Hague. The convention I'm talking about is trying to develop that national capacity: it's trying to get States to adopt national laws; it's trying to get States to exercise national jurisdiction; and it's trying to help States to cooperate with each other in prosecutions of offenders. So the basic idea is that this new convention would work in harmony with the Rome Statute,

and would help support the overall mission of the International Criminal Court, by focusing on the national law side of things, not on the Court itself.

- 11 It's certainly true that, whatever this new convention does, it needs to be fully consistent with the Rome Statute. If this new convention conflicts with the Rome Statute, that would be a huge problem. For example, occasionally you see people criticising Article 7 of the Rome Statute, saying that the definition could have been written better. But, in my view, it would be a very bad idea for ILC to come up with a different definition, given that there are already 122 States parties to the Rome Statute, who have all agreed on that definition. Moreover, the idea is to help promote national legal systems in aligning with the jurisdiction of the International Criminal Court, so you want the same definition operating in both venues.
- 12 Another example would be that, if there's an obligation under the Rome Statute to surrender someone to The Hague, and if there's an obligation in the new convention to extradite someone to another country, the convention needs to be written so that the obligation arising under the Rome Statute takes precedent. So the new convention needs to be written in a way that supports and does not conflict with the Rome Statute, and I think that's how the ILC will approach the matter.
- 13 Let me briefly explain the process before the International Law Commission, and then I'll stop talking and open it up to comments or questions. First, I proposed this idea of a new convention to the Commission in 2012. We talked about it all summer in 2012, and then we came back in the summer of 2013 and talked about it some more. At that point, there was sufficient consensus within the Commission to put the topic on the long term work program, which signalled to governments that we were thinking seriously about proceeding with the topic. In the fall of 2013, in New York, governments reacted to the possibility of this new convention and, for the most part, the reactions were positive. There were some countries that were neutral; there were some countries that said "well we have the Rome Statute, why do we need this?"; and there were some countries that would favour a new convention but on all the core crimes, not just on crimes against humanity, since there are aspects of the earlier conventions that might be updated.
- 14 So there were some differences of views, but most governments were comfortable with the idea of having the ILC begin drafting a convention on crimes against humanity. Based on that, in July 2014, the Commission moved this topic to the active agenda, and appointed me as special rapporteur. I'm now tasked with writing annual reports (a first report, a second report, a third report, etc.), with proposing in those reports the articles that will ultimately form the convention, and with helping to develop the Commission's commentary that will go along with the articles. You've probably seen previous International Law Commission projects that result in draft articles and commentary: we will now do that for crimes against humanity.
- 15 Consequently, if all goes well, in about four or five years, the ILC will produce a complete set of draft articles that will be a draft convention on crimes against humanity. We will then send those draft articles with commentary to the UN General Assembly in New York. We will maybe recommend that it be taken up by States as a convention, perhaps through inter-governmental negotiating conference, and we'll see what the General Assembly decides to do. They might say "great job, let's do it, let's convene a negotiating session and then proceed to adoption and ratification", or they might say "thank you but no thank you; interesting idea but we have other things we

want to do”. Who knows? The politics are what they are and there are reasons why now may be or may not be the perfect time to proceed with a treaty of this type.

- 16 But so far the reactions of governments have been largely favourable. And I like to think that this may be the next logical step in the progressive development of the international criminal law. We have adopted the Rome Statute, we’ve adopted the Kampala amendments to the Rome Statute, we’ve adopted numerous treaties criminalizing acts such as torture and enforced disappearance, and maybe in four or five years it will be time for a new treaty instrument that will fill a further gap in international criminal law. So, for the next four or five years, us 34 members of the International Law Commission will be doing our work, we will be reporting to governments what we’re doing, and governments will be reacting to it. In my role as special rapporteur, I’ll be talking to as many governments and groups as I can about the project, so as to hear any concerns that they have.
- 17 I think I’m going to leave it at that, and open it up to any questions that you might have about the project.

QUESTION 1: It’s a bit more of a specific question, so sorry for those of you who may think that it’s not interesting. It’s about Article 7, para. 1(c) of the Rome Statute that basically talks about one of the crimes against humanity as being “enslavement”. I just wanted to know, in your effort to write the commentary on enslavement, what would be your relationship with all the actors of human trafficking and could you give us maybe an example of how crimes against humanity towards slavery could be applied?

Murphy: Right now, I don’t know exactly how I will interact with groups concerned with ending human trafficking, though I welcome such engagement. But in terms of how much the Commission should try to explain the meaning of the definition of crimes against humanity as it relates to “enslavement,” I would say the following.

On the one hand, I think we should say something generally about what this definition in Article 7 means, as well as something about the existing case law that has developed surrounding the definition, not just in the ICC but in the prior tribunals as well. There are important questions about what is a “systematic” attack, what is a “widespread” attack, and what is the “policy” that needs to exist by a State or non-State actor: all of these issues, I think we should address at least in general terms.

On the other hand, there are some controversies that exist on some of these issues and I don’t think it’s really our role as the ILC to resolve all of these controversies. I think that the law has a life of its own and should be allowed to evolve in different ways, particularly through the case law of international and national courts, and the ICC in particular. And I also worry about freezing the law if the ILC prematurely makes a very definitive statement about something, since locking down the law in a particular way may not be helpful. So, I would expect that on something like your particular provision on enslavement, I’ll be looking to see if I can find any cases that directly speak to it, and I’ll be referring to those cases in my reports if such cases exist, but I won’t be trying to explain a meaning that hasn’t yet been dealt with by courts or tribunals. I may refer to some scholarly work because I think it’s a good authority to look at, but the goal is not to be creative, not to be anticipating things that have not yet happened, and instead basically to take the definition of crimes against humanity as it is and as it may be refined through judicial interpretation over time.

QUESTION 2: Were you personally mandated by the American government to pursue the creation of such a treaty, or was it a common decision made by different members of the Commission?

Murphy: I am the American national on the International Law Commission, and I was nominated by the US government for election to the ILC. However, I'm an independent expert and not an employee of the US government. I get paid a salary for being a professor, but that's from my University not from the US government. Further, the US government pays none of my expenses. Anywhere I go in my role as an ILC Member, either the United Nations or I myself pay my way. I do talk with persons in the US and other governments about issues that are before the Commission, because I think it important that all governments know what the Commission is doing. Further, my colleagues on the Commission sometimes ask me "will the US government likely support something or not?", so I do try to figure out the US government's reactions to our work as best I can.

So, I certainly did not ask the American government whether it was okay to put this topic forward and the decision to move forward with it was a decision of the ILC not of any government. And interestingly, the US government's reaction so far has fallen into the neutral camp. They have not said, "great idea, let's do it", but they also haven't said "terrible idea, stop", rather my sense is that they've been in the middle on it. There are certainly some parts of the US government who, at the question "do you favour Murphy's topic", would probably say "no", while there are other parts of the government that would probably be supportive.

For example, I hope that the US Department of Homeland Security will favour this project: that department's responsibility includes dealing with foreigners who turn up in the United States and who are "bad apples", having committed crimes against humanity abroad and then fleeing quietly to the United States. That leaves the Department of Homeland Security saying "this person did really bad acts and it would be great to prosecute them in the United States". But the United States has no crimes against humanity statute, and so the most the US government can do in some cases is to deport the person if he or she has violated US immigration law. A new convention that would call upon all States to adopt statutes on crimes against humanity and then to cooperate on matters such as investigation and prosecution, so that might be very attractive to the US government for dealing with such persons.

It might be hard for the US initially to ratify this new convention, because currently the US has a hard time ratifying many treaties given the super-majority requirement in the US Senate. It took the United States about 40 years to ratify the Genocide Convention, so it might take a while for the United States to join this treaty as well. On the other hand, even though the United States has not yet joined the Rome Statute, it might join this treaty. The US objections to the Rome Statute have a lot to do with the possibility of Americans being prosecuted before an international court in The Hague, and those concerns aren't necessarily the same when it comes to a new convention on crimes against humanity. The US has ratified the 1949 Geneva Conventions, the 1948 Genocide Convention, the 1984 Torture Convention, and various other treaties even though such treaties acknowledge the possibility (which already exists) of Americans being prosecuted in foreign countries.

QUESTION 3: I would like to know if, working on this treaty project, you want to allow a State to make reservations to some provisions of the treaty and if so, which ones. Because the

aim of your treaty in promoting the adoption of national laws makes the question of reservations to this treaty, in particular, very important.

Murphy: When I think about reservations to treaties, I often talk about it in terms of whether we want the treaty to have “wide” participation, in which case it is good to allow reservations, or whether we want a “deep” treaty, meaning a treaty that has a lot of provisions that cannot be modified or rejected, in which case we don’t want to allow reservations, because every time there’s a reservation it takes away a piece of the treaty in respect of the reserving State. In other words, it’s a trade-off. If there’s a “no reservation” clause in the treaty there’s a risk that some number of States won’t join, but it has the advantage of keeping the integrity of the treaty strong. If we allow reservations, parts of the treaty might be weakened, but more States may come into the regime. Some treaties of this kind, such as the Genocide Convention or the Torture Convention, do allow reservations. .

It is too early the process to be definitive on this point, but there may be some parts of the treaty where no reservations should be allowed. That might include the “extradite or prosecuted” obligation. But maybe some other things, such as exposure to inter-State dispute resolution at the International Court of justice, are not critical parts of the treaty and therefore should be open for States to make reservations. Much will depend on exactly what these treaty provisions say and ultimately what my colleagues on the ILC think is best..

The other thing I would say about it is that I would like to talk more with national authorities responsible for enactment of criminal laws because we do have, of course, different criminal systems worldwide, operating under very different traditions – civil law tradition, common law tradition, Asian traditions, Middle Eastern traditions, African traditions, Latin American traditions, and so on – and there are different ways the criminal law is nationalised in those systems. I want to be sure that, if we use the Rome Statute Article 7 definition, doing so doesn’t create some obvious problem of incorporation into national laws. As a general matter, we want all States using the same definition, but if there are some problematic issues relating to incorporation into national law it would be good to know what those issues are and to try to address them as best we can.

QUESTION 4: Do you have an idea about the ways to prevent, not just punish, crimes against humanity, particularly when States can’t do anything about it?

Murphy: How would this obligation to prevent work exactly? Well the good thing on this is that we have obligations to prevent in several existing treaties (such as the Convention on Genocide, the Torture Convention, etc.) and we have some courts that have interpreted what that obligation means (such as the International Court of Justice in the context of Bosnia-Serbia, the Inter-American Court of Human Rights, etc.). We also have the different human rights committees (the Torture Convention Committee, the International Covenant on Civil and Political Rights Human Rights Committee, etc.). When one puts together all of this information I think that one finds two different components to this obligation to prevent.

One component is that a State, in conducting its own activities, has a direct obligation to prevent crimes against humanity, meaning that if a State is going to engage in military activity, it needs to be training those people not to commit such crimes, and not to engage in any attack against the civilian population. And that’s got to be an order that starts at the top and goes all the way down to the bottom. This of course is

something that many countries already do. Crimes against humanity are the aggravated form of acts that are proscribed even if committed only once, and so many countries are already training their forces not to torture, or not to exterminate and murder people.

A different component of the obligation to prevent is that, even in the situation when it's not your own government doing the bad conduct, if you have an ability to influence non-State actors who are commit the bad act, then the obligation to prevent requires you to act. That's the *Bosnia v. Serbia* case: the Serbian military itself did not commit the actions in Srebrenica and the Bosnian-Serb army was not an organ of the Serbian government. But the Bosnian-Serb military could have been influenced by the government of Serbia not to commit the actions at issue and so the Court found that the failure of the Serbian government to attempt to influence the non-State actor was a violation of Serbia's obligation to prevent.

QUESTION 5: Many countries are reluctant on the issue of universal jurisdiction: why such a discrepancy (you indicated that only 21 countries exercise universal jurisdiction over crimes against humanity)? Is the International Law Commission trying to think about whether instead of multiplying the number of conventions, which might become quite confusing, it might be better to just take a set of measures in order to eradicate or decrease such crimes by diplomatic tools or creating a legal structure, instead of trying to overcome such a discrepancy in what States are willing to do?

Murphy: I think the objective we have is the same: when we look out at the world, we first of all see that these crimes are being committed, and then we see that many countries have not adopted national laws, and finally we see that when they have adopted such laws, they can be imperfect and we want to find a way to build up national capacity. That's the objective. How to do that? I could imagine someone arguing that doing a new treaty is not what we have to do. What we have to do is to go around to every country diplomatically and really get them to focus on this problem, so as to encourage them to adopt a national law or to pursue prosecutions or to cooperate with other States. That's possible. But even then you'd still have gaps, such as when it comes to the "extradite or prosecute" obligation, many countries don't extradite in the absence of a treaty. But my question would be, if we're traveling around the world trying to get countries to do all of these things, why not do it by means of a new convention? I mean, that's the whole point in pursuing treaties: that we agree upon what it is we want governments to do, we put it in the treaty instrument, we get them to ratify and implement the treaty, and we then monitor that implementation as best we can through States and non-State actors.

It's really a question of what's the best mechanism for making this happen and I think it is to adopt and implement a new treaty instrument. The Torture Convention, for example, has been very successful in getting countries to adopt national laws on torture, in allowing for extradition or prosecution, and in promoting mutual legal assistance. And I want that same thing in the context of crimes against humanity. The end goal is not the treaty, but to get States to do more.

Right now, the ILC is thinking that States are most likely to do more through a new treaty regime and we're hoping that governments and non-government actors agree, but time will tell.

QUESTION 6: Is crimes against humanity as formulated in the Rome Statute customary international law?

Murphy: The formulation of the definition of “crimes against humanity” in the Rome Statute differs from the formulation in the Yugoslav or Rwandan Statutes and from other statutes of international courts or tribunals. Indeed, the definition has changed over time. I would be prepared to defend the proposition that Article 7 is strong evidence as to customary international law today, given that 122 countries have ratified the Rome Statute, and in doing so seem to have agreed that this is the proper formulation for crimes against humanity under international law. Even countries like the United States that have not joined the Rome Statute do not seem to say that “you’ve defined crimes against humanity incorrectly”; at least that’s not the principal argument that they make as to why they have not joined.

The problem is that even if Article 7 reflects current customary international law, there are many countries that will not prosecute or extradite someone solely on the basis of customary international law. Rather, they will insist upon having a national statute in order to prosecute someone. Part of the idea in codifying the crime in national law is that, whenever someone commits the crime, that person was on notice that this was a criminal act. Unless it is written down somewhere, you may not be on notice that it’s a crime and therefore you should not be convicted or extradited for that crime.

Will we, in the ILC, say that Article 7 of the Rome Statute is customary international law? We don’t really need to do so for the purpose of our project, since the idea is to draft a treaty, but maybe some my colleagues will think we should say something like that.

Thank you very much for coming.

RÉSUMÉS

Selon Sean Murphy, professeur à la George Washington University Law School et rapporteur spécial de la Commission du droit international des Nations-Unies, « une convention mondiale sur les crimes contre l’humanité semble être une pièce clé manquante dans le cadre actuel du droit international humanitaire, du droit pénal international et du droit des droits de l’homme ». Le Professeur Murphy a abordé les enjeux relatifs au crime contre l’humanité et a évoqué son travail au sein de la CDI pour l’élaboration d’une Convention sur les crimes contre l’humanité, à l’occasion d’une conférence, organisée le 11 décembre 2014 à l’Université de Nanterre, par le Diplôme Universitaire « Organisations et juridictions pénales internationales » (DU OJPI) et le Centre de droit international (CEDIN).

According to Sean Murphy, Professor of Law at the George Washington University and Member of the United Nations International Law Commission (ICL), “a global convention on crimes against humanity appears to be a key missing piece in the current framework of international humanitarian law, international criminal law, and human rights law”. Professor Murphy addressed issues related to the crime against humanity and talked about his work within the ICL

on a Convention on crimes against humanity, during a conference organized at the University of Nanterre, December 11, 2014, by the *Diplôme Universitaire « Organisations et juridictions pénales internationales »* (DU OJPI) and the *Centre de droit international* (CEDIN).

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SEAN MURPHY

Professeur à la George Washington University Law School, Rapporteur spécial de la Commission du droit international des Nations Unies sur le sujet : Les crimes contre l'humanité