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CRIMES AGAINST HUMANITY: THE CASE FOR A SPECIALIZED CONVENTION

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In the past 100 years, more people have been killed in various types of conflicts and regime victimization than at any other time in history.[1] Most of the victims are likely to fall within the meaning of crimes against humanity (CAH). Nevertheless, the international community has so far failed to adopt a specialized convention on CAH.[2]

During World War I (WWI) (1914–18), almost twenty million people were killed.[3] The casualties were mostly combatants. Civilian deaths were largely an unintended consequence of war, though certainly there were war crimes when intentionally committed by combatants. During that conflict, one situation stood out: the estimated 200,000–800,000 civilian Armenians killed in 1915.[4] In 1919, the Inter-Allied Commission (save for the U.S. and Japan) called for the prosecution of Turkish officials

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1. *See* Christopher Mullins, *Conflict Victimization and Post-Conflict Justice 1945–2008*, *in* 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 67, 67 (M. Cherif Bassiouni ed., 2010).

2. *See generally* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY PRACTICE (Cambridge University Press, forthcoming 2011); LEILA NADYA SADAT, FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (2010).

3. *See* JOHN KEEGAN, THE FIRST WORLD WAR 422–23 (2000).

4. *See generally* JAMES BRYCE & ARNOLD TOYNBEE, THE TREATMENT OF ARMENIANS IN THE OTTOMAN EMPIRE, 1915–1916: DOCUMENTS PRESENTED TO VISCOUNT GREY OF FALLODEN BY VISCOUNT BRYCE (2000). Turkey argues that these numbers are inflated and that the violence against Armenians was popular and spontaneous because the Armenians collaborated with the Russians during a war in which the latter were the enemies of Turkey. The ultimate truth in these competing allegations has never been established, but the number of Armenian casualties and the support of Turkish officials for what happened to them clearly reveals the Armenians to have been helpless victims.

responsible.[5] That call was advanced on the basis of the 1907 Hague Convention's preamble referring to "the laws of humanity."[6] However, no prosecutions ensued. Instead, Turkey received immunity in a secret annex of the Treaty of Lausanne.[7]

World War II (WWII) brought about an estimated sixty million casualties—mostly civilians.[8] This included six million Jews and twenty million Slavs who were killed in a conflict that was characterized as "total war" (meaning that civilians and civilian property were not protected).[9] Unlike the aftermath of WWI, in which "crimes against the laws of humanity" were not prosecuted,[10] the victorious allies of WWII established the International Military Tribunal at Nuremberg (IMT), and the International Military Tribunal for the Far East (IMTFE),[11] which respectively contained "crimes against humanity" in Articles 6(c) and 5(c) of their Charter and Statute. At Nuremberg, eighteen defendants out of twenty-two were indicted for CAH (only two of whom were charged only with CAH),[12] and at Tokyo, twenty-eight persons were indicted, but none

5. COMMISSION ON THE RESPONSIBILITIES OF THE AUTHORS OF THE WAR AND ON THE ENFORCEMENT OF PENALTIES, REPORT PRESENTED TO THE PRELIMINARY PEACE CONFERENCE, *in* PAMPHLET NO. 32 (Carnegie Endowment for International Peace, Division of International Law ed., 1919), *reprinted in* 14 AM. J. INT'L L. 95 (1920).

6. Convention Respecting the Laws and Customs of War on Land, pmbl., Oct. 18, 1907, 36 Stat. 2277, 15 U.N.T.S. 9, *reprinted in* 2 AM. J. INT'L L. 90 (Supp. 1908).

7. The effort to conduct post-WWI prosecutions was thwarted by political considerations, and Turkish officials were ultimately given amnesty in the 1922 Treaty of Lausanne. *See* Treaty of Peace Between the Allied Powers and Turkey (Treaty of Lausanne), July 24, 1923, 28 L.N.T.S. 11, *reprinted in* 18 AM. J. INT'L L. 1 (Supp. 1924).

8. GERHARD L. WEINBERG, A WORLD AT ARMS: A GLOBAL HISTORY OF WORLD WAR II 894 (2d ed. 2005). *See also* MICHAEL BESS, CHOICES UNDER FIRE: MORAL DIMENSIONS OF WORLD WAR II 88–110 (2006) (discussing the increased targeting of civilian populations during WWII).

9. WEINBERG, *supra* note 8, at 894.

10. *See* COMMISSION REPORT, *supra* note 5.

11. *See* International Military Tribunals for the Far East Special Proclamation: Establishment of an International Military Tribunal for the Far East, at 3, Jan. 19, 1946, T.I.A.S. No. 1589, *reprinted in* 4 BEVANS 20, 20–21 (1968); Charter for the International Military Tribunal for the Far East, art. 1, Apr. 26, 1946, T.I.A.S. No. 1589, *reprinted in* 4 BEVANS 20, 27.

12. The IMT prosecuted twenty-two defendants: Julius Streicher, Hermann Wilhelm Goering, Martin Bormann, Rudolf Hess, Alfred Rosenberg, Joachim von Ribbentrop, Constantin von Neurath, Franz von Papen, Hjalmar Schacht, Walter Emanuel Funk, Wilhelm Frick, Baldur von Shirach, Ernst Kaltenbrunner, Wilhelm Keitel, Alfred Jodl, Erich Raeder, Karl Doenitz, Hans Frank, Artur Seyss-Inquart, Albert Speer, Fritz Sauckel, and Hans Fritzsche. Of the eighteen defendants indicted for CAH, only Hess and Fritzsche were found not guilty, and only Streicher and Schirach were charged and convicted for CAH but not war crimes. *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY PRACTICE (Cambridge University Press, forthcoming 2011) (manuscript ch. 3, on file with author); EUGENE DAVIDSON, THE TRIAL OF THE GERMANS: AN ACCOUNT OF THE TWENTY-TWO DEFENDANTS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG 24–27 (1966); JOHN APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES (2d ed. 1971).

for only CAH.[13] Most were prosecuted for "crimes against peace" and "war crimes".[14] Other prosecutions took place in Germany in the four Allies' zones of occupation pursuant to Control Council Law No. 10 (CCL 10).[15] Of the twelve cases prosecuted in the American zone at Nuremberg, 114 defendants were charged with CAH; eighty were convicted.[16] The prosecutions of Category B offenders in the Yokohama trials in Japan were mostly for war crimes.[17] However, no member of the Allied victorious powers was prosecuted for either war crimes or crimes against humanity in either the European or Far East theaters.[18] After WWII, national prosecutions for CAH took place in Argentina, Canada, Estonia, France, Germany, Hungary, Israel, Indonesia, Iraq, Italy, Latvia, and Peru.[19] In addition, there have been a number of national prosecutions in

13. *See* APPLEMAN, *supra* note 12**.**

14. The register of defendants included four prime ministers, four foreign ministers, five war ministers, two naval ministers, a lord keeper of the privy seal, and four ambassadors: Matsuoka Yosuke, Baron Kōki Hirota, General Seishirō Itagaki, General Sadao Araki, Field Marshall Shunroku Hata, Baron Kiichirō Hiranuma, Naoki Hoshiro, Marquis Kōichi Kido, General Kuniaki Koiso, Admiral Takasumi Oka, General Hiroshi Ōshima, General Kenryō Satō, Admiral Shigetarō Shimada, Toshio Shiratori, General Teiichi Suzuki, General Yoshijirō Umezu, Shigenori Tōgō, Mamoru Shigemitsu, Okinori Kaya, Nagano Osami, General Kenji Doihara, General Heitarō Kimura, General Iwane Matsui, Akira Muto, Hideki Tōjō, Kingorō Hashimoto, Jirō Minami, and Shūmei Ōkawa. NEIL BOISTER & ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL 54–60 (2008); ARNOLD C. BRACKMAN, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS (1987); PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945–1951 (1979); APPLEMAN, *supra* note 12.

15. Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Dec. 20, 1945, OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY, No. 3, at 50–55 (1946). *See* Remigiusz Bierzanek, *The Prosecution of War Crimes, in* 1A TREATISE ON INTERNATIONAL CRIMINAL LAW 559, 578 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

16. *See generally* TRIALS OF WAR CRIMINALS BEFORE THE NÜRNBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10 (Washington, D.C.: Government Printing Office, 1949–53, 15 vols.); JOHN APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES (1971).

17. *See* BRACKMAN, *supra* note 14, at 52–53. *See also* PICCIGALLO, *supra* note 14; *Reviews of the Yokohama Class B and Class C War Crimes Trials by the Eighth Army Judge Advocate 1946–69* (United States Army, Office of the Judge Advocate General, 1981); R. John Pritchard, *The Gift of Clemency Following British War Crimes Trials in the Far East, 1946–1948*, 7 CRIM. L.F. 15, 18 (1996).

18. Widespread aerial bombing of the city of Dresden, Germany in 1945 resulted in 35,000 civilian deaths. The bombings of Hiroshima and Nagasaki, Japan in August of 1945 resulted in an estimated toll of 200,000 civilian deaths.

19. Between 1947 and 1990 the Federal Republic of Germany prosecuted some 60,000 persons for war crimes and other WWII-era crimes. These were national prosecutions that followed the Allies' subsequent proceedings. Germany has prosecuted smaller cases, but it has not shown a particular interest in prosecuting for atonement. Probably the most important of its cases, the *Auschwitz* case, did not take place until 1963 in Frankfurt. *Case against R. Melka et al.* (Auschwitz concentration camp), Bundesgerichtshof in Justiz und NS-Verbrechen, Vol. XX, at 838 *et seq*. The German record of prosecuting Nazi perpetrators is riddled with amnesty arrangements, squabbles over the application of

Eastern and Central European countries that were occupied by the USSR, and in Western European countries for collaboration with the Nazi German occupiers.[20] While some of these European countries' prosecutions may have involved CAH as defined in CCL 10,[21] they were essentially against Nazi collaborators and political opponents. These trials were in large part politically motivated.

In 1994, the United Nations established the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the statutes of which included the crime of CAH in their Articles 3 and 5, respectively.[22] As of December 2010, these two tribunals have prosecuted cumulatively 240 persons on charges including genocide, war crimes, and CAH. The vast majority of those who have been prosecuted were for CAH.[23] At the ICTY, the indictments of 109 individuals included charges for CAH, and sixty of those individuals were convicted of CAH. At the ICTR, the indictments of eighty-four individuals included charges for CAH; of these, thirty-four were convicted, eight of which are currently on appeal. In addition to these two U.N.-established tribunals, there have been six mixed model tribunals established by the

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statutes of limitation, and poorly drafted legislation—all of which have contributed to insulating Nazi perpetrators from criminal trial.

For a survey of national prosecutions for CAH after 1945, see generally BASSIOUNI, *supra* note 12, ch. 9.

20. *See generally* THE POLITICS OF RETRIBUTION IN EUROPE: WORLD WAR II AND ITS AFTERMATH (Istvan Deak, Tony Judt and Jan T. Gross eds., 2000); GIULIANO VASSALLI, FORMULA DI RADBRUCH E DI DIRITTO PENALE: NOTE SULLA PUNIZIONE DEI DELITTI DI STATO NELLA GERMANIA POSTNAZISTA E NELLA GERMANIA POSTCOMUNISTA (2001); István Deák, *A Fatal Compromise? The Debate Over Collaboration and Resistance in Hungary*, 9 E. EUR. POL. & SOC'IES 209 (1995); István Deák, *Repression or Retribution? The War Crimes Trials in Post-World War II Hungary* (paper presented at AAASS Convention, Seattle, Nov. 23, 1997, on file with author); John S. Micgiel, *Legal Retribution in Poland, 1944–1946 and Historical Justice Today* (paper presented at the Vienna Conference on Political Justice in the Aftermath of World War II, Vienna, Nov. 2–5, 1995, on file with author); *see also* Peter Mohacsi & Peter Polt, *War Crimes and Crimes Against Humanity According to the Decision of the Constitutional Court of Hungary*, 67 RIDP 333 (1996) (concerning the nonapplicability of statutes of limitation to war crimes and "crimes against humanity" based on the 1993 legislation).

21. CCL 10 art. II(c).

22. Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), S.C. Res. 827, art. 3, U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Tribunal for Rwanda (ICTR), S.C. Res. 955, art. 5, U.N. Doc. S/RES/955 (Nov. 8, 1994).

For more information on the ICTY, see generally M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1996), and VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1995). For more information on the ICTR, see VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1997).

23. *See* Nadia Bernaz & Rémy Prouvèze, *International and Domestic Prosecutions*, *in* 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 269 (M. Cherif Bassiouni ed., 2010).

U.N.[24] in Cambodia,[25] Sierra Leone,[26] East Timor,[27] Kosovo,[28] and Bosnia-

24. *See* M. Cherif Bassiouni, *Mixed Models of International Criminal Justice*, *in* 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 423, 427–28 (M. Cherif Bassiouni ed., 2010).

25. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Royal Decree No. NS/RKM/1004/006 (2004) (Cambodia), *reprinted in* Aaron J. Buckley, *The Conflict in Cambodia and Post-Conflict Justice*, *in* POST-CONFLICT JUSTICE 635 app. at 659 (2002). Thus far, the prosecution of Kaing Guek Eav is the only prosecution to result in a conviction before the Extraordinary Chambers in the Courts of Cambodia (ECCC). Duch was convicted of CAH in the form of persecution and sentenced to thirty-five years imprisonment. *See* Prosecutor v. Kaing Guek Eav, Case No. 001/18-07-2007/ECCC-TC (ECCC filed Feb. 17, 2009), *available at* http://www.eccc.gov.kh/english/caseInfo 001.aspx. Each of the remaining four former Khmer Rouge officials indicted by the ECCC have been charged with CAH. *See* Prosecutor v. Nuon Chea, Case No. 002/19-09-2007/ECCC-PTC (ECCC filed Sept. 19, 2007), *available at* http://www.eccc.gov.kh/english/case002.aspx. *See also* Steven R. Ratner, *Accountability for the Khmer Rouge: A (Lack of) Progress Report*, *in* POST-CONFLICT JUSTICE 613 (M. Cherif Bassiouni ed., 2002); Craig Etcheson, *Accountability Beckons During a Year of Worries for the Khmer Rouge Leadership*, 6 ILSA J. INT'L & COMP. L. 507 (2000) (discussing the U.N.'s difficulties in establishing the Cambodian tribunal); Ben Kiernan, *Bringing the Khmer Rouge to Justice*, 1 HUM. RTS. REV. 92, 92 (2000) ("Cambodia is now studying the establishment of a 'mixed' national and international tribunal.").

26. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.–Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137, *available at* http://www.unker.org/refworld/decid/3fbdda8.html [hereinafter SCSL]. The SCSL was endorsed by the U.N. Security Council in S.C. Res. 1400, U.N. Doc. S/RES/1400 (Mar. 28, 2002).

All thirteen defendants before the SCSL were charged with CAH, among other crimes. *See* Prosecutor v. Fofana and Kondewa (CDF Case), Case No. SCSL-04-14-A (SCSL App. Chamber 2008); Prosecutor v. Charles Taylor, Case No. SCSL-03-01-T (SCSL filed Mar. 7, 2003); Prosecutor v. Sesay, Kallon and Gbao (RUF Case), Case No. SCSL-04-15-T (SCSL App. Chamber 2009); Prosecutor v. Brima, Kamara and Kanu (AFRC Case), Case No. SCSL-04-16-T (SCSL App. Chamber 2008). In total, eight of these individuals were convicted of crimes including CAH.

For more background on the creation of the Sierra Leone tribunal, see generally Jennifer L. Poole, *Post-Conflict Justice in Sierra Leone*, *in* POST-CONFLICT JUSTICE 563 (M. Cherif Bassiouni ed., 2002); DOUGLAS FARAH & STEPHEN BRAUN, MERCHANT OF DEATH: MONEY, GUNS, PLANES, AND THE MAN WHO MAKES WAR POSSIBLE (2007); GREG CAMPBELL, BLOOD DIAMONDS: TRACING THE DEADLY PATH OF THE WORLD'S MOST PRECIOUS STONES (2002); JOHN L. HIRSCH, SIERRA LEONE: DIAMONDS AND THE STRUGGLE FOR DEMOCRACY (2001).

27. S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999). *See also Regulation No. 2000/11 on the Organization of Courts in East Timor*, U.N. Transitional Administration in East Timor, U.N. Doc. UNTAET/REG/2000/11 (2000), *available at* http://www.un.org/peace/etimor/untaetR/Reg11.pdf. It is estimated that the Special Panels for Serious Crimes indicted 336 persons for charges including CAH. Of these, approximately forty-six were convicted for crimes including CAH. The prosecutions in East Timor have mostly resulted in convictions based on national crimes to the neglect of international crimes because the conduct has been qualified as national.

For more background on the creation of the tribunal in East Timor, see generally Suzannah Linton, *East Timor and Accountability for Serious Crimes*, *in* 3 INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT 257, 259–61 (M. Cherif Bassiouni ed., 3d rev. ed. 2008) (noting the UN's unique approach in East Timor); Michael J. Matheson, *United Nations Governance of Post-Conflict Societies: East Timor and Kosovo*, *in* POST-CONFLICT JUSTICE 523, 531 (M. Cherif Bassiouni ed., 2002) (discussing the U.N.'s role in East Timor).

28. S.C. Res. 1244, U.N. Doc S/RES/1244 (June 10, 1999); *see also Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo*, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/1999/1 (1999).

Herzegovina.[29] All of these tribunals contain CAH within their statutes. Finally in 1998, the International Criminal Court (ICC) was established, and its statute includes CAH in Article 7.[30] Thus far, twelve individuals have been indicted for charges including CAH.[31] However, as of yet, none of these individuals has been convicted for CAH.

From the end of WWII until 2008, some 313 conflicts of various types took place worldwide; the number of casualties is estimated at ninety-two million, most of whom were non-combatants.[32] In the 313 post-WWII conflicts mentioned above, the following data emerges:[33]

> Less than 1% of the perpetrators of international crimes have been brought to justice. These selective prosecutions have only taken place in fifty-three of the 313 conflicts identified by the study, which represents 17% of the total number of conflicts.[34] In contrast,

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29. The War Crimes Chamber was created in 2003 at the Peace Implementation Council Steering Board Meeting and underwent extensive negotiations until its adoption on January 6, 2005. The Court is subject to the 1977 Criminal Code of the Socialist Federal Republic of Yugoslavia rather than the new criminal and procedural codes of Bosnia and Herzegovina. The Court also applies the European Charter on Human Rights, ratified by Bosnia and Herzegovina in 2002. *See* Param-Preet Singh, *Narrowing the Impunity Gap: Trials Before Bosnia's War Crimes Chamber*, HUMAN RIGHTS WATCH (Feb. 11, 2007), *available at* http://www.hrw.org/en/node/11032/section/1. According to the data available to this writer, an estimated seventy-four persons were indicted for charges including CAH. Of these, an estimated thirty-eight were convicted for crimes including CAH.

30. Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 3. *See also* M. CHERIF BASSIOUNI, 1 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS, AND INTEGRATED TEXT OF THE STATUTE, ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 206–15 (2005).

31. They are: the *Katanga and Chui* case, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04–01/07, Decision on the Confirmation of Charges (Sept. 30, 2008); the *Mbarushimana* case, Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Warrant of Arrest (Sept. 28, 2010); the *Bemba* case, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05–01/08, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 March 2008 (June 10, 2008); the *Kony et al.* case, Prosecutor v. Kony, Otti, Odhiambo and Ongwen, Case No. ICC-02/04–01/05–53, Warrant of Arrest for Joseph Kony Issued on 8th July 2005 As Amended on 27th September 2005 (Sept. 27, 2005); the *Ahmad Harun & Ali Kushayb* case, Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), Case No. 02/05–01/07–2, Warrant of Arrest for Ahmad Harun (Apr. 27, 2007); and Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), Case No. ICC-02/05–01/07–3, Warrant of Arrest for Ali Kushayb (Apr. 27, 2007); and the *Al Bashir* case, Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05–01/09–95, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (July 12, 2010); Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05–01/09–94, Second Decision on the Prosecution's Application for a Warrant of Arrest (July 12, 2010).

32. *See* Mullins, *supra* note 1.

33. *See id*. *See also* M. Cherif Bassiouni, *Assessing Conflict Outcomes: Accountability and Impunity*, *in* 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 3, 6–7 (M. Cherif Bassiouni ed., 2010).

34. *See* Bernaz & Prouvèze, *supra* note 23.

amnesty laws were enacted in 126 of the 313 conflicts identified, which means that in 40% of all conflicts, perpetrators have benefited from impunity.[35]

Since 1948, international and mixed model tribunals have indicted only 823 persons.[36] The average cost of prosecution before the ICC, ICTY, and ICTR is approximately $10 million per case.

Fifty-six truth commissions and other investigative bodies have been established, mostly in Latin America.[37] Despite the well-known Truth and Reconciliation Commission of South Africa, this modality of post-conflict justice has been comparatively rare in Africa, as well as in Europe and Asia. In the Arab World, only Morocco and Israel have undertaken investigatory commissions.

In only sixteen of the 313 conflicts, some form of victim reparation was undertaken involving less than 1% of the victims of conflicts.[38] With the exception of some post-World War II victim compensation,[39] there has been no other instance of monetary victim compensation for other conflicts.

By the end of the 20th century, the ratio of military to civilian victims had soared to, on average, 9,000-to-1, from 1-to-1 in WWI.[40]

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35. *See* Louise Mallinder, *Amnesties*, *in* 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 793, 900–22 (M. Cherif Bassiouni ed., 2010).

36. They include: the ICC, 12; the ICTY, 161; the ICTR, 79; the SCSL, 13; the ECCC, 5; the *Ad Hoc* Tribunal for East Timor, nearly 400; the "Regulation 64 Panels" of Kosovo, more than 24; the Court of Bosnia-Herzegovina, 128; and by the Special Tribunal for Lebanon, none. *See* Bernaz & Prouvèze, *supra* note 23.

37. *See* Eric Wiebelhaus-Brahm, *Truth Commissions and Other Investigative Bodies*, *in* 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 477, 479–80 (M. Cherif Bassiouni ed., 2010).

38. *See* M. Cherif Bassiouni, *Victims' Rights*, *in* 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 575 (M. Cherif Bassiouni ed., 2010). *See generally* Naomi Roht-Arriza, *Reparations in International Law and Practice*, *in* 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 655 (M. Cherif Bassiouni ed., 2010) (providing a case-by-case discussion of states and regions that have awarded reparations).

39. *See* J.D. Bindenagel, *The German Experience*, *in* 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 709, 710 (M. Cherif Bassiouni ed., 2010).

40. M. Cherif Bassiouni, *Assessing Conflict Outcomes: Accountability and Impunity*, *in* 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 3, 17 (M. Cherif Bassiouni ed., 2010).

Even though this data is not very encouraging, international law scholars and experts point to historic legal precedents from 1923 to date, including prosecutions before international and national tribunals, as evidence of customary international law.[41] The record of national prosecutions in the half-century following the IMT and IMTFE, however, is so scant that it can hardly be considered as evidence of consistent state practice.[42] Since the 1980s the situation has changed. Based on this writer's research, some fifty-five states have criminalized CAH in their criminal codes as of December 2010.[43] The fact that since 1919 there has

41. *See* CLAUDE MULLINS, THE LEIPZIG TRIALS: AN ACCOUNT OF THE WAR CRIMINALS' TRIALS AND STUDY OF GERMAN MENTALITY (1921); GERD HANKEL, DIE LEIPZIGER PROZESSE: DEUTSCHE KRIEGSVERBRECHEN UND IHRE STRAFRECHTLICHE VERFOLGUNG NACH DEM ERSTEN WELTKRIEG (2003).

42. *See* BASSIOUNI, *supra* note 12.

43. The following is the list of the fifty-five countries that criminalize CAH in their respective criminal codes: Albania (http://www.legal-tools.org/doc/709ea8); Argentina (http://www.iccnow.org/documents/Ley_de_implementacion_argentina2.pdf); Australia (http://www.iccnow.org/documents/AustraliaICCActNo42.2002.pdf); Azerbaijan (http://www.legislationline.org/documents/section/criminal-codes); Bangladesh (http://www.bdlaws.gov.bd/print_sections_all.php?id=435 (last visited May 6, 2010)); Belarus (Penal Code of Republic of Belarus art. 128, adopted on July 9, 1999, *published in* The Register of the National Assembly of the Republic of Belarus, No. 28, 2000); Belgium (http://www.legal-tools.org/en/access-to-the-tools/national-implementing-legislation-database/); Bosnia and Herzegovina (http://iccdb.webfactional.com/documents/implementations/pdf/Criminal_Code_of_BH_eng.pdf); Burkina Faso (http://www.iccnow.org/documents/Decret_n2009-894-PRES_promulguant_la_loi_n052-2009-AN.pdf); Burundi; Canada (http://www.iccnow.org/documents/Canada.CrAgH.WcrEng.pdf); Chile (http://www.legal-tools.org/doc/5925e9/); Congo Brazzaville (http://www.nottingham.ac.uk/shared/shared_hrlcicju/Congo-Brazzaville/Loi_No_8-98_portant_definitions_et_repression_des_crimes_.pdf); Costa Rica; Croatia (http://www.legal-tools.org/doc/102d95); Cyprus; D.R. Congo (http://www.legal-tools.org/doc/aa2b04); El Salvador (http://www.cnj.gob.sv/index.php?view=article&catid=42:publicaciones&id=116:codigo-penal-de-el-salvador-comentado-&option=com_content&Itemid=12); Estonia (http://iccdb.webfactional.com/documents/implementations/word/Estonia_Criminal_Code.doc); Ethiopia; Fiji (http://www.fiji.gov.fj/index.php?option=com_docman&task=doc_download&gid=100&Itemid=158); France (http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_textan.htm); Georgia; Germany (http://www.iccnow.org/documents/GermanCodeOfInternation4C1.pdf); Indonesia (http://indonesia.ahrchk.net/news/mainfile.php/hrlaw/18?alt=english); Iraq; Ireland (http://iccdb.webfactional.com/documents/implementations/pdf/International_Criminal_Court_Act_2006_Ireland.pdf); Israel (http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Nazis%20and%20Nazi%20Collaborators%20-Punishment-%20Law-%20571); Kenya (http://www.kenyalaw.org/kenyalaw/klr_app/frames.php); Lithuania (http://www.iccnow.org/?mod=country&iduct=101); the Former Yugoslav Republic of Macedonia (http://www.legislationline.org/documents/section/criminal-codes/country/31); Mali (http://www.justicemali.org/code%20penal.pdf); Malta (http://www.legal-tools.org/doc/1d47ef); Montenegro (http://www.legislationline.org/documents/section/criminal-codes); the Netherlands (http://www.iccnow.org/documents/NL.IntCrAct.pdf); New Zealand (http://www.legal-tools.org/en/access-to-the-tools/national-implementing-legislation-database/); Niger (http://www.legal-tools.org/doc/53fff1); Norway (http://iccdb.webfactional.com/documents/implementations/word/Unofficial_translation_new_Chapter_16-1_Penal_Code_MOJ.doc); Panama; the Philippines (http://www.iccnow.org/documents/Republic_of_the_Philippines.pdf); Portugal (http://www.iccnow.org/documents/ImplementationICCPortugal_pt.pdf); Republic of Korea (http://www.iccnow.org/documents/KoreaImplementingAct.pdf);

been no specialized convention on CAH and as many as twelve different international definitions of CAH, evidences a weakness in customary international law.[44] No matter how similar the twelve definitions of CAH are in the international instruments containing them, they are nonetheless different formulations. This raises questions about whether they can be deemed sufficient to identify the specific contents of CAH in customary international law, particularly in light of the requirements of the principles of legality in international criminal law.[45] Nevertheless, these formulations have in common the following elements: (1) the perpetrators are state actors acting pursuant to state policy, and (2) engage in killing, torture, rape, and other human depredations against civilians, usually on a widespread or systematic basis. The commonality of these elements reveals the coalescence of customary international law around these characteristics. These characteristics, however, also reveal that those most vulnerable to being prosecuted for CAH are state actors, which explains the reticence of governments to support a specialized convention. Its

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Romania (http://www.legal-tools.org/doc/b64ac2); Rwanda (http://www.unhcr.org/refworld/docid/46c4597c2.html); Samoa (http://www.iccnow.org/documents/International_Criminal_Court_Act_2007_-_Eng.pdf); Senegal; Serbia (http://www.legal-tools.org/doc/cdb624); Sierra Leone; South Africa (http://www.iccnow.org/documents/SouthAfricaLegEng2002.pdf); Spain (http://www.iccnow.org/documents/Spain_ImplementingLegislation_Aug05.pdf *and* http://iccdb.webfactional.com/documents/implementations/word/Spain_Implementation_Provisions_in_Criminal_Code_2003.doc); Sudan; Timor Leste (Decree-Law 19/2009); Trinidad and Tobago (http://www.iccnow.org/documents/Trinidad_Tobago_The_International_Criminal_Court_Act_2006.pdf); Uganda (http://www.parliament.go.ug/enewsletter/index.php/home/view/59); United Kingdom (http://www.iccnow.org/?mod=country&iduct=184); and Uruguay (http://www.iccnow.org/documents/newLey_18026_Implementacion.pdf).

44. They are: Charter of the International Military Tribunal art. 6(c), Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279; Charter for the International Military Tribunal for the Far East art. 5(c), at 11, Apr. 26, 1946, T.I.A.S. No. 1589, *reprinted in* 4 BEVANS 20, 27–31; Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Dec. 20, 1945, OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY art. II, No. 3, at 50–55; *Draft Code of Crimes Against the Peace and Security of Mankind: Titles and Texts of Articles Adopted by the International Law Commission on its Forty-Eighth Session*, U.N. GAOR, 51st Sess., U.N. Doc. A/CN.4/L.532 (1996), *rev'd by* U.N. Doc. A/CN.4/L.532/Corr.1 *and* U.N. Doc. A/CN.4/L.532/Corr.3; Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 3, U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Tribunal for Rwanda, S.C. Res. 955, art. 5, U.N. Doc. S/RES/955 (Nov. 8, 1994); Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 3, *reprinted in* 37 I.L.M. 999 (1998); Administrative Regulation No. 2003/25 (July 6, 2003), UNMIK/REG/2003/25; KRIVIČNI ZAKON BOSNE I HERCEGOVINE (Criminal Code of Bosnia and Herzegovina) art. 172 (2003); SCSL, art. 2; *Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences*, U.N. Doc. UNTAET/REG/2000/15, (June 6, 2000); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 5, Royal Decree No. NS/RKM/1004/006 (2004) (Cambodia), *reprinted in* Aaron J. Buckley, *The Conflict in Cambodia and Post-Conflict Justice*, *in* POST-CONFLICT JUSTICE 635 app. at 659 (2002).

45. *See* M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 178 (2003).

absence, however, widens the impunity gap for state actors who perpetrate CAH.

Why such a specialized CAH convention has never been elaborated can only be explained by the fact that governments are concerned that their political leaders and senior public officials in the military, intelligence, police forces, and above all, their heads of state, may be subject to the provisions of such a convention if it existed.[46] Such state concerns are lessened in the ad hoc international and the mixed model tribunals established since 1994, because the jurisdiction of these tribunals is limited to certain conflicts, and also limited in time.[47] Thus, there is no exposure to criminal responsibility for CAH to other state actors who engage in the same or similar conduct in other contexts.[48] As to states' concerns about the prospects of prosecution before the ICC, they are limited to its 113 state parties and also by the ICC's capabilities.[49] So far, it has only nine pending cases with five defendants in custody (all of these cases originating in Africa, with African defendants).[50] The prospect of prosecuting a sitting head of state in the Sudan is in limbo for the time being.[51] The fact that the Darfur situation was referred to the ICC by the Security Council, which took no steps to enforce the ICC's arrest warrants against President al-Bashir and eleven others, reveals something about the political will of the international community to prosecute CAH.[52] All of this reveals weaknesses in the practice of states for purposes of consolidating customary international law.

The post-WWII conflicts and regime victimization described above reveal a new development in CAH.[53] Historically, perpetrators have been state actors whose conduct was part of a state policy. However, since

46. This writer was among the international criminal law experts to promote such a convention. *See generally* M. Cherif Bassiouni, *"Crimes Against Humanity": The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457 (1994).

47. *See generally* Bassiouni, *supra* note 24.

48. *See id.*

49. As of December 2010, 110 countries are state parties to the Rome Statute of the International Criminal Court. *See supra* text accompanying note 30.

50. The ICC, operating at near-full capacity with a staff of over 1,000 employees, presently has nine open cases.

51. *See, e.g.*, Ginger Thompson, *Obama Drops Plan to Isolate Sudan Leaders*, N.Y. TIMES, Oct. 16, 2009, at A1, *available at* http://www.nytimes.com/2009/10/17/world/africa/17sudan.html.

52. Using its authority under the Rome Statute, the Security Council referred the situation in Darfur to the Prosecutor of the ICC in S.C. Res. 1593 (Mar. 31, 2005). On March 4, 2009, the Pre-Trial Chamber of the ICC issued an arrest warrant for Sudanese President Omar al-Bashir for charges of crimes against humanity and war crimes. Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009), *available at* http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf.

53. *See* Mullins, *supra* note 1; Bassiouni, *supra* note 33, at 6–7.

WWII, non-state actors are increasingly committing CAH, often not acting pursuant to state policy, but as part of a group policy, although this is not always true. Frequently, these groups' practices represent indiscriminate violence without being part of a defined policy, but they do reflect a systematic pattern of conduct.

As currently defined in international instruments, CAH does not specifically include non-state actors within its scope.[54] This gap becomes particularly significant in light of the increased victimization by non-state actors as described above. Proponents of the inclusion of non-state actors within the scope of the ICC's Article 7 rely on the use of the term "organizational policy" in paragraph 2 of its statute. That reliance is misplaced. Paragraph 2 refers to the policies of organizations within a state. The intended meaning was designed to ensure that if the establishment of a policy by a given organization within a state (such as the military, intelligence, or police) could be established, it would be sufficient to institute state policy.[55] However, a new interpretation of "organizational policy" may be the only way to include non-state actors within the scope of CAH under Article 7(2) short of having either an amendment to the ICC Statute or an expression of interpretation of the meaning of "organizational policy" by the Assembly of States Parties. Those interested in expanding the scope of Article 7 to include non-state actors hope to rely on the jurisprudence of the ICC to interpret the term "organizational policy" as referring to the policies of non-state actors.[56]

Another way of expanding the scope of CAH to include non-state actors is to look at paragraph 1 of Article 7, which defines the conduct as "widespread or systematic" and deems it the controlling element, while considering paragraph 2 as an independent variable. By disaggregating paragraph 1 from paragraph 2, and by considering the element of "widespread or systematic" in paragraph 1 as controlling, a jurisprudential result could be reached that a state policy is not always required. This was the position of an ICTY decision in *Kunarac*.[57] However, this decision is

54. *See supra* text accompanying notes 36, 43.

55. *See* BASSIOUNI, *supra* note 30, at 150–52, 207.

56. *See* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 66–69 (2d ed. 2001). One author argues that no element of policy forms part of customary international law. *See, e.g.*, Guénaël Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for Yugoslavia and for Rwanda*, 43 HARV. INT'L L.J. 237, 244, 271–83 (2002) (arguing that customary international law tells us that the enumerated acts will amount to CAH if they are committed *as part of a widespread or systematic attack directed against any civilian population or any identifiable group*); GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND AD HOC TRIBUNALS 172 (2005).

57. Prosecutor v. Kunarac et al., Case No. IT-96-23/1-A, Judgment, ¶ 98, n.114 (June 12, 2002).

at best dubious in that it cherry-picks case law and relies on a number of precedents that do not stand for the proposition advanced by the decision.[58]

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58. William A. Schabas also voiced this criticism in responding to the *Kunarac* decision:

> In Jelisic, the ICTY had relied on a literal reading of the definition of [genocide]. The text of the definition contains no explicit requirement of a plan or policy. Similarly, with respect to crimes against humanity, the text of the Statute contains no explicit requirement of a plan or policy. On the other hand, the Appeals Chamber noted that there had been a significant debate on the matter in the case law and the academic literature. Astonishingly, however, the discussion of this important point was confined to a footnote in the judgment of the Appeals Chamber! When the authorities cited in the reference are scrutinized, it is not at all apparent how many of them assist in the conclusion that a State plan or policy is not an element of crimes against humanity.
>
> Generally speaking, the ICTY's very summary discussion of the issue of a State plan or policy with respect to both crimes against humanity and genocide has an air of the superficial. The result reached—that a State plan or policy is not a required element—appears to be a results-oriented decision rather than a profound analysis of the history of the two crimes or of their theoretical underpinnings. The ICTY also appears to have ignored the drafting histories of the crimes as well as subsequent developments such as the work of the International Law Commission.
>
> The ICTY's determination that no state plan or policy is required for crimes against humanity has proven to be more significant than in the case of genocide. For example, the *Kunarac* case involved the detention of women civilians in appalling conditions and their regular mistreatment, including rape. These were crimes committed by members of an organized paramilitary group, but they were not necessarily attributable to a State plan or policy. Kunarac was convicted of crimes against humanity. Expanding the concept of crimes against humanity by eliminating any requirement of a State plan or policy was therefore of considerable legal significance.

William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953, 958–60 (2008). Schabas's critique continues as follows:

> An important objection to such an interpretation of genocide, and crimes against humanity, is the exclusion of non-State actors. This problem can be adequately addressed by a broad construction of the conception of State policy so as to apply to State-like actors as well as States in the formal sense. Bodies like the Republika Srpska, the FARC, the Palestinian Authority, and perhaps the government of Taiwan would be addressed in this manner, but not organizations like Hell's Angels or the mafia.
>
> Even outside the context of customary international law, this issue will arise in the interpretation of Article 7(2)(a) of the Rome Statute, with its reference to a "State or organizational policy" as a contextual requirement for crimes against humanity. Dictionary definitions consider an organization to comprise any organized group of people, such as a club, society, trade union, or business. Surely the drafters of the Rome Statute did not intend for Article 7 to have such a broad scope, given that all previous case law concerning crimes against humanity, and all evidence of national prosecutions for crimes against humanity, had concerned State-supported atrocities. If they really meant to include any type of organization, such as a highly theoretical "organization" of two people, why did they put these words in at all? The biggest problem for the proponents of the broad view is their inability to explain how the term organization is to be qualified.
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> In his recent three-volume work, The Legislative History of the International Criminal Court, one of the leading experts on crimes against humanity, Professor M. Cherif Bassiouni, argues:
>
> "Contrary to what some advocates advance, Article 7 does not bring a new development to crimes against humanity, namely its applicability to non-state actors. If that were the case,

The case for a specialized international convention on CAH exists since the end of World War I, and has been particularly evident since the end of World War II.[59] The data obtained about the number of victims of CAH since WWII, as well as the few instances of national legislation and of national prosecutions since the end of WWII, makes it abundantly clear that such a specialized convention is needed.[60] Opponents of such a convention will argue that the ICC statute is sufficient, even though there are only 113 state parties out of 194 existing states. Even though Article 7 could be jurisprudentially interpreted by the ICC to encompass non-state actors who, since WWII, have been the main perpetrators of CAH, the limited capabilities of the ICC to reach state and non-state actors who commit the CAH remain at issue.[61] The ICC has demonstrated that it does not have, nor is it likely to have, the institutional capability and the resources needed to prosecute the perpetrators of CAH in the different conflicts and regime victimization occurring in the world and which are likely to continue to occur.[62] Reliance on the principle of complementarity contained in the ICC statute's Article 17 is presently questionable because member-states have yet to include the ICC crimes in their national legislation. Moreover, national criminal justice systems lack the capability of undertaking such a task.[63] The limited number of state parties that have

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> the mafia, for example, could be charged with such crimes before the ICC, and that is clearly neither the letter nor the spirit of Article 7. The question arose after 9/11 as to whether a group such as al-Qaeda, which operates on a worldwide basis and is capable of inflicting significant harm in more than one state, falls within this category. In this author's opinion, such a group does not qualify for inclusion within the meaning of crimes against humanity as defined in Article 7, and for that matter, under any definition of that crime up to Article 6(c) of the IMT, notwithstanding the international dangers that it poses . . . . The text [of article 7(2)] clearly refers to state policy, and the words "organisational policy" do not refer to the policy of an organisation, but the policy of a state. It does not refer to non-state actors . . . ."
>
> Professor Bassiouni may be pitching this a little too high because his approach excludes the State-like actors. As I understand his view, the term organization is meant to encompass bodies within a State such as the Gestapo and the SS.

Id. at 972–73. *See also* William A. Schabas, *Crimes Against Humanity: The State Plan or Policy Element*, *in* THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M. CHERIF BASSIOUNI 347, 347–64 (Leila Nadya Sadat & Michael P. Scharf eds., 2008).

59. *See supra* note 19 (on national prosecutions).

60. LEILA NADYA SADAT, FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (2010).

61. *See* Bassiouni, *supra* text accompanying note 46.

62. *See id. See also* Bassiouni, *supra* note 33, at 30.

63. *See* Rome Statute of the International Criminal Court, art. 125, July 17, 1998, 2187 U.N.T.S. 3. According to the Coalition for the ICC, approximately fifty-six states have adopted partial or full implementation legislation on cooperation and/or complementarity with the Court, and a further forty-three have advanced drafts in circulation, with a number of others likely to produce drafts in the near future. However, that list may be inaccurate in view of different national legislative standards. Moreover, this writer has been able to identify only fifty-five states which have legislation on CAH,

adopted specific national implementing legislation including CAH within their respective criminal codes is clear evidence that complementarity cannot, at this point in time, be relied upon for the national prosecution of CAH perpetrators.[64] But enhanced national enforcement is the best approach for the future.

The relationship between the ICC and its state parties is a vertical relationship, whereby state parties have an obligation to the ICC in the event that the ICC undertakes to investigate or prosecute CAH. The obligation to prosecute CAH even with respect to state parties that have not adopted national implementing legislation is inexistent. This vertical relationship between the ICC and its state parties does not extend to a horizontal relationship between the state parties. The statute does not provide for an obligation to prosecute or extradite as between state parties, and thus complementarity as between state parties does not exist. Lastly, complementarity does not exist between the ICC and non-state parties.

The future of international criminal justice does not depend on the ICC.[65] Instead, it depends on states to carry out domestically the task of investigating and prosecuting CAH. This national obligation is advanced by the "most distinguished publicists"[66] as being a part of customary international law obligation, but is not evidenced in the practice of states. Those of us who argue that CAH is a *jus cogens* crime and that there is an *erga omnes* obligation for states to prevent, prosecute, or extradite find themselves facing a gap in the practice of states.[67] The only way this gap can be filled is by having international obligations founded on a multilateral treaty, and that requires a specialized convention.[68]

The adoption of a specialized CAH convention is a need supported by the facts, and it is a need whose time has come to be fulfilled.[69] The project of the Washington University's Whitney R. Harris World Law Institute is not only a laudable academic exercise, it is a politically-needed

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and that means that this crime is not duly covered in the list of purported national implementing legislation. *See supra* text accompanying note 43.

64. Without such national legislation, state parties cannot prosecute for CAH.

65. *See generally* M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT'L L. 269 (2010).

66. Statute of the International Court of Justice, June 26, 1945, art. 38(3), 59 Stat. 1031, 33 U.N.T.S. 993.

67. *See* M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS., at 63, 69–70 (1996).

68. Crimes Against Humanity Initiative of the Whitney R. Harris World Law Institute, WASHINGTON UNIVERSITY SCHOOL OF LAW, http://law.wustl.edu/crimesagainsthumanity/ (last visited Nov. 17, 2010).

69. *See* SADAT, *supra* text accompanying note 60.

action.[70] But it is only the first step. The draft convention prepared under the auspices of the Harris Institute by a group of experts who have benefitted from consulting with a wider group of experts has now reached its final stage.[71] There is nothing more that experts can do to advance the goal of a specialized CAH convention. The experts' work is as good as it could ever be, and it is also mindful of the political realities of the ensuing diplomatic negotiating processes.

The draft CAH convention[72] uses the same definition as the ICC's Article 7, notwithstanding the issue presented by its applicability to non-state actors as well as the absence of a clear understanding of what categories of non-state actor groups are to be included. Distinctions are necessary to separate groups engaging in organized crime and other criminal activities from those whose organizational policy is to target civilian populations. Otherwise, the danger is for CAH to become a catchall international criminal law convention that encompasses all types of large-scale criminality, and thus transforming domestic crimes into international ones without an international jurisdictional element.[73]

The drafters of the CAH convention made a policy choice designed to induce the ICC's 113 state parties to become state parties to the draft CAH convention. The tradeoff for the 113 state parties' support for the draft convention was deemed more significant than the benefit of clarifying the two issues mentioned above.

The added value of the draft CAH convention is to establish for ICC state parties a horizontal relationship between them that complements the ICC's statutory scheme. In addition, the draft CAH convention establishes a horizontal relationship between its own state parties, and is expected to include states that are non-state parties to the ICC. In so doing, it also establishes a connecting link between non-state parties and the ICC through the new, comprehensive mechanisms of international cooperation in the prevention, investigation, prosecution, and punishment of alleged and convicted perpetrators of CAH. In short, such a specialized convention completes the missing links of a universal scheme designed to enhance accountability for CAH violations and reduce the gap of impunity that now exists.

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70. *See* Crimes Against Humanity Initiative, *supra* note 68.

71. *Id*.

72. The text of the draft convention can be found at the Crimes Against Humanity Initiative website, *available at* http://law.wustl.edu/crimesagainsthumanity/documents/CAHInitiative031210.pdf (last visited Dec. 13, 2010).

73. *See* BASSIOUNI, *supra* note 12, ch. 1.

In addition to extending CAH's *ratione personae*, there is a need to also extend its *ratione materiae*. Presently, the historical evolution of CAH's protected interests has been limited to harm against the person, but only in the nature of direct harm. It does not take into account certain attacks upon other protected interests that may have effects or consequences on the life, health, and welfare of persons. This is particularly true with respect to environmental crimes and cybercrimes, and it escalates the potential use of biological warfare. With respect to the first of these crimes, there are a number of relevant international conventions for the protection of the environment, but they seldom include criminal sanctions.[74] This gap exists not withstanding the fact that such environmental violations as the dumping of nuclear and hazardous waste material can have serious life and health impacts including other forms of dangerous chemicals released in the air, soil, and water. Similarly, cybercrime or, for that matter, what is now being referred to as cyberterrorism may well cause serious threats to life, health, and well-being, particularly if one takes into account the scenario of shutting down hospital and healthcare facilities. Lastly, the use of biological substances by individuals and armed groups can have extremely harmful consequences. But so far, we do not have an international convention that criminalizes the use of biological substances against individuals. These and other acts which are not directly aimed at human beings, but which ultimately have an impact upon human beings, should be included in an expanded *ratione materiae* of a more progressive definition of CAH. There are also other extensions of the present listing of human protections, such as persecution of persons with disabilities and persecution based on sexual orientation.

Prevention, investigation, prosecution, and punishment depend on the political will of states, but also on the capabilities of national criminal justice systems to implement domestic and international criminal laws. It is therefore not only a question of political will that is at stake, important as that may be, but also the capacity of national justice systems that can make a universal prevention and enforcement scheme effective.

The existence of such a scheme based on a specialized CAH convention will also enhance the effectiveness of inter-state cooperation and will not only provide the mechanism for states to cooperate in the pursuit of the modalities listed in the draft CAH convention, which reflect

74. *See* Stephen C. McCaffrey, *Criminalization of Environmental Protection*, *in* 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 1013 (M. Cherif Bassiouni ed., 3d ed. 2008).

the historic concept of *aut dedere aut judicare*,[75] but will also provide an institutional mechanism for certain states to enhance other states' capabilities.

Historically, international criminal law conventions have focused on the use of the indirect enforcement system, which depends on national criminal justice systems as well as the effectiveness of inter-state criminal justice capabilities.[76] International criminal law conventions have, however, seldom addressed issues of prevention, which the draft CAH convention specifically addresses.[77] This, too, is an enhanced feature of this draft convention in comparison to other international criminal law conventions.[78]

The role of scholars and experts now comes to an end and the next stage will come when we pass the baton to the international diplomatic/political processes that will hopefully produce the type of specialized convention proposed by the draft CAH convention. Admittedly, the baton may not easily pass from one group to the other, or it could simply fall to the ground. Even if it passes, it is not certain that the next group will take it to the finish line.

Realpolitik has historically stood in the way of achieving international criminal justice goals.[79] States, notwithstanding the era of globalization that we are in, still consider their strategic and economic interests superior to those of international criminal justice.[80] They have not yet incorporated the goals of international criminal justice as part of their political national interests, and the international community has not yet reached a level of

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75. *See* M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE*: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 3–6 (1995).

76. *See* BASSIOUNI, *supra* note 45, at 333.

77. *See* Crimes Against Humanity Initiative, *supra* note 68.

78. These provisions are a culmination of similar provisions contained in the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, *reprinted in* 28 I.L.M. 493 (1989); United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Jan. 8, 2001); United Nations Convention on Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Nov. 21, 2003); and the International Convention for the Protection of All Persons from Forced Disappearance, G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Jan. 12, 2007).

79. *See* M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 409 (2000) ("Impunity, at both the international and national levels, is due to the conflicting goals of *realpolitik* and justice."); M. Cherif Bassiouni, *The Perennial Conflict Between International Criminal Justice and* Realpolitik, 22 GA. ST. U. L. REV. 541, 547 (2006); M. Cherif Bassiouni, *Searching for Justice in the World of* Realpolitik, 12 PACE INT'L L. REV. 213 (2000); M. Cherif Bassiouni, *Challenges Facing a Rule-of-Law-Oriented World Order*, 8 SANTA CLARA J. INT'L L. 1 (2010).

80. *See* Bassiouni, *Perspectives on International Criminal Justice*, *supra* note 65.

sufficient coalescence to impose the inclusion of such goals as part of both state goals and the international community's goals.

The prevention and prosecution of CAH are part of the commonly-shared values of the international community, and of national societies in many states. Nevertheless, a hurdle still exists preventing the translation of these commonly-shared values into commonly-shared interests which are implemented by both collective and individual state action. The pursuit of power and wealth in what is today explained in terms of national strategic and economic interests prevail over human values and goals. This is reflected in the practice of political settlements to end conflicts which overlook the pursuit of post-conflict justice.

International criminal justice is still a work in progress, facing visible and invisible obstacles. The determination of those who are committed to it can hope to advance the goal of overcoming these obstacles. The efforts of those who have brought about the draft CAH specialized convention to this stage are to be lauded and applauded, but their task as well as that of others is far from being completed.[81] The next phase is going to be the most arduous one, and it will need wise, determined, and consistent efforts to create the necessary momentum to achieve the goals of international criminal justice. In that respect, the role of international civil society will be critical. As was evident in the post-1994 history of the ICC, NGOs played an important role in achieving the final result, reached in 1998.[82]

The Talmud and the Qur'an contain a very similar statement to the effect that "he who saves one life saves all of humanity."[83] If the adoption of a specialized convention on crimes against humanity is only capable of saving one life, then those who will have worked at bringing it about will share in the rewarding knowledge that their efforts are equivalent to having saved all of humanity. Experience, however, tells us that if such a convention is adopted and is enforced, even with limitations, it is likely to have a preventive and deterring effect that will save many lives. In so doing, those who have contributed to the effort will have the reward of

81. Members of the Committee include Leila Nadya Sadat (Chair), M. Cherif Bassiouni, Hans Corell, Richard Goldstone, Juan Mendez, Don Taylor, and Christine Van Den Wyngaert.

82. For a discussion of the role NGOs played during the ICC preparatory process, see M. Cherif Bassiouni, *International Criminal Justice in Historical Perspective*, *in* BASSIOUNI, 1 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 30, at 3, 74.

83. Qur'an 5:32 states, ". . . if anyone saves a life, it shall be as though he had saved the lives of all mankind . . . would be as if he saved the life of the whole people." *Reprinted in* THE MESSAGE OF THE QUR'AN (Muhammad Asad trans., 2003), at 172. And in the Talmud, "Whoever destroys the life of a single human being . . . it is as if he had destroyed an entire world; and whoever preserves the life of a single human being . . . it is as if he had preserved an entire world." *Talmud Bavli*, Sanhedrin 37a.

having contributed something of value to humankind, and they will also contribute to peace, because, ultimately, there is no peace without justice.