

## **Keynote Address**

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## Introduction of Keynote Speaker: Colonel Brenda J. Hollis

ZeJ Moczydlowski

As president of the Washington University Law Veterans Association, I am thrilled that this event gives me a chance to introduce our keynote speaker—a friend, a fellow veteran, and an amazing human—Colonel Brenda J Hollis.

In international law, you would be hard-pressed to find a jurist whose career has touched many famous cases. After a twenty-two-year career in the United States Air Force, Colonel Hollis went on to even greater things. She was one of the prosecutors in the first trial before an international tribunal since Nuremberg and Tokyo. She served as the lead prosecutor for the Special Court for Sierra Leone, putting away former Liberian President Charles Taylor. She assisted the Office of the Prosecutor of the International Tribunal for Rwanda. And most recently, she came out of retirement for either the second or third time—I have lost count at this point—to become the Principal Trial Lawyer in charge of the International Criminal Court’s investigation into international crimes committed in Ukraine. She was also in charge of the investigation into crimes allegedly committed by HAMAS in Israel and by high-level Israeli officials in Gaza.

However, those are just a few points from her CV. And while they tell the story of what she has *done*, I want to tell a brief anecdote about who she *is*.

Last summer, at lunch with Colonel Hollis, I asked what it has been like to serve on the front lines of Ukraine. As we talked, a military-specific question popped into my head: what she had been wearing on the battlefield. In response, she looked at me like I was silly—because she already knew I knew the answer: *she simply wore whatever her Ukrainian escorts wore*.

To many, that may seem innocuous, but as a special operations veteran who served with foreign militaries, I cannot overstate how much simple gestures convey to people on the front lines—it is often more than anything you say aloud. Something as small as choosing what you wear can show your allies that you understand what they are going through. It demonstrates that you are there to help them, that you are more than a suit, that you respect their customs and cultures, and that you are paying attention.

That comment showed me that—her remarkable history as a prosecutor aside—Colonel Hollis remembered lessons from the military about cultivating relationships, building bridges, and winning hearts and minds. It

made me recognize her as a warrior-turned-lawyer who never forgot how to form teams. And I am confident that this mentality, combined with a brilliant mind, is what makes her one of the most respected names in the history of the International Criminal Court.

So, with that, please join me in welcoming our keynote speaker, Colonel Brenda Hollis.

# **From Academic Offering To Global Treaty: Negotiating A Convention On Crimes Against Humanity Keynote Address And Reflections**

Brenda J. Hollis

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## INTRODUCTORY REMARKS

I am very happy to be here with you this afternoon, even though it is remotely. And thank you very much for that very gracious introduction. But when you boil it all down, what it really means is that I am really old. I have done a lot of things over a lot of years.

Thank you for the opportunity to participate in this very important symposium. And I also extend my congratulations to Prof. Leila Sadat and all those who have transformed an idea into a proposal that has gained wide acceptance. A difficult task, very well done. Congratulations, indeed.

I want to emphasize that today I am speaking in my personal capacity. My reflections are based on my experience and perspectives as a career prosecutor and do not represent the position of any international court or any organ of such courts.

There are many possible approaches to this discussion. All of them raise many questions—for most of which I do not have the answers. So, we rely on bright, innovative minds such as yours to answer most of those questions.

## ORIGINS AND CORE ISSUES IN CRIMES AGAINST HUMANITY

Let's jump in. I want to focus on a few issues and associated questions that I think are central to any discussion of crimes against humanity, and if the convention does or should deal with those issues.

I want to first remind ourselves of the origins of crimes against humanity and some of the fundamental issues we face regarding these crimes—including differing definitions, proof requirements, and how jurisprudence deals with those differences. And again, the extent to which those issues are or should be dealt with by the convention. Also, the propriety of cumulatively charging crimes against humanity and other mass atrocity crimes.

Now, I do have a word of caution for you. I strongly suggest that the convention should contain language making clear that the failure to sign and ratify the convention does not relieve States and individuals from their obligations to hold accountable those who are responsible for crimes against humanity arising from other legal sources.

Some may say, well, of course, this is understood. But in my experience, a lot of the litigation is around issues that people thought were clearly understood. So, we need to take that on and make those obligations clear in the language of the convention so that States that do not ratify the convention cannot use the lack of clarity as a loophole to avoid those obligations.

Now, finally, for me, the most important part of the discussion is to consider the significance of crimes against humanity in today's international environment, the enforcement challenges we face, how the convention may

deal with those crimes, and the benefits of having a convention as part of our legal framework as opposed to reliance on customary law.

#### EVOLVING LEGAL FRAMEWORKS AND DIVERGENCES

Let's turn to the origins of crimes against humanity and the differing legal frameworks for these crimes.

Since Nuremberg, our understanding of the legal parameters of crimes against humanity has evolved, and the legal framework has become more consistent. But some differences do remain, and they must be dealt with.

Let's examine some of the differing chapeau requirements and the extent to which these differences have been interpreted and reconciled by international courts.

#### WIDESPREAD OR SYSTEMATIC REQUIREMENT

First, there is a requirement that the attacks be widespread *or* systematic. That is pretty clearly understood in today's jurisprudence. But, as we recall, Article 6 of the Nuremberg Charter<sup>1</sup> and the Nuremberg Judgment<sup>2</sup> define crimes against humanity as a legal framework to encompass widespread and systematic commission of enumerated crimes committed against a civilian population.

The International Criminal Tribunal for Rwanda (ICTR)<sup>3</sup>, the Special Court for Sierra Leone (SCSL)<sup>4</sup>, and International Criminal Court (ICC)<sup>5</sup> chapeau requirements all include proof of widespread or systematic attack. The International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>6</sup> chapeau did not include that requirement. However, the ICTY jurisprudence brought its language into conformity with the later language of other courts—the *Tadić* Appeals Judgment<sup>7</sup> reasoning that widespread or systematic character of the attack is an essential element of these crimes. So that issue was resolved.

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1 Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279.

2 Judgment of the International Military Tribunal (Nuremberg), Oct. 1, 1946, 41 Am. J. Int'l L. 172 (1947).

3 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 580 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998).

4 Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶ 375 (Spec. Ct. for Sierra Leone May 18, 2012).

5 Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

6 Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. SC Res. 827 (May 25, 1993).

7 Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Judgment (Int'l Crim. Trib. for the Former Yugoslavia, July 15, 1999).

## NEXUS TO ARMED CONFLICT

What about the nexus of crimes against humanity to armed conflict?

The Nuremberg Charter and the Nuremberg Judgment required that the crimes be committed in the execution of or in connection with any crime against peace and war crime. So, they did require a nexus with these other crimes.

In contrast, Control Council Law No. 10<sup>8</sup> removed this required nexus. The ICTR, SCSL, and ICC statutes do not include this nexus—making clear that this crime may be prosecuted in the absence of an armed conflict, that accountability for crimes against humanity is equal to and independent of accountability for war crimes.

The ICTY chapeau, however, provided that the tribunal has the power to prosecute persons for enumerated crimes against humanity when committed in armed conflict. Once again, the ICTY's jurisprudence reconciled this difference. The *Tadić* Appeals Judgment held that a nexus between the accused's acts and armed conflict is not required to establish criminal responsibility for crimes against humanity. The armed conflict requirement in the statute is satisfied by proof that there was an armed conflict at the time of the acts. That is all that the statute requires.

And the judges went on to say that to the extent it does require that nexus, that requirement goes beyond what is required by customary international law.

The ICC jurisprudence seems to muddy the waters on this issue, seeming to subordinate crimes against humanity to the commission of war crimes.

## DISCRIMINATORY INTENT AND POLICY REQUIREMENTS

If we turn to the ICTR, its chapeau added the requirement that the attack be based on grounds of nationality, ethnicity, race, or religion. This additional requirement was again reconciled with ICTR jurisprudence—the Appeals Chamber underlining that the Security Council's inclusion of this discriminatory intent was intended to address the specific context in which the crimes in Rwanda occurred and was not reflective of customary international law.

In adding this requirement, the Security Council did not depart from international humanitarian law, nor did it change the legal requirements for crimes against humanity. At most, it limited the Rwanda tribunal's jurisdiction.

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<sup>8</sup> Control Council Law No. 10, Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50 (1946).

In the *Akayesu* case, the Appeals Chamber made clear that—except in the case of persecution—a discriminatory intent is not required by international humanitarian law.

The ICC Elements of Crimes added a requirement that the attack be pursuant to or in furtherance of a state or organizational policy to commit such an attack. This additional requirement was rejected by the *ad hoc* tribunals—and I think rightly so.

Though it is specifically included in the ICC Elements of Crimes, the ICC jurisprudence somewhat narrowly construes the policy element in a way that tends to mitigate its negative impact on accountability. For example, the judges have found that it is not required that the policy must consist of a pre-established design. Rather, it can crystallize and develop only as actions are undertaken. Also, it need not be bureaucratic, formalized, or precise, and may be implicit. In general, it may be inferred from the manner in which relevant acts occur.

#### DEFINITIONAL ISSUES: CIVILIANS AND ATTACKS

There were other issues that arose regarding chapeau requirements. For example:

What is the nature of the attack directed against a civilian population? Must it equate to a military attack? The courts have held that it need not equate to such an attack, as crimes against humanity can and do occur in peacetime.

Must there be multiple acts? Yes; a few isolated acts are insufficient. While there is a quantitative element, it is assessed in the broader context of the course of conduct, and the individual acts are considered cumulatively.

Must the civilian population be the primary target? The ICTR and ICTY answer in the affirmative, whereas the ICC—correctly, in my view—rejects this requirement.

What does “civilian” mean in peacetime? The ICTR concluded that a broad definition applies, including within it all persons not actively taking part in hostilities—even members of armed forces who have laid down their arms or are *hors de combat*. Excluding those with the duty to maintain public order from the definition of civilian is problematic in my mind—unless they are actively engaging in combat.

#### RECONCILING JURISPRUDENCE AND THE ROLE OF THE CONVENTION

So, what we can see is this: with some exceptions—such as the ICC policy requirement—most differing chapeau issues have been reconciled through jurisprudential interpretation and clarification.

To the extent that they have been reconciled, does the convention incorporate those reconciled approaches, or will we slip back into

discussions about the various differences that had to be reconciled in the past?

To the extent differences do exist regarding the chapeau requirements, how does or should the convention deal with them?

How should it deal with differences such as the ICC policy requirement? Should it automatically accept ICC language and requirements, even though some of this language and these requirements—such as this policy nexus—are contrary to the jurisprudence of other international courts, which jurisprudence, in my view, is more reflective of the intent and purpose of crimes against humanity?

#### SUBSTANTIVE ELEMENTS: THE CRIME OF PERSECUTION

We also see differences regarding the elements and scope of substantive crimes. One crime against humanity is of particular importance in our current circumstances: persecution.

The ICC includes within this crime persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender grounds, or other grounds that are universally recognized as impermissible under international law—a notably broad formulation.

On the other hand, based on the language of their foundational documents, the ICTR, ICTY, and the Cambodia have taken a narrower approach—limiting persecution to political, racial, and religious grounds. Based on the language of its statute, the SCSL includes persecution on political, racial, ethnic, or religious grounds.

How does—or how should—the convention deal with this difference? Given the importance of this crime today, I suggest the answer is to use the broadest definition.

What does that imply for charging, which often occurs well after the crimes have been committed because these courts come into existence after their commission?

#### CUMULATIVE CHARGING

Let's look at how courts have decided the propriety of cumulative charging of crimes against humanity and other mass atrocity crimes, based on the same facts.

Such charging has been found permissible on two grounds:

**Each crime has a materially distinct element** not contained within the others.

Crimes against humanity require proof of a widespread or systematic attack directed against a civilian population.<sup>9</sup>

War crimes require proof of armed conflict.

Genocide requires proof of intent to destroy a protected group in whole or in part.

**Each crime protects different societal values or interests.**

Cumulative charging reflects the **true character and extent of the criminality**. It reflects the **totality of the accused's course of conduct**.

Several ICTR judgments have found that because these different crimes are intended to protect disparate values, they are never coextensive. In *Akayesu*, the ICTR laid out those different values:

Crimes against humanity protect civilian populations from attack.

War crimes protect noncombatants from abuses during war.

Genocide protects specific groups from extermination.

So, the question arises: Does and should the convention deal with this issue? And if so, how?

#### ENFORCEMENT AND THE PRESENT-DAY URGENCY

Now let's turn to what, for me, are the most important discussions to have. And in that regard, three questions arise:

Why is robust enforcement of this crime, in my view, even more important today?

What legal framework do we apply to best serve the purpose of crimes against humanity and provide the most effective enforcement mechanisms?

To what extent does and should the convention address these questions—and how?

#### WHY ROBUST ENFORCEMENT MATTERS TODAY

Robust enforcement matters today for several reasons. Because today, there is an increasing danger of governments committing widespread or systematic crimes against their civilian populations.

We have seen the rise of regimes which operate—or seek to operate—outside a rules-based international order. We have seen the fair and equal rule of law being undermined to achieve other objectives.

Effective judicial action under crimes against humanity is, in my mind, the only way to protect civilian populations from this onslaught. Some examples are:

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<sup>9</sup> ICTR Statute art. 3; *see also* Prosecutor v. Delalić, Case No. IT-96-21-A, Judgment, ¶ 31 (ICTY Feb. 20, 2001) (holding that individual acts must be assessed cumulatively as part of a widespread or systematic attack directed against a civilian population for crimes against humanity).

In the Philippines, extrajudicial executions were carried out for the purported purpose of dealing with drug problems—no due process, no fair trial guarantees.

Enforced disappearances of those deemed to be involved in drug offenses—again, no due process.

In our own country today: persecution or threatened persecution of political rivals; retaliation against those who investigated or prosecuted crimes committed by high level officials.

Judges being targeted for rulings that go against political dictates.

Deportation of people—including those in the country legally—based on stereotypes of language, appearance, or ethnicity.

Threatened imprisonment of political critics, or those who espouse differing views.

Termination of employment based on political affiliations.

These are all reasons why accountability for commission of crimes against humanity must remain one of the fundamental guards against such violations of rights.

#### FRAMEWORK AND POLITICAL WILL

It is equally important to consider what legal framework will best achieve the purpose of crimes against humanity and support robust enforcement.

In my view, the **broadest possible framework**—whether customary law, statute, jurisprudence, or a combination—is what is needed today.

But enforcement depends not only on legal clarity. It depends on **political will, independent and impartial judicial action, and capacity to act**. What happens when court orders are ignored? Who carries out enforcement? What is the recourse when authorities refuse to enforce such orders?

Does—and should—the convention address these enforcement issues? And if so, how?

#### WHY A CONVENTION STILL MATTERS

Despite all the challenges, there are important merits to having a Crimes Against Humanity Convention.

It brings the **legal weight** of a convention instrument.

It should recognize and codify the **universality of customary law** protections.

It reduces good-faith legal disputes about the status of such protections among signatories.

Of course, it must be made clear that the Convention does **not negate customary law obligations** for non-signatories.

Let me also issue a word of caution: As we have seen in the *ad hoc* tribunals and the ICC, signatories do not always comply. What recourse do we have in those circumstances?

#### CONCLUSION

In conclusion, despite all the challenges that must be overcome, in my view, making a Crimes Against Humanity Convention part of our international and domestic legal framework is a very important initiative.

Thank you. And again, let me applaud the efforts of all of you who have worked so diligently and long to make this Convention a reality.

## Q&A Session

**Q1:** One proposal during the Rome Conference was to eliminate the civilian population requirement entirely and simply use the term ‘population.’ This proposal was rejected because crimes against humanity can occur in peacetime. Attacks outside of armed conflict, where there is no fighting, are in a sense, attacks on civilians. I found your point about the jurisprudence not being expansive enough particularly interesting. Could you elaborate on that further?

**Hollis:** Thank you. I think I would also have voted against eliminating ‘civilian’ because—as we know—crimes against humanity can occur in situations of armed conflict as well. There is no hierarchy of crimes; armed conflict is not an element of crimes against humanity nor are these crimes subordinate to war crimes. However, since crimes against humanity can occur in the context of war crimes, removing ‘civilian’ as a qualifier could allow these crimes to be charged when committed against combatants—but these acts would not be crimes under the law of armed conflict. So, I would not support that sort of revision. Nonetheless, it is essential to look at how we interpret the statutory language, as well as the intent and purpose of the protections afforded. Today, as I mentioned earlier, we see a real, significant increase in threats to civilian populations from their own governments. In that regard, it is imperative to interpret the requirements of crimes against humanity carefully and expansively.

**Q2:** Thank you for your speech. My question is: we know that crimes against humanity are one of the four core crimes under the Rome Statute. Would a treaty on crimes against humanity overlap or conflict with the ICC?

**Hollis:** That is a very interesting question. To the extent that such a treaty basically replicates the ICC requirements—as Prof. Leila Sadat mentioned—there should be no issue. Potential conflict could arise if the convention, after negotiation, diverges significantly from the Rome Statute. But of course, State Parties to the Rome Statute would retain their primary obligations under the statute, establishing a clear hierarchy. Friction could still occur, and judges at the different courts would need to reconcile discrepancies.

**Q3:** Thank you very much. It was a privilege to hear Prosecutor Hollis speak. My question concerns a U.S. practitioner who practiced abroad:

would you have qualified the attacks of 9/11 as crimes against humanity rather than terrorism if the U.S. had laws on crimes against humanity?

**Hollis:** Thank you. I would likely pursue charging it under both bases. Crimes against humanity requires a widespread or systematic attack not both. 9/11 certainly was systematic, and in my view, also widespread—not only geographically, but also in number of victims. So yes, 9/11 meets that requirement. Terrorism is a distinct international war crime and should be recognized as such. While some argue that terrorism is not well defined, it has been clearly defined in the jurisprudence of the ICTY and other international courts. In my view it should be enumerated as an international crime of itself, not confined to armed conflict.

**Q4:** Many States in the Sixth Committee have proposed expanding the definition of crimes against humanity to include environmental crimes or gender apartheid. Would this be codification or progressive development?

**Hollis:** In one sense, increased specificity clarifies the law as it currently exists and reduces litigation over categorization. Environmental crimes should have been given greater significance. Under current frameworks, such acts can be charged under existing specific acts. But clarity in the statute is beneficial.<sup>10</sup> From a practitioner's perspective, greater clarity minimizes litigation.

**Q5:** You mentioned cumulative convictions. Could you elaborate on your initiative to incorporate this into the proposed convention?

**Hollis:** I am uncertain to what extent the convention will address cumulative conviction in detail. However, if it does, it should follow existing jurisprudence. Both bases I discussed earlier – charging 9/11 as both a crime against humanity and terrorism — are legitimate, and in my view clearly supported by jurisprudence of international criminal courts. The broader value of cumulative charging and conviction is that it shows a complete picture of an accused's criminality—how many different societal interests were violated—which informs the assessment of gravity and sentencing.

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<sup>10</sup> Article 7(1)(k) recognizes that 'other inhumane acts with similar character intentionally causes great suffering, or serious injury to body or to mental or physical health' are themselves crimes against humanity. Rome Statute, *supra* note 5, at art 7(1)(k). While the provision does not explicitly reference environmental crimes or gender apartheid, its broad formulation suggests that that acts causing large-scale suffering and injury could be encompassed within this category.

**Q6:** Could you speak briefly on command responsibility or superior responsibility and its applicability to crimes against humanity?

**Hollis:** Any convention should embrace a broad number of modes of liability—especially those developed from the *ad hoc* tribunals, which were very comprehensive. Command responsibility depends on whether the person had effective control—formal or informal—over the perpetrators. While it may be harder to prove with civilians rather than with military superiors, it remains an important mode of criminal liability.

**Q7:** You mentioned that ICC signatories sometimes fail to enforce judgments. How should the ICC proceed? Should it compel enforcement? How should other institutions respond?

**Hollis:** Failures of enforcement involve a process at both the ICC and at the *ad hoc* tribunals. Judges first determine whether a violation has occurred. The State gets a chance to respond to alleged failures and to explain itself. So far, that is judicial. Beyond this, the process becomes political. At the *ad hoc* tribunals, the matters are referred to the Security Council. At the ICC, it goes to the Assembly of States Parties. Often, political considerations—not the law or legal reasoning—determine the outcome. Once enforcement enters the political realm, objective, informed decision-making is compromised.