Prevention of Crimes against Humanity

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Abstract

Abstract. Like the Genocide Convention, the draft articles on crimes against humanity are not confined to issues of punishment. They also, in the preamble and especially in article 4, impose an obligation of prevention. It is informed principally by the 2007 judgment of the International Court of Justice as well as be case law of international human rights tribunals. The obligation has an internal dimension, by which States must prevent crimes against humanity within their own jurisdiction. But it also has an external dimension that mandates international cooperation and even intervention which must necessarily be compatible with the Charter of the United Nations. The draft articles are not as robust as the Genocide Convention with respect to the inchoate crimes of incitement and conspiracy. The obligation of non-refoulement is also a dimension of the preventative role of the draft articles.

1. Introduction

Crimes against humanity may usefully be thought of as a cognate of gross and systematic violations of human rights. Many of the definitional developments in crimes against humanity since they were first codified in the Charter of the International Military Tribunal, such as the addition of apartheid, torture, and enforced disappearance, reflect developments in human rights law. The crime against humanity of persecution, as defined in Article 7(1)(h) of the Rome Statute, seems directly tributary of progress in the protection of human rights and dependent upon it for its interpretation. The International Law Commission (ILC), which is now preparing components of a treaty on international law, once even proposed abandoning the label 'crimes against humanity' in favour of 'systematic or mass violations of human rights'.[1]

At the most basic level, then, the prevention of crimes against humanity involves addressing violations of human rights that may not yet warrant qualification as 'gross and

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[1] *Report of the International Law Commission on the work of its forty-third session (29 April-19 July 1991)*, UN Doc. A/46/10, at 103.

systematic'. Such a broad and holistic view of the prevention of atrocity crimes, including crimes against humanity, is reflected in the work of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Adviser to the Secretary-General on the Prevention of Genocide.[2] It often focusses on a range of transitional justice measures and such issues as addressing the legacy of past atrocities in order to prevent their reoccurrence.[3] But these important matters are surely beyond the scope of an instrument like the draft articles on crimes against humanity currently being studied by the ILC.

According to the ILC Drafting Committee, in its first report, 'the draft articles' primary purpose [is] the *prevention* of crimes against humanity'.[4] Taking the lead from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,[5] as interpreted by such bodies as the International Court of Justice (ICJ), prevention of crimes against humanity has its place within the draft articles. The notion of prevention appears explicitly in the preamble of the draft articles and in three distinct provisions. Prevention is also implicit in the *non-refoulement* obligation set out in draft Article 5 because it requires states to ensure that crimes against humanity are not perpetrated as a result of rendition from their territory to a place where there is a real risk of their occurrence. The draft articles take some modest steps towards codifying the obligation of prevention, in some respects taking it slightly farther than in the Genocide Convention while in others appearing to fall short of the earlier instrument. The scope of prevention of crimes against humanity remains relatively enigmatic, as it does with genocide. The compelling analogy, and the starting point for any understanding of the prevention of crimes against humanity, is the 1948 Genocide Convention.

2. Prevention and the Genocide Convention

It is not always appreciated that the 1948 Genocide Convention is in some sense a response to the inadequate reach of crimes against humanity. When Ernesto Dihigo, the Cuban representative to the first session of the General Assembly, took the floor in the Sixth Committee on 22 November 1946 to propose a resolution on the crime of genocide, he explained that '[a]t the Nürnberg trials, it had not been possible to punish certain cases of

[2] See, for example, *Joint study of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Adviser to the Secretary-General on the Prevention of Genocide*, UN Doc. A/HRC/37/65, 1 March 2018.
[3] *Resolution adopted by the Human Rights Council on 30 September 2016: Human rights and transitional justice*, UN Doc. A/HRC/RES/33/19, 5 October 2016, § 7.
[4] International Law Commission (ILC), *Summary record of the 3366th* meeting, UN Doc. A/CN.4/SR.3366, 3 July 2017 ('*Summary record of the 3366th* meeting'), at 3 (emphasis added).
[5] Convention on the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277.

genocide because they had been committed before the beginning of the war. Fearing that such crimes might remain unpunished owing to the principle of *non* [sic] *crimen sine lege*, the representative of Cuba asked that genocide be declared an international crime.' He said this was the purpose of the resolution.[6] The initial draft resolution sponsored by Cuba, India, and Panama did not have a title. Its operative paragraph called for the Economic and Social Council to prepare a report 'on the possibilities of declaring genocide an international crime and assuring international cooperation for its *prevention* and punishment'.[7]

Inspired by the draft resolution, Saudi Arabia, in one of its more significant contributions to the advancement of human rights, submitted a draft convention on genocide that required future states parties 'to make effective use of every means at their disposal, acting separately or in co-operation to prevent and penalise genocide'.[8] Resolution 96(I), entitled 'The Crime of Genocide', was adopted unanimously by the General Assembly on 11 December 1946. Operative paragraph 3 'recommend[s] that international co-operation be organised between states with a view to facilitating the speedy prevention and punishment of the crime of genocide … .' The *travaux préparatoires* demonstrate that the importance of prevention was present from the earliest stages of codification of the law of genocide, indeed, even before the idea of a convention had emerged. The Convention itself acknowledges the significance of prevention and imposes this as a binding treaty obligation.

However, the Genocide Convention provides little in the way of guidance as to the scope of the duty to prevent genocide. The Convention concentrates on criminal prosecution of genocide. Prevention seems to be contemplated in an exceedingly narrow sense, whereby the crime is prevented by prosecuting the perpetrators. Arguably, the existence of the Convention may also provide some measure of deterrence, which contributes to prevention. Over the decades following the adoption of the Genocide Convention, little attention was devoted to fulfilment of the obligation to prevent the crime. For example, the most significant study of the Convention within the United Nations, issued by the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in 1985, acknowledged the issue of prevention but did not offer much in terms of concrete proposals. It urged the establishment

[6] UN General Assembly (GA), Sixth Committee, *Summary Record of Meetings*, UN Doc. A/C.6/84, 25 November 1946.
[7] *Request from the Delegations for Cuba, India and Panama for the inclusion of an additional item in the Agenda*, UN Doc. A/BUR/50, 2 November 1946 (emphasis added).
[8] *Draft protocol for the prevention and punishment of the crime of genocide, proposed by the delegation of Saudi Arabia*, UN Doc. A/C.6/86, 26 November 1946.

of a mechanism to provide 'early warning' although there was no guidance on what would be done in the event of serious concerns that the crime might actually be committed.[9]

The 1994 genocide in Rwanda was a turning point. Since then, great attention has been devoted to addressing the dimensions of the prevention of genocide as well as of other atrocity crimes. On the tenth anniversary of the Rwandan genocide, the Secretary-General of the United Nations established a post of Special Advisor on the Prevention of Genocide.[10] In the *Bosnia v. Serbia* case, the ICJ considered the scope of the obligation to prevent genocide, giving it teeth when it found a violation of the Convention by Serbia for its failure to intervene appropriately at the time genocide was perpetrated in Srebrenica.[11] Closely related, the doctrine of the 'responsibility to protect' has emerged. It imposes a duty on all states to prevent both genocide and crimes against humanity 'through appropriate and necessary means'.[12] Given this background to the renewed interest in codifying obligations with respect to crimes against humanity, it is quite unthinkable that a new convention be adopted that does not adequately address the issue of prevention.

3. The Draft Articles and Prevention

The fourth recital of the preamble of the draft articles states: '[a]ffirming that crimes against humanity, which are among the most serious crimes of concern to the international community as a whole, must be prevented in conformity with international law, … '.[13] Moreover, the fifth recital declares that states parties are '[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes …'. The third recital of the preamble to the draft articles also addresses prevention although the word itself is not employed. It '[r[ecognis[es] further that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*)'. Obviously, prohibition is a measure of prevention.

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[9] *Revised and updated report on the question of the prevention and punishment of the crime of genocide, Prepared by Mr. B. Whitaker*, UN Doc. E/CN.4/Sub.2/1985/6, 2 July 1985, §§ 78-84.
[10] See W. Schabas, 'The Special Adviser on the Prevention of Genocide and his Inscrutable Mandate', in C.T. Majinge (ed.), *Rule of Law through Human Rights and International Criminal Justice: Essays in Honour of Adama Dieng*, (Cambridge Scholars, 2015) 65-81.
[11] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment of 26 February 2007, ICJ Reports (2007) 43.
[12] *2005 World Summit Outcome*, UN Doc. A/RES/60/1, 24 October 2005, § 138.
[13] The original proposal by the Special Rapporteur (*Third report on crimes against humanity By Sean D. Murphy, Special Rapporteur*, UN Doc. A/CN.4/704, 23 January 2017, 'Third Murphy Report', at 138) read: '[a]ffirming that crimes against humanity, one of the most serious crimes of concern to the international community as a whole, must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, …'

According to the general commentary, the Commission intended the preamble to address prevention as distinct from punishment. The commentary explains that the draft articles have 'two overall objectives: the prevention and the punishment of crimes against humanity' and that the fourth recital to the preamble focuses upon the first of them.[14] The commentary observes that this paragraph 'foreshadows' obligations that are set out in draft Articles 2, 4, and 5. It adds that in affirming that crimes against humanity 'must be prevented in conformity with international law', recital four of the preamble 'indicates that such crimes are among the most serious crimes of concern to the international community as a whole'.[15] The formulation 'the most serious crimes of concern to the international community as a whole' is taken from the Rome Statute of the International Criminal Court (ICC), where it appears in the preamble, and in Articles 1 and 5.[16] The general commentary also explains that the fifth recital of the preamble 'affirms the link between the first overall objective (prevention) and the second overall objective (punishment) of the present draft articles, by indicating that prevention is advanced by putting an end to impunity for the perpetrators of such crimes'.[17] It, too, is derived from a recital in the preamble of the Rome Statute.[18]

Article 2 of the draft articles declares that '[c]rimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which states undertake to prevent and punish'. It is really a preliminary provision that introduces the substantive articles. The provisions echo the language of Article I of the 1948 Convention on Genocide. Indeed, the word 'undertake' was introduced by the Drafting Committee,[19] replacing 'shall' in the original proposal of the Special Rapporteur,[20] so as to maintain the parallelism with the 1948 Genocide Convention. The Drafting Committee noted that the ICJ had interpreted the word 'undertake', as it appears in Article I of the Genocide Convention, as meaning to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, and to accept an obligation.[21] The quite lengthy commentary to this article recalls the history of crimes

[14] *Report of the International Law Commission on the work of its sixty-ninth session*, 1 May–2 June and 3 July–4 August 2017, UN Doc. A/72/10 ('2017 ILC Report'), at 24.
[15] *Ibid*.
[16] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 3. See *Summary record of the 3366th meeting*, *supra* note *at* 3.
[17] 2017 ILC Report, *supra* note 14, at 24.
[18] ILC, *Report of the Drafting Committee*, *supra* note 16, at 3.
[19] ILC, *Text of draft articles 1, 2, 3 and 4 provisionally adopted by the Drafting Committee on 28 and 29 May and on 1 and 2 June 2015*, UN Doc. A/CN.4/L.853, 2 June 2015, at 1.
[20] *First report on crimes against humanity By Sean D. Murphy, Special Rapporteur*, UN Doc. A/CN.4/680, 17 February 2015, ('First Murphy Report'), Annex, at 87. The Special Rapporteur had considered use of the word 'undertake', *ibid.*, § 113.
[21] ILC, *Summary record of the 3263rd meeting*, UN Doc. A/CN.4/SR.3263, 5 June 2015 ('*Summary record of the 3263rd meeting*'), at 6.

against humanity, referring to the first codification in the Charter of the International Military Tribunal, to the Principles adopted by the ILC in 1950, and to more recent initiatives such as the Statute of the International Criminal Tribunal for the former Yugoslavia.[22] The general commentary does not provide any further enlightenment on the scope of the obligation of prevention.

Article 4 is the principal provision dealing with the obligation to prevent crimes against humanity. That it should be a distinct provision emerged in the report of the Drafting Committee at the 2015 session of the Commission and underscores the attention attached to prevention. The Drafting Committee described the purpose of the article as being 'to set forth the various elements that collectively promote the prevention crimes against humanity'. The Drafting Committee gave the provision the title 'Obligation of prevention'. This is 'meant to suggest that the obligation has a range of elements rather than a single focus'.[23] The text adopted by the Commission reads as follows:

> 1. Each State undertakes to prevent crimes against humanity, in conformity with international law, including through:
> (a) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction or control; and
> (b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organisations.
> 2. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.[24]

The general commentary notes that the opening words of the paragraph are formulated in a manner similar to that of Article I of the 1948 Genocide Convention.[25] As it did with Article 2 of the draft articles, the Drafting Committee replaced the word 'shall' with 'undertakes',[26] in the interests of consistency.[27]

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[22] 2017 ILC Report, *supra* note 14, at 25-28.
[23] ILC, *Summary record of the 3263rd meeting*, *supra* note 21, at 7.
[24] 2017 ILC Report, *supra* note 14, at 45. The first draft of the provision proposed by the Special Rapporteur (UN Doc. A/CN.4/680, Annex, at 87) read as follows: '1. Each state party confirms that crimes against humanity, whether committed in time of peace or in time of war, are crimes under international law which it undertakes to prevent and punish. 2. Each state party shall take effective legislative, administrative, judicial or other measures to prevent crimes against humanity in any territory under its jurisdiction. 3. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of crimes against humanity.'
[25] 2017 ILC Report, *supra* note 14, at 48.
[26] ILC, Text of draft articles *supra* note 19, at 3.
[27] ILC, *Summary record of the 3263rd meeting*, *supra* note 21, at 6.

The general commentary provides a lengthy elaboration of the scope of prevention and the intent behind Article 4. It begins by reviewing existing treaty practice concerning the prevention of crimes and other acts, especially with respect to treaties dealing with acts that may, depending upon the circumstances, also constitute crimes against humanity. The International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted in 1973, declares that apartheid is a crime against humanity.[28] The more recent Convention on enforced disappearance states that '[t]he widespread or systematic practice of enforced disappearance constitutes a crime against humanity'.[29] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[30] does not explicitly invoke the concept of crimes against humanity but torture is recognized as such in other instruments, such as the ICC Statute. Finally, the 1948 Genocide Convention, born from dissatisfaction with the limited scope of crimes against humanity affirmed in the judgment of the International Military Tribunal, deals with a category of international crime that has often been described as a form or category of crime against humanity.[31] More generally, as the commentary explains, echoing a paragraph in the 2007 ICJ judgment,[32] an obligation of prevention has for many decades featured in most multilateral treaties dealing with crimes, even those outside of the realm of crimes against humanity and human rights.[33]

Interpretation of the obligation of prevention in the draft articles is obviously informed by the ICJ judgment regarding prevention of genocide.[34] The general commentary examines

[28] International Convention on the Suppression and Punishment of the Crime of Apartheid, (1986) 1015 UNTS 243, Art. I(1).
[29] International Convention for the Protection of All Persons from Enforced Disappearance (2010) 2716 UNTS 3, ('Convention against Enforced Disappearance'), Art. 4. See also PP4 of the Convention. On enforced disappearance as a crime against humanity, see W. Schabas, 'Defining enforced disappearance as a crime against humanity', in M. Bideault, M. Boumghar, O. de Frouville and L. Trigeaud (eds), *Mélanges en l'honneur du professeur Emmanuel Decaux, Réciprocité et universalité, Sources et régimes du droit international des droits de l'homme* (Editions Pédone, 2017) 449-466.
[30] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Convention against Torture'), (1987) 1465 UNTS 85.
[31] Convention on the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277. See, for example, Judgment on Defence Motions to Acquit, *Sikirica* et al. (IT-95-8-I), Trial Chamber, 3 September 2001, § 58, explaining that genocide is a crime against humanity and that it belonged to a 'genus' that includes the crime against humanity of persecution.
[32] *Bosnia v Serbia*, *supra* note 11, § 429.
[33] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, (1973) 974 UNTS 177, Art. 10(1); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, (1977) 1035 UNTS 167, Art. 4; International Convention against the Taking of Hostages, (1983) 1316 UNTS 205, Art. 4; Convention on the Safety of United Nations and Associated Personnel; International Convention for the Suppression of Terrorist Bombings, (2001) 2149 UNTS 256, Art. 15; United Nations Convention against Transnational Organized Crime, (2003) 2225 UNTS 209, Art. 9(1); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, (2003) 2237 UNTS 319, Art. 9(1).
[34] *Bosnia v Serbia*, *supra* note 11, §§ 428-328.

the reasoning of the Court in considerable detail.[35] Although this portion of the commentary begins with the words '[i]nternational courts and tribunals have addressed these obligations of prevention', no case law other than the ICJ ruling in *Bosnia v. Serbia* is discussed. It may well be that the *Bosnia* judgment is the only judicial consideration of the obligation to prevent, by any court and with respect to any treaty. With reference to the Court's judgment, the general commentary observes that a breach of the obligation of prevention is not a criminal violation but rather one of international law engaging state responsibility. It recalls the commentary to the articles on state responsibility: '[w]here crimes against international law are committed by state officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them.'[36]

The general commentary then turns to international human rights law. This issue is developed in more detail in the first Report of the Special Rapporteur.[37] Some human rights treaties explicitly comprise a dimension of prevention. For example, states parties to the International Convention on the Elimination of All Forms of Racial Discrimination 'undertake to prevent, prohibit and eradicate all practices of [racial segregation and apartheid] in territories under their jurisdiction'.[38] Along similar lines, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the 'Istanbul Convention'), as its title indicates, imposes an obligation to prevent violence against women.[39] Although the general commentary does not make such a reference, provisions such as Article 20(1) of the International Covenant on Civil and Political Rights (ICCPR) — '[a]ny propaganda for war shall be prohibited by law' — also have a preventive mission.

The human rights courts and treaty bodies have developed a body of case law with respect to what are sometimes called horizontal obligations. These exist in addition to the basic obligation not to actually violate a norm of human rights that is imposed on a state party to a particular treaty. In this respect, the general commentary devotes a paragraph to reviewing the case law of the European Court of Human Rights. The ILC notes that although the European Convention on Human Rights (ECHR) has no express obligation to 'prevent' breaches, such an obligation has been found by the Court with respect to specific provisions. In this area, there is quite abundant case law of the European Court on the right to life and the prohibition of

[35] 2017 ILC Report, *supra* note 14, at 48-51.
[36] *Ibid*., at 50, citing *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, at 142, § (3) of the commentary to Art. 58.
[37] First Murphy Report, *supra* note 20, §§ 102-104.
[38] International Convention on the Elimination of All Forms of Racial Discrimination, (1969) 660 UNTS 195, Art. 3.
[39] (2014) CETS 210, Art. 4(2).

torture or inhuman or degrading treatment or punishment. In a case dealing with domestic violence, the European Court declared that the state has a positive obligation to take 'preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual'.[40] The Court has even extended this to self-harm, holding that Article 2 of the Convention 'obliges the national authorities to prevent an individual from taking his or her own life if the decision has not been taken freely and with full understanding of what is involved'.[41] Along similar lines, states parties must take action to prevent torture and inhuman or degrading treatment being inflicted by persons not acting on behalf of the state.[42] The ILC cites comparable pronouncements from the Inter-American Court of Human Rights, where the horizontal dimension of human rights treaties was first developed, but it does not refer to similar case law of the Human Rights Committee in application of the ICCPR.[43]

4. The General Obligation of Prevention

Draft Article 4(1) comprises a chapeau and two sub-paragraphs. Each of these three components creates legal obligations. The chapeau sets out general obligations, whereas the two sub-paragraphs distinguish between specific obligations depending upon whether they arise inside or outside the state's territory. Referring to the general obligation of prevention, the ILC has stressed the importance of the distinction between prevention and punishment. In this respect, it has referred to a pronouncement of the ICJ in *Bosnia v. Serbia* that 'one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent'.[44] However, it is clearly inadequate to confound the obligation of prevention with that of punishment by contending that the former is observed if the latter is respected. The obligation of prevention has an autonomous and distinct character, described by the ICJ as being 'both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty.'[45]

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[40] At the European Court of Human Rights (ECtHR): *Opuz v. Turkey*, Appl. no. 33401/02, 9 June 2009, § 128. Also: *Osman v. the United Kingdom*, Appl. nos 87/1997/871/1083, 28 October 1998, § 115; *Kontrová v. Slovakia,* Appl. no. 7510/04, 31 May 2007, § 49; *Mastromatteo v. Italy*, Appl. No. 37703/97, 24 October 2002, § 67 *in fine*; *Branko Tomašić and Others v. Croatia*, Appl. no. 46598/06 15 January 2009, § 50.
[41] *Haas v. Switzerland,* Appl. no. 31322/07 20 January 2011, § 54.
[42] *A. v. the United Kingdom*, Appl. no. 25599/94 23 September 1998, § 22; *Z and Others v. the United Kingdom*, Appl. no 29392/95, 10 may 2001, §§ 73-75; *Abdu v. Bulgaria*, Appl. no. 26827/08, 11 March 2014, § 40.
[43] For example, *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, § 8.
[44] *Bosnia v Serbia*, *supra* note 11, § 426.
[45] *Ibid*., § 427.

In the *Bosnia v. Serbia* judgment, the Court concluded that the Convention imposed an obligation upon states not to commit genocide. It derived this obligation from both the classification of genocide as 'a crime under international law' and from the obligation of prevention declared in Article I.[46] By the adoption of comparable language in the draft articles, it is said that they also, and first and foremost, impose an obligation upon states not to commit crimes against humanity. It is useful to bear in mind that when it recognized an obligation not to commit genocide, the ICJ was interpreting Article IX of the Genocide Convention. The Court was confronted with determining whether the compromissory clause giving it jurisdiction over the 'interpretation, application or fulfilment of the present Convention' also authorized it to rule that a state party had actually committed genocide. Arguments had been raised that the obligations upon states parties were confined to the punishment of the crime by individual perpetrators.

It seems somewhat tautological to contend that an obligation to prevent brings with it an obligation to refrain from doing the very thing that is to be prevented. Criminal law consists of a range of prohibitions, of varying degrees of seriousness. It cannot normally be deduced from the prohibition of an act that there is a corresponding obligation to prevent the act. Some legal systems make the failure to prevent a crime a distinct offence, but this cannot be generalized. The ICJ said '[i]t would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law'.[47] That is of course quite true. But does it follow that the prohibition is derived from the obligation of prevention? It was unnecessary for the Court to make such a finding because it did not conclude Serbia had committed genocide. Rather, it found it had breached the obligation of prevention. Be that as it may, the precedent established by the Court makes it unnecessary for the draft articles on crimes against humanity to include an explicit prohibition of the commission of crimes against humanity by states. Moreover, whatever the wisdom of the Court's reasoning, the positive obligations related to prevention, both internally and externally, pose legal problems of far greater interest and difficulty.

[46] *Ibid*., § 186.
[47] *Ibid*., § 166.

5. The Internal Dimension

The first sub-paragraph of draft Article 4(1) is concerned with territory under the 'jurisdiction or control' of a state. The obligation of prevention is described as involving 'effective legislative, administrative, judicial or other preventive measures'. The formulation is inspired by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[48] The ICJ judgment in *Bosnia v. Serbia* declares that 'the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur'.[49] The Court said that to incur responsibility, 'it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed'.[50]

The general commentary explains that the term 'other preventive measures' was preferred to 'other measures', which is the term used in the Torture Convention, in order to 'reinforce the point that the measures at issue in this clause relate solely to prevention'. Moreover, the Commission declares that the term 'effective' is intended to imply 'that the State is expected to keep the measures that it has taken under review and, if they are deficient, to improve them through more effective measures'. In its general commentary, the Commission cited with approval General Comment 2 of the Committee Against Torture:

> States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented. States parties also have the obligation continually to keep under review and improve their national laws and performance under the Convention in accordance with the Committee's concluding observations and views adopted on individual communications. If the measures adopted by the state party fail to accomplish the purpose of eradicating acts of torture, the Convention requires that they be revised and/or that new, more effective measures be adopted.[51]

Turning to the specific types of measures to be pursued by a state, the Commission said the obligation of prevention would usually oblige a state to adopt national legislation, keep the legislation under review, educate government officials as to the state's obligations, implement training programmes for those involved in law enforcement and, 'once the proscribed act is

[48] Convention against Torture, *supra* note 30, Art. 2.
[49] *Bosnia v Serbia*, *supra* note 11, § 432.
[50] *Ibid*.
[51] 2017 ILC Report, *supra* note 14, at 51, citing General Comment 2, Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2, § 4.

committed, fulfil in good faith any other obligations to investigate and either prosecute or extradite offenders, since doing so serves, in part, to deter future acts by others'.[52]

6. Territorial Scope of the Obligation

The first sub-paragraph, where a state party undertakes to prevent crimes against humanity through 'effective legislative, administrative, judicial or other preventive measures', declares that it applies not just to the territory of a state party but also to 'any territory under its jurisdiction or control'. The Chairman of the Drafting Committee, Mathias Forteau, explained that the phrase 'in any territory under its jurisdiction or control' was 'inspired by previous work of the Commission' and 'intends to encapsulate the territory *de jure* of the State, as well as the territory under its control *de facto*'.[53] According to the general commentary on the draft articles, '[s]uch a formulation covers the territory of a State, but also covers activities carried out in other territory under the State's jurisdiction'.[54] The general commentary refers to the commentary of the ILC on the draft articles on the prevention of transboundary harm from hazardous activities, adopted in 2001.[55] In its earlier statements, the Commission intended application to situations where a state exercises de facto jurisdiction even if it lacks *de jure* jurisdiction. Examples include unlawful intervention, occupation, and unlawful annexation.

A somewhat similar issue was addressed by the drafters of the Genocide Convention. The result is a so-called 'colonial clause', by which a state party may by declaration extend the application of the Convention 'to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible'.[56] Such clauses no longer figure in modern treaties. However, that has not stopped some states from behaving as if they still exist, or as if they are implied in a treaty. Practice under the ICC Statute provides relevant examples. Although reservations to the ICC Statute are prohibited,[57] some states parties have purported to exclude certain territories from the jurisdiction of the Court.[58] This is contrary to the general rule by which ratification provides the Court with jurisdiction over the territory of a state party.[59] The United Kingdom has acted as if the Rome Statute contains a provision similar to

[52] 2017 ILC Report, *supra* note 14, at 51-52.
[53] Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau, 5 June 2015.
[54] 2017 ILC Report, *supra* note 14, at 53.
[55] *ILC Yearbook ... 2001*, vol. II (Part Two) and corrigendum, at 151; *ILC Yearbook ... 2006*, vol. II (Part Two), at 70, § (25)
[56] Genocide Convention, *supra* note 31, Art. 10.
[57] Art. 120 ICCSt.
[58] Territorial exclusion, Denmark (Greenland and Faroe Islands), (2002) 2189 UNTS 499; Territorial exclusion, New Zealand (Tokelau Islands), (2002) 2189 UNTS 499.
[59] Art. 12(2) ICCSt.

Article 10 of the Genocide Convention. It has made a series of declarations extending the jurisdiction of the Court to certain territories.[60] By implication, then, the United Kingdom appears to believe that the Court cannot exercise jurisdiction over those territories for which it has not made a declaration, such as the British Indian Ocean Territory, currently the site of an important military base of the United States.

This is not the place for a detailed analysis of issues of territorial jurisdiction. They have led to much debate before the European Court of Human Rights[61] and the Human Rights Committee.[62] In its comments on the draft articles, the United Kingdom said that the ILC should also consider further the appropriate jurisdictional scope of the obligation of prevention under draft Article 4.[63] The issue does not really concern very many states, as it applies to cases of occupation and annexation, or possible cases where a state's armed forces are present on the territory of another state. But because such situations have an extraordinary potential for the perpetration of crimes against humanity and other violations of international law, it may be useful to provide greater clarification of this point in the commentary.

7. The External Dimension: Cooperation and Intervention

The external dimension of the obligation of prevention is set out in subparagraph 1(b) of Article 4 of the draft articles. Accordingly, states undertake 'to prevent crimes against humanity, in conformity with international law, including through … (b) cooperation with other States, relevant intergovernmental organisations, and, as appropriate, other organisations'. Nothing resembling the sub-paragraph appears in the original draft of the Special Rapporteur. The formulation was added by the Drafting Committee at the 2015 session of the Commission.[64]

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[60] Gibraltar, C.N.271.2015.TREATIES-XVIII.10 (Depositary Notification); Isle of Man, C.N.696.2012.TREATIES-XVIII.10 (Depositary Notification); Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St Helena, Ascension and Tristan da Cunha, Sovereign Base Areas of Akrotiri and Dhekelia, Turks and Caicos Islands, C.N.161.2010.TREATIES-1 (Depositary Notification).

[61] *Catan and Others v. the Republic of Moldova and Russia*, Appl. nos 43370/04, 8252/05 and 18454/06 19 Octber 2012, § 106; *Loizidou v. Turkey* (preliminary objections), Appl. no. 15318/89, 23 March 1995, § 62; *Cyprus v. Turkey*, Appl. no. 25781/94, 10 May 2001, § 76; *Banković and Others v. Belgium and Others*, Appl. no. 52207/99, 19 December 2001, § 70; *Ilaşcu and Others v. Moldova and Russia*, Appl. no. 48787/99, 8 July 2004, §§ 314-316; *Loizidou v. Turkey (merits)*, Appl. no. 15318/89, 18 December 1996, § 52; *Al-Skeini and Others v. the United Kingdom*, Appl. no. 55721/07, 7 July 2011, § 138.

[62] For example, *Concluding observations on the fourth report of the United States of America*, UN Doc. CCPR/C/USA/CO/4, 23 April 2014, §§ 4, 9, 22. For a broader discussion of jurisdictional issues raised by the ILC draft articles, see A. Coco, 'The Universal Duty to Establish Jurisdiction over and Investigate Crimes against Humanity: Preliminary Remarks on draft Articles 7, 8, 9 and 11 by the International Law Commission', within this special issue, at Section 2.

[63] UN GA, Sixth Committee, *Summary Record of the 23rd Meeting*, UN Doc. A/C.6/70/SR.23, 27 November 2015, § 37.

[64] ILC, *Summary record of the 3263rd meeting*, *supra* note 21, at 7.

The Report of the Drafting Committee provides only a summary explanation for the text. It focusses on the words 'in conformity with international law', which are added to the *chapeau* of the provision although they appear to be principally if not exclusively directed at subparagraph 1(b).

The draft articles do not say so explicitly but subparagraph 1(b) makes it clear enough that there is an obligation to prevent genocide that extends beyond the jurisdiction of a state party. The author of this chapter still vividly recalls attending a course in July 1994 given at Brown University when the territorial scope of the obligation to prevent genocide was discussed. The Rwandan genocide, which had begun several weeks previously, had not yet run its course. Senior American diplomats who attended as resource persons were challenged about the failure of the United States and other members of the Security Council to take appropriate action at the early stages of the massacres, in April, May, and June 1994. They responded that the Genocide Convention only required the United States to prevent genocide within its own borders. The reticence of the permanent members of the Security Council to take action to prevent genocide is described and documented in Samantha Power's book *A Problem from Hell*.[65]

The conservative view that the obligation to prevent genocide stops at the border soon gave way to an equally extreme position that was seemingly at the other end of the spectrum. Soon it was being argued, often with reference to 'lessons learned' from the Rwandan genocide, that prevention of genocide justified military intervention even in the absence of authorization by the Security Council under Chapter VII of the Charter. In early 1999, searching for legal justification of the bombing of Serbia, President Bill Clinton invoked the 'g-word' and insisted upon the imperative of intervention to protect the Kosovar population even without a resolution of the Security Council.[66]

Policy debates that followed NATO military activity in 1999 led to the development of the 'responsibility to protect' doctrine. Succinctly set out in two paragraphs of a General Assembly resolution,[67] it is closely related to the obligation of prevention of both genocide and crimes against humanity. Indeed, the Resolution speaks of a responsibility to protect with regard to genocide and crimes against humanity, as well as war crimes and ethnic cleansing, without any distinction between these different categories. The General Assembly resolution

[65] S. Power, *A Problem from Hell: America and the Age of Genocide* (Basic Books, 2002). See also D. Scheffer, *All the Missing Souls, A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012), especially chapter 2.
[66] J. Broder, `In Address to the Nation, Clinton Explains Need to Take Action', *New York Times*, 25 March 1999.
[67] World Summit Outcome, *supra* note 12, §§ 138-139.

makes it explicit that the responsibility to protect has both internal and external dimensions. First, it is the responsibility of each state to protect its own populations, entailing 'the prevention of such crimes, including their incitement'. Second, the 'international community … has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means'. Finally, where a state manifestly fails to protect its population, 'collective action' may be contemplated 'through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis'.

Since the 2005 codification of the responsibility to protect, there have been occasional attempts to contend that intervention outside the framework of the Charter may be permissible in order to prevent genocide and crimes against humanity. For example, in 2008 senior policy makers in Washington produced a 'blueprint' for the prevention of genocide and crimes against humanity that argued for armed intervention even without Security Council authorization. '[W]e must never rule out doing what is necessary to stop genocide or mass atrocities', said the authors.[68] Two years later, American diplomats attempted to introduce an 'understanding' into amendments to the Rome Statute concerning the crime of aggression so as to exclude so-called 'humanitarian intervention'. Out-manoeuvred by the Iranians at the Kampala Review Conference, they were forced to accept an amendment that added the phrase 'in accordance with the Charter of the United Nations' that effectively neutered their efforts.[69]

The claim that threats of genocide, and crimes against humanity, may authorize the use of force in the absence of a Security Council decision returns again and again, but from the usual sources. Sometimes proponents speak of a right to intervene. But if this exists, surely it constitutes an obligation rather than a right, and one to be exercized in a principled and equitable manner rather than in pursuit of less noble imperatives of great power foreign policy. Anne Peters has argued persuasively that a special obligation is imposed upon permanent members of the Security Council to take appropriate action when atrocities occur.[70]

The 2007 ICJ judgment in the *Bosnia v. Serbia* case is also relevant to the extraterritorial issue. The Court found that Serbia had breached the obligation of prevention set out in Article 1 of the 1948 Convention by its failure to intervene in neighbouring Bosnia and Herzegovina. The judgment is therefore a precedent for the extension of the obligation of

[68] M. Albright and W. Cohen, *Preventing Genocide: A Blueprint for U.S. Policymakers* (United States Holocaust Memorial Museum et al., 2008), at 97.
[69] *Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression*, RC/Res.6, 11 June 2010, § 6, Annex III.
[70] A. Peters, 'The Security Council's Responsibility to Protect', 8 *International Organizations Law Review* (2011) 1.

prevention beyond the borders of a state. The Court began its discussion of prevention by noting that the capacity of a state to prevent genocide 'depends, among other things, on the geographical distance of the state concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events'. Manifestly, then, this applies to prevention of genocide outside the territory of the state.[71]

'The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide', the Court said.[72] It explained that the state's 'obligation to prevent, and the corresponding duty to act' commenced when it learned of a serious risk that genocide would be committed. 'From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent *(dolus specialis)*, it is under a duty to make such use of these means as the circumstances permit.'[73] The Court considered that in 1995, when the Srebrenica massacre took place, the relationship between the government of the Federal Republic of Yugoslavia and the Bosnian Serbs was 'very close', giving it a 'position of influence … unlike that of any of the other States parties to the Genocide Convention owing to the strength of the political, military and financial links'.[74] The Court concluded that the Yugoslav federal authorities should 'have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised'.[75] By its failure to act, Serbia breached its obligation of prevention and thereby engaged its responsibility under the Genocide Convention. Obviously, there was no relevant Security Council resolution authorizing the use of force by Serbia. Thus, the Court's reference to intervention did not at all contemplate military activity but rather lawful measures involving diplomatic activity and other forms of peaceful pressure.

This is the context in which the ILC considered it appropriate to insert the phrase 'in conformity with international law' into the chapeau of Article 4. According to the Drafting Committee, in its 2015 report, 'the measures to be taken by States to fulfil this obligation must

[71] *Bosnia v Serbia*, *supra* note 11, § 430.
[72] *Ibid*., § 430.
[73] *Ibid*., § 431.
[74] *Ibid*., § 434.
[75] *Ibid*., § 438.

be consistent with the existing rules of international law, including the Charter of the United Nations. In other words, States cannot rely on their obligation of prevention as set forth in these draft articles as a justification for the violation of existing rules, in particular those relating to the use of force.'[76] The point receives further confirmation in the general commentary, where it is noted that in *Bosnia v. Serbia* the ICJ insisted that when engaging in measures of prevention, 'it is clear that every State may only act within the limits permitted by international law'.[77] According to the ILC, measures undertaken by a state to fulfil the obligation to prevent crimes against humanity, 'must be consistent with the rules of international law, including rules on the use of force set forth in the Charter of the United Nations, international humanitarian law, and human rights law. The State is only expected to take such measures as it legally can take under international law to prevent crimes against humanity.'[78]

This issue returned, at least indirectly, in discussion about the preamble of the draft articles. Two relevant paragraphs were proposed by the Special Rapporteur. The first reaffirmed the purposes and principles of the Charter of the United Nations, 'and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'. The second '[e]mphasi[sed] in this connection that nothing in the present draft articles shall be taken as authorising any State to intervene in an armed conflict or in the internal affairs of any other State …'.[79] Neither the summary records of the meetings of the Commission nor the report provide explanation for the disappearance of these paragraphs from the final version. However, it would be stretching things to imply from the absence of the two paragraphs that the Commission sought to retreat from the unequivocal views it expressed about intervention elsewhere in the 2017 report.

The second sub-paragraph of draft Article 4 does not in fact put any emphasis on the type of unilateral prevention that the ICJ focussed upon in the *Bosnia v. Serbia* case. Consistent with the General Assembly's formulation of the responsibility to protect, multilateral cooperation is quite central to the prevention of crimes against humanity. When sub-paragraph 1(b) was first proposed, the Drafting Committee explained that it had been included in light of a general consensus within the Commission about the importance of cooperation as an aspect of the obligation of prevention. The focus was on 'relevant intergovernmental organisations'.

[76] ILC, *Summary record of the 3263rd meeting*, *supra* note 21, at 7.
[77] 2017 ILC Report, *supra* note 14, at 49, citing *Bosnia v Serbia, supra* note 11, § 430.
[78] *Ibid.*
[79] Third Murphy Report, *supra* note 13, 164-165.

According to the Drafting Committee, the relevance of any particular intergovernmental organisation 'would depend on, among other things, the organisation's functions, the relationship of the State to that organisation and the context in which the need for cooperation arose'. The Drafting Committee considered that this included non-governmental organisations that might play an important role in the prevention of crimes against humanity in specific countries.[80] The general commentary expands upon these remarks, noting that the duty to cooperate in the prevention of crimes against humanity actually arises from the Charter of the United Nations. In particular, Article 1(3) of the Charter identifies one of the purposes of the United Nations as being to 'achieve international cooperation in solving international problems of ... [a] humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all'. Moreover, articles 55 and 56 of the Charter pledge all Members States 'to take joint and separate action in cooperation with the Organisation for the achievement of' certain purposes, including 'universal respect for, and observance of, human rights and fundamental freedoms for all'.[81]

It is regrettable that the draft articles do not confirm more precisely the principle of an obligation of prevention extending beyond the jurisdiction of a state, one that exists regardless of whether 'other States, relevant intergovernmental organisations, and, as appropriate, other organisations' are active. Any concern that an overly broad statement of the principle might appear to authorize the use of force unilaterally can easily be addressed with appropriate language. When the ICJ told Serbia that it bore obligations of prevention even outside its borders, it was insisting upon the impermissibility of remaining silent and inactive in the fact of atrocities, wherever they occur. Should this not be affirmed explicitly in the draft articles?

8. The Missing Inchoate Crimes

Despite attempts at parallelism with the 1948 Genocide Convention, one of its significant elements related to the issue of prevention is missing from the draft articles on crimes against humanity. During the drafting of the Genocide Convention, much of the discussion about prevention revolved around the inchoate offences set out in Article III. It lists five 'punishable acts', of which the first is genocide. The other four are conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide. The final act, complicity, only applies when the crime of genocide is perpetrated.

[80] ILC, *Summary record of the 3263rd meeting*, *supra* note 21, at 7-8.
[81] 2017 ILC Report, *supra* note 14, at 74.

However, the other three acts are preparatory or incomplete crimes, and their prosecution is governed by the Genocide Convention even if the crime of genocide is not itself perpetrated. Provisions of the Convention imposing obligations with respect to adoption of legislation and cooperation in extradition quite explicitly apply not only to genocide but also to the other acts listed in Article III.

Adding the inchoate crimes to the Genocide Convention was not without controversy, particularly the offence of direct and public incitement, given the concern that it could encroach on freedom of expression.[82] In the Sixth Committee of the General Assembly, Manfred Lachs of Poland insisted that because prevention was also the goal of the Convention, freedom of the press 'must not be so great as to permit the Press to engage in incitement to genocide'.[83] Others also linked the criminalisation of direct and public incitement to the preventive role of the Convention.[84] The crime of direct and public incitement is not always well understood, perhaps because there have been several convictions by the International Criminal Tribunal for Rwanda under circumstances where genocide was indeed committed.[85] However, in the case of incitement to genocide that is committed, it is unnecessary to establish that the act was 'direct' and 'public'. Incitement, even if 'private' and 'indirect', is a form of complicity if the crime of genocide is itself perpetrated. The Rwandan genocide, in which hate-filled media played such an important role, led to heightened concern with the phenomenon of incitement. The Security Council has urged states and relevant organizations, with respect to the African Great Lakes region, 'to cooperate in countering radio broadcasts and publications that incite acts of genocide, hatred, and violence in the region'.[86] Some argue that incitement may extend to a range of forms of what are called 'hate speech', such as denial of historic genocides.

The inchoate acts listed in Article III of the Genocide Convention were incorporated into the statutes of the ad hoc tribunals.[87] The Security Council combined the provisions of

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[82] G. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, Fruition* (Oxford University Press, 2017), at 118-123; L. Berster, 'Article III', in C. Tams, L. Berster and B. Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide, A Commentary* (Beck, 2014) 157-190, at 167-174; J. Ohlin, 'Incitement and Conspiracy to Commit Genocide', in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009) 207-227.

[83] UN GA, Sixth Committee, *Continuation of the Consideration of the Draft Convention on Genocide*, UN Doc. A/C.6/SR.84, 26 October 1948.

[84] *Ibid*., statements by Pérez Perozo, Venezuela; and Morozov, Soviet Union; see also Zourek, Czechoslovakia, in UN GA, Sixth Committee, *Continuation of the Consideration of the Draft Convention on Genocide*, UN Doc. A/C.6/SR.85, 27 October 1948.

[85] Judgment, *Nahimana et al*. (ICTR-99-52), Appeals Chamber, 28 November 2007; Judgment, *Ngirabatware* (MICT-12-29), Appeals Chamber, 18 December 2014; Judgment, *Bikindi* (ICTR-01-72), Appeals Chamber, 18 March 2010.

[86] SC Res. 1161 (1998), § 5.

[87] Art. 4(3) ICTYSt.; Art. 2(3) ICTRSt.

Articles II and III so that the definition of genocide also included the 'other acts'. This amounted to a form of *lex specialis* that created problems of interpretation given that participation in the crimes within the jurisdiction of the ad hoc tribunals were also governed by a general provision. Perhaps recognition of these difficulties at the ad hoc tribunals prompted the drafters of the Rome Statute to avoid blending Articles II and III of the Genocide Convention. Instead, Article 25, which is in Part III of the Rome Statute, sets out forms of participation in the crimes that are defined in Part II of the Rome Statute. In principle, Article 25 applies generally and without distinction to all of the crimes within the Court's subject-matter jurisdiction. By exception, 'direct and public incitement', set out in Article 25(3)(e), only applies in the case of genocide. The drafters of the Rome Statute did not extend the inchoate form of incitement, whose mission is prevention, to crimes against humanity or war crimes.[88] Nor is it applied to the crime of aggression by the amendments adopted in 2010.

The ILC included inchoate incitement of crimes against humanity in the 1951 and 1954 drafts of the Code of Offences Against the Peace and Security of Mankind. For example, Article 2(13) of the 1954 draft is a general provision applicable to all of the crimes in the Draft Code, including crimes against humanity. Thus, 'conspiracy' and 'direct incitement' are punishable with respect to 'any of the offences in the preceding paragraphs of this article'.[89] The commentary to the 1951 draft Code of Crimes says that the provision on 'conspiracy' was derived from the Charter of the International Military Tribunal, implying that it does not extend to the inchoate form of conspiracy. On the other hand, the commentary says that 'direct incitement' is based upon the Genocide Convention, implying that inchoate incitement is contemplated.[90] The ambiguity of the treatment of this subject in the drafts of the 1950s persisted in the 1991 text adopted by the Commission.[91] However, the 1996 version of the Code of Crimes adopted by the ILC takes a narrower view, providing for criminal liability of a person who '[d]irectly participates in planning or conspiring to commit such a crime which in fact occurs' and '[d]irectly and publicly incites another individual to commit such a crime

[88] L. Sadat, 'A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity', in L. Sadat (ed.), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press, 2011) 455-501, at 497.
[89] *Report of the International Law Commission covering the work of its sixth session*, 3 June-28 July 1954, UN Doc. A/CN.4/88, § 54.
[90] *Report of the International Law Commission covering the work of its third session*, 16 May-27 July 1951, UN Doc. A/CN.4/48, § 59. Also *Draft code of offences against the peace and security of mankind*, UN Doc. A/CN.4/44, 12 April 1951, § 131.
[91] *Report of the International Law Commission on the work of its forty-third session*, 29 April-19 July 1991, UN Doc. A/46/10, § 176.

which in fact occurs'.[92] In effect, then, it eliminates the inchoate form of incitement. The words 'in effect occurs' were added by the Drafting Committee.[93] The commentary states:

> Participation only entails responsibility when the crime is actually committed or at least attempted. In some cases it was found useful to mention this requirement in the corresponding subparagraphs in order to dispel possible doubts. It is of course understood that the requirement only extends to the application of the Code and does not purport to be the assertion of a general principle in the characterization of participation as a source of criminal responsibility.[94]

Footnote 45 follows: 'This limitation does not in any way affect the application of the general principles independently of the Code or of similar provisions contained in other instruments, notably Article III of the Convention on the Prevention and Punishment of the Crime of Genocide.

The explanation continues several paragraphs later:

> The phrase 'which in fact occurs' indicates that the criminal responsibility of an individual for inciting another individual to commit a crime set out in articles 17 to 20 is limited to situations in which the other individual actually commits that crime, as discussed in paragraph (6) above. The principle of individual criminal responsibility for incitement was recognized in the Charter of the Nürnberg Tribunal (art. 6 (instigation)), the Convention on the Prevention and Punishment of the Crime of Genocide (art. Ill, sub- parade)), the statute of the International Tribunal for the Former Yugoslavia (art. 7, para. 1 (instigation)) and the statute of the International Tribunal for Rwanda (art. 6, para. 1 (instigation)). This principle was also recognized by the Commission in the 1954 draft Code (art. 2, para. 13 (ii)).[95]

The reference may be misleading because as far as genocide is concerned the 1996 Code is significantly more restrictive than the 1948 Convention and the statutes of the ad hoc tribunals. It does not seem that the Commission considered the distinction between the inchoate forms of incitement and complicity and those where it is a form of complicity in a crime that has taken place. It should also be borne in mind in considering the relevance of these discussions within the Commission that the purpose of the Code of Crimes is not the same as that of the draft articles on crimes against humanity. The Code of Crimes was intended to deal with acts that

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[92] *Report of the International Law Commission on the work of its forty-eighth session* ('1996 ILC Report'), 6 May-26 July 1996, UN Doc. A/51/10, at 18, Art. 2(e)-f).
[93] ILC, *Summary record of the 2437th meeting*, UN Doc. A/CN.4/SR.2437, 6 June 1996, § 7.
[94] 1996 ILC Report, *supra* note 92, at 20, § 6.
[95] *Ibid*., at 22, § 16.

threaten the peace and security of humanity. No such requirement is imposed upon crimes against humanity. Consequently, possible justifications for the narrow approach to inchoate crimes taken by the Commission in drafting the Code of Crimes are not necessarily applicable to the draft articles on crimes against humanity.

Attempt is the only one of the inchoate acts in Article III of the Genocide Convention that is found in Article 25 of the Rome Statute and that therefore applies to crimes against humanity. That attempt is the least problematic of the inchoate acts is confirmed by its inclusion in Article 6 of the draft articles where obligations of criminalisation in national law are set out in detail. Article 25 requires states to incorporate 'committing' along with various form of complicity ('ordering, soliciting, inducing, aiding, abetting or otherwise assisting') and 'attempting to commit' crimes against humanity.

The Washington University draft convention on crimes against humanity, which prompted the work of the ILC, contains a provision within the article on individual criminal responsibility recognising that a person shall be liable who '[d]irectly and publicly incites others to commit crimes against humanity'.[96] The explanatory note says that the provision draws upon Article 25 of the Rome Statute.[97] In her contribution to the work on the draft convention, Elies van Sliedregt comments briefly on the issue of inchoate liability, recommending that the inclusion of direct and public incitement 'seems useful and desirable'. On the other hand, she says that recognizing inchoate conspiracy is 'less necessary' given the inclusion of indirect perpetration.[98] However, although indirect perpetration is adequate to address conspiracy when the crime is actually committed, it does not cover inchoate conspiracy at all. Prof. Van Sliedregt also notes that indirect conspiracy was controversial at Nuremberg and in drafting the Rome Statute. The International Military Tribunal dealt with crimes that were actually committed so inchoate conspiracy did not present itself as a problem. Subsequently, inchoate conspiracy was included in the Genocide Convention and in the statutes of the ad hoc tribunals. My recollection is that the distinction between inchoate or 'common-law' conspiracy and conspiracy as a form of complicity was not well understood by those who negotiated the provisions at the Rome Conference. Some of the participants in the drafting of

[96] Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, in Sadat, *Forging a Convention*, *supra* note 88, 359-386, at 367.
[97] *Ibid*.
[98] E. van Sliedregt, 'Modes of Participation', in Sadat, *Forging a Convention*, *supra* note 88, 223-261, at 254. For a broader discussion of draft Article 6 of the ILC project, see also E. van Sliedregt, 'Criminalization of Crimes against Humanity under National Law', in this special issue.

Article 25 believed, mistakenly, that conspiracy pursuant to Article III of the Genocide Convention was adequately addressed in Article 25(3)(d) of the Rome Statute.

The summary records of the ILC indicate that the Drafting Committee decided that incitement as a mode of participation did not belong in the draft articles 'in part because the term "incitement" had not been included in certain international treaties, such as the Rome Statute, and in part because the concept did not exist in some national legal systems. Members of the Drafting Committee had considered that the concept of incitement was covered under the concepts of "soliciting" and "inducing" in subparagraph (c), and that would be reflected in the commentary.'[99] The omission of 'direct and public incitement' and 'conspiracy' is not discussed in the general commentary on the draft articles although the provision is mentioned indicating that it had not been entirely overlooked by the Commission.[100]

The fact that there are unfortunate gaps in Article 25 of the Rome Statute is not a good reason to omit direct and public incitement and conspiracy to commit crimes against humanity from the draft articles. Nor is there validity to the contention that these inchoate forms of crimes against humanity are not included in some national legal systems. This didn't inhibit the General Assembly in 1948 when it adopted the Genocide Convention. This discrepancy between the Genocide Convention and the draft articles on crimes against humanity of the ILC should be addressed. A provision might be added along the lines of Article III of the Genocide Convention, and references to various obligations described as applying not only to crimes against humanity but also to such 'other acts'. In its 2015 resolution entitled Prevention of Genocide, the United Nations Human Rights Council recalled the importance of addressing incitement in the prevention of genocide.[101] The same can be said of crimes against humanity. The neglect by the ILC of the inchoate acts, in particular conspiracy and direct and public incitement, confirms the existence of obstacles that obstruct progress in this area.

9. Exceptional Circumstances are No Justification

Paragraph 2 of draft Article 4 states that exceptional circumstances may not be invoked as a justification for the offence. The provision is modelled on an article in the Convention against Torture.[102] The rather archaic reference to 'state of war or threat of war' in the Torture

[99] ILC, *Summary record of the 3312th meeting*, UN Doc. A/CN.4/SR.3312, 9 June 2016, at 4.
[100] 2017 ILC Report, *supra* note 14, at 64, § 13.
[101] *Prevention of Genocide*, UN Doc. A/HRC/RES/28/34, 7 April 2015 § 2. Also *Prevention of Genocide*, UN Doc. A/HRC/RES/7/25, 28 March 2008, § 4; *Prevention of Genocide*, UN Doc. A/HRC/RES/22/22, 22 March 2013, § 2.
[102] Convention against Torture, *supra* note 30, Art. 2(2).

Convention is replaced with 'armed conflict'. The general commentary points out that the words 'such as' were included in order to stress that the examples provided are not intended to be exhaustive.[103] The formulation is drafted so as to address conduct of non-state actors as well as states. However, it is confined to the context of the obligation of prevention. It is not meant to apply to possible defences in criminal proceedings.[104]

The Drafting Committee considered whether paragraph 2 might be better located as a stand-alone provision rather than being linked in the way it is to the obligation of prevention. It left the question unresolved.[105]

10. *Non-refoulement*

The draft articles impose a general obligation of *non-refoulement* in the case of crimes against humanity, building upon principles established in international refugee law by specialized human rights treaties, and in the case law of international human rights courts and treaty bodies. Entitled *non-refoulement*, draft Article 5 states as follows:

> 1. No State shall expel, return (*refouler*), surrender or extradite a person to territory under the jurisdiction of another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the territory under the jurisdiction of the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

The provision is inspired by Article 16 of the Enforced Disappearance Convention although the two texts are not identical.[106] The Commission preferred this as a model because it is without prejudice to other obligations of *non-refoulement* upon the state arising from treaties or customary international law.[107] *Non-refoulement* is a specific manifestation of the obligation of prevention in that it imposes a duty on a state when there is a 'danger' that a crime against humanity may be committed. It was for precisely this reason that the Drafting Committee thought the provision, which was originally Article 12, should be placed after Article 4.[108]

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[103] 2017 ILC Report, *supra* note 14, at 55.
[104] *Ibid.*
[105] ILC, *Summary record of the 3263rd meeting*, *supra* note 21, at 8.
[106] Convention against Enforced Disappearance, *supra* note 29, Art. 16.
[107] 2017 ILC Report, *supra* note 14, at 57.
[108] UN Doc. A/CN.4/SR.3366, p. 3.

An early formulation of the principle can be found in the fourth Geneva Convention of 1949, which prohibits the transfer of a protected person to a country where prosecution for political opinions or religious beliefs may take place.[109] However, the 1951 Refugee Convention probably provides the best-known provision. It prohibits the expulsion or return of a refugee 'to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.[110] The rule may be set aside where there are 'reasonable grounds' to consider that the individual is a danger to the security of the country or if, after conviction of 'a particularly serious crime', the person 'constitutes a danger to the community'. In contrast with the Refugee Convention, absolute prohibitions of non-refoulement are set out in international conventions concerning torture and enforced disappearance.[111] Although not set out explicitly in the ECHR, the European Court of Human Rights has concluded that there is an obligation of non-refoulement where there is a real risk that an applicant would be exposed to the death penalty,[112] to torture and inhuman or degrading treatment or punishment.[113] The Human Rights Committee has adopted a comparable position with respect to application of the ICCPR.[114] The European Court has developed quite a sophisticated body of jurisprudence that will be helpful to those applying Article 5 of the draft articles.

11. Conclusions

At first glance, the treatment of prevention by the draft articles is far more robust than in the 1948 Genocide Convention. Of course, the same can be said of the draft articles as a whole. Although modelled upon the 1948 Genocide Convention, they are much, much longer. In many respects, they develop and expand upon matters that received only vague and summary treatment in the 1948 Convention. From that perspective, the text on prevention as well as other relevant provisions appear prolix and inadequate. The Commission has not adequately echoed the pronouncements of the ICJ concerning an autonomous and unilateral obligation on states

[109] Geneva Convention relative to the Protection of Civilian Persons in Time of War, (1950) 75 UNTS 173, Art. 45.
[110] Convention relating to the Status of Refugees, (1954) 189 UNTS 150, Art. 33.
[111] Convention against Torture, *supra* note 30, Art. 3.
[112] *Al Nashiri v. Poland*, Appl. no. 28761/11, 24 July 2014, § 577. Also: *S.R. v. Sweden*, Appl. no. 62806/00, 23 April 2002; *Ismaili v. Germany*, Appl. no. 58128/00, 15 March 2001.
[113] *Chahal v. the United Kingdom*, Appl. no. 22414/93, 15 November 1996, § 79; *Saadi v. Italy*, Appl. no. 37201/06, 28 February 2008, § 127.
[114] *J.D. v. Denmark*, No. 2204/2012, 26 October 2016, § 11.2; *R.G. et al. v. Denmark*, No. 2351/2014, 2 November 2015, § 7.4; X v. Denmark, No. 2007/2010, 26 March 2014, § 9.2; *K. v. Denmark*, No. 2393/2014, 16 July 2015, § 7.3; *P.T. v. Denmark*, No. 2272/2013, 1 April 2015, § 7.2.

to prevent genocide outside their borders, whether or not there are any international initiatives requiring their cooperation. Even more glaring is the treatment accorded to inchoate forms of perpetration, especially incitement and conspiracy. The Genocide Convention is superior to the draft articles in this respect. Instead of progressive development, the draft articles appear to weaken or dilute some important principles that ought to be, some 70 years after adoption of the Genocide Convention, beyond any dispute.