

Complementarity and cooperation in international criminal justice

Assessing initiatives to fill the impunity gap

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Summary

The international criminal justice system, although centred on the International Criminal Court (ICC), is dependent on effective domestic action, including state cooperation with the ICC. The ICC is premised on the concept of complementarity, which means that the primary responsibility for exercising jurisdiction in respect of international crimes rests with national systems. However, there is no comprehensive convention obligating states to criminalise and exercise jurisdiction over such crimes at national level. More importantly, there is no comprehensive convention requiring interstate cooperation to promote the successful investigation of international crimes. This paper assesses two recent initiatives aimed at establishing such a comprehensive convention.

THE ICC IS AT THE CENTRE of international criminal-justice discussions. At the political or ideological level, these have tended to focus on the relationship between the ICC and other bodies, such as the African Union (AU) and the UN Security Council. In the context of the former relationship, the fact that the ICC has so far investigated crimes and prosecuted perpetrators only in Africa has led the AU to suggest that the ICC has an anti-African bias and an imperialist inclination.¹ The relationship between the Security Council and the ICC, provided for in the Rome Statute of the ICC, raises questions about political influence over the ICC and has compounded the criticism of political bias against Africa.² At a more doctrinal level, the discussions surrounding the ICC have focused on specific principles and obligations, such as complementarity and cooperation.³ In particular, the doctrinal discourse has focused on the obligation to cooperate, and the capacity and willingness of national jurisdictions to prosecute perpetrators of international crimes.

On the one hand, it should come as little surprise that the focus of attention has been on the ICC. After all, it is the first permanent court with jurisdiction over international crimes. To the extent that we can speak of an international criminal justice system, the ICC is the glue that holds that system together. On the other hand, by its own terms, the Rome Statute of the ICC is premised on the idea that national criminal justice systems should be the primary vehicles for the delivery of justice and accountability for international crimes.⁴ It could therefore be argued that it should be domestic prosecutions, and not the ICC, that are key when it comes to the pursuit of international

criminal justice. Under the Rome Statute, complementarity is the vehicle through which the general objective to place states in the position of exercising jurisdiction over international crimes can be achieved. The focus on complementarity – and enhancing it – has obvious benefits for the political debate. Enhancing complementarity will mean that African states will be in a position to prosecute international criminals independently, which would reduce the need for the ICC's involvement and at the same time might mitigate the AU's criticism that the ICC is biased against Africa.

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The purpose of this paper is to consider the tools and options for facilitating the state's exercise of criminal jurisdiction over international crimes. In particular, it considers two recent initiatives to enhance complementarity by proposing conventions to facilitate the exercise of jurisdiction by states and strengthen interstate cooperation. The first of these is the study by the International Law Commission (ILC) of crimes against humanity. The second is the initiative taken by Belgium, Slovenia and the Netherlands for a convention on mutual legal assistance with respect to Rome Statute crimes (the BSN initiative).⁵ Both initiatives have interstate cooperation as their central feature.⁶ There is also a civil-society initiative for a convention on crimes against humanity (referred to as the crimes against humanity initiative).⁷

This paper, however, is focused on the intergovernmental initiatives – the ILC study and the BSN initiative. In any event, the ILC initiative is sufficiently closely related to the civil-society project that the latter need not be addressed separately. This paper addresses, firstly, the importance of complementarity and cooperation in the international criminal-justice system, underpinned by the Rome Statute, and attempts to identify any legal gaps. The paper then provides a brief analysis of the ILC study and the BSN initiative. It then discusses prospects for synergies between the two initiatives before offering general concluding remarks.

In its assessment of both initiatives, in particular from the perspective of Africa, it is important to recall that one of the galvanising factors for establishing the ICC was the commitment to ensure that the horrors of Rwanda's genocide were never repeated. The 'never again' mantra explained, at least partly, the leading role that Africa took in supporting a permanent international criminal court.⁸ Therefore, the rationale for the ICC was never just about ensuring accountability for atrocities committed but also about preventing future atrocities. The initiatives should therefore also be designed with the prevention of atrocities in mind.

Identifying gaps in the pursuit of complementarity

The ILC and BSN initiatives both recognise the important, albeit complementary, role played by the ICC in the international criminal justice system. For example, the ILC syllabus for a possible crimes-against-humanity project notes that the ICC 'will remain a key international institution for prosecution of high-level persons who commit this crime'.⁹ Similarly, the Declaration on the BSN Initiative refers to the ICC's role as investigating and prosecuting where states are unable or unwilling to do so.¹⁰ The Rome Statute system is therefore central to both initiatives. However, both initiatives proceed from the assumption that there are legal gaps in the system. In particular,



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the initiatives are based on the view that there are legal gaps in two specific areas – the obligation on states to establish and exercise jurisdiction, and the duty to cooperate between states.

Obligation to exercise national jurisdiction

Although both initiatives recognise the importance of the Rome Statute, both recognise that an effective international criminal-justice system depends mainly on effective domestic investigation and prosecution. The ILC syllabus, for example, while recognising the centrality of the Rome Statute and the ICC, observes that ‘the ICC does not have the capacity to prosecute all persons who commit crimes against humanity, [and that] effective prevention and prosecution of such crimes’ has to take place primarily in national jurisdictions.¹¹

An effective international criminal-justice system depends mainly on effective domestic investigation and prosecution

Similarly, the BSN declaration begins by stating that it is ‘first and foremost States’ responsibility to uphold and implement the conventions criminalising the crime of genocide, crimes against humanity and war crimes’.¹² To this extent, both initiatives echo the spirit of the Rome Statute embodied in the principle of complementarity.¹³

In its preamble, the Rome Statute emphasises that ‘it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’ and that ‘the International Criminal Court ... shall be complementary to national criminal jurisdictions’.¹⁴

The importance of complementarity under the Rome Statute is equally borne out by the statements issued by the various organs of the ICC. In February 2012, for example, then prosecutor elect of the ICC, Fatou Bensouda, stated that one of the ‘main principles of the Statute is that all Parties commit to investigate, prosecute and prevent massive crimes when perpetrated within their own jurisdiction’.¹⁵ Bensouda also said that states parties accept that it is ‘their primary responsibility to investigate and prosecute’ and that, should they fail in this responsibility, ‘the ICC can independently decide to step in’.¹⁶

In a similar vein, the president of the ICC, Judge Sang-Hyun Song, differentiated between the ICC and the ad hoc tribunals created by the UN Security Council by referring to complementarity.¹⁷ He said that the ICC was designed ‘from the ground up with [the] relationship between States and the Court in mind’.¹⁸ In this system, he said, ‘The ICC is a court of last resort’ and ‘the primary responsibility for investigation and

prosecution of the Rome Statute crimes lies with the states’.¹⁹ Importantly, Judge Song stressed that this is ‘both a *right* and a *responsibility* of each state’.²⁰ In the annual resolutions on complementarity, the states parties have also consistently underscored that it is the ‘primary responsibility of States to investigate and prosecute’ serious international crimes.²¹

The BSN and ILC initiatives attempt to address certain gaps in the Rome Statute complementarity objective and, thereby, to contribute to more effective investigation and cooperation under national law. From the perspective of complementarity, the primary legal gap is that although the Rome Statute provides for the primacy of national jurisdiction, it does not require states parties, as a legal obligation, to prosecute perpetrators of Rome Statute crimes. The jurisdiction of the ICC, including the conditions for its exercise, is established in the Rome Statute.²² However, under the Rome Statute, complementarity serves only as bar – an admissibility requirement – to the exercise of jurisdiction of the ICC. Article 17 of the Rome Statute, for example, provides that the court ‘shall determine that a case is inadmissible where’, among others, that ‘case is being prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to genuinely carry out the investigation or prosecution’.²³ The Rome Statute addresses in great detail these inadmissibility aspects of complementarity, including, for example, descriptions of what is meant by unwillingness,²⁴ inability²⁵ and how the admissibility of the court, including on the grounds of complementarity, can be challenged.²⁶ These aspects of admissibility have, moreover, been developed in the jurisprudence of the ICC.²⁷

The Rome Statute emphasises that ‘it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’

Although the Rome Statute provides that the ICC is complementary to national systems and establishes an elaborate admissibility regime based on complementarity, it does not, by its terms, establish national jurisdiction nor does it require states parties to establish national jurisdiction over Rome Statute crimes.²⁸ This is counterintuitive given that domestic criminalisation is essential for effective complementarity.²⁹ However, even though the provisions of the Rome Statute do not require as a legal obligation the establishment of national jurisdiction over Rome Statute crimes, those states that have domesticated the Rome Statute have also established national jurisdiction. The South African implementation of the Rome Statute Act, for example, provides that any person who commits

a Rome Statute crime is guilty of an offence.³⁰ This provision is echoed in the domestic implementation legislation of other African states.³¹

Moreover, at times it appears that the organs of the court also assume the existence of a responsibility on the part of states parties to exercise jurisdiction. In the statement referred to above, the prosecutor of the ICC defines the commitment by states parties to prosecute as a 'responsibility'.³² In a legal sense, the word 'responsibility' does not have the same connotation (other than in the context of the secondary rules of state responsibility) as an obligation or a duty. However, the president of the court, in his statement quoted earlier, seems to go beyond moral responsibility in his description of the commitment to assert and establish jurisdiction over Rome Statute crimes.³³ Having described the commitment as both a duty and a right, he goes on to say that 'states parties to the Rome Statute have an *obligation* [emphasis added] to ensure that their national justice systems are capable of conducting proceedings into alleged' Rome Statute crimes.³⁴

The notion that there is a legal obligation to establish national jurisdiction has also found its way into judicial practice. In the Kenya admissibility case, for example, the ICC Pre-Trial Chamber stated that in addition to having the right to exercise jurisdiction over Rome Statute crimes, states are also 'under an existing duty to do so as explicitly stated in the Statute's preambular paragraph'.³⁵

Similarly, the North Gauteng High Court of South Africa held that South Africa was under an obligation 'imposed both in terms of international law and South African law' to investigate and prosecute perpetrators of Rome Statute crimes.³⁶ It should be noted that, on appeal, the Supreme Court of Appeal of South Africa based the obligation to initiate investigations solely on South Africa's domestic implementation legislation, and not on the Rome Statute. This is perhaps an indication that the higher court does not share the view that the Rome Statute obliges the exercise of national jurisdiction.³⁷

The Kenya admissibility case, likewise, is open to the interpretation that it is not the Rome Statute that obliges the establishment and exercise of jurisdiction. This case could be interpreted as an affirmation of the assumption in the Rome Statute that general international law prior to the Rome Statute imposed such an obligation – hence the phrase 'an existing duty'.³⁸ At any rate, it would be difficult on the basis of the text of the Rome Statute to sustain the assertion that the statute itself imposes an obligation to exercise national jurisdiction over Rome Statute crimes. Indeed, it appears that not all states implementing the Rome Statute have made the

policy choice of establishing jurisdiction, suggesting that under the Rome Statute establishment of jurisdiction was not a legal requirement.³⁹

This analysis suggests that although states have, in some cases, enacted legislation to establish national jurisdiction over international crimes, the Rome Statute does not impose an obligation to do so. Moreover, to justify the existence of a general rule of customary international law, one would need to show widespread practice and the belief that the practice is required by law.⁴⁰ Given that the cases – which are not sufficiently widespread or general – of establishing jurisdiction have been in connection with the Rome Statute, and not out of a general obligation imposed by international law, it would be difficult to argue that there is a general obligation under international law to establish jurisdiction.⁴¹ For the Rome Statute system to be effective, there is a need to exercise national jurisdiction. Therefore, the lack of an obligation on states to establish such jurisdiction is tantamount to a legal gap in the international system underpinned by the Rome Statute.

This legal gap could be filled by the two initiatives under consideration here.

For the Rome Statute system to be effective, there is a need to exercise national jurisdiction

Interstate cooperation

The second legal gap pertains to cooperation and is also linked to complementarity. Effective complementarity requires not only the criminalisation of international crimes, but also the ability to effectively investigate them. An essential element for effective investigation and successful prosecution of those committing international crimes is interstate cooperation.⁴²

The Rome Statute creates an elaborate cooperation regime to promote the effectiveness of the ICC.⁴³ As a general obligation, the Rome Statute provides for states parties to 'cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'.⁴⁴ The statute lists various forms of cooperation that a state is obliged to provide. These include the identification of individuals, the taking of evidence, the questioning of any person, service of documents, execution of searches and seizures, the freezing of assets and the catch-all phrase 'any other type of assistance which is not prohibited by the law of the requested State'.⁴⁵ But, without question, the most important form of cooperation provided for in the statute is the obligation to cooperate in the arrest and surrender of persons under an ICC arrest warrant.⁴⁶ In addition to specifying the

content of the obligations, the Rome Statute also lays down the various procedures that should be followed in carrying out the general duty to cooperate.⁴⁷

The importance of cooperation in the Rome Statute system is underlined annually by the states parties, when they reaffirm ‘the importance of effective and comprehensive cooperation ... to enable the Court to fulfil its mandate’.⁴⁸ The Assembly of States Parties has also developed a robust, although largely ineffective mechanism for countering non-cooperation.⁴⁹ The importance of cooperation for the Rome Statute system is also reflected in the fact that all domestic legislation involving the Rome Statute includes a robust cooperation regime. The South African legislation, for example, includes elaborate provisions on cooperation with respect to arrest and surrender,⁵⁰ and detailed provisions on other aspects of cooperation and assistance.⁵¹ This is also true of other domestic legislation implementing the Rome Statute, both in Africa and elsewhere.⁵²

While the Rome Statute creates a rather elaborate and comprehensive regime that, by and large, the states parties give effect to in their domestic systems, this regime is only vertical in nature, in the sense that it only applies between the ICC and the state parties. This is reflected in President Song’s assertion that the ICC was designed ‘from the ground up’ with the relationship between states and the court in mind.⁵³ The Rome Statute does not, however, include a horizontal obligation for states to cooperate with one another in the investigation of international crimes.⁵⁴ The only provision for interstate cooperation relates to cases of competing requests, or, in other words, those cases where the ICC has made a request for cooperation from a state party and, at the same time, another state, whether a party to the statute or not, has made a similar request.⁵⁵

It is therefore not surprising that the states parties’ implementing legislation does not provide for interstate cooperation. Yet even national-level prosecution of international crimes benefits from interstate cooperation. This type of cooperation is particularly important in cases where the forum state – the state where the investigation and prosecution are taking place – is not the place where the crime occurred.⁵⁶ In the context of the Rome Statute, which is based on complementarity and the notion of national systems exercising jurisdiction, interstate cooperation would greatly increase a state’s capacity to investigate international crimes and prosecute their perpetrators.

There are many examples where a lack of such cooperation has served as an impediment to prosecution in instances where the presence of a legal framework for cooperation may have facilitated cooperation

It is clear therefore that there is a legal gap with respect to interstate cooperation. Although it is based on the notion that domestic legal systems have the primary responsibility to exercise jurisdiction, the Rome Statute does not impose an obligation on states to cooperate with one another – even though interstate cooperation is necessary for effective national investigation and prosecution.

There are many examples where a lack of such cooperation has served as an impediment to prosecution in instances where the presence of a legal framework for cooperation may have facilitated cooperation.⁵⁷ This legal gap could be filled by the two initiatives under discussion.



THERE IS A LEGAL GAP WITH RESPECT TO INTERSTATE COOPERATION: THE ROME STATUTE DOES NOT IMPOSE AN OBLIGATION ON STATES TO COOPERATE WITH ONE ANOTHER

The International Law Commission's project on crimes against humanity

The nuts and bolts of the proposal

The ILC is a subsidiary organ of the UN General Assembly. Its mandate is to promote the progressive development and codification of international law.⁵⁸ Broadly speaking, this means that the ILC studies areas of international law, produces texts and transmits them to the General Assembly, which might then turn them into conventions.⁵⁹ Some of the most important treaties of modern international law, including the Vienna Convention on the Law of Treaties and the Vienna Convention on Diplomatic Relations, are the products of the ILC's work.⁶⁰ Importantly, the text that formed the basis of the negotiations that would eventually lead to the Rome Statute was drawn up by the ILC.⁶¹

The ILC sees the study of crimes against humanity and the elaboration of a convention as key missing pieces in the international criminal justice system

During the sixty-fourth session of the ILC in 2012, Sean D Murphy, a member of the commission, proposed that the ILC study the topic of crimes against humanity.⁶² After a lengthy discussion, the ILC placed the topic of crimes against humanity on its current work programme and appointed Sean Murphy as special rapporteur during its sixty-sixth session, on 18 July 2014.⁶³ According to his proposed work plan, Murphy intends for the commission to complete its work on the topic and adopt a full set of draft articles on first reading by the end of 2016.⁶⁴ The first report of the special rapporteur, expected in the 2015 session of the ILC, is predicted to contain initial provisions but not the full set of draft articles.

The proposal is premised on the assumption that, of the three main international crimes – i.e. crimes against humanity, genocide and war crimes – only crimes against humanity have not been the subject of a major global treaty, with the basic obligations to criminalise such crimes and cooperate over them.⁶⁵ While the Geneva conventions and Protocol I are in place for dealing with war crimes⁶⁶ and the Genocide Convention exists for the crime of genocide,⁶⁷ there is no comparable regime for crimes against humanity. The ILC sees the study of crimes against humanity and the elaboration of a convention as key missing pieces in the international criminal justice system.⁶⁸ The ILC has a history of work in this field, including the 1996 Draft Code of Crimes.⁶⁹ This code provides that states 'shall take such measures as may be necessary to establish ... jurisdiction over' international crimes.⁷⁰ The code also makes it a requirement to extradite or prosecute persons alleged to have committed international crimes.⁷¹ The topic of extradition or prosecution had also been on the agenda of the ILC since 2005, but in 2014 the commission decided to discontinue the project by providing a final report without producing any draft articles.

The proposed ILC topic of crimes against humanity would aim to define such crimes for the purposes of the convention. According to the ILC proposal, the definition of crimes against humanity will be as it is defined in the Rome Statute.⁷² Similarly, the definition of crimes against humanity in the Proposed International Convention of the Crimes Against Humanity Initiative follows, with minor amendments, the Rome Statute's definition of crimes against humanity.⁷³ Although the definition is important,



THE WORKING METHODS OF THE ILC REQUIRE EVERY DRAFT ARTICLE TO BE EXTENSIVELY SUPPORTED BY DOCTRINE, STATE PRACTICE AND OTHER SOURCES OF INTERNATIONAL LAW

the key elements of the envisioned convention would be the provisions for the enactment of national criminal legislation, the exercise of jurisdiction and provisions for interstate cooperation.

The convention would oblige states to criminalise crimes against humanity in their national laws in a manner that would harmonise the definition of such crimes across national legal systems.⁷⁴ The ILC would also propose that states exercise jurisdiction not only for acts committed in their territories or by their nationals, but also for ‘acts by non-nationals committed abroad who then turn up in the Party’s territory’.⁷⁵ Therefore, the envisioned ILC draft convention would require a state to exercise universal jurisdiction if the accused person were in its territory. This type of universal jurisdiction, requiring only the presence of the accused in the territory of the forum after the commission of the alleged offence, is also envisaged in other instruments, such as the convention proposed by the Crimes against Humanity Initiative.⁷⁶ Whether, and how, the ILC will decide to address the question of investigation – i.e. whether the commission will decide to include a duty to investigate *in absentia* and what the parameters of such a duty will be – remains to be seen.

The envisioned ILC draft convention would require a state to exercise universal jurisdiction if the accused person were in its territory

Additionally, the ILC would propose ‘robust inter-State cooperation by the Parties for the investigation, prosecution, and punishment of the offence, including through mutual legal assistance and extradition, and recognition of evidence’.⁷⁷ Presumably, the specific legal obligations for this would be based on the types of provisions currently found in existing treaties on such matters. The types of assistance that could be covered under an ILC draft convention might include assistance in the taking of evidence, service of judicial documents, execution of searches, providing information and tracing the proceeds of crime.⁷⁸ Perhaps the central element of the ILC project will be the obligation to prosecute or extradite, a legal principle known as *aut dedere aut judicare*.⁷⁹ The *aut dedere aut judicare* obligation, broadly stated, obliges a state to prosecute offenders present in its territory or, if it is unable or unwilling to do so, to extradite the offender to a state that is willing to do so.⁸⁰

The ILC proposal recognises that comparable conventions on other crimes have ‘focused only on these core elements’.⁸¹ The proposal, however, notes that the ILC may decide to go beyond these and consider other elements.⁸² It is here that there is a

possibility for the ILC to identify elements that might contribute to crime prevention, such as the establishment of cooperative early-warning systems.

Amnesty International issued a public statement welcoming the ILC’s decision to include the topic on its current agenda, and called on the commission to include additional elements in its draft convention, such as ‘full reparations’ and exclusion of immunities.⁸³

Challenges and hurdles

The ILC is an ideal forum for drawing up a text on which states can base a final convention on the criminalisation and cooperation in respect of Rome Statute crimes, in particular crimes against humanity. The ILC’s working methods, which involve detailed study of state practice and international law, will lead to a high-quality instrument, which, while moving the law forward, will also be consistent with the numerous laws and arrangements currently in place. Furthermore, while ILC members are independent legal experts skilled in the crafting of such an instrument, they can also assess the annual reaction of states in the Sixth Committee of the UN General Assembly to the ILC’s ongoing work, thereby allowing adjustments to take account of state preferences.

Nevertheless, the ILC’s decision to study this topic is not without its challenges and detractors. The challenges are both institutional and substantive.

On an institutional level, the challenge is that the working methods of the ILC require every draft article to be extensively supported by doctrine, state practice and other sources of international law. Consequently, it often takes an inordinate amount of time for the commission to consider topics.⁸⁴ However, as noted above, the ILC proposal foresees that this topic will take considerably less time, partly because of ‘the existence of analogous conventions, as well as a considerable foundation derived from the existing international criminal tribunals’.⁸⁵

On a substantive level, questions have been raised, both by members of the commission and states in the UN General Assembly, about possible conflicts between the ILC product and the Rome Statute. For example, the statement of the Nordic countries during the General Assembly debate on the commission’s report for example, stressed that the ILC’s consideration of this topic must not lead to the opening up of agreed language under the Rome Statute.⁸⁶

The statement made by the Netherlands was more direct and went to the heart of the problem. The Netherlands representative stated that what was required was an international instrument ‘that would cover all the major international crimes, including crimes against humanity’.⁸⁷ Implicit in this statement is that by not covering genocide and war crimes, the ILC project risked fragmenting and making ineffective the international cooperation

regime that is being advocated. These issues had been raised by this author in the ILC and, as a result, the commission's 2013 report states that the 'view was expressed that the consideration of the topic in the syllabus should have taken a broader perspective, including the coverage of all core crimes'.⁸⁸ As noted above, the ILC syllabus responds to this by noting that war crimes and genocide have been the subject of their own comprehensive treaties.⁸⁹ Although it is true that the Geneva conventions and Genocide conventions did provide for the criminalisation of war crimes and genocide, it could not be argued that they had the same robust interstate-cooperation mechanisms as foreseen in the intended draft convention.⁹⁰ For example, the Genocide Convention, while establishing an *aut dedere aut judicare* obligation, does not expressly require the establishment of universal jurisdiction.⁹¹ As the statement by South Africa suggests, 'the deficiency identified in the Rome Statute concerning [interstate obligations] was not particular to crimes against humanity and applied to all the serious crimes'.⁹²

The Belgium, Slovenia and Netherlands initiative

The nuts and bolts of the BSN initiative

Unlike the ILC proposal, the BSN initiative is much broader. It encompasses not only crimes against humanity, but also genocide and war crimes. The BSN initiative is anchored in a declaration that currently has 40 adherents, including four from Africa.⁹³ This declaration highlights that if complementarity 'is to be truly effective, it is essential that states are able to cooperate practically, in providing judicial assistance and – if the need arises – extradition of the accused'.⁹⁴ The declaration then stresses that for this to happen, an effective legal framework is necessary but that the current conventional framework does not 'address judicial assistance and extradition in modern terms and norms'.⁹⁵ The declaration commits its adherents to address these shortfalls by negotiating a 'procedural multilateral treaty on mutual legal assistance and extradition to cover this gap'.⁹⁶ The initiative catalogues areas of cooperation, such as extradition, mutual legal assistance, taking of evidence, protection of witnesses, and searches and seizures, among many others.⁹⁷

The BSN initiative does not necessarily foresee a new definition for crimes against humanity, war crimes or genocide but intends to rely on the Rome Statute's definition of these crimes. The report of the expert meeting of November 2011, organised by the initiators of the project, notes that the reference to the crimes could be made by either including the 'respective definitions from the Rome Statute' or by referring to 'the relevant provisions in the Rome Statute'.⁹⁸ Instead of defining the crimes, the BSN initiative seeks to focus primarily on interstate cooperation.

The convention foreseen by the BSN initiative is, according to its authors, to be based on 'existing procedural provisions from more recent treaties on mutual legal assistance'.⁹⁹

In addition to addressing the core procedural obligations of interstate cooperation, the BSN initiative would also require the establishment of jurisdiction over crimes against humanity, war crimes and genocide.¹⁰⁰ As well as the more traditional basis of jurisdiction, territory and nationality, the BSN initiative, like the ILC project, also foresees the exercise of universal jurisdiction 'where the alleged offender is present' is in its territory.¹⁰¹ As with the ILC project, at the heart of the BSN initiative is the *aut dedere aut judicare* principle.¹⁰²

Challenges and hurdles

The BSN initiative, more than the ILC topic, is expressly meant to complement the Rome Statute, in the sense that it is almost an implementing agreement to the Rome Statute provisions on complementarity. In other words, the BSN initiative is born primarily out of a recognition of a gap in the Rome Statute system, and this initiative is aimed at filling this gap.¹⁰³ There is therefore a conscious effort on the part of the BSN initiative to be faithful to the Rome Statute. This explains in part the reluctance to provide an independent definition of the crimes.

The BSN initiative's adherence to the Rome Statute, while valuable and useful, creates a dilemma for its proponents, however. The proponents are espousing a universal convention to ensure maximum reach. After all, interstate cooperation is only effective if perpetrators are denied forums in which to hide. The declaration by the sponsor states, for example, asserts that the convention eventually adopted would be 'open to all States interested in enhancing their capacity to nationally prosecute these international crimes'.¹⁰⁴ This is in recognition of the fact that, while the 122 states parties to the Rome Statute constitute a significant number, there is a large number of states outside the Rome Statute whose adherence to the envisioned convention would be important to close the impunity gap. When one combines this with the fact that many states parties may decide, for a number of reasons, not to join the mutual legal-assistance convention, the reach of any instrument developed under the framework of the Rome Statute is significantly reduced.¹⁰⁵ This has created a dilemma about the forum within which to pursue the BSN initiative.

The proponents of the initiative have identified various forums as possibilities within which to pursue the mutual-legal-assistance convention. The first obvious forum to consider is, notwithstanding the issue of the limited membership identified above, the ICC's Assembly of States Parties. There is no reason, at least not as a matter of law, why an instrument developed within the framework of the Rome Statute cannot be open to

all states, including those not party to the Rome Statute. However, under the current political climate, and in particular given relations between the AU and the ICC, an instrument explicitly designated as a Rome Statute supplementary instrument – whether the term ‘protocol’, ‘implementing agreement’ or ‘supplementary convention’ is used or not – might cause some states parties, especially from Africa, not to ratify the said instrument. In the same vein, states not party to the Rome Statute with principled objection to the ICC, and which would ordinarily join a mutual legal assistance for international crimes, might decide not to join an instrument under the Rome Statute, developed within the framework of the Assembly of States, due to the institutional linkage with the Rome Statute. It is therefore not surprising that the option of pursuing this instrument within the framework of the Assembly of States Parties is not being seriously considered by the proponents of the BSN initiative.¹⁰⁶

The BSN initiative is born primarily out of a recognition of a gap in the Rome Statute system. This initiative is aimed at filling that gap

The options that are being seriously considered by the proponents are the Commission on Crime Prevention and Criminal Justice in Vienna, and the General Assembly of the UN. In 2013 Belgium, Slovenia and the Netherlands had proposed that the Commission on Crime Prevention take up the matter of the convention on mutual legal assistance. The idea, however, was rejected and was not even placed on the agenda. While there may have been certain states that had substantive reasons for rejecting the initiative itself, for most states (including South Africa, which is a co-sponsor), the issue hinged on the forum. Some states took the view that the Commission on Crime Prevention was concerned not with international crimes of the Rome Statute type, but with transnational crimes. While the main co-sponsors still see the Commission on Crime Prevention as the most appropriate forum for addressing this issue, the objection that it is the wrong forum is likely to prove difficult to overcome.

Given the challenges of using the Commission on Crime Prevention or the Assembly of States Parties, the General Assembly of the UN would seem to be the most promising option as the forum. Some proponents, however, are concerned that the General Assembly is overly politicised and that some states are likely to transpose their hostility towards the ICC to any discussions about mutual legal assistance for international crimes. Moreover, since the ILC is a subsidiary organ of the General Assembly, the General Assembly might be reluctant to place on its agenda a subject that is already being considered by the ILC.

Synergies between the two projects

The ILC and BSN initiatives are both aimed at filling an important gap in the international criminal justice system by establishing a robust, interstate cooperation regime with respect to serious crimes of concern to the international community and by making provision for an obligation to prosecute or extradite.

Filling the impunity gap has the added benefit of easing some of the tension in the AU–ICC impasse. While the AU has proposed expanding the jurisdiction of the mooted African Court on Justice and Human Rights to include international crimes as a way of enhancing African exercise of jurisdiction, many legal and practical

IN
2013

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problems have been identified with this project.¹⁰⁷ A treaty, whether it were to flow from the ILC project or the BSN initiative – or a combination of the two – would not only increase the ability of African states to prosecute those committing international crimes perpetrated on the continent, but also enhance cooperation to facilitate successful prosecution. The question, though, is whether these two initiatives are mutually exclusive and whether only one should be supported.

Filling the impunity gap has the added benefit of easing some of the tension in the AU–ICC impasse

At first glance, the ILC and BSN initiatives are in competition and are therefore mutually exclusive. After all, it is difficult to see how conventions resulting from these two initiatives could be simultaneously viable in terms of their ratification and impact. The success of the BSN initiative is likely to mean the irrelevance of the ILC topic. The provisions for mutual legal assistance and *aut dedere aut judicare* provisions would, in all likelihood, be similar, if not identical, in content. Since crimes against humanity would already be covered under the BSN initiative, the value added of the ILC topic would be questionable at best. Conversely, it could be argued that if the ILC topic were to succeed, the value added of the BSN initiative would be diminished, as it would just enhance the rudimentary regimes that already exist in the genocide and Geneva conventions.

Nonetheless, while the goal should be to pursue one convention that addresses all three crimes, there is value in pursuing both projects. First, from a substantive perspective, the detailed study of work that goes into ILC projects provides the best option for a legally solid convention, drawing on the vast material available, including judicial decisions, state practice and other treaties covering comparable provisions. The BSN initiative, on the other hand, as a state-centred process, will help galvanise the support of states for a global convention on the mutual legal assistance for these crimes, including crimes against humanity. There may therefore be value in pursuing both the ILC and BSN initiatives in light of the respective advantages that they bring.

There may therefore be value in pursuing both the ILC and BSN initiatives in light of the respective advantages that they bring

There is also a second, more strategic reason, for supporting both initiatives. The issue of the forum is likely to continue to be a stumbling block for the BSN initiative. The ILC topic, on the other hand, already has a forum and work on the topic has already begun. It is true that the ILC topic is more limited than the BSN initiative. However, the ILC topic would, on finalisation be submitted to the General Assembly for consideration by states. If the General Assembly were to decide to negotiate a convention on the basis of this text, states could extend the scope of the convention to cover also genocide and war crimes in a way that captures the essence of the BSN initiative. Previous examples of ILC work show that states do not blindly adopt the initiatives of the ILC, but do make adjustments, sometimes drastic ones, to meet their particular needs and objectives. The Rome Statute, for example, while based on the work of the ILC, looks different in many material respects, including in its approach to the exercise of jurisdiction.¹⁰⁸ Similarly, with respect to the Law of the Treaties, many changes, including the definition of *jus cogens*, were made.¹⁰⁹



THE BSN INITIATIVE, A STATE-CENTRED PROCESS, WILL HELP GALVANISE THE SUPPORT OF STATES FOR A GLOBAL CONVENTION ON MUTUAL LEGAL ASSISTANCE

Conclusion

While the ICC is at the centre of the international criminal justice system, it is domestic systems that have the primary responsibility for carrying out investigations and prosecutions for international crimes. Yet, the international criminal justice system does not have a sufficiently well-developed legal framework to facilitate domestic prosecution, including a well-developed interstate cooperation system. The BSN and ILC initiatives aim to develop mutual legal assistance instruments for international crimes, so they should be welcomed as important contributions to enhancing complementarity.

It is hoped that states, as they engage with both processes, will not only support them, but also seek to strengthen them. In particular, states should ensure that at a minimum any convention that flows from either the BSN or ILC project should contain certain key elements. First, the convention should establish an obligation to criminalise the relevant crimes. Second, the convention should contain an obligation to extradite offenders wanted for such offences if it decides not to prosecute (the *aut dedere aut judicare* obligation). Finally, the convention should include a robust provision for interstate cooperation, which covers not only the duty to cooperate, but also specifies the parameters and modalities of this duty.

Notes

- 1 The AU decisions at the heart of the rocky relationship between the AU and the ICC are too numerous to list. See, however, as examples, the AU summit decision on the meeting of African states parties to the Rome Statute of the International Criminal Court, Assembly/AU/Dec. 245(XIII), July 2009; the decision on the progress report of the commission on the implementation of decision assembly/AU/Dec. 270(XIV) on the second ministerial meeting on the Rome Statute of the International Criminal Court Doc. Assembly/AU/10(XV), Assembly/AU/Dec. 296(XV), July 2010; and the decision on the implementation of the decisions on the International Criminal Court, Assembly/AU/Dec. 419(XIX), July 2012. See also Max du Plessis, *Universalising international criminal law – The International Criminal Court, Africa and the problems of political perceptions*, ISS paper 249, December 2013.
- 2 See Tendayi Achiume, *The African Union, the International Criminal Court and the Security Council*, background paper, University of California, Irvine School of Law, ICC-UNSC Workshop, November 2012, www.councilandcourt.org/files/2013/04/ICC-AU-UNSC-Position-Paper-FINAL.pdf (accessed 5 June 2014). See also Marc Weller, Undoing the global constitution: UN Security Council action on the International Criminal Court, *International Affairs*, 693, 2002, 78; Matthew Happold, Darfur, the Security Council and the International Criminal Court, *International and Comparative Law Quarterly*, 226, 2006, 55; Condorelli and Ciampi, Comments on the Security Council referral of the situation in Darfur to the ICC, *Journal of International Criminal Justice* 3, 2005, 590; and Dire Tladi, When elephants collide it is the grass that suffers: Cooperation and the Security Council in the context of the AU-ICC dynamic, *Journal of International Criminal Justice*, 7, 2014, 381.
- 3 See, for example, Bert Swart, General problems, in Antonio Cassese, Paola Gaeta and John RWD Jones (eds.), *The Rome Statute of the International Criminal Court: A commentary (volume II)*, 2002, 1589, where the authors describe the ICC as a 'giant without arms and legs who needs artificial limbs to walk and work'. See also Annalisa Ciampi,

The obligation to cooperate, in Antonio Cassese, Paola Gaeta and John RWD Jones (eds.), *The Rome Statute of the International Criminal Court: A commentary (volume II)*, 2002, 1607; Bert Swart, Arrest and surrender, in Antonio Cassese, Paola Gaeta and John RWD Jones (eds.), *The Rome Statute of the International Criminal Court: A commentary (volume II)*, 2002, 1640; and Dire Tladi, The ICC decisions on Chad and Malawi: On cooperation, immunities and Article 98, *Journal of International Criminal Justice*, 199, 2013, 11. On Complementarity, see Sarah MH Nouwen, *Complementarity in the line of fire: The catalysing effect of the International Criminal Court in Uganda and Sudan*. Cambridge University Press, 2013.

- 4 The preamble to the Rome Statute of the ICC affirms that prosecution for the most serious crimes 'must be ensured by taking measures at the national level and by enhancing international cooperation'. It also emphasises that the ICC 'shall be complementary to national criminal jurisdiction'.
- 5 See the Declaration on international initiative for opening negotiations on a multilateral treaty for mutual legal assistance and extradition in domestic prosecution of atrocity crimes (crimes of genocide, crimes against humanity and war crimes) (on file with author). See also, for a more detailed discussion, *A legal gap? Getting the evidence where it can be found: Investigating and prosecuting international crimes*, report of the Expert Meeting, The Hague, 22 November 2011 (on file with author).
- 6 See Sean D Murphy, *Crimes against humanity – International Law Commission report on the work of its sixty-fifth session* (6 May to 7 June and 8 July to 9 August 2013), General Assembly official records, sixty-eighth session, supplement no. 10 (A/68/10) (Annex B).
- 7 See Whitney R Harris, World Law Institute Crimes Against Humanity Initiative, Proposed Convention on the Prevention and Punishment Of Crimes Against Humanity, in Leila Nadya Sadat (ed.), *Forging a convention for crimes against humanity*. Cambridge University Press, 2011, 359.
- 8 For a discussion of Africa's role in the ICC, see, for example, Sivuyile Maqungo, The establishment of the International Criminal Court: SADC's participation in the negotiations, *African Security Review*, 42, 2000, 9.
- 9 Sean D Murphy, *Crimes against humanity – International Law Commission report on the work of its sixty-fifth session* (6 May to 7 June and 8 July to 9 August 2013), General Assembly official records, sixty-eighth session, supplement no. 10 (A/68/10) (Annex B), para. 11.
- 10 See the Declaration on international initiative for opening negotiations on a multilateral treaty for mutual legal assistance and extradition in domestic prosecution of atrocity crimes (crimes of genocide, crimes against humanity and war crimes) (on file with author).
- 11 Sean D Murphy, *Crimes against humanity – International Law Commission report on the work of its sixty-fifth session* (6 May to 7 June and 8 July to 9 August 2013), General Assembly official records, sixty-eighth session, supplement no. 10 (A/68/10) (Annex B), para. 11.
- 12 See the Declaration on international initiative for opening negotiations on a multilateral treaty for mutual legal assistance and extradition in domestic prosecution of atrocity crimes (crimes of genocide, crimes against humanity and war crimes) (on file with author).
- 13 On the principle of complementarity and its implementation in Africa, see Lee Stone and Max du Plessis, *The implementation of the Rome Statute of the International Criminal Court (ICC) in African countries*, www.issafrica.org (accessed 21 July 2014).
- 14 See the preamble to the Rome Statute, paras 6 and 10.
- 15 Fatou Bensouda, The Rome Statute ten years on: Where to from here for the ICC? Lecture at Melbourne University Law School, 17 February 2011.
- 16 Ibid.
- 17 Sang-Hyun Song, The International Criminal Court: A global commitment to end impunity, presentation at Istanbul Bilgi University, 22 May 2013.
- 18 Ibid.
- 19 Ibid.
- 20 Ibid. Italics added by author for emphasis.

- 21 See, for example, the preambular paragraph of the ICC Assembly of States' resolution on complementarity, ICC-ASP/12/Res. 4, 27 November 2013.
- 22 See Articles 5, 12 and 13 of the Rome Statute of the ICC.
- 23 See Article 17 of the Rome Statute of the ICC.
- 24 Article 17(2) of the Rome Statute states that in determining unwillingness, the court should consider whether the proceedings were or are being undertaken, whether there has been unjustified delay in the proceedings which in the circumstances will be inconsistent with an intention to bring the person to justice, and whether the proceedings are not conducted independently or with impartiality.
- 25 Article 27(3) provides that in order to determine inability, the court shall consider whether 'due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony' or is otherwise not able to carry out proceedings.
- 26 Article 19 of the Rome Statute.
- 27 See, for example, *The situation in Libya: In the case of the Prosecutor v. Saif-al-Islam Gaddafi and Abdullah al-Senussi, public redacted decision on the admissibility of the case against Abdullah al-Senussi* (no. ICC-01/11-01/11), 11 October 2013, paras 66–67 and 199–218. See also *The situation in the Republic Of Kenya: In the case of the Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, public decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to Article 19(2) (b) of the statute* (no. ICC-01/09-02/11), 30 May 2011, paras 49–66.
- 28 Although the preamble to the Rome Statute declares that serious international crimes 'must not go unpunished' and that their 'effective prosecution must be ensured by taking measures at the national level', this is not followed up by an obligation in the operative text of the Rome Statute.
- 29 See Kai Ambos, Crimes against humanity and the International Criminal Court, in Leila Nadya Sadat (ed.), *Forging a convention for crimes against humanity*. Cambridge University Press, 2011, 295–296. For a list of Rome Statute domestic implementation legislation, as well as draft legislation, see www.iccnw.org/?mod=romeimplementation&iduidctp=10&show=all#10 (accessed 1 June 2014).
- 30 See Section 4(1) Implementation of the Rome Statute of the International Criminal Court Act 2002 (Act 27 of 2002).
- 31 See, for example, Section 4(1) of the International Criminal Court Act 2011 (Act 27 of 2011) (Mauritius); Section 6 of the International Crimes Act 2008 (Kenya); Section 7 (genocide), Section 8 (crimes against humanity) and Section 9 (war crimes) in the International Criminal Court Act of 2010 (Uganda). A similar trend is evident in the national legislation of non-African states. See, for example, subdivisions B, C and D of the International Criminal Court (Consequential Amendments) Act 2002 (Australia), sections, 6, 7 and 8 of the Act to Introduce the Code of Crimes against International Law of 26 June 2002 (Germany) and Section 4(1) of the Crimes against Humanity and War Crimes Act 2000 (Canada).
- 32 Fatou Bensouda, The Rome Statute ten years on: Where to from here for the ICC? Lecture at Melbourne University Law School, 17 February 2011.
- 33 Sang-Hyun Song, The International Criminal Court: A global commitment to end impunity, presentation at Istanbul Bilgi University, 22 May 2013.
- 34 Ibid.
- 35 *The situation in the Republic Of Kenya: In the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, public decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to Article 19(2) (b) of the statute* (no. ICC-01/09-02/11), 30 May 2011, para. 40.
- 36 *South African Litigation Centre and Another v. National Director of Public Prosecutions and Others*, 2012 (10) BCLR 109 (GNP), para. 15.
- 37 *National Commissioner of the South African Police and Another v. Southern African Human Rights Litigation Centre and Another*, 2014 (2) SA 42 (SCA).
- 38 *The situation in the Republic Of Kenya: In the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, public decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to Article 19(2)(b) of the statute* (no. ICC-01/09-02/11), 30 May 2011, para. 40. The preambular paragraph at issue recalls that there is a duty to exercise jurisdiction, rather than seek to establish such jurisdiction. Whether the assumption in the preambular provision is accurate can only be determined by an assessment of state practice and whether such practice is accepted by states as law.
- 39 See, for example, Act 65 of 15 June Relating to the Implementation of the Statute of the International Criminal Court in Norwegian Law (Norway). The Norwegian Act, by its terms, applies to cooperation between Norway and the ICC.
- 40 See, generally, International Law Commission, *Second report on the identification of customary international law*, by the special rapporteur, Michael Wood (A/CN.4/672). See also, generally, John Dugard, *International law: A South African perspective* (3rd edition). Cape Town: Juta, 2006, 33.
- 41 For the general rule that the practice must be motivated by a belief that there exists a rule of customary international law, and not a treaty rule, see *The North Sea continental shelf cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)* 1969 International Court of Justice, 3, para. 78.
- 42 See Laura M Olson, Re-enforcing enforcement in a specialised convention on crimes against humanity: Inter-state cooperation, mutual legal assistance, and the *aut dedere aut judicare* obligation, in Leila Nadya Sadat (ed.), *Forging a convention for crimes against humanity*, 2011, 523 ff. See also Siri Frigaard, keynote address, *A legal gap? Getting the evidence where it can be found: Investigating and prosecuting international crimes*, 22 November 2011. Explaining Norway's experience in prosecuting international crimes in Sierra Leone and Bosnia and Herzegovina, Frigaard states that 'to be able to investigate and prosecute [these cases], the investigators and prosecutor were having extensive legal assistance from many countries'.
- 43 Dire Tladi, When elephants collide it is the grass that suffers: Cooperation and the Security Council in the context of the AU–ICC dynamic, *African Journal of Legal Studies* (forthcoming); Dire Tladi, The ICC decisions on Chad and Malawi: On cooperation, immunities and Article 98, *Journal of International Criminal Justice*, 199, 2013.
- 44 Article 86 of the Rome Statute.
- 45 Article 93(1) of the Rome Statute.
- 46 Article 91 of the Rome Statute.
- 47 See, for example, articles 87, 91 and 96 of the Rome Statute.
- 48 Para. 3 of the ICC ASP Resolution on Cooperation, ICC-ASP/12/Res.3, 27 November 2013.
- 49 See Assembly procedures relating to non-cooperation in Annex to ICC ASP resolution on strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/10/Res. 5.
- 50 Sections 8 to 13 of the Implementation of the Rome Statute Act.
- 51 Sections 14 to 32 of the Implementation of the Rome Statute Act.
- 52 See, for example, sections 21 to 31 of the International Criminal Court Act 2011 (Act 27 of 2011) (Mauritius); sections 20 to 151 of the International Crimes Act (Kenya); and sections 20 to 80 of the International Criminal Court Act (Uganda).
- 53 Sang-Hyun Song, The International Criminal Court: A global commitment to end impunity, presentation at Istanbul Bilgi University, 22 May 2013.
- 54 See Ward Ferdinandusse, Improving inter-state cooperation for the national prosecution of international crimes: Towards a new treaty? *ASIL Insights*, 18:5, 2014, www.asil.org (accessed 22 July 2014).

- 55 Article 90 of the Rome Statute.
- 56 See Laura M Olson, Re-enforcing enforcement in a specialised convention on crimes against humanity: Inter-state cooperation, mutual legal assistance, and the *aut dedere aut judicare* obligation, in Leila Nadya Sadat (ed.), *Forging a convention for crimes against humanity*. Cambridge University Press, 2011. Olson describes 'inter-state cooperation' as the 'linchpin for effective enforcement'.
- 57 See Ward Ferdinandusse, Improving inter-state cooperation for the national prosecution of international crimes: Towards a new treaty? *ASIL Insights*, 18:5, 2014, www.asil.org (accessed 22 July 2014), in which the author lists many examples, including the attempts by Ethiopia to secure the extradition of its former president Mengistu from Zimbabwe and South Africa, and negative responses to Rwanda's requests for the extradition of some suspects in relation to the 1994 genocide.
- 58 See Article 15 of the Statute of the ILC.
- 59 While this is the traditional approach of the commission, in recent years the ILC has adopted instruments and texts that are not designed to be turned into conventions. See, for example, ILC, Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities with commentaries, http://legal.un.org/ilc/texts/9_10.htm (accessed 22 July 2014). See also ILC, Conclusions of the work of the study group on the fragmentation of international law: Difficulties arising from the diversification and expansion of international law, http://legal.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf (accessed 22 July 2014).
- 60 See 1966 draft articles on the law of treaties, with commentaries and the 1958 draft articles on the diplomatic intercourse.
- 61 See 1994 Draft Statute for an International Criminal Court, with commentaries.
- 62 Sean D Murphy, *Crimes against humanity – International Law Commission report on the work of its sixty-fifth session* (6 May to 7 June and 8 July to 9 August 2013), General Assembly official records, sixty-eighth session, supplement no. 10 (A/68/10) (Annex B).
- 63 The process of placing topics on the agenda of the ILC is and sometimes lengthy. The first step, which involves motivating the legal and theoretical merits of the topic for codification and progressive development, is to place the topic on the long-term programme of work. The topic of crimes against humanity was placed on the long-term programme of work during the ILC's sixty-fifth session (July 2013).
- 64 The commission normally adopts a text on a preliminary basis and then submits it to the General Assembly for comments, a practice referred to as adoption on first reading. After first reading, states are given time to study and comment on the text, after which the commission adopts the final text on the basis of the comments. This is known as adoption on second reading.
- 65 Sean D Murphy, *Crimes against humanity – International Law Commission report on the work of its sixty-fifth session* (6 May to 7 June and 8 July to 9 August 2013), General Assembly official records, sixty-eighth session, supplement no. 10 (A/68/10) (Annex B), para. 1
- 66 See, for example, the 1949 Geneva Convention Relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the 1949 Geneva Convention Relative to the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; the 1949 Geneva Convention Relative to the Treatment of Prisoners of War; the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War. See also the 1977 protocol additional to the Geneva conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts.
- 67 See the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.
- 68 Sean D Murphy, *Crimes against humanity – International Law Commission report on the work of its sixty-fifth session* (6 May to 7 June and 8 July to 9 August 2013), General Assembly official records, sixty-eighth session, supplement no. 10 (A/68/10) (Annex B), para. 3.
- 69 ILC 1996 Draft code of crimes against the peace and security of mankind with commentaries.
- 70 Draft Article 8 of the 1996 Draft code of crimes.
- 71 Draft Article 9 of the 1996 Draft code of crimes.
- 72 Sean D Murphy, *Crimes against humanity – International Law Commission report on the work of its sixty-fifth session* (6 May to 7 June and 8 July to 9 August 2013), General Assembly official records, sixty-eighth session, supplement no. 10 (A/68/10) (Annex B), para. 8.
- 73 See Article 3 of the Proposed Convention on the Prevention and Punishment of Crimes against Humanity (note 7 above).
- 74 Sean D Murphy, *Crimes against humanity – International Law Commission report on the work of its sixty-fifth session* (6 May to 7 June and 8 July to 9 August 2013), General Assembly official records, sixty-eighth session, supplement no. 10 (A/68/10) (Annex B), para. 8.
- 75 Ibid.
- 76 See Article 9(1) of the Proposed Convention on the Prevention and Punishment of Crimes against Humanity (note 7 above). This type of universal jurisdiction is similarly imposed in Section 4(3) of South Africa's Implementation of the Rome Statute of the International Criminal Court Act 2002 (Act 27 of 2002). See also *National Commissioner of the South African Police Service and Another v. South African Human Rights Litigation Centre and Another*, Supreme Court of Appeal (case number 485/2012), judgment of 27 November 2013 (as yet unreported), paras 50 ff.
- 77 Sean D Murphy, *Crimes against humanity – International Law Commission report on the work of its sixty-fifth session* (6 May to 7 June and 8 July to 9 August 2013), General Assembly official records, sixty-eighth session, supplement no. 10 (A/68/10) (Annex B), para. 8.
- 78 A catalogue of the types of assistance are contained in Annex 3 of the Proposed Convention on the Prevention and Punishment of Crimes against Humanity (note 7 above). See also, for discussion, Laura M Olson, Re-enforcing enforcement in a specialised convention on crimes against humanity: Inter-state cooperation, mutual legal assistance, and the *aut dedere aut judicare* obligation, in Leila Nadya Sadat (ed.), *Forging a convention for crimes against humanity*. Cambridge University Press, 2011, 336 ff.
- 79 Sean D Murphy, *Crimes against humanity – International Law Commission report on the work of its sixty-fifth session* (6 May to 7 June and 8 July to 9 August 2013), General Assembly official records, sixty-eighth session, supplement no. 10 (A/68/10) (Annex B), para. 8.
- 80 See, for discussion, International Court of Justice reports, *Questions relating to the obligations to extradite or prosecute (Belgium v. Senegal)*, 2012, 422. See also ILC, *Report of the working group on the obligation to extradite or prosecute (aut dedere aut judicare): International Law Commission report on the work of its sixty-fifth Session* (6 May to 7 June and 8 July to 9 August 2013), General Assembly official records sixty-eighth session supplement no. 10 (A/68/10) (Annex A). On the history of the concept, see Laura M Olson, Re-enforcing enforcement in a specialised convention on crimes against humanity: Inter-state cooperation, mutual legal assistance, and the *aut dedere aut judicare* obligation, in Leila Nadya Sadat (ed.), *Forging a convention for crimes against humanity*. Cambridge University Press, 2011, 324 ff. See also Article 9 of the Proposed Convention on the Prevention and Punishment of Crimes against Humanity (note 7 above).
- 81 Sean D Murphy, *Crimes against humanity – International Law Commission report on the work of its sixty-fifth session* (6 May to 7 June and 8 July to 9 August 2013), General Assembly official records, sixty-eighth session, supplement no. 10 (A/68/10) (Annex B), para. 8.
- 82 Ibid.
- 83 Amnesty International, public statement on the initiative to draft new convention on crimes against humanity: New chance to strengthen fight against impunity, 18 July 2014 (on file with author).

- 84 The ILC worked on the topic of the responsibility of states for internationally wrongful acts from 1954 and only produced the draft articles in 2001. The draft articles on the law of treaties, for example, were a product of work that took about 17 years.
- 85 Sean D Murphy, *Crimes against humanity – International Law Commission report on the work of its sixty-fifth session* (6 May to 7 June and 8 July to 9 August 2013), General Assembly official records, sixty-eighth session, supplement no. 10 (A/68/10) (Annex B), para. 17.
- 86 See the statement of Mr Fife (Norway), during the Sixth Committee of the General Assembly deliberation, summary records of the 17th meeting during the sixty-eighth session of the General Assembly (A/C.6/68/SR.17), para. 38. See also the statement of Mr Macleod (United Kingdom), Sixth Committee of the General Assembly deliberation, summary records of the 18th meeting during the sixty-eighth session of the General Assembly (A/C.6/68/SR.18).
- 87 Ms Lijnzaard (Netherlands), Sixth Committee of the General Assembly deliberation, summary records of the 18th meeting during the sixty-eighth session of the General Assembly (A/C.6/68/SR.18), para. 37.
- 88 ILC, Other decisions and conclusions of the commission, International Law Commission report on the work of its sixty-fifth session (6 May to 7 June and 8 July to 9 August 2013), Chapter XII, General Assembly official records, sixty-eighth session, supplement no. 10 (A/68/10), para. 170.
- 89 Sean D Murphy, *Crimes against humanity – International Law Commission report on the work of its sixty-fifth session* (6 May to 7 June and 8 July to 9 August 2013), General Assembly official records, sixty-eighth session, supplement no. 10 (A/68/10) (Annex B), para. 1.
- 90 Ward Ferdinandusse, Improving inter-state cooperation for the national prosecution of international crimes: Towards a new treaty? *ASIL Insights*, 18:5, 2014, www.asil.org (accessed 22 July 2014).
- 91 See Articles V, VI and VII of the 1949 Convention on the Prevention and Punishment of the Crime of Genocide.
- 92 Mr Joyini (South Africa), Sixth Committee of the General Assembly deliberation, summary records of the 18th meeting during the sixty-eighth session of the General Assembly (A/C.6/68/SR.18), para. 56.
- 93 The four African states are Malawi, Senegal, Seychelles and South Africa. See Declaration by international initiative for opening negotiations on a multilateral treaty for mutual legal assistance and extradition in domestic prosecution of atrocity crimes (crimes of genocide, crimes against humanity and war crimes) (on file with the author).
- 94 Ibid.
- 95 Ibid.
- 96 Ibid.
- 97 Ibid.
- 98 *A legal gap? Getting the evidence where it can be found: Investigating and prosecuting international crimes*, report of the Expert Meeting, The Hague, 22 November 2011, Annex 1 (on file with author).
- 99 See Explanatory note by Argentina, Belgium, Slovenia and the Netherlands, Towards a multilateral treaty for mutual legal assistance and extradition for domestic prosecution of atrocity crimes (crimes against humanity, war crimes and crimes of genocide) (on file with the author).
- 100 *A legal gap? Getting to evidence where it can be found: Investigating and prosecuting international crimes*, report of the Expert Meeting, The Hague, 22 November 2011, Annex 1 (on file with author).
- 101 Ibid.
- 102 Ibid.
- 103 Declaration by International initiative for opening negotiations on a multilateral treaty for mutual legal assistance and extradition in domestic prosecution of atrocity crimes (on file with the author).
- 104 Ibid.
- 105 The recent climate clouding AU–ICC politics may certainly have an impact on the adherence by ICC states parties to a convention developed under the Rome Statute.
- 106 During a meeting held on 31 March 2014, the only options identified by the proponents were the Commission on Crimes Prevention and Criminal Justice in Vienna and the General Assembly (Sixth Committee). See the minutes of strategic meeting with supporting states, held on 31 March 2014, the Netherlands Ministry of Foreign Affairs, The Hague (on file with author).
- 107 See, for example, Ademola Abass, The proposed criminal jurisdiction for the African Court: Some problematical aspects, *Netherlands International Law Review* 27, 2013, 60; see also Max du Plessis, *Universalising international criminal law – The International Criminal Court, Africa and the problems of political perceptions*, ISS paper 249, December 2013, 8. See for discussion Dire Tladi, The immunity provision in the AU Amendment Protocol and the entrenchment of the hero-villain trend, *Journal of International Criminal Justice*, (forthcoming).
- 108 Compare, for example, draft articles 20 to 27 of the ILC Draft statute for an international criminal court with commentaries, 1994, with articles 5, 12, 13, 14 and 15 of the Rome Statute.
- 109 See, for elaboration, Dire Tladi, *Jus Cogens, International Law Commission report on the work of its sixty-sixth session* (5 May to 6 June and 7 July to 8 August 2014), para. 8, General Assembly official records, sixty-eighth session supplement no. 10 (A/69/10) (Annex). This topic was included in the ILC's long-term programme of work in August 2014.

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