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

Antonio Coco

Abstract

The International Law Commission's (ILC) draft articles on crimes against humanity contain some key provisions on the duty to establish national jurisdiction over crimes against humanity (draft Article 7) and on the duty to investigate the possible occurrence of crimes against humanity (draft Articles 8 and 9). This contribution analyses, first, the duty to establish national jurisdiction over crimes against humanity, focusing in particular on the identification of what constitutes 'territory under a state's jurisdiction' and on the principle of universal jurisdiction. Secondly, it delves into the general duty to investigate situations in which crimes against humanity may have been committed, clarifying the circumstances in which such duty may arise and the requirements that the related investigations should satisfy. Thirdly, this contribution deals with the specific duty to carry out a preliminary inquiry into allegations against suspects who are found on the state's territory, exploring in particular the extent to which the pertinent information should be shared with other states and the fair treatment guarantees that draft Article 11 accords to alleged offenders. In suggesting some improvements, this contribution considers that these articles — though representing a welcome development — constitute no more than the bare minimum to be done at the international level to prevent and punish crimes against humanity effectively.

1. Introduction

The International Law Commission's (ILC) draft articles on crimes against humanity constitute a long-awaited achievement, which at the same time empowers states and makes them responsible for the prevention and punishment of crimes against humanity. Should they be ever translated into an international convention — as they should be — these provisions would, on one side, represent a solid basis for good-willed national authorities to carry out investigations and prosecutions and, on the other, oblige recalcitrant ones to do so as well. Such result passes through some key draft articles, namely those concerning the duty to establish national jurisdiction over crimes against humanity (draft Article 7) and those concerning the duty to investigate the possible occurrence of crimes against humanity (draft Articles 8 and 9). Effective national prosecutions, vital to ensure the prevention of further crimes against humanity,[1] will be more likely to occur should those articles be effectively and genuinely implemented by states. There are at least three reasons to greet and support the adoption of these provisions.

First, we are, unfortunately, living the days in which faith in the International Criminal Court (ICC) project is wavering, threatened by a lack of adequate resources, insufficient political support and crushingly unreasonable expectations. Now, more than ever, a decentralized system of national investigations and prosecutions must be strengthened, so that the need for it to be complemented by an international intervention will arise less often.

[1] *Report of the International Law Commission, Sixty-ninth session (1 May-2 June and 3 July-4 August 2017)* ('2017 ILC Report'), UN Doc. A/72/10, § 46, Commentary to Article 4, § 17.

Second, whilst fight against impunity for other two 'core international crimes'— namely war crimes and genocide — has for a long time benefited from a conventional regulation, national prosecutions on charges of crimes against humanity have never had such chance. Rather, these prosecutions have always been impossible or made very difficult precisely because, *inter alia*, of the lack of jurisdiction or adequate legislation.[2] A clinic study conducted in 2013 at the George Washington University shows that only about 25% of the 83 states under scrutiny had adopted a provision allowing the exercise of national jurisdiction over a non-national suspected of having committed crimes against humanity abroad against non-nationals.[3] Assuming that these numbers can be projected on a global scale, only about a quarter of the members of the international community of states already have the tools to effectively punish crimes against humanity regardless of where they are committed.

Third, due to migration fluxes and the international diaspora of foreign fighters fleeing from war-torn regions, many perpetrators of crimes against humanity may find themselves in the hands of a state that is neither their state of nationality, nor the state where they have committed their misdeeds.[4] This result may be unpleasant for 'unable' states, lacking appropriate jurisdictional powers under national law, what effectively makes them — albeit unintentionally — a safe haven for criminals. Conversely, it is wholly unacceptable that 'unwilling' states may provide sanctuary to perpetrators of crimes against humanity by omitting to exercise jurisdiction over them.[5] As astutely remarked by Professor Sadat, reminding states of their duty to establish jurisdiction over crimes against humanity may push them into a 'virtuous cycle' generating an improvement in prevention and punishment of other crimes covered by international conventions, like terrorism, human trafficking, organized crime and corruption.[6]

This is not to say that the articles analysed in this contribution (namely draft Articles 7, 8 and 9) represent a complete novelty in international law. They are actually no novelty at all. Similar provisions exist — just to mention two examples — in the Convention against Torture and in the Convention against Enforced Disappearance, both dealing with conducts which will amount to crimes against humanity if committed as part of a widespread or systematic attack against the civilian population. The existence of a general duty to establish and exercise jurisdiction over crimes against humanity rightly features in the preamble to the ILC draft articles.[7] Moreover, it has widely been accepted that crimes against humanity represent a

---

[2] cf. L. Sadat's article in this special issue, Introduction.

[3] Carrillo and Nelson, 'Comparative Law Study and Analysis of National Legislation Relating to Crimes against Humanity and Extraterritorial Jurisdiction Special Report', *George Washington International Law Review* 481 , at 493–95, 497–503. This information is discussed in *First Report of the Special Rapporteur, Mr. Sean D. Murphy* ('2015 Murphy Report'), UN Doc. A/CN.4/680, 17 February 2015, § 61. The Special Rapporteur presents findings of the clinical study more in general at §§ 58-64.

[4] For example, Akhavan cites the example of Canada, where people involved in Rwandan genocide like Munyaneza moved. See Akhavan, 'The Universal Repression of Crimes Against Humanity before National Jurisdictions', in L. N. Sadat (ed.), *Forging a Convention for Crimes against Humanity* (2011) 28 , at 41.

[5] Sadat, 'Codifying the 'Laws of Humanity' and the 'Dictates of the Public Conscience': Towards a New Global Treaty on Crimes Against Humanity', in M. Bergsmo and T. Song (eds.), *On the Proposed Crimes Against Humanity Convention* (2014) 17 , at 45–46.

[6] *Ibid.*, at 46.

[7] 2017 ILC Report, *supra* note 1, § 45 (Text of the Draft Articles), Preamble, § 7.

violation of *jus cogens*,[8] what could mean that refusing to investigate and prosecute the relevant allegations may implicitly constitute wrongful recognition of the situation's legality or assistance in maintaining it.[9] More importantly, one should not forget that crimes against humanity, in most cases, constitute serious violations of human rights, considering that the underlying offences harm basic human rights (e.g. imprisonment and the right to freedom from arbitrary detention). The connection with human rights law is particularly evident when state agents are responsible for crimes against humanity, since human rights obligations are traditionally imposed on states. But such connection may be found even when non-state actors are responsible for crimes against humanity,[10] should one accept that non-state actors also have human rights obligations under international law,[11] or at least when non-state actors' behaviour functions as catalyst for the state violation of its positive duties to protect human rights.[12] In so far as the said connection exists, as it will be explained in the rest of this contribution, obligations arising from the relevant human rights treaties already include a duty to establish jurisdiction and investigate alleged violations.

It is not my intention to argue, either, that these articles alone are sufficient to close the impunity gap for crimes against humanity. Quite on the contrary, in the way they have been drafted by the ILC, they represent no more than the bare minimum to be done at the international level to counter the commission of crimes against humanity. The current wording of draft articles 7, 8 and 9 still contains a few weaknesses, which I will try to unpack in this contribution. I will start, first, by analysing the duty to establish national jurisdiction over crimes against humanity (Section 2), focusing in particular on the identification of what constitutes 'territory under a state's jurisdiction' and on the principle of universal jurisdiction. Secondly, I will delve into the general duty to investigate situations in which crimes against humanity may have been committed (Section 3), clarifying the circumstances in which such duty may arise and the requirements

---

[8] *Ibid*., § 3; See also C. Bassiouni, *Crimes against Humanity in International Law* (Kluwer, 1999), at 210; Judgment, *Kupreškić et al.* (IT-95-16-T), Trial Chamber, 14 January 2000, § 520. See also Piqué, 'Beyond Territory, Jurisdiction, and Control: Towards a Comprehensive Obligation to Prevent Crimes Against Humanity', in M. Bergsmo and T. Song (eds.), *On the Proposed Crimes Against Humanity Convention* (2014) 135 , at 145.

[9] *Responsibility of States for Internationally Wrongful Acts*, GA Res. 56/83, 12 December 2001, Annex, Art. 41(2).

[10] The International Criminal Court ('ICC') has already a couple of times explained that crimes against humanity can be committed by non-state actors pursuant to a non-state organizational policy. See Judgment pursuant to article 74 of the Statute, *Katanga* (ICC-01/04-01/07-3436-tENG), Trial Chamber II, 7 March 2014, §§ 1119-1121; and Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in Kenya* (ICC-01/09-19), Pre-Trial Chamber II, 31 March 2010, § 90. This stance has been criticised by Judge Kaul in his Dissenting Opinion to the Kenya authorization decision, especially at § 51, where he suggests that the 'crimes against humanity' label should be reserved to crimes perpetrated pursuant to an organizational policy by state or state-like actors. See also Kreß, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision', 23 *Leiden Journal of International Law* (2010) 855. The author, especially at 867-871, argues that customary international law supports Judge Kaul's position.

[11] The argument has been put forward by some scholars, most notably A. Clapham, *Human Rights Obligations of Non-State Actors* (2006). See also D. Murray, *Human Rights Obligations of Non-State Armed Groups* (2016).

[12] See e.g. *Kiliç v Turkey*, ECtHR, 28 March 2000, § 73; *Pueblo Bello Massacre v Colombia*, IACtHR, 31 January 2006, §§ 139-140; *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v Sudan* (Communications n° 279/03 and 296/05), African Commission on Human and Peoples' Rights (AfComHPR), 27 May 2009, § 147. More cases are discussed in L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (2011), at 180–184.

which the related investigations should satisfy. Thirdly, I will deal with the specific duty to carry out a preliminary inquiry into allegations against suspects who are found on the state's territory (Section 4), exploring in particular the extent to which the pertinent information should be shared with other states and the fair treatment guarantees that draft Article 11 accords to alleged offenders. Each section contains suggestions to amend the draft articles, with a view to their improvement.

2. The Duty to Establish Jurisdiction (Draft Article 7)

Draft Article 7 creates a duty for states to establish jurisdiction for conduct amounting to a crime against humanity based either: on the fact that the relevant conduct took place in a territory under the state's jurisdiction;[13] or on the fact that the conduct was performed by a state's national;[14] or, if the state deems it appropriate, on the fact that the victim of the crime was a state's national;[15] or, in any case, whenever a person suspected to have committed crimes against humanity is present on any territory under the state's jurisdiction.[16] A provision of this kind was always expected to be part of the ILC work, and it is indeed pretty common for treaties imposing an obligation to criminalize certain conduct (as done by draft Article 6) to also impose a duty to establish jurisdiction over such conduct.[17] Similar provisions can be found, *inter alia*, in the Convention against Torture (Article 5) and in the Convention against Enforced Disappearance (Article 9). Also the Geneva Conventions contain an implicit obligation to establish jurisdiction (including universal jurisdiction), concerning grave breaches of the Conventions (e.g. Article 49(2), Geneva Convention I).[18] The Genocide convention does not contain an explicit duty to establish jurisdiction, but Article VI specifies that alleged *genocidaires* must be tried before the courts of the state on whose territory the offence was allegedly committed — hence implicitly providing an obligation to establish jurisdiction based on the territoriality principle. The ICC Statute in itself does not provide for a duty to establish jurisdiction over the relevant crimes. A failure to exercise jurisdiction would simply open the door for the complementary intervention by the Court. Yet, the preamble of the Statute recalls that states have a duty to exercise their

[13] Or on board a ship or aircraft registered in the State. See Article 7(1)(a).

[14] Or, if the state deems it appropriate, by a stateless person who is habitually resident in the state's territory. See Article 7(1)(b).

[15] Article 7(1)(c).

[16] Article 7(2).

[17] *Second Report of the Special Rapporteur, Mr. Sean D. Murphy* ('2016 Murphy Report'), UN Doc. A/CN.4/690, 21 January 2016, § 87.

[18] See also Geneva Convention II, Art. 50(2); Geneva Convention III, Art. 129(2); Geneva Convention IV, Art. 146(2). As it is well known, grave breaches of the Geneva Conventions and of Additional Protocol I are a particular category of war crimes committed in international armed conflicts. An obligation to establish jurisdiction over all other war crimes (regardless of whether perpetrated in international or non-international armed conflicts) is deemed to exist in customary international law according to the 2005 ICRC Study on Customary International Humanitarian Law (available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/home, visited 11 April 2018). Indeed, Rule 158 obliges states to investigate war crimes allegedly committed by their nationals or armed forces, or on their territory. As it will be explained infra, investigations are an exercise of jurisdiction.

jurisdiction over such crimes,[19] which is best understood as a reference to a rule of customary international law, the scope *ratione personae* of which has been left 'delightfully ambiguous'.[20]

As it is well known, 'jurisdiction' generally designates the state's power to exercise authority over persons, objects and events.[21] A general obligation to establish jurisdiction is, thus, an obligation to assert the existence of such authority by subjecting those persons, objects or events to a State's legislation (prescriptive jurisdiction) or by subjecting them to the process of its courts, whether in civil or criminal proceedings (adjudicative or judicial jurisdiction), or by ensuring compliance with that legislation through police or other executive mechanisms (enforcement jurisdiction).[22] Quite clearly, the ILC draft articles on crimes against humanity are concerned with criminal jurisdiction: draft Article 6 obliges states to ensure that crimes against humanity constitute offences under national criminal law, and draft Article 7 obliges states to assert their jurisdiction over such offences.[23] This, practically, means that states are obliged to make their national law — including judicial proceedings and enforcement mechanisms — applicable to conduct amounting to crimes against humanity and consequently to alleged offenders. One may object that it does not make sense to create a duty to establish enforcement jurisdiction over individuals who are not located on the state's territory. Indeed, whilst enforcement jurisdiction on any person, object or event located on a state's territory is usually absolute,[24] its exercise (e.g. an arrest) outside of the state's border without consent of the territorial state would constitute a violation of the territorial state's sovereignty. However, one should not overlook that — in order to obtain such consent and potentially arrest a suspect extraterritorially — the state would first need to vest its police with enforcement authority, subordinating its exercise to the territorial state's consent. In other words, an obligation to establish criminal jurisdiction is different from the obligation to exercise such jurisdiction,[25] which may substantiate itself in a duty to investigate the occurrence of crimes against humanity (draft Articles 8 and 9(2)), to take an alleged offender into custody (draft Article 9(1)) or to

---

[19] Preamble, § 6, ICCSt. See also Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Katanga* (ICC-01/04-01/07-1497), Appeals Chamber, 25 September 2009, § 85.

[20] T.N. Slade, R.S. Clark, 'Preamble and final clauses', in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (Kluwer, 1999), 421-450, at 427.

[21] Cf slightly differently worded but similar definitions in J. Crawford, *Brownlie's Principles of Public International Law* (8th ed., 2012), at 456. And M. N. Shaw, *International Law* (8th ed., 2017), at 483. See also Staker, 'Jurisdiction', in M. D. Evans (ed.), *International Law* 4 (2014) 309 , at 309.

[22] O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', 2 *Journal of International Criminal Justice* (2004) 735 , at 736–737. The author convincingly argues that, for criminal matters, there is no particular reason to distinguish adjudicative jurisdiction from the other two forms of jurisdiction.

[23] On the question of whether international law contains an obligation to establish universal jurisdiction over civil claims for torture, see ECtHR, *Naït Liman v Switzerland*, Grand Chamber, 15 March 2018. Importantly, whilst controversially denying such universal civil jurisdiction, the Court accepts at § 178 the existence of universal criminal jurisdiction for acts of torture.

[24] Separate Opinion of President Guillaume, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, International Court of Justice, 14 February 2002, ICJ Reports (2002) 3, at 36-37, § 4.

[25] *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, Council of the European Union, 8672/1/09 REV1, 16 April 2009, § 11; Geneuss, 'Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU–EU Expert Report on the Principle of Universal Jurisdiction', 7 *Journal of International Criminal Justice* (2009) 945 , at 949.

prosecute, extradite or surrender him/her (draft Article 10). Hence, draft Article 7 obligates states to make not only their substantive law but also enforcement action applicable to the conduct and individuals in question, so that they can be liable to be investigated, arrested, detained, prosecuted, and sentenced.

A. Crimes Committed on any Territory under the State's Jurisdiction

In this light, the obligation to establish jurisdiction when the offence is committed in a territory under the state's jurisdiction — despite being quite common in treaty making — may appear to be almost superfluous. States always have regulatory authority within their *de jure* geo-political borders[26] and, historically, conduct occurring on board a vessel or aircraft registered in the state has been equated to conduct occurring on the state's territory for jurisdictional purposes.[27] Where does the normative value of Article 7 lie then? The answer is that, by creating an obligation to establish jurisdiction over offences committed 'in any territory under [the state's] jurisdiction', the article unequivocally refers to any territory over which that state has *de facto* control, e.g. territory which is under military occupation or which has been unlawfully annexed or in any case where the state has 'day-to-day ability to act',[28] as it is also confirmed in the commentary to both Article 4 (on the obligation to prevent) and Article 7,[29] and in the International Court of Justice's (ICJ) jurisprudence.[30] As correctly explained by some states commenting on the provision at the General Assembly, the duty to establish jurisdiction extends to any place or facility under the state's control, anywhere located.[31] The obligation would, for instance, clearly extend to an extraterritorial detention camp like the one operated by the United States in Guantanamo Bay.

Moreover, in order to avoid impunity gaps, and in light of the proposed convention's object and purpose, the obligation in Article 7(1)(a) shall extend to all offences committed against individuals within the power or effective control of state agents acting outside of the state's territory. According to numerous authorities such individuals find themselves under that state's jurisdiction.[32] Even though those authorities make reference to the obligation to protect

---

[26] J. Klabbers, *International Law* (2nd ed., 2017), at 100. A. Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (7th ed., 2012), at 242. See also 2016 Murphy Report, *supra* note 17, § 100. According to the ECtHR, such jurisdiction formally exists even if the state has de facto lost control of certain areas which, for example, are under control of a non-state armed group. See ECtHR, *Assanidze v Georgia*, 8 April 2004, §§ 139–140; ECtHR, *Ilascu and others v Moldova and Russia*, 8 July 2004, § 333.

[27] 2016 Murphy Report, *supra* note 17, § 97. See also K. Ambos, *Treatise on International Criminal Law. Volume III, International Criminal Procedure* (2016), at 216.

[28] 2015 Murphy Report, supra note 3, § 115.

[29] 2017 ILC Report, supra note 1, § 46, commentary to draft Article 7, § 6. See also *Statement of the Chairman of the Drafting Committee, 68th session of the International Law Commission*, 9 June 2016, p. 8.

[30] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971) 12, at 42, § 118.

[31] Iceland (Nordic countries), Statement at UN GA, 6th Committee, UN Doc. A/C.6/71/SR.24, § 61.

[32] Cf UN Human Rights Committee (HRC), *General Comment No. 31*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 29 March 2004, § 10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004) 136, at 180, § 111. Cf among others ECtHR, *Loizidou v Turkey*, 18 December 1996, § 62; ECtHR, *Cyprus v Turkey*, 10 May 2001, § 77; IAComHR, *Coard v US*, 29 September 1999, § 37.

and respect human rights of the individuals in question, there is no good reason to exclude a similar interpretation for the articles on crimes against humanity, especially considering the inextricable link between such criminal category and human rights. Otherwise, states could escape an obligation to establish jurisdiction over offences committed outside of a territory under the state's control by state agents who do not have the state's nationality (and hence would not be covered by Article 7(1)(b)), and who are not present on the state's territory (and thus are not subject to Article 7(2) either). To make such obligation more explicit, a new draft Article 7(1)(a) could add the expression 'or whenever a person is under the physical control of that state'.[33]

Furthermore, in order to understand the contours of territorial jurisdiction, one should first know what it means that a certain offence is 'committed' on a state's territory. This issue is even more pressing for crimes against humanity, a category of offences characterized by a contextual element, a conduct element and, in some cases, requiring the production of certain consequences. Where is a crime against humanity 'committed', then? Among various possible interpretation of the principle of territoriality,[34] to best match the object and purpose of the ILC articles on crimes against humanity, one should consider that a crime is committed on the territory of any state where one of its constituent elements took place[35] — a reading adopted, inter alia, by the ICC Prosecutor.[36] Hence, for the purposes of Article 7(1)(a), a state should establish jurisdiction as long as the widespread or systematic attack against the civilian population, or part of it, or any element of any underlying offence (conduct, circumstances or consequences) takes place on any territory under its jurisdiction.

B. Offenders and Victims

Personal jurisdiction, either in its active or passive form, is not much problematic if not for identification of who could be labelled as an 'offender' and who could be labelled as a 'victim'. As for offenders, a plain reading of draft article 6(2) clarifies that they include not only those who commit a crime against humanity, but also those who attempt such commission and those who order, solicit, induce, aid, abet or otherwise assist in or contribute to the commission or attempted commission of crimes against humanity. Military commanders or civilian superiors are

---

33 Which was already proposed in Washington University, Crimes Against Humanity Initiative, *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, August 2010, Article 10. For a similar proposal, see Piqué, *supra* note 8, at 158–160. There is a possibility that such an addition leads to an 'a contrario' argument with respect to human rights treaties. Should the ILC decide to include my suggestion in the final articles, the related commentary should specify that the adopted language does not introduce a new standard, but only makes the correct interpretation of human rights treaties, as endorsed by several treaty bodies, explicit.

34 For a brief overview, see Shaw, *supra* note 21, at 488–493. Alternatively, C. Ryngaert, *Jurisdiction in International Law* (2nd ed., 2015), at 49–100.

35 Ambos, *supra* note 27, at 213–214. See also *S.S. Lotus*, 1927 PCIJ Series A, No. 10, at 23; and Harvard Research in International Law, 'Draft Convention on Jurisdiction with Respect to Crime,' 29 *American Journal of International Law* (AJIL) (1935) 435, at 445: 'A crime is committed "in whole within the territory when every essential constituent element is consummated within the territory"; it is committed "in part within the territory" when any essential constituent element is consummated there.'

36 Application under Regulation 46(3), *Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute* (ICC-RoC46(3)-01/18-1), Office of the Prosecutor, 9 April 2018, §§ 28 and 32-42; see also Article 5 Report, *Situation in the Republic of Korea*, ICC Office of the Prosecutor, 23 June 2014, § 39.

also 'offenders' if they meet the conditions set forth in Article 6(3). Jurisdiction based on the active nationality principle is clearly meant to cover conduct of nationals abroad, including armed forces involved in military operations.

As to the definition of 'victims', surely national law will play a decisive role. The definition adopted by existing international instruments[37] and the constant jurisprudence of human rights treaty bodies[38] — reported in the ILC commentary to draft Article 12, dealing with victims and witnesses[39] — includes anyone who has individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights through acts or omissions that amount to a crime against humanity, and affected immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization (so-called 'indirect victims').[40] Nothing in the articles excludes that victims may also be legal persons.[41]

Some have questioned whether the concept only covers victims of an underlying offence (e.g. imprisonment) or 'victims of the situation', e.g. those who have suffered harm as a result of the widespread or systematic attack which represents the context for crimes against humanity.[42] Considering that, under draft Article 3(2)(a), 'attack' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 (i.e. underlying offences), a person who has suffered harm as a result of the attack, by definition, has suffered harm as a result of one of the underlying offences and will, thus, be considered as a victim.

C. Universal jurisdiction

Draft Article 7(2), containing an obligation to establish jurisdiction whenever an alleged offender is present on a state's territory, regardless of any other jurisdictional link, deserves special attention. As it will be explained *infra*, this language recalls the principle of universal jurisdiction — conditional on the offender's presence on the territory — defined by a commentator as the single most important argument in favour of the creation of an international convention on crimes against humanity.[43] A duty of this kind has not always been recognized in international law: for instance, whilst it exists for grave breaches of the Geneva Conventions, the

---

[37] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res. 60/147, 16 December 2005 § 8; *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res. 40/34, 29 November 1985 §§ 1-2; see also Rule 85, ICC RPE.

[38] See e.g. ECtHR, *Vallianatos v Greece*, Grand Chamber, 7 November 2013, § 47; ECtHR, *Elberte v. Latvia*, 13 January 2015, § 137; IACtHR, *Bámaca-Velásquez v Guatemala*, 25 November 2000, §§ 159-166; Committee against Torture, *General Comment No. 3*, UN Doc. CAT/C/GC/3, 19 November 2012, § 3.

[39] 2017 ILC Report, *supra* note 1, § 46, Commentary to Article 12, at 93-94, §§ 3-4.33.

[40] Redacted version of 'Decision on 'indirect victims'', *Lubanga* (ICC-01/04-01/06-1813), Trial Chamber I, 8 April 2009 §§ 44-52. See also Spiga, 'Indirect Victims' Participation in the Lubanga Trial', 8 *Journal of International Criminal Justice* (2010) 183.

[41] Art. 34 ECHR; IACtHR, *Yakye Axa Indigenous Community v Paraguay*, 17 June 2005, § 176; Rule 85(b) ICC RPE, which however only extends such qualification to entities have suffered direct harm.

[42] Romania, Statement at UN GA, 6th Committee, UN Doc. A/C.6/72/SR.19, § 80.

[43] Akhavan, *supra* note 4, at 28.

Genocide Convention does not contain a similar rule. Different sources have pointed out that the establishment of universal jurisdiction for core international crimes is certainly a right of states, but not necessarily an obligation under customary international law.[44] However, the argument for a customary duty to establish universal jurisdiction on crimes against humanity may rely on the *jus cogens* nature of the prohibition to commit such crimes.[45] Indeed, if one were to apply the rule contained in Article 41, ILC Articles on State Responsibility, states would have an obligation to cooperate to bring to an end any serious breach of *jus cogens* norms, an obligation not to recognize as lawful such situations, and an obligation not to render aid or assistance in maintaining that situation. Refraining from establishing jurisdiction over crimes against humanity arguably violates one or more of these obligations. In any case, an obligation to establish jurisdiction regardless of any territoriality or nationality link is not a novelty in treaty law. Article 5(2) CAT and Article 9(2) CED contain a similar duty which, as confirmed by the ICJ, is necessary for enabling a preliminary inquiry into an alleged offender and for complying with the obligation to extradite or prosecute.[46]

Of note, the ILC refrains from using the expression 'universal jurisdiction' in the draft articles.[47] Still, several states called for an explicit reference to such concept.[48] But would this reference be legally correct? As a matter of fact, the ILC draft articles are an embryonic treaty and, as such, would only bind states parties to it. Thus, some may argue that the obligation to establish jurisdiction in draft Article 7(2) would not be 'truly universal', but only applicable *inter partes*, i.e. between contracting parties.[49] Consequently, a certain state party shall only establish jurisdiction over crimes committed either by/against a national of another state party, or on the territory of another state party — something that has been labelled as a 'quasi-universal' jurisdiction.[50] In establishing jurisdiction in these cases, a state would act in the interests of the group of states party to the treaty.[51] However, there is support for the position that the said treaty obligation may extend to nationals of states non-parties at least when involving crimes whose

---

[44] See e.g. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1), Appeals Chamber, 2 October 1995, § 62; Judgment, *Furundžija* (IT-95-17/1), Trial Chamber, 10 December 1998, § 156; Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, *Arrest Warrant of 11 April 2000 (Democrutic Republic of the Congo v. Belgium)* ('Higgins *et al.* Opinion'), Judgment, ICJ Reports (200), 3 at 78, § 51; *Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 ILR 298; *Demjanjuk v Petrovsky* (1985) 603 F.Supp.1468; 776 F.2d 571.

[45] In this sense Bassiouni, 'International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes'', 59 *Law and Contemporary Problems* (1996) 63 , at 65–66.

[46] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports (2012), 422, at §§ 74-75.

[47] 2016 Murphy Report, supra note 17, § 113 explains why such wording may be inappropriate. Similarly, Higgins *et al.* Opinion, *supra* note 44, § 41, prefer defining it as 'obligatory jurisdiction over persons, albeit in relation to acts committed elsewhere'.

[48] Statements at the UN GA 6th Committee by: El Salvador, UN Doc. A/C.6/71/SR.25, § 55; Iceland (Nordic countries), UN Doc. A/C.6/71/SR.24, § 60; UN Doc. Slovenia, A/C.6/71/SR.26, § 108.

[49] Geneuss, *supra* note 25, at 953. Ryngaert, *supra* note 34, at 123–124.

[50] Crawford, *supra* note 21, at 469–471. Shaw, *supra* note 21, at 504.

[51] *Belgium v Senegal*, supra note 46, § 69. Cimiotta, 'The Relevance of Erga Omnes Obligations in Prosecuting International Crimes', 76 *Zeitschrift Für Ausländisches öffentliches Recht Und Völkerrecht* (2016) 687 , at 701.

prohibition amounts to *jus cogens*[52] or that are 'indisputably prohibited by customary international law',[53] what would make jurisdiction 'truly' universal. In establishing jurisdiction in such cases, a state would act as a representative of the entire international community.[54] Consequently, since crimes against humanity are prohibited by a peremptory norm of international law, the ILC may want to consider including the expression 'universal jurisdiction' in the final version of the draft articles or at least in their preamble, in light of its important symbolic value.

Criticism towards the current version of draft Article 7(2) has already been expressed by some states, which decry that the current draft limits too much the state's margin of appreciation. According to such critics, the provision should be narrowed down in light of the practical difficulties of investigating crimes with no territorial or personal link with the state, in order to maintain a more coherent criminal policy, and in order to avoid an overburdening of national prosecutions with proceedings which would exceed their capacity.[55] France, e.g. suggested that the duty to establish jurisdiction should only arise when the suspect 'habitually resides in the state's territory' and when the state deems it appropriate.[56] In light of the present stage of development of international law in the fight against international crimes, however, these proposals appear to be anachronistic. As explained, the provision on the duty to establish universal jurisdiction is so central to the ILC project that any attempt to undermine it could potentially defeat the purpose of the whole proposed convention.

One cannot but notice how the obligation to establish jurisdiction based on the universality principle is necessary to ensure that other provisions in the draft articles can be effectively implemented. As noted by the ICJ in *Belgium v Senegal* with regard to similar provisions in the Torture Convention, the establishment of universal jurisdiction conditioned to the suspect's presence is necessary to carry out a preliminary enquiry on his/her alleged misconduct (demanded by draft Article 9(2) in the case of crimes against humanity) and for submitting his/her case to the competent authorities for prosecution (as requested by draft Article 10).[57] To say it even more explicitly, 'without established jurisdictional ground, the competent authorities of a State party would not be able to fulfil the obligation to prosecute or take a decision on a request for extradition from another State party.'[58] For this reason it seems odd that

---

[52] *Ex parte Pinochet (n° 3)* [2000] 1 AC 147, at 275 (Lord Millet); *Demjanjuk v. Petrovsky* (1985) 603 F.Supp. 1468; 776 F.2d 571.

[53] Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction', 1 *Journal of International Criminal Justice* (2003) 589 , at 594. The author cites US practice in this sense, in particular *US v Ramzi Ahmed Yousef*, US Court of Appeal for the 2nd Circuit, 4 April 2003, 327 F.3d 56, at 64-66.

[54] Langer, 'Universal Jurisdiction Is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction', 13 *Journal of International Criminal Justice* (2015) 245 , at 249. Luban, 'A Theory of Crimes against Humanity', *Yale Journal of International Law* 85 , at 140–143. The US seem to have followed such reading in their judicial practice. See e.g. *United States v Yunis (No 2)*, 681 F.Supp 896, 901 (DDC, 1988).

[55] *France's observations, submitted to the GA 6th committee after the ILC 68th session* (2017), available at http://legal.un.org/ilc/guide/7_7.shtml (visited 12 April 2018), p. 2. Concerns were also repeated in France, Statement at the UN GA 6th Committee, UN Doc. A/C.6/71/SR.20, § 76.

[56] France's observations, *supra* note 55, p. 3.

[57] *Belgium v Senegal*, supra note 46, § 74.

[58] Dissenting Opinion by Judge Xue, *Belgium v Senegal*, supra note 46, § 26. A substantially similar conclusion is expressed by President Guillaume in his Separate Opinion to the Arrest Warrant Judgment. See *supra*, note 24, § 9.

draft Article 7(2) creates a duty to establish universal jurisdiction only if the state on whose territory the suspect is present 'does not extradite or surrender the person'. Arrest for the purposes of extradition or surrender necessarily requires some sort of enforcement jurisdiction, and even subjection to extradition or surrender may imply the exercise of prescriptive and adjudicative authority — considering that the related processes may be governed at least in part by national law, and may see the involvement of national judicial organs. Hence, I would suggest that the mentioned expression is removed from draft article 7(2). Of course, one ought not to forget that jurisdiction for the purposes of compliance with the obligation to extradite or prosecute may be established on any ground, including — as explained by draft Article 7(3) — any ground other than those listed in draft Article 7, established by a state in accordance with its national law. Universal jurisdiction ex Article 7(2) only acts as a 'residual' jurisdictional ground, to ensure that there is no gap in the repression of crimes against humanity.

In this regard, given the likely coexistence of several states' jurisdiction with regard to crimes against humanity, the ILC draft articles could have inserted a provision on how to solve any potential conflicts of jurisdiction. The Special Rapporteur explains that these are usually solved through cooperation and comity between the competing states and that, in practice, the state where the suspect is located is better positioned to proceed with a prosecution if willing and able to do so.[59] Moreover, draft Article 15 on the settlement of disputes may be of help in this case. Nevertheless, considering that a clarification in this sense has already been requested at the General Assembly,[60] the ILC could tackle the issue when working on a final version of the articles. Two possible solutions are possible, i.e. either giving priority to the state where the alleged offender is located, or to the state with the closest jurisdictional link. The latter solution would effectively make universal jurisdiction subsidiary to the exercise of jurisdiction based on another title. Some scholars would favour this outcome at least as a matter of policy,[61] but customary international law does not seem to provide any hierarchy among jurisdictional titles.[62] Thus, in the event that the ILC decides not to give priority to the custodial state, it should clarify what jurisdictional link must be given priority between multiple 'traditional' ones (e.g. between territoriality and active nationality). Moreover, whatever its choice about the criteria to solve potential jurisdictional conflicts, the ILC should also make clear that a state enjoys priority only 'provided that such state is willing and able to proceed with a prosecution.' The ILC could then

---

For this reason, some scholars have defined the obligation *aut dedere aut judicare* as a form 'primary universal repression'. See Akhavan, *supra* note 4, at 34.

[59] 2016 Murphy Report, *supra* note 17, § 115.

[60] Russia proposed to give priority to states acting on the basis of the territorality or active nationality principles, since those would be the states with the greatest interest in the matter. See Russian Federation, Statement at the UN GA 6th Committee, UN Doc. A/C.6/71/SR.25, § 65.

[61] Ryngaert, *supra* note 34, at 231. See also Institut de Droit International, *Resolution on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes*, 26 August 2005, Art. 3(c) and (d). Kress believes that, even though practice in this sense is not abundant, a rule in this sense has already evolved. Kreß, 'Universal Jurisdiction over International Crimes and the Institut de Droit International', 4 *Journal of International Criminal Justice* (2006) 561 , at 579–581. In this sense also Cassese, *supra* note 54, at 593. See also Separate opinion of Judges Higgins et al., para 59.

[62] Ryngaert, *supra* note 34, at 143. See also 'The AU-EU Expert Report on the Principle of Universal Jurisdiction', Council of the European Union, 8672/1/09 REV1, 16 April 2009, § 14, and approving commentary in Geneuss, *supra* note 25, at 957.

go on and explain — with a language that is vaguely reminiscent of the ICC Statute provisions on admissibility[63] — that a state would not be considered 'willing' whenever proceedings are being undertaken for the purpose of shielding the person concerned from criminal responsibility, or whenever there has been an unjustified delay, or whenever proceedings are not being conducted independently or impartially.

3. The General Duty to Investigate Crimes against Humanity

A. Different Types of Duties to Investigate

Draft Article 8 provides that each state has a duty to carry out, through its competent authorities, a prompt and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction. This general duty to investigate is closely linked with the more specific duty to make a preliminary inquiry over the facts in which a person suspected of having committed crimes against humanity may have been involved. This last obligation is contained in draft Article 9(2) and some of its aspects will be analysed in the next section of this contribution. It is important to note that considerations about competent authorities and requirements of promptness, impartiality and effectiveness are equally applicable to both kinds of investigation. The two kinds of investigation differ of course, *first*, when it comes to their scope: adopting ICC-specific terminology for mere classification purposes, draft Article 8 concerns 'situations' of crimes against humanity, whilst draft Article 9(2) concerns 'cases', i.e. specific individual conducts within them.[64] They also differ, *second*, with regard to triggering information: a general investigation should be started in presence of reasonable grounds that the state's territory is or has been the theatre of crimes against humanity, whilst a specific investigation is triggered by the presence of a suspect on the state's territory, regardless of where he/she may have committed crimes against humanity. *Third*, the two have different finalities: a general investigation aims (also) at stopping ongoing crimes, whilst a specific investigation appears to be primarily a premise for the choice of whether to prosecute, extradite or surrender the suspect, and a means to verify that the individual in question is being appropriately detained.[65] This is not to say, of course, that there is no overlap between the two obligations. However, as explained by the Special Rapporteur, the general obligation to investigate arises irrespective of whether the alleged offender is known or present on the state's territory.[66]

Whilst such duties to investigate may look like a novelty in international law, they actually aren't. If one accepts that crimes against humanity constitute serious violations of

[63] Cf., in particular, Art. 17(2) ICCSt.

[64] The ICC jurisprudence has vaguely defined a 'situation' as a set of circumstances subject to investigation and prosecution, 'generally defined in terms of temporal, territorial and in some cases personal parameters'. See e.g. Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2,VPRS 3,VPRS 4,VPRS 5 and VPRS 6, *Situation in the Democratic Republic of the Congo* (ICC-01/04-101-tEN-Corr), Pre-Trial Chamber I, 17 January 2006, § 65; Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, *Bemba* (ICC-01/05-01/08-14-tENG), Pre-Trial Chamber III, 10 June 2008, § 16. Most situations have so far been delimited with reference to a particular region or country (e.g. Northern Uganda or Central African Republic).

[65] 2016 Murphy report, *supra* note 17, § 121.

[66] *Ibid*., § 123; cf also 2015 Murphy Report, *supra* note 3, § 180.

fundamental human rights,[67] the duty to investigate crimes against humanity can be considered to be already implicit in the duty to investigate human rights violations. With regard to the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee (HRC) has confirmed that the existence of a 'general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies', an implication of the right to an effective remedy enshrined in Article 2(3),[68] a provision which has to be respected even during times of emergency and armed conflict.[69] Regional human rights bodies have expressed a similar stance, though sometimes with regard to specific rights. For instance, according to the European Court of Human Rights (ECtHR), a duty to investigate arises from the obligation to protect the right to life and prevent its violation.[70] The Inter-American Court of Human Rights (IACtHR) has several times recalled the existence of a general duty to investigate violations of any right protected by the American Convention of Human Rights, in accordance with Article 1,[71] and it has also linked such duty to the effective protection of the right to life[72] and of the right to a fair trial.[73] General duties to investigate conduct which may amount to crimes against humanity are also established, inter alia, by the Convention against Enforced Disappearance (Articles 3 and 12) and by the Convention against Torture (Article 12).[74] The ILC draft articles have the great merit, then, of making such general duty explicit.

B. Meaning and Characters of Required Investigations

But what does it mean for states to have a duty to investigate? Investigation, in its ordinary meaning, is any search for information in order to determine if the law was violated and, if so, who is responsible. According to draft Article 8 investigations are to be carried out by competent authorities, which are in charge of collecting facts and evidence into a case file for potential prosecutions.[75]

---

[67] At least in the cases specified in the Introduction, above.

[68] HRC, *General Comment 31*, *supra* note 32, §15. See also HRC, *Bautista de Arellana v Colombia*, 27 October 1995, § 8.6; *Rajapakse v Sri Lanka*, 14 July 2006, § 9.3.

[69] HRC, General Comment No. 29, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, § 14. Cf also ECtHR, *Isayeva v Russia*, 24 February 2005, § 209; ECtHR, *Al-Skeini v United Kingdom*, Grand Chamber, 7 July 2011, § 164.

[70] See e.g. ECtHR, *McCann et al. v United Kingdom*, Grand Chamber, 27 September 1995, § 161; ECtHR, *Ergi v Turkey*, 28 July 1998, §§ 82-85.

[71] Cf. e.g. IACtHR, *Pueblo Bello*, *supra* note 12, §§ 142-145; IACtHR, *Zambrano Velez v Ecuador*, 4 July 2007, § 88.

[72] IACtHR, *Cruz Sanchez v Peru (Extrajudicial Executions)*, 31 March 2011, §§ 127, 170 and 179. See also *Zambrano Velez*, *supra* note 71, §§ 88-89.

[73] IACtHR, *Paniagua Morales et al. v Guatemala*, 8 March 1998, §§ 133-136 (violation of Art. 8, Inter-American Convention against Torture) and §§ 137ff (violation of Art. 8 ACHR, right to a fair trial); see also *Extrajudicial executions*, supra note 72, § 162 ff.

[74] A soft law instrument like the *UN Basic Principles on the Right to a Remedy* (*supra*, note 37) also contains such an obligation, at §§ 3(b) and 4. See also *Report of the United Nations Fact-Finding Mission on the Gaza Conflict* ('Goldstone Report'), UN Doc. A/HRC/12/48, 25 September 2009, §§ 121 and 1773.

[75] *Belgium v Senegal*, supra note 46, § 83. This principle was stated with respect to the preliminary inquiry aimed at a specific alleged offender, but it is applicable to the more general duty to investigate.

Only investigations meeting certain qualitative requirements, however, would fulfil the obligation contained in the ILC articles. Two of these requirements can be found in draft Article 8 itself, requiring a 'prompt and impartial' investigation. The Special Rapporteur and the ILC commentary explain, correctly, that *promptness* refers to the absence of undue delay from the moment in which the competent authorities have received information which would warrant the investigation.[76] *Impartiality* would refer, instead, to the fact that the investigation 'gives equal weight to assertions that the offence did or did not occur', and to the fact that the search for truth would not spare government officials and government records, if appropriate.[77]

At least three fundamental requirements, however, have been left out of the ILC draft and should be considered by the ILC for inclusion into a new draft. The first one, mentioned at least in the ILC commentary, is the requirement of *effectiveness*.[78] In the absence of guidance by the commentary, one could just adopt the expression's ordinary meaning, by which effectiveness would point to the authorities' ability to search and collect sufficient information with a view to deciding whether to proceed with prosecutions. Hence, effectiveness would require the commitment of adequate human and economic resources and early clarity as to the strategy to be followed.[79] Secondly, *independence* is also frequently cited as a requirement for investigations on human rights abuses, pointing out to a sufficient separation between the authorities carrying out investigations and those entities which may be interested in a specific outcome.[80] The third missing but necessary requirement would be *transparency* of investigations.[81] This of course does not mean making every single investigative finding public, as this could both prejudice the investigations' effectiveness and violate the suspects' right to be presumed innocent and to a fair trial. But some sort of public scrutiny of the authorities' conduct should be ensured, including a

---

[76] 2016 Murphy report, *supra* note 17, § 126. The ILC commentary to Draft Article 8 (§ 2) provides that national authorities shall proceed automatically to investigation once reasonable grounds to believe that crimes against humanity have been or are being committed.

[77] 2017 ILC Report, *supra* note 1, §46, Commentary to Art. 8, § 4.

[78] *Ibid*. The commentary actually uses the expression 'serious, effective and unbiased', but seriousness and lack of bias could already be construed within the requirement of impartiality explicit in draft Art. 8. See also 2016 Murphy report, *supra* note 17, § 128.

[79] Notably, effectiveness has been deemed to be an essential character of investigation into human rights abuses by the Goldstone report, *supra* note 74, at §§ 121, 1814; and by *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, Office of the UN High Commissioner for Human Rights, New York/Geneva, 2017, §§ 24-27. See also *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res. 55/89, 4 December 2000; and *Principles on the Effective Prevention and Investigation of Extrajudicial, Arbitrary and Summary Executions* ECOSOC Res. 3, 4 May 1981 1989/65, annex), § 10. See also ECtHR, *Zavoloka v Latvia*, 7 July 2009, § 34; ECtHR, *Kaya v Turkey*, 19 February 1998, § 87; IACtHR, *Mapiripán Massacre v Colombia*, 15 September 2005, § 224; IACtHR, *Myrna Mack Chang v Guatemala*, 25 November 2003, §§ 153–158.

[80] Again, see Goldstone Report, *supra* note 74, at §§ 121, 1814; *Minnesota Protocol*, supra note 79, §§ 28-31. See also, e.g., AfComHPR, *Amnesty International et al v Sudan*, 15 November 1999, § 51; ECtHR, *Giuliani and Gaggio v Italy*, Grand Chamber, 24 March 2011, § 300.

[81] *Minnesota Protocol*, supra note 79, §§ 32-33. See also Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law, *The Public Commission to Examine the Maritime Incident of 31 May 2010, Second Report* ('Turkel Report II'), February 2013, §§ 90-94.

chance to secure accountability for any failure in the discharge of their duties.[82] The requirement of transparency would also mean that victims and their families should be kept informed about the status and/or outcome of investigations, as appropriate, and as a means to ensure their right to an effective remedy and to access information.[83]

Investigations into alleged crimes against humanity on a state's territory may obviously be more problematic than investigations into an alleged common crime. Indeed, even though it seems that crimes against humanity can be committed pursuant to a non-state organizational policy,[84] some of the most concerning situations will involve state-driven violence, which would in turn create serious doubts about investigations' genuineness. Moreover, the potential emergency context surrounding crimes against humanity could make investigations even more difficult. The lack of proper administrative structures and resources, the unavailability of evidence, and security concerns are all factors that could endanger a state's ability to fulfil its obligation under draft Article 8. Still, should the ILC clarify the requirements for a proper investigation and add the suggested attributes, this could be an incentive for states to improve the preparation and structural capacity of their investigative authorities.

Having defined what investigations are and how they should be conducted, one should also understand when the duty to investigate is triggered. Draft Article 8 only says that such duty arises when 'there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed', but the meaning of this expression is explained neither in the article nor in the commentaries, except for the clarification that investigations must be started 'regardless of victims complaints'.[85] For human rights abuses, triggers for investigations identified in soft-law instruments include 'any potentially unlawful death'[86] and 'an arguable claim … or … reasonable grounds to suspect that a serious human rights violation has occurred'.[87] In the ICC context, where 'a reasonable basis to proceed' is required for the Prosecutor to start an investigation,[88] the threshold has been deemed to be quite low, amounting to 'a sensible or reasonable justification for a belief' that a crime is being or has been committed, and only aims at preventing 'unwarranted, frivolous, or politically motivated investigations'.[89]

---

[82] ECtHR, *Giuliani and Gaggio v Italy*, *supra* note 80, § 303; ECtHR, *Isayeva*, supra note 69, § 213; IACtHR, *Ibsen Cardenas and Ibsen Pena v Bolivia*, 1 September 2010, § 238. See also Directorate General of Human Rights and Rule of Law, Council of Europe, *Eradicating impunity for serious human rights violations: Guidelines and reference texts*, 2011, p. 13.

[83] ECtHR, *Giuliani and Gaggio v Italy*, *supra* note 80, § 304; ECtHR, *Ahmet Özkan et al. v Turkey*, 6 April 2004, § 314; IACtHR, *Pueblo Bello*, *supra* note 12, § 144; IACtHR, *Gomes Lund et al. v Brazil*, 24 November 2010, § 257.

[84] See *supra*, Introduction and note 13.

[85] 2017 ILC Report, *supra* note 1, §46, Commentary to Art. 8, p. 80, § 2, referring to the similar obligation in Art. 12 CAT.

[86] *Minnesota Protocol*, supra note 79, § 15.

[87] Council of Europe, *Eradicating impunity*, *supra* note 82, p. 11.

[88] Cf. Artt. 15(3), 15(4) and 53(1) ICCSt.

[89] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya* (ICC-01/09-19), Pre-Trial Chamber II, 31 March 2010, §§ 35 and 32 respectively. Conversely, the standard of 'reasonable grounds to believe that the person has committed a crime' required by Art. 58(1)(a) ICCSt. for the issuance of an arrest warrant seems not to be the appropriate one, as it is concerned not with the trigger of an investigation, but with the issuance of a measure restricting the liberty of a specific individual. It appears obvious to require a higher standard of evidence in those cases. For further analysis of

Considering that the ICC's mandate concerns precisely (though not only) crimes against humanity, it seems that such a low threshold would also be appropriate for triggering the national duty to investigate.

Whilst draft Article 8 is certainly commendable in stipulating the duty of states to investigate crimes against humanity, the choice to limit such duty to crimes committed on the state's territory[90] is not equally commendable. On the one hand, these states may very well be those involved in the perpetration of the crimes and, as explained, expecting a prompt and impartial investigation from them may appear somewhat naïve. Such duty would maybe be more impactful if imposed on a greater amount of states to the extent of their capabilities, including — when appropriate — through regional organizations. On the other hand, a state's obligation to investigate should be extended to the conduct of its armed forces abroad,[91] especially when operating as part of a UN peacekeeping force.[92] There is no justifiable reason to exclude investigations in such cases — even when the alleged offender is not present on the state's territory and hence could not be subject to the specific investigation mandated by draft Article 9(2) — given that no one but the state in question would be better suited to verify allegations of misconduct by its own troops.

4. The Specific Duty to Investigate Alleged Offenders under the State's Jurisdiction, and their Fair Treatment

Draft Article 9 deals in general with preliminary measures to be taken when a suspect is present on the state's territory, and include three different obligations: a duty to take legal measures to ensure the suspect's continued presence on the territory; a duty to carry out an investigation into the alleged facts; and a duty to share information with other states, with regard to the circumstances warranting the suspect's custody, the results of the investigation and the course of action which the state intends to follow.

The article reproduces an obligation that is already contained in a number of international and regional treaties, most notably Article 6 of the Torture Convention and Article 10 of the Enforced Disappearance Convention[93] and, as I explained when dealing with the general obligation to investigate, it builds on already existing positive duties deriving from international and general human rights treaties.

Such obligation, whilst not revolutionary, is crucial for the effective prevention and punishment of crimes against humanity. It equally applies, for instance, to foreign fighters who left the battlefield to settle back into society and to government officials who travel abroad

---

such standard, see M. Klamberg, Commentary to the ICC Statute, Article 58, Case Matrix Network, available at https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/rome-statute/#c1231 (visited 12 April 2018).

[90] Statement of the Chairman of the Drafting Committee, *supra* note 29, pp. 9-10.

[91] Iceland (Nordic countries), Statement at the UN GA 6th Committee, UN Doc. A/C.6/71/SR.24, § 61

[92] See Austria ILC statement 2017, p. 2, repeated in their statement at the UN GA 6th Committee, UN Doc., A/C.6/71/SR.25, § 83.

[93] More treaties containing a similar provision are listed in the 2016 Murphy report, *supra* note 17, § 139, 142 and 147

temporarily: once information pointing out to the fact that they may have committed an offence within the draft articles exists, they must immediately be taken into custody [94] and an investigation into their alleged conduct must be launched. An effective implementation of draft Article 9 would ensure that no safe haven exists for persons who are responsible for crimes against humanity and that their conduct is closely scrutinized wherever they move. Notwithstanding the fact that draft Article 9 is carefully crafted to achieve this objective, a few issues still warrant a closer look.

A. The Preliminary Inquiry

The central part of the article is, ironically, the one to which the ILC devoted the smallest amount of words, i.e. § (2) on the duty to carry out a preliminary inquiry into the allegations of crimes against humanity against a person who is present on territory under the state's jurisdiction. Even though this is called an 'inquiry', it is in fact an investigation into the facts in which the suspect was allegedly involved, in order to understand whether his/her continued custody is justified and in order to take a decision on the necessary course of action.[95] In particular, such inquiry shall be aimed at confirming, corroborating or denying suspicions about the person who is allegedly responsible for crimes against humanity. Hence, a simple questioning of the suspect aimed at confirming their identity or inform them of the allegations would not be sufficient.[96] It is 'preliminary' in the sense that it is not necessarily aimed at a prosecution, but it may well be propaedeutic to such outcome and, in this sense, national investigative authorities should already at an early stage consider this possibility. The inquiry of course is not only aimed at fighting impunity, but also at ensuring fairness for keeping the suspect in custody, confirming that there are reasonable grounds for his/her continued detention.[97]

Investigations shall start as soon as the relevant authorities have information or a suspicion that a person present on their territory is responsible for crimes against humanity. The investigation should start 'immediately', i.e. as soon as the information is received. At the latest, this would happen when a complaint is brought against the suspect in question. [98] Unlike in draft Article 8, nothing in draft article 9(2) or in the commentary indicates that the suspicion must be reasonable, from which it could be inferred that any suspicion of such heinous offences warrants a closer scrutiny, and such scrutiny should delve deeper and deeper as the suspicion gets more credible. Obviously, however, an arrest or any measure restricting the suspect's liberty would need to comply with the guarantees and standards set forth in international human rights law and in the applicable national law. As to the person subject to inquiry, it goes without saying, he/she does not need to allegedly be a direct perpetrator of crimes against humanity. Any mode of liability would engage his/her criminal responsibility, and hence be the object of investigations.

---

[94] 2016 Murphy Report, *supra* note 17, § 145

[95] 2016 Murphy Report, *supra* note 17, § 136.

[96] *Belgium v Senegal*, supra note 46, § 83 ff.

[97] 2016 Murphy Report, *supra* note 17, §137.

[98] *Ibid*., § 136. Cf. also implication from *Belgium v Senegal*, supra note 46, § 88.

B. Information sharing

At the end of the preliminary inquiry, the state shall inform other states who have jurisdiction on the same offence because of the territoriality or nationality (active or passive) principles. The state should also inform such state of any custodial measures taken against the suspect, and of the circumstances warranting custody. Such duty to share information is obviously linked to the possibility of extradition or judicial cooperation between different states, but it is of a general character and should be fulfilled even when there is a firm intention to prosecute — even just to verify whether other states are interested in exercising jurisdiction.[99] Such intention, as hinted at by the draft Article, should be made explicit at the time of notification. In this respect, it seems that the language adopted by the ILC in draft Article 9(3) could be slightly amended. Whilst the text provides that the *forum deprehensionis* shall 'indicate whether it intends to exercise jurisdiction', such jurisdiction has already been exercised by investigating the relevant facts and taking the suspect into custody. Rather, the ILC could require the custodial state to 'indicate whether it intends to prosecute, extradite or surrender the suspect'.

The draft Article, which certainly aims to facilitate international cooperation in the fight against crimes against humanity, has engendered mixed reactions. On one side, France has noted that the duty to inform other states about the results of the preliminary inquiry may be inconvenient for several reasons: it risks compromising the investigations, increasing the chances for information leaks; it may run counter the presumption of innocence of the suspect; it may be inappropriate if the state to which the information is owed might somehow be involved in the commission of the crimes, with the potential to lead to international tensions and political pressures on the investigators.[100] For this reason, France proposes to subordinate the duty of information sharing to situations in which the investigating state believes that the communication would not endanger the ongoing investigations.[101] Draft Article 9(3) maybe already addresses France's concerns — implicitly — by prescribing that custody of a suspect shall be notified 'immediately', whilst the inquiry findings shall only be notified 'promptly'. This may signify that investigative results could be shared only when this would not jeopardize the investigations themselves. In the interest of clarity, the ILC may explicitly adopt France's proposal or explain the rule better in the commentary. Information about the suspect's custody, conversely, needs to be shared 'immediately' in any case, in order to ensure early communication between the suspect and a representative of his/her state of nationality (draft Article 11(2)(a)). This last wording choice ('immediately') has also attracted criticism, as South African representatives at the General Assembly have underlined how this would pose too heavy a burden on the investigating state, which at the time of the arrest may not yet have identified the other states concerned.[102] Obviously, however, the duty to notify other states only arises once these other states have been identified, after having found out basic information about the suspect's nationality and about the

[99] 2016 Murphy Report, *supra* note 17, § 148.

[100] France's observations, *supra* note 55, pp. 4-5. See also France, Statement at the UN GA 6th Committee, UN Doc. A/C.6/71/SR.20, § 76.

[101] '*s'il estime que cette information n'est pas de nature à mettre en danger les investigations en cours*', in France's observations, *supra* note 55, p. 3.

[102] South Africa, Statement at the UN GA 6th Committee, UN Doc. A/C.6/72/SR.20, § 7

facts which are alleged against him.[103] For instance, states which have jurisdiction based on the principle of passive personality should not (and could not!) be notified until potential victims of such nationality have been identified. Hence, despite the fact that information about detention is already liable to cause undue political tensions and external pressure on investigations, the language adopted in the current version of draft Article 9(3) appears to strike an acceptable balance between the rights of the suspect and the needs of investigations, and should not be modified except as I suggest above.

C. Suspects in Custody and their Fair Treatment

Once a suspect has been taken into custody, or his liberty has been restricted in any other way according to national law (e.g. by withholding his/her passport), he/she is entitled to a certain number of guarantees — regardless, of course, of whether they have been restricted due to the procedure spelled out in Article 9 or because the suspect has been subject to extradition.

The *first* guarantee is already spelled out in draft article 9(3): measures to ensure that the suspect does not flee can only be maintained for such time as necessary for criminal, extradition or surrender proceedings to commence.[104] *Secondly*, whatever 'measure' — regardless of whether legal or not[105] — has been taken against a person in connection with allegations of crimes against humanity, that person is to be guaranteed fair treatment and protected to the fullest extent by his/her rights deriving from applicable national and international law. *Thirdly*, draft Article 11(2) spells out a duty of allowing any person who is 'in prison, custody or detention' for allegations of crimes against humanity[106] to communicate with a representative of their state of nationality, or of any state willing to assist him/her.

Of note, the draft uses the general expression 'fair treatment', a good choice of term that certainly includes fundamental guarantees like the presumption of innocence and the principle of legality[107] and which avoids inadvertent limitations of protection potentially deriving from the use of a set list of protected rights.[108] Whilst the language of draft Article 11 is already quite protective, however, some have voiced concern for the ambiguous reference to 'applicable national law' (with regard to fair treatment in general) and with regard to the 'laws and regulations of the State in the territory under whose jurisdiction the person is present' for communication rights. In this regard, the ILC should dispel any doubts about the primacy of international human rights law over any conflicting national provision. In this light, Amnesty International has proposed to introduce a clearer reference to 'amplest right to a fair trial in accordance with the highest standards of international law'.[109] Similarly, but perhaps more

[103] In this sense, 2017 ILC Report, *supra* note 1, §46, Commentary to Art. 9, § 3.
[104] 2016 Murphy Report, *supra* note 17, § 143.
[105] Statement of the Chairman of the Drafting Committee, *supra* note 29, p. 14
[106] See Statement of the Chairman of the Drafting Committee, *supra* note 29, p. 15, for an explanation of the ILC wording choice.
[107] 2016 Murphy Report, *supra* note 17, § 169.
[108] 2016 Murphy Report, *supra* note 17, § 179.
[109] Amnesty International, *17-Point Program for a Convention on Crimes against Humanity*, 21 February 2018, § 8.

realistically, Italy proposed that national law should only be applicable inasmuch as it is fully consistent with international human rights law.[110]

5. Conclusion

The ILC articles on crimes against humanity are, regrettably, far from a finished project. I say 'regrettably' because the provisions that I have analysed in this contribution actually have the concrete potential to facilitate prevention and punishment of crimes against humanity, and further negotiations carry the risk of regressions. The explicit recognition of duties to establish jurisdiction over and to investigate crimes against humanity would be a tremendous achievement and a most welcome consolidation of 70 years of normative evolution since Nuremberg. They would clarify once and for all that such duties exist in international law and they would establish a helpful bridge between international criminal law and international human rights law.

But, in so doing, the ILC draft articles are no more than a bare minimum. I have attempted to highlight the (few) outstanding problems with the current version of draft Articles 7, 8, 9 and 11 and, since the draft articles' wording is open to interpretation in several places, I have also proposed readings that would be most consistent with the object and purpose of the whole project. Needless to say, this is not meant in any way to diminish the quality of the ILC work. Far from it, the future discussion of the ILC draft articles in general, and of the provisions on jurisdiction and investigations in particular, should start from the assumption that it sets a standard behind which one should not fall.

[110] Italy, Statement at the UN GA 6th Committee, UN Doc. A/C.6/72/SR.18, § 139, echoing a statement of similar spirit by Austria at § 67.