Preface and Acknowledgments

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This book represents the culmination of more than one hundred years of effort in the development of international criminal law. With extraordinary support and input from nearly 250 noted experts from around the world, a complete Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity has finally been elaborated. It is my sincere hope that the Proposed Convention, along with the collected scholarly articles and drafting history set forth herein, will serve as a foundation for the consideration — and ultimate adoption by States — of a crimes against humanity convention, a still-missing and essential piece of the framework of international humanitarian and international criminal law.

During the trials of the German and Japanese leaders by the Allies following World War II, crimes against humanity emerged as an independent basis of individual criminal liability in international law. Although the so-called Martens Clause of the 1907 Hague Convention Respecting the Laws and Customs of War on Land referenced the “laws of humanity, and … the dictates of the public conscience” as protections available under the law of nations to human beings caught in the ravages of war, this language was too uncertain to provide a clear basis for either State responsibility or criminal liability under international law. Subsequently, crimes against humanity were specifically included in the Charters of the International Military Tribunals at Nuremberg and Tokyo to address depredations directed against civilian populations by the State — including the State of the victims’ nationality. Indeed, it was in many ways the most revolutionary of the charges upon which the accused were convicted, for its foundations in international law were so fragile. Following the trials, the Nuremberg Principles embodied in the IMT Charter and Judgment were adopted by the General Assembly in 1946 and

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1 See, e.g., Leila Sadat, The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again, 32 Colum. J. Transnat’l. L. 289, 296–300 (1994).


4 The other was the crime of waging an aggressive war.

codified by the International Law Commission in 1950.\(^6\) Thus, “crimes against humanity,” whatever their uncertain legal origin, had apparently found a firm place in international law as a category of offenses condemned by international law for which individuals could be tried and punished. The codification of the crime of genocide – itself a crime against humanity – lent some truth to this assumption; however, the important achievement of the Genocide Convention’s adoption and entry into force in 1951\(^7\) was overshadowed by Cold War politics. Indeed, no trials for genocide took place until 1998, when Jean-Paul Akayesu, mayor (bourgmestre) of the town of Taba, was convicted by the International Criminal Tribunal for Rwanda (ICTR) for his role in the slaughter that had engulfed Rwanda in 1994.\(^8\) Crimes against humanity percolated in the legal systems of a handful of countries that had domesticated the crime, such as France, and certain elements of their prohibition could be found in new international instruments prohibiting torture and apartheid.\(^9\) Scholarly articles periodically appeared as well. But the promise of “never again,” as many have observed before me, was repeatedly dishonored as the mass atrocities committed in the second half of the twentieth century unfolded before the eyes of the world, bloody in their carnage and the human toll they exacted, and shocking in their cruelty and barbarism.\(^10\) There was little accountability of any kind exacted from those responsible for these crimes against humanity – ces crimes contre l’esprit – whether committed by government officials or military leaders, rebels, insurgents, or low-level perpetrators. The Nuremberg promise remained unfulfilled.\(^11\)


\(^8\) Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 494 (Sept. 2, 1998).


\(^10\) One recent study has suggested that between 1945 and 2008, between 92 million and 101 million persons were killed in 313 different conflicts, the majority of whom were civilians. In addition to those killed directly in these events, others have died as a consequence, or had their lives shattered in other ways – through the loss of property; through victimization by sexual violence; through disappearances, slavery and slavery-related practices, deportations and forced displacements, and torture. M. Cherif Bassiouni, Assessing Conflict Outcomes: Accountability and Impunity, in The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice 6 (M. Cherif Bassiouni ed., 2010).

\(^11\) In 1989, the Cold War ended with the fall of the Berlin Wall, and this began to change. The International Criminal Court project, which had lain fallow, was restarted with the introduction of a resolution into the General Assembly by Trinidad and Tobago, leading a coalition of sixteen Caribbean nations, and work on the Draft Code of Crimes continued at the International Law
One of the most horrific examples of post–World War II crimes against humanity was the Cambodian “genocide” discussed by Gareth Evans in this volume. From 1975 to 1979, the Khmer Rouge regime killed an estimated 1.7 million–2.5 million Cambodians, out of a total population of 7 million.\(^\text{12}\) Although now popularly referred to as a “genocide,” legally that is a difficult case to make. Indeed, there has been a great deal of criticism and worry generated by the decision of the co-prosecutors of the Extraordinary Chambers for Cambodia to bring charges of genocide against several former high-ranking leaders of the Khmer Rouge regime, for fear that the charges will not be legally possible to prove.\(^\text{13}\) For the most part, individuals were killed, tortured, starved, or worked to death by the Khmer Rouge not because of their appurtenance to a particular racial, ethnic, religious, or national group – the four categories to which the Genocide Convention applies – but because of their political or social classes, or the fact that they could be identified as intellectuals.\(^\text{14}\) While theories have been advanced suggesting ways that the Genocide Convention applied to these atrocities,\(^\text{15}\) and an argument can certainly be made that some groups were exterminated \textit{qua} groups (such as Buddhist monks, whose numbers were reportedly reduced from 60,000 to 1,000),\(^\text{16}\) most experts agree with Evans’ chilling assessment that:

\begin{quote}
[F]or all its compelling general moral authority, the Genocide Convention had absolutely no legal application to the killing fields of Cambodia, which nearly everyone still thinks of as the worst genocide of modern times. Because those doing the killing and beating and expelling were of exactly the same nationality, ethnicity, race and religion as those they were victimizing – and their motives were political, ideological and class-based … the necessary elements of specific intent required for its application were simply not there.\(^\text{17}\)
\end{quote}

Once again, the international community had failed both to prevent the commission of mass atrocities and to provide the legal tools necessary to react to their


\(^{14}\) See Samantha Power, “A Problem from Hell”: \textit{America and the Age of Genocide} 87–154 (2002).


\(^{16}\) Power, supra note 14, at 143.

\(^{17}\) Gareth Evans, \textit{Crimes Against Humanity and the Responsibility to Protect}, in this volume, at 3.
As war broke out in the former Yugoslavia, and the Rwandan genocide took place with the world watching in horror, the international community reached for the Nuremberg precedent only to find that it had failed to finish it. This made the task of using law as an antidote to barbarism a difficult and complex endeavor. The uncertainty in the law was evidenced by the texts of the Statutes for the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), which contained different and arguably contradictory definitions of crimes against humanity, a notion difficult to square with the idea of universal international crimes. M. Cherif Bassiouni underscored this problem in an important, but little noticed, article appearing in 1994 entitled “‘Crimes Against Humanity’: The Need for a Specialized Convention,” in which he lamented the “existence of a significant gap in the international normative proscriptive scheme, one which is regrettably met by political decision makers with shocking complacency.”

With the adoption of the International Criminal Court (ICC) Statute in 1998, crimes against humanity were finally defined and ensconced in an international convention. The ICC definition is similar to earlier versions but differs in important respects, such as the requirement that crimes against humanity be committed “pursuant to a State or organizational policy.” However, it was a convention that by its own terms did not purport to represent customary law, but only law defined for the purposes of the Statute itself. (Whether it has subsequently come to represent customary international law was debated during the course of this Initiative). Moreover, even if the ICC definition ultimately represents customary international law, it applies only to cases to be tried before the ICC. Although presumably ICC Party States can and will adopt the ICC definition as domestic law (and are encouraged to do so pursuant to the principle of complementarity), the ICC Statute provides no vehicle for inter-State cooperation. Putting it more simply, the adoption of the Rome Statute advanced the normative work of defining crimes against humanity considerably but did not obviate the need to fill the lacunae in the legal framework as regards the commission of atrocity crimes, most of which are crimes against...
humanity, and not genocide, and many of which are crimes against humanity, and not war crimes. As the ad hoc tribunals begin to close down, shoring up the capacity for national legal systems to pick up cases involving crimes against humanity appears imperative if the small gains achieved during the past two decades of international criminal justice are not to be reversed. This is particularly true as regards crimes against humanity, for recent experience demonstrates that crimes against humanity have been committed and charged in all situations currently under examination before the international criminal tribunals (and the ICC) to date.

As Richard J. Goldstone notes in the Foreword to this volume, the case of Bosnia v. Serbia before the International Court of Justice again evidenced the difficulty this normative gap engenders. For the debate in that case, centering upon whether the mass atrocities in Bosnia committed during the 1990s constituted genocide, missed the point. Although the Court recognized that many serious violations of the laws of armed conflict and crimes against humanity had been committed by Bosnian Serb troops, because the Court’s jurisdiction was limited to genocide, these other crimes were not before them, and they “slipped off the table.” Of the nearly 200,000 deaths, 50,000 rapes estimated to have occurred, and the 2.2 million forcibly displaced as a result of the Serb ethnic cleansing campaign, genocide was held to have been proven only in the massacre of some 8,000 Muslim men and boys in Srebrenica in July 1995. What was missing was a convention on crimes against humanity that would have given the International Court of Justice jurisdiction not only in respect of the crime of genocide but for crimes against humanity as well.

Thus, in 2008, the Whitney R. Harris World Law Institute, under my direction, launched the Crimes Against Humanity Initiative. As the Comprehensive History to the Proposed Convention explains, the Initiative had three primary objectives: (1) to study the current state of the law and sociological reality as regards the commission of crimes against humanity; (2) to combat the indifference generated by an
assessment that a particular crime is “only” a crime against humanity (rather than a “genocide”); and (3) to address the gap in the current law by elaborating the first-ever comprehensive specialized convention on crimes against humanity.

The Initiative has progressed in phases, each building upon the work of the last. The publication of this volume, including the papers herein and the Proposed Convention, represents the culmination of the first three phases of the Initiative: (I) preparation of the project and methodological development; (II) private study of the project through the commissioning of the papers in this volume, the convening of expert meetings, and collaborative discussion of draft treaty language; and (III) public discussion of the project with relevant constituencies and the publication of the Proposed Convention. Ambitious in scope and conceptual design, the project is directed by a Steering Committee of renowned experts and has drawn on the Harris Institute’s connections, particularly overseas, to assemble a truly extraordinary international effort on the elaboration of a proposed convention on crimes against humanity.

During Phase II, the papers in this collection, written by leading experts, were presented and discussed at a conference held at the Washington University School of Law on April 13–14, 2009. They were then revised for publication. They address the legal regulation of crimes against humanity and examine the broader social and historical context within which they occur. Each chapter was commissioned not only to examine the topic’s relationship to the elaboration of a future treaty, but to serve as an important contribution to the literature on crimes against humanity in and of itself.

Each of the fifteen papers in this collection is a gem. The papers range from technical discussions of specific legal issues such as modes of responsibility (van Sliedregt), immunities and amnesties (Orentlicher), enforcement (Olson), and gender crimes (Oosterveld) to broader conceptual treatments of earlier codification efforts (Clark), the definition of the crime in the Rome Statute and customary international law (Ambos and Mettraux), and the phenomenon of ethnic cleansing (Hagan & Haugh). Several of the papers contrast the ICC and ad hoc tribunal definition of crimes against humanity and were very helpful to the discussions as the drafting effort progressed (see, e.g., Sluiter); the same can be said for the many other contributions to the volume, which addressed specific topics such as crimes against humanity and terrorism (Scharf & Newton), universal jurisdiction (Akhavan), and the Responsibility to Protect (Scheffer). David M. Crane’s contribution outlining “Operation Justice” in Sierra Leone is an outstanding case study of “peace and justice” in action; likewise, M. Cherif Bassiouni’s exposé on “revisiting the architecture of crimes against humanity” is a magisterial account of the crime’s development during the past century.

31 One paper, on Re-enforcing Enforcement, was commissioned subsequent to the April meeting based upon the emphasis in that meeting on inter-State cooperation as a principal need for the Convention. Laura M. Olson, Re-enforcing Enforcement in a Specialized Convention on Crimes Against Humanity: Inter-State Cooperation, Mutual Legal Assistance, and the Ant Dedere Ant Judicare Obligation, in this volume.
In discussing the scholarly work, more questions were raised than answered. What was the social harm any convention would protect? Atrocities committed by the State, or a broader concept that would include non-State actors? Would a new legal instrument prove useful in combating atrocity crimes? How would any new instrument interact with the Rome Statute for the International Criminal Court? The lengthy discussions that transpired are memorialized in the *Comprehensive History* found in Appendix III and will no doubt continue after this book has been published, but it should be emphasized that the discussion and elaboration of the Convention’s provisions are deeply intertwined with the academic work accomplished at the same time.

As the initial scholarly work was undertaken, a preliminary draft text of the convention, prepared by Cherif Bassiouni, was circulated to participants of the April meeting to begin the drafting process. As the Initiative progressed, nearly 250 experts were consulted, many of whom submitted detailed comments (orally or in writing) on the various drafts of the proposed convention circulated or attended meetings convened by the Initiative either in the United States or abroad. Between formal meetings, technical advisory sessions were held during which every comment received – whether in writing or communicated verbally – was discussed as the Convention was refined. The *Proposed Convention* went through seven major revisions (and innumerable minor ones) and was approved by the members of the Steering Committee as it now appears in Appendices I (in English) and II (in French) in this volume. The *Comprehensive History* appearing in Appendix III describes the drafting process as well as the debates that surfaced during the *Proposed Convention’s* elaboration in detail.

The *Proposed Convention*, we hope, will begin, not end, debate. Elaborated by experts without the constraints of government instructions (although deeply cognizant of political realities), it is, we believe, an excellent platform for discussion by States with a view toward the eventual adoption of a United Nations Convention on the Prevention and Punishment of Crimes Against Humanity. The *Proposed Convention* builds upon and complements the ICC Statute by retaining the Rome Statute definition of crimes against humanity but has added robust interstate cooperation, extradition, and mutual legal assistance provisions in Annexes 2–6. Universal jurisdiction was retained (but is not mandatory), and the Rome Statute served as a model for several additional provisions, including Articles 4–7 (Responsibility, Official Capacity, Non-Applicability of Statute of Limitations) and with respect to final clauses. Other provisions draw on international criminal law and human rights instruments more broadly, such as the recently negotiated Enforced Disappearance Convention, the Terrorist Bombing Convention, the Convention Against Torture, the United Nations Conventions on Corruption and Organized Crime, the European Transfer of Proceedings Convention, and the Inter-American Criminal Sentences Convention, to name a few.  

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32 A complete list is found in the table at the back of the *Proposed Convention* found in Appendixes I and II of this volume.
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Yet although we benefitted from the existence of current international criminal law instruments, the creative work of the Initiative was to meld these and our own ideas into a single, coherent international convention that establishes the principle of State Responsibility as well as individual criminal responsibility (including the possibility of responsibility for the criminal acts of legal persons) for the commission of crimes against humanity. The Proposed Convention innovates in many respects by attempting to bring prevention into the instrument in a much more explicit way than predecessor instruments, by including the possibility of responsibility for the criminal acts of legal persons, by excluding defenses of immunities and statutory limitations, by prohibiting reservations, and by establishing a unique institutional mechanism for supervision of the Convention. Echoing its 1907 forbear, it also contains its own Martens Clause in paragraph 13 of the Preamble. Elaborating the twenty-seven articles and six annexes of the treaty was a daunting challenge, and one that could not have been accomplished without the dedication and enthusiasm of many individuals.

First, I am deeply grateful to M. Cherif Bassiouni for his extraordinary contributions in leading the drafting effort and his service as a member of the Initiative’s Steering Committee. I am equally grateful to Hans Corell, Richard J. Goldstone, Juan Méndez, William A. Schabas, and Christine Van den Wyngaert – the other members of the Steering Committee – for their leadership. Each member of the Initiative’s Steering Committee brought tremendous energy and expertise to the project, guiding its methodological development and conceptual design and carefully reading, commenting on, and debating each interim draft of the Proposed Convention extensively. The collegial spirit with which our discussions were carried out and our work engaged helped enormously in keeping us on track, and the collective wisdom and experience of my colleagues made working on this project both delightful and inspiring. I really cannot thank them enough.

As with all such projects, many supported the effort without being on the front pages of it, so to speak. Of special note are the experts that gave generously of their time and talent, particularly Morten Bergsmo, Robert Cryer, Larry Johnson, Guénaël Mettraux, Laura M. Olson, Göran Sluiter, and Elies van Sliedgret, who attended one or more technical advisory sessions and contributed extensively to the elaboration of the Convention’s text. In addition, our Senior Cash Nickerson Fellows, including Amitis (Amy) Khojasteh, Yordanka Nedyalkova (who also served as Associate Director of the Institute), B. Don Taylor III (who also served as Executive Director of the Institute), and Neill Townsend, did a marvelous job assisting with the project in so many ways – we are grateful for their enthusiasm and dedication. Our student Fellows did a terrific job as well, including Genevra Alberti, McCall Carter, Erika Detjen, Shannon Dobson, Andrew Esterday, Margaret LeBlanc, Jason Meyer, Stephanie Nickerson, Sarah Placzek, and Margaret Wichmann. We could not have managed the project without the institutional and personal support of Mark Wrighton, Chancellor of Washington University in St. Louis; Kent Syverud, Dean of the School of Law; Michael Peil, Associate Dean for International Programs;
Sherrie Malone, my faculty assistant; Linda McClain, the Institute’s former Assistant Director; and Shelly Ford, the Institute’s new Administrative Coordinator.

Our major conferences outside of St. Louis would not have been successful without the assistance of Carsten Stahn and the Grotius Centre at Leiden University, Wim Blockmans and The Netherlands Institute for Advanced Study, the City of The Hague, and The Brookings Institution. We are particularly grateful to Brookings for its superb support and organization of our final Phase III conference, particularly Brookings’ President Strobe Talbott, Deputy Director and Senior Fellow Andrew Solomon, and Project Manager Jacqueline Geis. Robert S. Brookings endowed Washington University in St. Louis and the prestigious Washington, D.C., think tank that bears his name, and it is therefore somehow fitting that these two legacy institutions should collaborate on this important project.

We could not have undertaken this effort at all without the extraordinary support provided by Steven Cash Nickerson, Washington University alumnus, who gave generously to support the first three phases of the Initiative. Cash believed in this project from its inception, supporting it himself, and thereby helping us to raise monies elsewhere. We are grateful to the United States Institute of Peace, Humanity United, and the Brookings–Washington University Academic Venture Fund for additional, critical financial support. Finally, we thank our other institutional partners – the American Society of International Law, the International Law Association (American Branch), and the International Association of Penal Law (American Branch) – for their support of the Initiative’s work as well.

At the end of the day, however, it is perhaps to Whitney R. Harris, former Nuremberg Prosecutor, to whom we are most indebted. For it was Whitney who, along with his fellow trial counsel, first prosecuted crimes against humanity at Nuremberg; Whitney who endowed the Institute bearing his name, providing it with the means to carry on his life’s work; and Whitney who served as our counselor, advisor, and friend on this project, as with so many before it. I am sorry that he did not live to see it bear fruit.

One cannot embark on an endeavor such as this without being keenly aware of the currents of history. Here, in the heartland of America, calling for the elaboration of an international convention embodying international legal principles for the settlement of international problems, is not new. The Resolution responsible for the convening of the Second Hague Peace Conference – from which emanated the 1907 Hague Convention – issued from the Inter-Parliamentary Union meeting in St. Louis, Missouri, on the occasion of the 1904 World’s Fair. Indeed, the participants in the first meeting of the Initiative in April 2009 gathered in historic Ridgley Hall on the Washington University campus for a photograph, which was taken in the same room in which, 105 years earlier, the Inter-Parliamentary Union

33 Editorial Comment, The Second Peace Conference of the Hague, 1 Am. J. Int’l L. 431 (1907). The hopes of that second Peace Conference, however, and the 1907 Convention it produced, were soon dashed as European leaders led their countries into the terrible war that followed.
had issued its call for peace. Nor is it unheard of for a group of experts\(^{34}\) or an academic institution to spearhead an effort such as this. Witness, for example, the Harvard Research project in international law, which produced three draft conventions, published in 1935.\(^ {35}\) The authors of that project cautioned that the “drafts [were] completed within the limits of a rigorous time-schedule, by men already burdened with exacting duties; and these facts should be borne in mind in any appraisal of the work done.”\(^ {36}\) We hope that our work fares somewhat better, although the men and women who contributed to it, of course, were under the same constraints of busy schedules and deadlines.

What will become of the *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*? Phase IV of the Initiative contemplates a global awareness campaign to help make the Convention a reality. But will States embrace this “academic offering” and take up the challenge to negotiate a convention for the suppression of crimes against humanity? Or will indifference continue to be the hallmark of international policy?

As Whitney R. Harris admonished us, shortly before his death:

> The challenge to humanity is to establish and maintain the foundations of peace and justice upon the Earth for the centuries to come. We must learn to end war and protect life, to seek justice and find mercy, to help others and embrace compassion. Each person must respect every other person and honor the God who made this incredible mystery of human life a reality.\(^ {37}\)

I hope that this Initiative, undertaken by the Institute that bears his name, will contribute to the realization of these goals.

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34 The International Law Association, for example, elaborated a draft statute for an international criminal court in 1926. *International Law Association, Report of the Thirty-Fourth Conference* (1927).


36 *Id.* at 8.

37 Whitney R. Harris, *This I Believe*, written and recorded for National Public Radio, June 12, 2006.