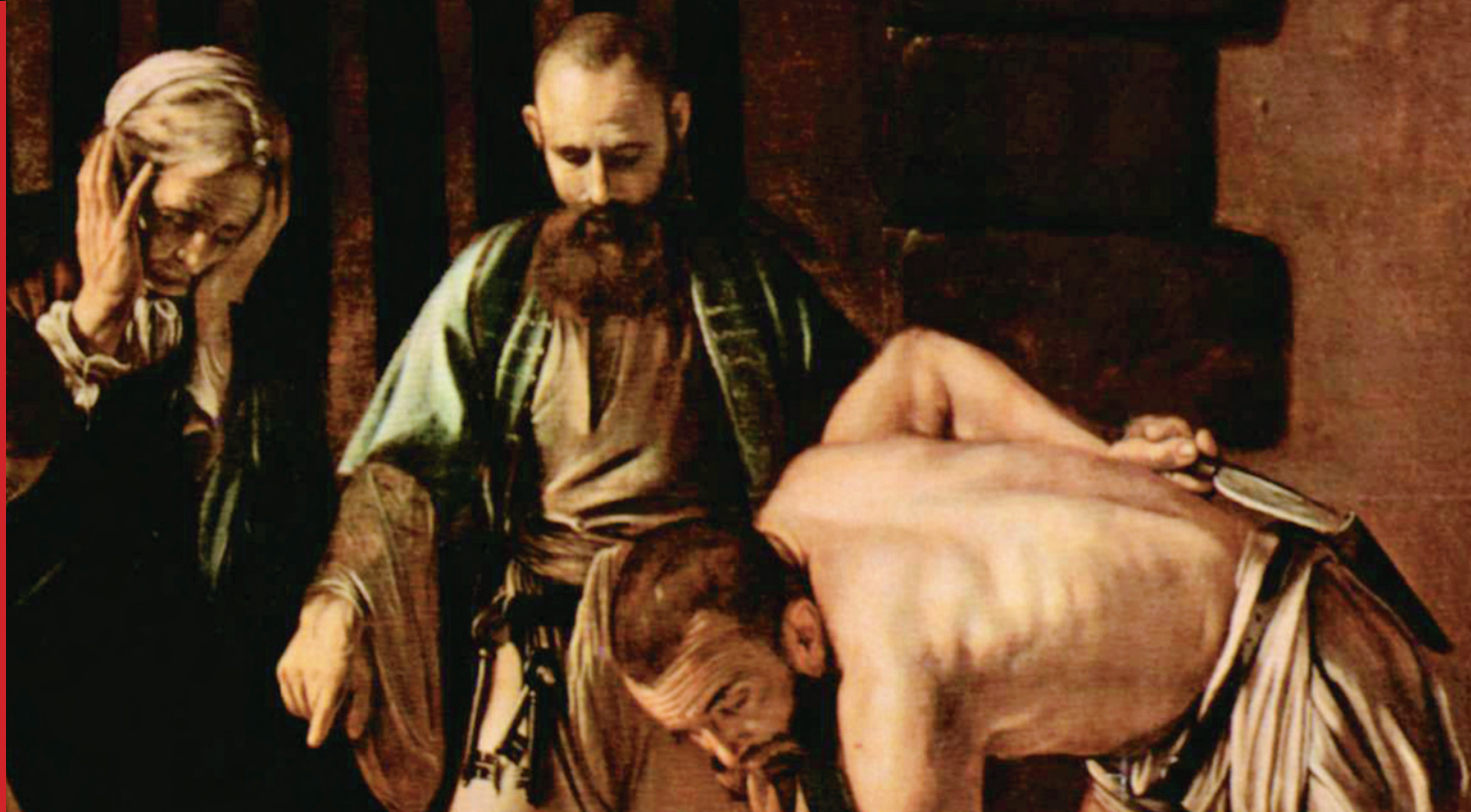


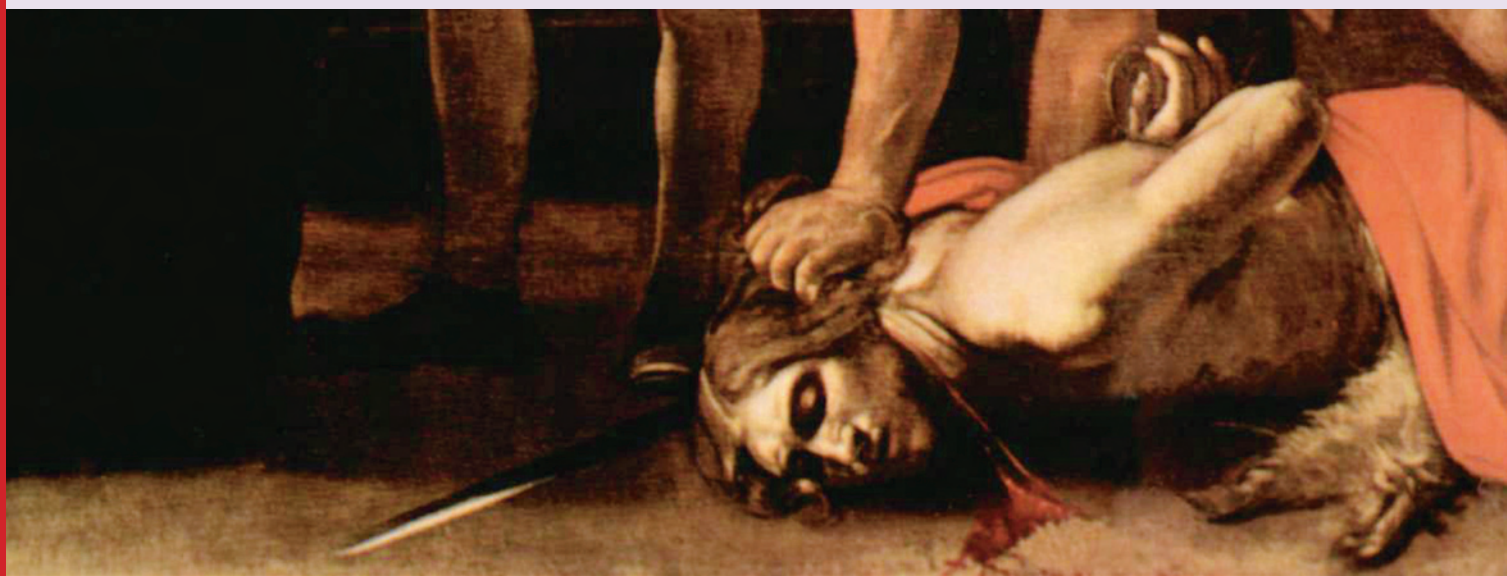
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On the Proposed Crimes Against Humanity Convention

Morten Bergsmo and SONG Tianying (editors)



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FOREWORD BY HANS CORELL

When I started writing these lines, I had just been informed that my long-time friend Judge Hans-Peter Kaul had passed away. It is therefore with great sadness that I am authoring this brief foreword. At the same time, in so doing, I remember with gratitude and fondness my many contacts with Hans-Peter over the years. In this particular context I recall our interaction at the international conference commemorating the tenth anniversary of the International Criminal Court, which took place at Washington University School of Law in St. Louis in November 2012. Judge Kaul's important and dedicated contribution to the development of international criminal law will long be remembered.

When I was invited to contribute this foreword, it was suggested that readers would find it particularly interesting if the foreword contained a few words about my background in international criminal law and justice from the early Commission on Security and Cooperation in Europe ('CSCE') – now Organization for Security and Co-operation in Europe ('OSCE') – mission to Croatia, up until the current initiative for a convention on crimes against humanity; my view on whether such a convention should be developed, and, if so, how it could add to the existing international legal order; and what those who will be involved in its making should keep in mind in light of past experience and new challenges. The following is an attempt to respond to this invitation.

My background in criminal law practice dates back to 1962, when I graduated from law school and joined the judiciary. In my country, Sweden, it is customary that young lawyers join the judiciary as law clerks, working with senior judges at the circuit court level. A few months later, these young lawyers are assigned to adjudicate petty criminal cases as a first step in their judicial career. This is what happened to me with the result that criminal justice became part of my daily work for more than ten years in different circuit courts and also in one of our courts of appeal.

With respect to the idea of establishing international criminal courts, I was rather doubtful in those days. Would this work? Would not the complexity of dealing with criminal cases at the national level multiply at the international level? Would not trials before international criminal courts be politicised? Was this realistic?

Later in life, I completely changed my mind. As a CSCE war crimes rapporteur in the former Yugoslavia I realised that nobody would do anything about bringing perpetrators of the crimes committed there to justice unless an international criminal tribunal was created. On 9 February 1993, Helmut Türk of Austria, Gro Hillestad Thune of Norway and I completed our task by presenting our report Proposal for an International War Crimes Tribunal for the Former Yugoslavia by Rapporteurs (Corell-Türk-Thune) under the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia. The CSCE immediately forwarded the proposal to the United Nations, and later in the same month the Security Council decided, on the basis also of a proposal by a U.N. Commission, to establish the International Criminal Tribunal for the former Yugoslavia ('ICTY').

About a year later, in March 1994, I found myself in the position as Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations. To make a long story short: during my ten years in that position, I was involved in the final steps of establishing the ICTY and later in establishing the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia. Furthermore, in 1998, I was the Representative of the Secretary-General at the Rome Conference that adopted the Rome Statute of the International Criminal Court. Consequently, when the Statute entered into force in 2002, I was also involved in the establishment of the Court.

At the conference in St. Louis in 2012, I reflected on State sovereignty in modern-day society and came to the conclusion that one of the most prominent features of this sovereignty is the responsibility to protect. This responsibility includes an obligation on States to protect their populations against grave international crimes. Therefore, the international criminal justice system must function everywhere. The whole State community must be part of this system in the future.

Making a comparison with the criminal justice system at the national level, I asked the question whether it would be possible to administer a country if all of a sudden the criminal justice system would not apply in certain municipalities or counties. The self-evident answer is that it would not. In consequence, if we look to the administration of our modern day international globalized society, the conclusion is the same. The international criminal justice system must apply in all States. This will take time. But it must be the goal.

This brings me to the Crimes Against Humanity Initiative. I must confess that I was somewhat dubious at the outset when I was invited to join its Steering Committee. Was it really necessary to elaborate such a convention after the adoption of the Rome Statute and the establishment of the International Criminal Court? On further reflection, I soon came to the conclusion that it is an anomaly that we do not have an elaborate convention on crimes against humanity when other parts of international humanitarian law are codified, notably in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and in the 1949 Geneva Conventions and their Additional Protocols.

The contribution which the Proposed Convention will make to the observance of the principle of complementarity is of particular importance. It goes without saying that a robust criminal justice system at the national level in all States is an indispensable element in a proper administration of our global society in the future. For this reason it is crucial that national criminal law in this field is as homogenous as possible. In addition, it is important that there are also provisions that assist States when they need to co-operate in bringing perpetrators to justice. The principle of *aut dedere aut judicare* is a necessary element in fulfilling the obligation to bring perpetrators of international crimes to justice.

Needless to say, the focus of the International Criminal Court must be on high-ranking officials, leaving the prosecution of low- and mid-level perpetrators to domestic courts. It is therefore imperative that prosecution at this level can be done effectively and efficiently. This also necessitates an effective inter-State co-operation relating to such prosecutions. A new convention will provide the basis for inter-State co-operation in matters relating to, for example, evidence, extradition, and transfer of proceedings.

A central element in the elaboration of a new convention on crimes against humanity is that it is seen as complementary to the Rome Statute; under no circumstances should it prejudice or be seen to prejudice the work of the International Criminal Court.

Against this background it is a great step forward that the International Law Commission of the United Nations in its meeting in 2014 decided to add the topic of “crimes against humanity” to its active agenda. A contributing factor to this decision may have been a very fruitful and interesting meeting in Geneva in May 2014, in which members of the Commission participated in discussions with members of the Initiative and others. The report from this meeting – ‘Fulfilling the Dictates of Pub-

lic Conscience: Moving Forward with a Convention on Crimes Against Humanity’ – provides highly interesting reading.

In the Commission’s work, the definition of crimes against humanity will constitute a central component. During the work of the Initiative a great majority of the more than 250 experts consulted supported the need to align any new convention with Article 7 of the Rome Statute. Let me express the hope that the Commission will proceed on the assumption that no changes in Article 7 should be made by a new crimes against humanity convention.

A critical element in the upcoming process is to promote a new convention and to convince States that are doubtful and hesitant that a new convention is the way ahead. The work instigated by the Initiative has generated an opportunity that simply must not be missed.

It is against this background that the present anthology must be warmly welcomed. It will most certainly be an important contribution to the work that now lies ahead and I do look forward to reading the articles when the volume is published.

Hans Corell
Former Legal Counsel of the United Nations

FICHL Publication Series No. 18 (2014):

On the Proposed Crimes Against Humanity Convention

Morten Bergsmo and SONG Tianying (editors)

This anthology is about the need for and nature of a convention on crimes against humanity. It uses the Proposed Convention on the Prevention and Punishment of Crimes Against Humanity as an important reference point. 16 authors discuss how such a convention may consolidate the definition of crimes against humanity, and develop measures for their prevention and punishment, decades after the conclusion of the Genocide Convention and Geneva Conventions. The authors include Leila N. Sadat, Eleni Chaitidou, Darryl Robinson, María Luisa Piqué, Travis Weber, Julie Pasch, Rhea Brathwaite, Christen Price, Rita Maxwell, Mary Kate Whalen, Ian Kennedy, SHANG Weiwei, ZHANG Yueyao and Tessa Bolton. It contains a preface by late Judge Hans-Peter Kaul and a foreword by Hans Corell.

The book is inspired by the rationale of crimes against humanity to protect against the most serious violations of fundamental individual rights, and its realization especially through domestic mechanisms. Such consciousness calls upon appropriate definition and use of contextual elements of the crime, effective jurisdiction for prevention and prosecution, and robust inter-State co-operation. The book considers individual State experiences in combating crimes against humanity. It underlines the importance of avoiding that the process to develop a new convention waters down the law of crimes against humanity or causes further polarisation between States in the area of international criminal law. It suggests that the scope of the obligation to prevent crimes against humanity will become a decisive question.

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effective legislative, administrative, judicial and other measures in accordance with the Charter of the United Nations to prevent and punish the commission of crimes against humanity in any territory under its jurisdiction or control.

A. Crimes against humanity

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Each State Party shall adopt such legislative and other measures as may be necessary to establish crimes against humanity as serious offenses under its criminal law, as well as its military law, and make such offenses punishable by appropriate penalties which take into account the grave nature of those offenses, the harm committed, and the individual circumstances of the offender. In addition, such a person may be barred from holding public rank or office, be it military or