CRIMES AGAINST HUMANITY INITIATIVE

INITIATIVE SUR LES CRIMES CONTRE L'HUMANITÉ

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ABILA STUDY GROUP

CRIMES AGAINST HUMANITY

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INTRODUCTION TO THE WORK OF THE ABILA STUDY GROUP ON THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST HUMANITY

By Leila Nadya Sadat, Chair

On January 19, 2026, States will launch a four-year process of preparing and negotiating a new global treaty on the prevention and punishment of crimes against humanity. The task before them is immense and of historic importance: to craft an instrument that is well-grounded in treaty and customary international law principles that have been established and developed ever since the Nuremberg and Tokyo trials of 1945 and 1946, and at the same time elaborate a text that will stand the test of time and be both relevant and responsive thirty, fifty, or even one hundred years from now. The papers and proposals in this compilation are intended as a modest contribution to that effort, and have been prepared to assist States in this important and difficult work.

The treaty discussions that will begin in January with the convening of a Preparatory Committee and a Working Group will be based on two important United Nations documents. First, the International Law Commission's 2019 Draft Articles, with Commentaries, on the Prevention and Punishment of Crimes against Humanity (ILC Draft Articles). Second, General Assembly Resolution 79/122, adopted on December 4, 2024, which took the decision to "convene the United Nations Conference of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity."

Resolution 79/122 is a complex text resulting from many compromises and six years of effort by treaty proponents in the Sixth (Legal) Committee of the General Assembly. The Resolution sets out a pathway for the negotiation of a global treaty on the prevention and punishment of crimes against humanity over a four-year period (with the possibility of an additional session, if necessary). In addition to setting out a timeline in operative paragraph 4, paragraph 5 of the Resolution specifies that the text that will "serve as the basis for negotiations" will be *both* the ILC Draft Articles *and* "a compilation of proposals for amendments to the draft articles submitted by Governments".

Why a compiled text? The 6th preambular paragraph of Resolution 79/122 notes that during the elaboration of the text by the Commission, as well as the many years of discussion in the Sixth Committee, the ILC Draft Articles had been the subject of extensive comments from Governments, many of which had advanced "a number of suggestions for changes to the draft articles".

The proposals advanced by States (and civil society) over the past six years, as well as during the period from 2013 to 2019, when the ILC elaborated its draft, can be roughly grouped into three categories:

(i) additions to the Draft Articles that address aspects that the ILC had opted to omit (such as the establishment of a treaty monitoring mechanism or the inclusion of direct and public incitement as a mode of liability, for example);
(ii) additions to the Draft Articles that were never addressed by the ILC (such as a non-discrimination provision, adding certain new offenses to the enumerated list of crimes against humanity, and the question of reservations and other final clauses); and finally
(iii) modifications of the Draft Articles to ensure clarity and/or advance elements of importance (such as elaborating further upon the prevention requirements of Draft Articles 3 and 4, including a definition of "victims", modifying the dispute settlement provision in Draft Article 15, or improving the preamble by adding a *Martens Clause,* for example).

These three categories overlap to some degree: the Commission adopted the Rome Statute's definition of crimes against humanity (with three changes) to promote uniformity, implicitly suggesting a rejection of additional crimes. However, the Commission never considered *on the merits* Government or civil society proposals for the inclusion of additional crimes, or changes to the Rome Statute definition. The one exception was the deletion of the definition of gender (Rome Statute Article 7(3)), which the Commission proposed in response to comments received on the first reading of the Draft Articles in 2017.

Operative paragraph 9 of Resolution 79/122 "invites" Governments to submit "proposals for amendments to the draft articles for inclusion in the compiled text" no later than April 30, 2026. Of course, the text can be subject to amendments proposed by Governments at any time during the negotiations, but the April 30 deadline provides a helpful benchmark. Thus, as the negotiations advance, first through the Preparatory Committee and Working Group, then at the level of the Diplomatic Conference itself, it is clearly contemplated by Resolution 79/122 that the ILC Draft Articles are the starting point of the negotiations, not the endpoint.

For this reason, in Spring 2025, the International Law Association (American Branch) established a Study Group to (1) study the Draft Articles and proposals of States and civil society for amendments and modification of the Draft Articles; and (2) based upon that examination, prepare a series of short proposals, as well as papers addressing a handful of thematic concerns, that could be drafted and submitted to Governments for their

consideration. The proposed Study Group's mandate was accepted by the President of the Branch, Professor Michael P. Scharf, and by ABILA's Co-Directors of Study, Professor Mortimer Sellers and Professor Milena Sterio. The Study Group held its first meeting on May 29, 2026, and adopted a tentative program of work and timeline. I am honored to serve as the Chair.

Comprised of thirty-eight members and two advisors, including experts from both the United States and abroad, the Study Group organized its work into sixteen separate proposals: (i) eleven proposals for specific amendments to the Draft Articles; (ii) two proposals for new additions to the Convention's text; and (iii) three thematic papers. The Study Group was divided into subgroups for each topic, with each subgroup having a chair or co-chairs, and as papers were finalized, they were then discussed by a meeting of the entire Study Group (on zoom), with oral and written comments provided to the subgroup which then prepared a revised text for the entire Study Group, as well as for the Drafting Committee. The Drafting Committee, chaired by Professor Olympia Bekou, was responsible for editing, cite-checking, and formatting as well as overseeing the coherence and consistency of the papers. Each of the finalized papers has been posted on the ABILA website, and some were distributed to States as early as October 2025. We completed fourteen of the initially proposed papers during this phase of our work. The next phase contemplates the establishment of a Study Group or Committee at the ILA level, with broader international participation, and an expanded mandate.

As the Chair of this effort, I have been overwhelmed by the extraordinary work undertaken by the members of the Study Group, each one of whom has volunteered their time and expertise while participating in their personal capacities. In particular, the other members of the Drafting Committee – Professor Bekou, Sara Ciucci, and Christopher Lentz – have served with special distinction and commitment, and it has been an honor to serve alongside them.

The proposals offered by the Study Group track the discussions of the Draft Articles by States and have been purposefully kept short to enhance their practical usefulness. The explanatory notes following each proposal offer both legal and historical analysis that support the proposed text. The three thematic papers – on Civil Society Participation, Children, and Gender Competency, Inclusivity and Non-Discrimination – advance perspectives that are critically important to the elaboration of a crimes against humanity treaty that can meet 21st century concerns. Likewise, the proposals proposing new enumerated crimes against humanity – environmental destruction, slave trade, and starvation, for example – address 21st century atrocities of increasing gravity. The fourteen papers included in this compilation represent a concrete contribution of distinguished academics, civil society experts, and experienced practitioners, many of whom have

spent long years, even decades, grappling with the application and interpretation of atrocity law and policy.

It is our sincere hope that these proposals will inform the work of States as they undertake the elaboration of a Convention on the Prevention and Punishment of Crimes against Humanity. This treaty is not meant to be just a piece of paper; it is a promise to humanity that the words "never again", uttered in the wake of the devastation wrought by the Second World War, should and will have real meaning.

Respectfully submitted,

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St. Louis, Missouri
January 12, 2026

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TABLE OF CONTENTS

CRIMES AGAINST HUMANITY INITIATIVE

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UK | CHINA | MALAYSIA

WashU Law
Whitney R. Harris World Law Institute

INTERNATIONAL LAW ASSOCIATION
AMERICAN BRANCH
EST. 1922

MARTENS CLAUSE

ABILA STUDY GROUP

CRIMES AGAINST HUMANITY

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MARTENS CLAUSE

Proposed Addition to the Preamble of the Prevention and Punishment of Crimes against Humanity [ILC Draft]

Preamble

[…]

Declaring **that in cases not covered by the present Convention or by other international agreements, the human person remains under the protection and authority of principles of international law derived from established customs, from the laws of humanity, and from the dictates of the public conscience, and continues to enjoy the fundamental rights that are recognized by international law;**

[…]

Explanatory Notes

The inclusion of a Martens clause in the Draft Articles is recommended to strengthen the Convention's moral and legal foundation and ensure that courts and other interpreters apply it consistently with humanitarian principles.

The proposed text – modeled on provisions in the Hague Conventions, Geneva Conventions, and other international instruments – acknowledges that individuals remain under the protection of "international law derived from established customs, from the laws of humanity, and from the dictates of public conscience" in cases not explicitly covered by the Convention. Its inclusion would situate the Convention within established legal precedent, preserve space for the development of customary international law, and reinforce the Convention's commitment to humanitarian values.

1. The preamble is a critical element of any treaty. It guides government officials, courts, and academics regarding the instrument's "object and purpose", which will be the basis of interpreting any ambiguous language.[1] The Convention's preamble must set forth the reasons for the Convention's adoption and situate it as part of a system of international

[1] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(1). This provision reflects customary international law. See e.g. ICJ, *Obligations of States in respect of Climate Change* (Advisory Opinion) (23 July 2025) paras 176-177.

criminal justice. The preamble also serves an expressive function, allowing the reader to understand the important social values the treaty enshrines and protects.

2. The Preamble in the Draft Articles sets forth some general principles governing the proposed Convention's relationship to the International Criminal Court and references the *jus cogens* nature of crimes against humanity.[2] It does not, however, include a Martens clause.

3. What we now know as the Martens clause was introduced at the 1899 Hague Peace Conference by Russian jurist F.F. de Martens to provide supplementary protections, grounded in morality and law, in particular for populations in occupied territories, including armed resisters.[3] Martens proposed the clause as a compromise during the negotiations,[4] suggesting that even where specific treaty rules were absent, the parties to a conflict remained bound by fundamental principles of humanity and the public conscience, thereby limiting States' freedom to act without restraint against civilian populations.[5] Since its first appearance in 1899, this principle has been reinforced with the emergence of binding *jus cogens* norms that protect individuals regardless of State consent.[6]

4. Most commentators tie the emergence of crimes against humanity as an offense at Nuremberg to the Martens clauses of the 1899 and 1907 Hague Conventions. Justice Robert H. Jackson invoked Martens clause language in shaping Article 6(c) of the London Charter (defining crimes against humanity), observing that such atrocities had "been assimilated as a part of International Law at least since 1907", when the Fourth Hague Convention provided that inhabitants and belligerents remain under the protection of the law of nations which, in turn, arise from "the laws of humanity and the dictates of the public conscience".[7] The International Military Tribunal's Judgment at Nuremberg

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[2] UNGA, 'Report of the International Law Commission (71st Session), Text of the Draft Articles on Prevention and Punishment of Crimes Against Humanity and Commentaries Thereto' (20 August 2019) UN Doc A/74/10, preamble, paras 4, 7.

[3] Theodor Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience' (2000) 94 American Journal of International Law 78, 79.

[4] See Jeffrey Kahn, '"Protection and Empire": The Martens Clause, State Sovereignty, and Individual Rights' (2016) 56 Virginia Journal of International Law 1, 24.

[5] Ibid, 5 ("[H]istory reminds us that the purpose of the clause was not to end debate, but to forestall the worst consequences for civilian populations and belligerents that would result if the parties assumed that a lack of tight-fitting treaty law meant *carte blanche* freedom to act [...].").

[6] Ibid, 5-6.

[7] Justice Robert H. Jackson, *Report to the President on Atrocities and War Crimes* (7 June 1945) <https://avalon.law.yale.edu/imt/imt_jack01.asp>. See also Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907> (Fourth Hague Convention), preamble para 8; Egon Schwelb, 'Crimes Against Humanity' (1946) 23 British Yearbook of International Law 178, 187.

echoed Jackson's reference, condemning the Nazis' crimes as committed "in complete disregard of the elementary dictates of humanity" and affirming that "[t]he prohibition of aggressive war [was] demanded by the conscience of the world".[8]

5. Martens clauses continue to be included in recent treaties, sometimes as preambular provisions,[9] or sometimes in the denunciation clause of a particular treaty.[10] A Martens

[8] *Trial of the Major War Criminals before the International Military Tribunal* (Judgment) (30 September-1 October 1946) XXII Blue Series 411, 465, 470.

[9] Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-ii-1899> preamble para 9 ("Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience"); Fourth Hague Convention (n 7) preamble para 8 ("Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, preamble para 4 ("Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience"); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 137, preamble para 5 ("*Confirming their determination* that in cases not covered by this Convention and its annexed Protocols or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience"); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211 preamble paras 8, 11 ("*Stressing* the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of anti-personnel mines and recognizing the efforts to that end [...] *Basing* themselves on the principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited [...]"); Convention of Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010) 2688 UNTS 39, preamble paras 11, 17 ("*Reaffirming* that in cases not covered by this Convention or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law, derived from established custom, from the principles of humanity and from the dictates of public conscience [...] *Stressing* the role of public conscience in furthering the principles of humanity as evidenced by the global call for an end to civilian suffering caused by cluster munitions"); Treaty on the Prohibition of Nuclear Weapons (adopted 7 July 2017, entered into force 22 January 2021) <https://treaties.un.org/doc/Treaties/2017/07/20170707%2003-42%20PM/Ch_XXVI_9.pdf> preamble paras 11, 24 ("*Reaffirming* that any use of nuclear weapons would also be abhorrent to the principles of humanity and the dictates of public conscience [...] *Stressing* the role of public conscience in the furthering of the principles of humanity as evidenced by the call for the total elimination of nuclear weapons").

[10] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, art 63 ("The denunciation shall

clause was included in 1977 as a stand-alone provision of Protocol I to the Geneva Conventions,[11] and in a General Assembly resolution on the protection of the environment, adopted only a few years ago.[12] Finally, an analogous provision was included in the preamble of the 2013 Arms Trade Treaty.[13]

6. Scholars have noted the "enduring legacy" and "continuing currency" of the Martens clause.[14] In addition to a number of treaties, it is also included in military manuals,[15] and has been relied upon by the International Law Commission.[16] Its inclusion in diverse legal instruments demonstrates how the clause has evolved from its original role as a diplomatic compromise in a particular treaty to a core principle of international law. The International Court of Justice has noted that the clause is an expression of customary international law in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, affirming that its "continuing existence and applicability is not to be doubted".[17]

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have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85, art 62 (same); Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, art 142 (same); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 158 (same).

[11] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art 1(2) ("In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.").

[12] UNGA Res 77/104 (7 December 2022) UN Doc A/RES/77/104, annex, principle 12 (titled "Martens Clause with respect to the protection of the environment in relation to armed conflicts", and providing that: "In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience"). The General Assembly adopted this resolution without a vote.

[13] Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) 3013 UNTS 269, preamble paras 6, 18 ("*Acknowledging* that peace and security, development and human rights are pillars of the United Nations system and foundations for collective security and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing [...] *Determined* to act in accordance with the following principles [...] Respecting and ensuring respect for international humanitarian law in accordance with, inter alia, the Geneva Conventions of 1949, and respecting and ensuring respect for human rights in accordance with, inter alia, the Charter of the United Nations and the Universal Declaration of Human Rights").

[14] See e.g. Meron (n 3) 78-79.

[15] Ibid 78.

[16] UNGA, 'Report of the International Law Commission (73rd Session), Text of the Draft Principles on Protection of the Environment in Relation to Armed Conflict' (5 August 2022) UN Doc A/77/10, principle 12, commentary paras 1-9.

[17] See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (8 July 1996) 1996 ICJ Rep 226, paras 84, 87.

7. The clause also functions as a crucial interpretive principle, entailing that the treaties in which it is included be construed "in case of doubt, consistently with the principles of humanity and the dictates of public conscience".[18] In the words of the International Criminal Tribunal for the former Yugoslavia, this "celebrated" clause "enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise", and forms part of customary international law.[19] Thus, the provision operates not merely as historical language but as an active legal tool that shapes judicial decision-making when treaty provisions or customary rules provide insufficient guidance. Inclusion of a Martens clause in the new treaty would thus enhance the protection it offers the civilian population, particularly when faced with "ingenious cruelty that occurs in armed conflicts" and attacks directed against the civilian population.[20]

8. During the discussions that took place in Geneva as the ILC completed its work, and during the debates in the Sixth Committee over the past six years in New York, many experts and State delegates have warned of the need not to prejudice the continuing development of customary international law as a result of treaty codification.

9. Including a Martens clause in the preamble could respond to this concern and reinforce Draft Article 2(3) by affirming that humanitarian principles remain operative even where treaty text is silent.

[18] Meron (n 3) 88.
[19] *Prosecutor v Kupreškić et al.* (Judgment) IT-95-16-T (14 January 2000) para 525 (citing the "authoritative view of the International Court of Justice").
[20] See Kahn (n 4) 44 ("[The Martens clause] reminds us that an exhaustive accounting of inhumanity is impossible, and therefore a general rule must apply to limit the ingenious human cruelty that occurs in armed conflicts.").

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PERSECUTION AS A CRIME AGAINST HUMANITY

Proposed Revised Text of Article 2(1)(h) of the Draft Articles on Prevention and Punishment of Crimes Against Humanity [ILC Draft]

Article 2 Definition of crimes against humanity

1. For the purpose of the present draft articles, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

[…]

(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law~~, in connection with any act referred to in this paragraph~~;

Explanatory Notes

1. This proposal is intended to bring the language presently included in Draft Article 2(1)(h) in line with customary international law, the practice of contemporary international tribunals, and the Convention's core objective of preventing crimes against humanity.[1]

2. This brief reviews the founding documents and practice of international tribunals, as well as the opinions and domestic law of certain States, concerning the requirement

[1] This proposal focuses exclusively on the nexus requirement. Other discussions on Draft Article 2(1)(h) have addressed expanding the list of discriminatory grounds contained in this definition of persecution, and the ABILA Study Group suggests that States consider including these proposals in Draft Article 2. See, e.g., ABILA Study Group Proposal on Children (advocating that "age" be included in this definition); UNGA Sixth Committee, 'Workshop on a Convention on the Prevention and Punishment of Crimes against Humanity' (21 March 2024) UN Doc A/C.6/78/INF/3, para 20 (noting that the "question of adding other protected categories, including Indigenous Peoples and persons with disabilities, to article 2(1)(h) was raised"); International Disability, Peace and Security Network Crimes against Humanity Working Group, Policy Brief, 'Disability: A Missing Piece of the International Criminal Law Puzzle' (July 2025) <https://usicd.org/wp-content/uploads/2025/07/IDPSN-CAHWG-CAH-Disability-Policy-Note-Revised-July-2025-V2.pdf?ref=disabilitydebrief.org> 3-7 (advocating for inclusion of "disability").

that persecution be committed "in connection with any act referred to in" Draft Article 2(1) of the Convention, commonly referred to as the "nexus requirement". It then examines the implications of this requirement in light of the Convention's goal to prevent atrocities, using the examples of Nazi Germany as well as present-day Afghanistan.

3. The Charter of the International Military Tribunal (IMT), the founding document that governed the first international criminal prosecution of the crime against humanity of persecution at Nuremberg, limited its mandate to persecution "in execution of or in connection with any crime within the jurisdiction of the Tribunal".[2] However, this language was intended to address concerns about introducing crimes against humanity as a new legal category, not about the crime against humanity of persecution *per se*. By linking them to crimes against peace or war crimes, the drafters limited the IMT's jurisdiction over crimes against humanity to those committed after the start of World War II in Europe,[3] thereby mitigating concerns over retroactivity[4] and sovereignty.[5]

4. Four months later, Control Council Law No. 10, which set out the basis for the separate Nuremberg Military Tribunals, omitted the nexus requirement in its definition of persecution.[6] Since then, the UN Security Council and nearly all international and internationalized tribunals—including the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda, Special Court for Sierra Leone, Extraordinary Chambers in the Courts of Cambodia (ECCC), and Kosovo Specialist Chambers—have excluded any language requiring such a nexus.[7]

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[2] Charter of the International Military Tribunal (8 August 1945) art 6(c).

[3] Christopher K Hall, Niamh Hayes, Joseph Powderly in Otto Triffterer, Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd ed, Hart 2016) 226.

[4] Beth Van Schaack, Ron C Slye, *International Criminal Law and Its Enforcement: Cases and Materials* (5th ed, Foundation Press 2025) 603 ("It is generally understood that this so called 'war nexus' was added to counter the claim that the Allies were legislating retroactively.").

[5] David Luban, 'The Legacies of Nuremberg' (1987) 54(4) Social Research 779, 789 ("Article 6(c) [...] restricts its criminalization of 'persecutions on political, racial or religious grounds' by adding the crucial phrase '*in execution of or in connection with any crime within the jurisdiction of the Tribunal*.' The result is that persecutions on political, racial, or religious grounds are not crimes against humanity unless the perpetrator has also launched an aggressive war or committed war crimes. Persecutions do not, that is, cost a state its sovereignty until it has already forfeited it on other grounds.").

[6] Control Council Law No. 10, 'Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity' (20 December 1945) art II(1)(c).

[7] UNSC Res 827 (25 May 1993) UN Doc S/RES/827 (1993) para 1, approving UN, 'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)' (3 May 1993) UN Doc S/25704, annex (Statute of the International Criminal Tribunal for the former Yugoslavia) art 5(h); UNSC Res 955 (8 November 1994) UN Doc S/RES/955 (1994), annex (Statute of the International Criminal Tribunal for Rwanda) art 3(h); Statute of the Special Court for Sierra Leone (entered into force 12 April 2002) art 2(h); Law on the

5. Notably, the ICC's retention of a nexus requirement in Article 7(1)(h) of the Rome Statute was primarily a jurisdictional and drafting compromise—it functioned as a constraint tied to the ICC's jurisdictional framework, not as a substantive statement of law.[8]

6. Indeed, in the *Kupreškič* case, the ICTY Trial Chamber considered the question of whether the Rome Statute's reintroduction of a linkage requirement should have any bearing on its own consideration of the crime against humanity of persecution.[9] Rather than adopting the Statute's language, the Chamber concluded that such a condition was "not consonant with customary international law".[10] Further, the Chamber concluded that persecution encompasses non-enumerated discriminatory acts such as discriminatory laws and attacks on political, social, or economic rights, as long as such acts are examined in their context and their cumulative effect is considered.[11]

7. The ECCC Trial Chamber likewise rejected the defense argument in Case 002/01 that persecution should be linked to another offense.[12] The Chamber instead applied customary international law as it existed in 1975, with no nexus requirement.[13] The Chamber noted that "the ECCC Law [...] contains no requirement that persecution be linked to another crime within the jurisdiction of this court".[14]

8. During the International Law Commission's 2019 discussions on the Draft Articles, several States supported removing the phrase "in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes" from the

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Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (27 October 2004) art 5; Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (3 August 2015) art 13(1)(h).

[8] See, e.g., Kriangsak Kittichaisaree, *International Criminal Law* (OUP 2001) 121; Darryl Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93(1) AJIL 43, 53-55 (describing the compromise requiring a connection).

[9] *Prosecutor v Kupreškić et al* (Trial Judgment) (14 January 2000) IT-95-16-T, para 580.

[10] Ibid.

[11] Ibid. paras 611, 615(c), 615(e).

[12] *Prosecutor v Nuon & Khieu* (Case 002/01) (Trial Judgment) (7 August 2014) 002/19-09-2007/ECCC/TC, paras 431-433 (considering the accused's argument that the agreement creating the ECCC referenced the Rome Statute's definition of crimes against humanity).

[13] Ibid, para 432 (quoting *Prosecutor v Kaing* (Case 001) (Appeal Judgment) (3 February 2012) 001/18-07-2007-ECCC/SC, para 261).

[14] *Prosecutor v Nuon & Khieu* (n 12) n 1293.

definition of persecution.[15] For instance, Brazil questioned whether "there is actually the need to require [...] a link" to genocide or war crimes, while Chile, France, Peru, Sierra Leone, and Uruguay urged its deletion entirely.[16] Chile noted that the nexus requirement reflects the ICC's unique jurisdiction rather than international law generally,[17] and warned that retaining it could wrongly "imply that the intentional and severe deprivation of human rights by reason of the identity of a group is not sufficiently serious to be considered an international crime of itself".[18] Leading international criminal law scholars likewise agree that customary international law does not require a connection, even to other acts listed within the crimes against humanity provision.[19]

9. More recently, both Brazil and Malta suggested that persecution should be a "stand-alone" crime.[20] Australia supported considering this position,[21] noting that eliminating the nexus requirement was "consistent with the definition of persecution under customary international law and in other international criminal law treaties".[22]

10. Domestic laws in several jurisdictions also do not require a link to other crimes, whether genocide, war crimes, or other crimes against humanity. For instance, the German Code of Crimes Against International Law , though designed to implement the Rome Statute within the German legal system, omits any requirement that persecution be connected to another prohibited act.[23] Its legislative history notes that "[t]he requirement of such a connection does not correspond to the current state of customary international law, as

[15] UNGA, International Law Commission (71st Session), 'Fourth Report on Crimes Against Humanity' (18 February 2019) UN Doc A/CN.4/725, paras 60, 64.
[16] Ibid, paras 63-64.
[17] This view is shared by a number of experts. See, e.g., Kittichaisaree (n 8) 121; Antonio Cassese et al, *Cassese's International Criminal Law* (3rd ed, OUP 2013) 107.
[18] UNGA, 'Fourth Report on Crimes Against Humanity' (n 15) para 64.
[19] See, e.g., Cassese (n 17) 107; Gerhard Werle, Florian Jessberger, *Principles of International Criminal Law* (4th ed, OUP 2020) 427 ("With this ['in connection with'] design, the ICC Statute lags behind customary international law, since the crime of persecution, like crimes against humanity in general, has developed into an independent crime.").
[20] UNGA, 'Crimes against Humanity: Report of the Secretary-General' (12 January 2024) UN Doc A/78/717, para 49.
[21] Ibid.
[22] UNGA Sixth Committee (78th Session) 'Summary Record of the 41st Meeting (2 April 2024) UN Doc A/C.6/78/SR.41, para 51.
[23] See Code of Crimes Against International Law (Germany) (2002) Federal Law Gazette I, 2254 (as amended) <https://legislationline.org/sites/default/files/documents/a8/GERM_Code%20of%20Crimes%20against%20International%20Law.pdf> sec 7(10).

the International Criminal Tribunal for the former Yugoslavia has recently confirmed on several occasions".[24]

11. At least twenty-five more countries that proscribe persecution have no nexus requirement.[25] The absence of a nexus requirement in domestic legislation across a wide range of jurisdictions—spanning civil law, common law, and mixed systems—underscores the breadth of State practice and its representative character across different regions and legal traditions.

12. Moreover, the nexus requirement undermines the Convention's goal of preventing crimes against humanity, as it allows acts of persecution to remain unchecked when not linked to other crimes—a situation that has historically preceded an escalation of violence. For instance, the Nazi persecution of Jews became manifest in 1933 with business boycotts as well as legislation restricting their ability to work, followed two years later by the Nuremberg Laws, stripping them of citizenship.[26] Those measures

[24] Draft Law on the Introduction of the International Criminal Code (Germany), BT-Drucksache 14/8524 (13 March 2002) <https://dserver.bundestag.de/btd/14/085/1408524.pdf> 22 (unofficial translation) (citing to both the ICTY *Kupreškić et al.* and the *Kordić & Čerkez* Trial Judgments).

[25] Armenian Criminal Code (2024) art 135(1)(8); Burundian Criminal Code (2017) art 198(8); Cambodian Criminal Code (2025) art 188(8); Criminal Code of Czechia (2023) sec 401(e); Organic Law 74-25 of the Dominican Republic (entering into force in August 2026) art 82(13); Penal Code of Ecuador (2021) art 86; Finnish Criminal Code (2022) ch 11, sec 3(5); French Penal Code (2026) art 212-1(8); Criminal Code of Georgia (2021) art 408; Criminal Code of Hungary (2025) sec 143(h); Lithuanian Criminal Code (2024) art 100; Criminal Code of Montenegro (2024) art 427; Criminal Code of North Macedonia (2023) art 403-a; Penal Code of Norway (2008) art 102(h); Penal Code of Panama (2016) art 441(10); Criminal Code of Poland (2026) art 118a(3)(2); Law No 31/2004 of Portugal (2004) ch 2, art 9(h); Republic of Korea, Act on the Punishment of Crimes Within the Jurisdiction of the International Criminal Court (2007), Act no 8719, art 9(7); Criminal Code of Romania (2018) art 439(j); Law Amending the Penal Code of Senegal (2007) art 431-2(7); Criminal Code of Serbia (2022) art 371; Criminal Law of Slovakia (2025) art 425(g); Criminal Code of Spain (2024) art 607*bis*(1)(1); Swedish Act on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes (2014) sec 2(8); Penal Code of Timor-Leste (2009) art 124(h). While the Swiss Criminal Code does contain the linkage language, it also recognizes persecution when it is "for the purpose of the systematic oppression or domination of an ethnic group". Swiss Criminal Code (2025) SR 311.0, art 264*a*(i). The practice of States that implemented the provisions of the Rome Statute by referral—that is, by incorporating the Statute in a schedule or annex to their domestic implementation law—should be weighted differently from that of many of the States listed above, which chose to incorporate the Rome Statute crimes by redrafting relevant substantive definitions, taking into account not only the Rome Statute but other sources of international law, including customary international law and the requirements of their national legal system. This approach allowed those States to address the ICC's jurisdictional limits and ensure that such limits did not unduly constrain their national exercise of jurisdiction over the international crime of persecution, in line with customary international law and relevant precedents.

[26] See, e.g., Richard D Heideman, 'Legalizing Hate: The Significance of the Nuremberg Laws and The Post-War Nuremberg Trials' (2017) 39 Loyola of Los Angeles International and Comparative Law Review 5, 5-10; Anti-Defamation League, 'Nazi Germany and Anti-Jewish Policy' (2005) <https://www.adl.org/sites/default/files/nazi-germany-and-anti-jewish-policy.pdf> 1-2.

were implemented years before such oppression intensified into even greater violence, including deportation, imprisonment, torture, and enslavement—acts that ultimately culminated in the systematic murder of 6 million Jews.[27] Recognizing persecution without requiring a nexus from the outset would permit States to avoid the escalation of violence that almost inevitably follows.[28]

13. The situation in Afghanistan offers another compelling example of why eliminating the nexus requirement is critical to realizing the Convention's prevention mandate. During the Taliban's first regime (1996–2001), official decrees barred women and girls from education, prohibited employment outside the home, and imposed severe restrictions on movement and dress, all enforced through the Ministry for the Propagation of Virtue and the Prevention of Vice.[29] The same structural patterns have re-emerged since August 2021.[30] Yet, under the current formulation of Draft Article 2(1)(h), such legalized and systematic oppression, without evidence of another enumerated act, would likely not meet the Draft's definition of persecution. The Taliban's violent and brutal enforcement of these decrees serves as yet another example of how unchecked persecution often evolves into broader atrocities.[31] Replicating the nexus requirement in the Convention would force States to wait until violence escalates before they could act pursuant to the Convention, effectively depriving them of an additional means to intervene and prevent

[27] See, e.g., United States Holocaust Memorial Museum, 'Holocaust Encyclopedia: Introduction to the Holocaust' <https://encyclopedia.ushmm.org/content/en/article/introduction-to-the-holocaust>.

[28] This phenomenon has been identified as an "atrocity cascade". See, e.g., Leila Nadya Sadat, 'Genocide in Syria International Legal Options, International Legal Limits, and the Serious Problem of Political Will' Vol 5 *Impunity Watch* 1-20 (2015) 1, 17.

[29] See, e.g., UN Human Rights Council, 'Study on the So-Called Law on the Promotion of Virtue and the Prevention of Vice: Report of the Special Rapporteur on the Situation of Human Rights in Afghanistan, Richard Bennett', UN Doc A/HRC/58/74 (12 March 2025) paras 15-21.

[30] See, e.g., ibid para 3 ("[T]he Special Rapporteur provides an analysis of the law on the promotion of virtue and the prevention of vice [...] tracing a clear trajectory of escalating repression since the [Taliban] retook power and drawing parallels with the group's draconian rule from 1996–2001."); UN Human Rights Council, 'Situation of Human Rights in Afghanistan: Report of the Special Rapporteur on the Situation of Human Rights in Afghanistan', UN Doc A/HRC/55/80 (23 February 2025) paras 2, 14-31.

[31] See, e.g., ICC, Press Release 'Situation in Afghanistan: ICC Pre-Trial Chamber II issues arrest warrants for Haibatullah Akhundzada and Abdul Hakim Haqqani' (8 July 2025) <https://www.icc-cpi.int/news/situation-afghanistan-icc-pre-trial-chamber-ii-issues-arrest-warrants-haibatullah-akhundzada> ("Pre-Trial Chamber II considered that the Taliban have implemented a governmental policy that resulted in severe violations of fundamental rights and freedoms of the civilian population of Afghanistan, in connection with conducts of murder, imprisonment, torture, rape and enforced disappearance. [...] Specifically, the Taliban severely deprived, through decrees and edicts, girls and women of the rights to education, privacy and family life and the freedoms of movement, expression, thought, conscience and religion."); UNGA and UNSC, 'The Situation in Afghanistan and Its Implications for International Peace and Security: Report of the Secretary-General', UN Doc A/79/797-S/2025/109 (21 February 2025) paras 39-43.

further atrocities from occurring or to punish persecutory acts that led to those atrocities in the first place.

14. In sum, removing the nexus requirement from Draft Article 2(1)(h) would ensure consistency with customary international law. Moreover, several States have expressed support for this position, and domestic legislation in at least twenty-five jurisdictions across different regions and legal traditions reflects this approach. Significantly, removing the nexus requirement appears to be a crucial step toward achieving the Convention's core objective of preventing and punishing crimes against humanity.

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SLAVE TRADE AND ENSLAVEMENT AS CRIMES AGAINST HUMANITY

Proposed Revised Text for Article 2 of the Draft Articles on Prevention and Punishment of Crimes Against Humanity [ILC Draft]

Article 2 Definition of crimes against humanity

1. For the purposes of the present draft articles, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

[...]

(c) enslavement **and/or the slave trade**;

[...]

2. For the purpose of paragraph 1:

(c) "enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person ~~and includes the exercise of such power in the course of trafficking in persons, in particular women and children~~**, and "the slave trade" means all acts involved in the capture, acquisition or disposal of a person with intent or knowledge to reduce that person to slavery, all acts involved in the acquisition of an enslaved person with a view to selling or exchanging that person, all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged, and, in general, every act of trade or transport of an enslaved person by whatever means of conveyance**;

Explanatory Notes

This proposal mirrors the proposal submitted by Sierra Leone to amend the concomitant provisions of the Rome Statute of the ICC.[1] It seeks to include the slave trade as a

[1] See UN, 'Rome Statute of the International Criminal Court: Sierra Leone: Proposal of Amendments' (16 April 2025) C.N.175.2025.TREATIES-XVIII.10 (Depositary Notification) <https://treaties.un.org/doc/Publication/CN/2025/CN.175.2025-Eng.pdf> Annex. See also UNGA Sixth Committee (78th Session) 'Summary Record of the 11th Meeting' (12 October 2023) UN Doc A/C.6/78/SR.11, para 75 (Sierra Leone).

punishable act in the Convention to close an existing impunity gap.[2] Proposed Draft Article 2(1) provides an effective accountability avenue for acts of the slave trade. Proposed Article 2(2)(c) offers a more concise definition of enslavement, building upon the definition set forth in the 1926 Slavery Convention and reaffirmed in the 1956 Supplementary Slavery Convention.[3]

1. The Draft Articles enumerate the prohibitions for enslavement and for sexual slavery;[4] absent, however, is a provision for the slave trade. The prohibition of the slave trade is a peremptory or *jus cogens* norm with attendant *erga omnes* obligations.[5] Additionally, the slave trade is a treaty and customary-based international crime,[6] a crime against humanity,[7] a war crime,[8] and a non-derogable human rights violation.[9]

Slave Trade Defined

2. The slave trade involves intentionally or knowingly reducing a person to enslavement or acquiring or disposing of an enslaved person with a view to maintaining them in a

[2] This proposal expands upon a brief prepared by Patricia Viseur Sellers, Jocelyn Getgen Kestenbaum, and Alexandra Lily Kather: 'Including the Slave Trade in the Draft Articles on Prevention and Punishment of Crimes Against Humanity' (15 September 2023) <https://www.globaljusticecenter.net/wp-content/uploads/2023/10/Slavery-and-Slave-Trade-Expert-Legal-Brief-CAH-Treaty.pdf>.

[3] Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253, art 1(2); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 266 UNTS 3 (Supplementary Slavery Convention) art 7(c).

[4] UNGA, 'Report of the International Law Commission (71st Session), Text of the Draft Articles on Prevention and Punishment of Crimes Against Humanity and Commentaries Thereto' (20 August 2019) UN Doc A/74/10 [hereinafter "ILC Draft Articles"], arts 2(1)(c), 2(1)(g).

[5] See, e.g., American Law Institute, 'Restatement (Third) of Foreign Relations of the United States' (1987) sec 702 comment e; M Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 L Contemp Probs 63, 68-73.

[6] Slavery Convention (n 3) art 1(2); Supplementary Slavery Convention (n 3) arts 3(1), 7(c); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, art 4(2)(f); ICRC, Jean-Marie Henckaerts, Louise Doswald-Beck 'Customary International Humanitarian Law, Volume I: Rules' (Cambridge University Press, 2005) Rule 94 <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule94>. Many of the 19th century anti-slave trade treaties recognized the imposition of penal sanctions for slave trading, such as the Congress of Vienna, the Treaty of London, the General Act of Berlin, the General Act of Brussels, and the 1890 Treaty between Great Britain and Spain for the Suppression of the African Slave Trade. See, e.g., M Cherif Bassiouni, 'Enslavement as an International Crime' (1991) 23 NYU J Int'L L & Pol 445, 459-463.

[7] Council of the European Union, 'Declaration of the EU-CELAC Summit 2023' (18 July 2023) 12000/23, para 10 (acknowledging that the slave trade is a crime against humanity).

[8] Additional Protocol II (n 6) art 4(2)(f); ICRC (n 6) Rule 94.

[9] Universal Declaration of Human Rights (adopted 10 December 1948) UN Doc A/RES/217(III), art 4; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 8(1); American Convention on Human Rights: "Pact of San José, Costa Rica" (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 6(1); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 5.

situation of enslavement.[10] It includes the abduction, kidnapping, sale, disposal, or transfer of any person, including a child and regardless of any other status, with a view to reducing or maintaining that person in enslavement.

3. A range of conduct could constitute acts of the slave trade, such as the abduction, sequestering, or rounding up of persons, including children, with the intent to enslave them as porters for a militia group; the sale and transfer of migrants; the distribution of girls and women to paramilitary fighters; and the recruitment of children to fight in armed groups or armed forces.[11] Likewise, the transport, transfer, sale, exchange, or disposal by any means of enslaved persons, including children, to subsequent situations of enslavement are acts of the slave trade.

4. Moreover, it is legally immaterial whether a person who is slave traded consented to being slave traded. An individual's consent or lack of consent is not an element of the crime of the slave trade. Similarly, establishing the presence or absence of coercive circumstances, custody, or duress is not determinative of the crime of the slave trade. The slave trade's proscribed conduct focuses on the perpetrator's intent or knowledge, not on the reaction, mental state, or emotion of the victim.[12]

Slave Trade's Relation to Slavery/Enslavement, Sexual Slavery, and Other Crimes

5. The slave trade and slavery/enslavement are distinct international crimes. Enslavement, as worded in Draft Article 2(2)(c), repeats verbatim the Rome Statute's provision on enslavement under Article 7(2)(c).[13] Both articles draw upon the 1926 Slavery Convention and the 1956 Supplementary Slavery Convention's definition of slavery: "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[14] Acts of the slave trade precede—or are precursors to—acts of enslavement, slavery, or sexual slavery.[15]

6. The slave trade might occur serially among slave traders, without resulting in slavery/enslavement or sexual slavery charges. It suffices that the perpetrator's

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[10] Slavery Convention (n 3) art 1(2); Supplementary Slavery Convention (n 3) art 7(c) (The slave trade means "all acts involved in the capture, acquisition or disposal of a person with intent to reduce [that person] to slavery; all acts involved in the acquisition of [an enslaved person] with a view to selling or exchanging [that person]; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in [enslaved persons] by whatever means of conveyance").

[11] See, e.g., ICC OTP, 'Policy on Slavery Crimes' (December 2024) <https://www.icc-cpi.int/sites/default/files/2024-12/policy-slavery-web-eng.pdf> paras 41-42; Patricia Viseur Sellers, Jocelyn Getgen Kestenbaum, 'Missing in Action: The International Crime of the Slave Trade' (2020) 18 J Int'l Crim Just 517, 536-537.

[12] Consent is legally immaterial for all slavery crimes, including slavery/enslavement and sexual slavery.

[13] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 7(2)(c) ("'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children").

[14] Slavery Convention (n 3) art 1(1); Supplementary Slavery Convention (n 3) art 7(a).

[15] Sellers, Kestenbaum, 'Missing in Action: The International Crime of the Slave Trade' (n 11) 536-537.

mens rea and *actus reus* is to intentionally reduce or maintain a person, eventually, in enslavement, including sexual slavery,[16] to establish the slave trade.

7. The ICC's Elements of Crimes assists the Court in the interpretation and application of crimes under its jurisdiction consistent with the Rome Statute and clarifies that enslavement requires for the perpetrator to "exercise any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty."[17] Accordingly, the Rome Statute, and consequently the Draft Articles, only provide legal redress for acts of the slave trade that concurrently entail the exercise of powers attaching to the right of ownership and, thus, constitute enslavement. As a result, neither the Draft Articles nor the Rome Statute presently provides adequate redress for the slave trade.

Enslavement and the Slave Trade's Relation to Trafficking in Persons

8. Draft Article 2(2)(c), replicating the Rome Statute's Article 7(2)(c) definition of enslavement, refers to "trafficking in persons"[18] as an example of conduct that may constitute indicia or evidence of enslavement's first element, the exercise of any or all the powers attaching to the right of ownership over a person.[19] As an international crime, the slave trade is distinct from the transnational crime of trafficking.

9. Trafficking in persons is not an international crime; it is a transnational crime and a human rights violation.[20] Like the Rome Statute, the Draft Articles will not expressly provide for jurisdiction over prohibitions of trafficking in persons.

10. Acts of trafficking in persons may factually resemble acts of the slave trade or enslavement; thus, leading to their legal conflation, and often an erasure of the international crime of the slave trade.[21] Importantly, the slave trade, unlike trafficking, does not require proof of the use of force or other coercive or deceptive circumstances, or exploitation, nor does the slave trade differentiate between the

[16] The ILC Draft Articles contain a provision for sexual slavery in Draft Article 2(1)(g) that mirrors Article 7(1)(g) of the Rome Statute. The enumerated crime of "sexual slavery" under the Rome Statute is defined identically to slavery or enslavement (a perpetrator exercises any of the powers attaching to the right of ownership over a person), with the additional burden of proof that the perpetrator "cause[s] such person or persons to engage in one or more acts of a sexual nature." Elements of Crimes (2013) art 7(1)(g)-2 element 2.

[17] ICC, Elements of Crimes (n 16), art 7(1)(c) element 1. See also Rome Statute (n 13) art 9(1).

[18] Compare Rome Statute (n 13) art 7(2)(c) ("'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children"), with ILC Draft Articles (n 4) art 2(2)(c) (same).

[19] Elements of Crimes (n 16) art 7(1)(c) element 1.

[20] See, e.g., Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, art 6; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 35.

[21] Harmen van der Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts' (2014) 13 Chinese J Int'l L 297, 303.

age of victims to determine the relevance of consent.[22]

11. While evidence of the slave trade might encompass conduct of trafficking in persons, such as transport, recruitment, or disposal, it is a distinct international crime that should be enumerated in the Draft Articles.

Modification to the Definition of Enslavement in the Draft Articles

12. Accordingly, this proposal suggests deleting from the definition of enslavement the words "and includes the exercise of such power in the course of trafficking in persons, in particular women and children." The list of indicia or evidence for the exercise of any or all of the powers attaching to the right of ownership is non-exhaustive.[23] The current wording seemingly prioritizes trafficking in women and children. The proposed deletion would enhance the clarity of the non-exhaustive list of conduct that may serve as indicia of enslavement and align the provision with relevant treaty language.

[22] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319, art 3(b)-(c) (providing that, absent abusive or deceptive circumstances described in Article 3(a), consent may be a relevant consideration as to whether an adult is a trafficking victim, whereas no such allowance is made with respect to a child).

[23] "Indicia to determine enslavement include control or restrictions of movement; measures to deter or prevent escape; control of physical environment; psychological control or pressure; force, threat of force or coercion; control of sexuality and reproductive autonomy; assertions of exclusivity; control over breeding; forced administration of contraception, forced gestation, control of breastfeeding, starvation; forced labor; torture; subjugation to medical experimentation; removal of organs; menstrual verification; impregnation; and cruel treatment and abuse." OTP ICC, Policy on Slavery Crimes (n 11) para 68.

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STARVATION AS A CRIME AGAINST HUMANITY

Proposed Addition to Article 2 of the Draft Articles on the Prevention and Punishment of Crimes Against Humanity [ILC Draft]

Article 2 Definition of crimes against humanity

1. For the purpose of the present draft articles, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

[…]

(k) starvation;

[…]

2. For the purpose of paragraph 1:

(j) "starvation" means depriving persons of objects indispensable to survival, in particular food, safe water, and the systems by which they are produced, maintained, or distributed, in a way calculated to deny those objects' sustenance value or in a way that would be expected to cause or exacerbate acute malnutrition within the population;

Explanatory Note

1. The Draft Articles do not include starvation as an enumerated crime against humanity. The Convention provides an opportunity to close this gap in legal protection and harmonize crimes against humanity with war crimes and genocide on the issue of starvation.[1] Doing so will enhance guidance to States and individuals and lay the foundation for accountability across international criminal law.

[1] The starvation of civilians is an enumerated war crime and encompassed within an enumerated act of genocide (deliberate infliction of conditions of life calculated to destroy). Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art II(c); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art 54; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8

2. There is an evident and urgent imperative to pursue those objectives.
    a. In 2024, more than 294 million people across 53 countries or territories experienced what the Integrated Food Security Phase Classification scale terms "crisis," or worse, levels of acute food insecurity.[2] This was almost triple the 105.2 million suffering at that level in 2016.[3] Disastrously, 37 million people within the 294 million were at or beyond the emergency threshold (the final stage before catastrophe/famine).[4]
    b. Acts of deprivation, often in armed conflict, are key drivers of this hardship. In its landmark Resolution 2417 (2018), the UN Security Council expressed that it was "[d]eeply concerned" regarding "global humanitarian needs" and "strongly condemn[ed]" both the "use of starvation of civilians as a method of warfare" and the "unlawful denial of humanitarian access", while "[s]trongly urg[ing] States to conduct, in an independent manner, full, prompt, impartial and effective investigations" of such practices.[5]
    c. In the most severe food crises at present, famine has been confirmed in multiple areas of Sudan,[6] where the UN Fact-Finding Mission has described the warring parties as having weaponized food and other essentials, to devastating effect,[7] and in the Gaza Strip,[8] where the International Criminal Court has issued arrest warrants relating to starvation and other alleged crimes.[9] More broadly, in recent years, the number of people suffering acute food insecurity in armed conflict has consistently

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June 1977, entered into force 7 December 1978) 1125 UNTS 609, art 14; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) arts 6(c), 8(2)(b)(xxv); Amendment to article 8 of the Rome Statute of the International Criminal Court (Intentionally using starvation of civilians) (adopted 6 December 2019, entered into force 14 October 2021), UN Doc C.N.394.2020 (inserting a new article 8(2)(e)(xix) in the Rome Statute); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia*) (Merits) [2015] ICJ Rep 3, para 161; *Prosecutor v Tolimir* (Judgment) IT-05-88-2/A (8 April 2015) paras 225-226.

[2] Food Security Information Network and Global Network Against Food Crises, Global Report on Food Crises (2025) <https://www.fsinplatform.org/report/global-report-food-crises-2025/#acute-food-insecurity>.

[3] Ibid.

[4] Ibid.

[5] UNSC Res 2417 (24 May 2018) UN Doc S/RES/2417 (2018) preamble, paras 5-6.

[6] IPC, 'Famine Review Committee, Sudan, December 2024: Conclusions and Recommendations' (2024) <https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/IPC_Famine_Review_Committee_Report_Sudan_Dec2024.pdf> 1, 19.

[7] Independent International Fact-Finding Mission for the Sudan, 'Oral Update at the 59th session of the Human Rights Council' (17 June 2025) <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/ffm-sudan/17-06-2025-oral-update-hrc59-en.pdf> 3.

[8] IPC, 'Famine Review Committee, Gaza Strip, August 2025: Conclusions and Recommendations' (2025) <https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/IPC_Famine_Review_Committee_Report_Gaza_Aug2025.pdf> 2, 16.

[9] ICC, Press Release 'Situation in the State of Palestine: ICC Pre-Trial Chamber I Rejects the State of Israel's Challenges to Jurisdiction and Issues Warrants of Arrest for Benjamin Netanyahu and Yoav Gallant' (21 November 2024) <https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>.

exceeded the number of those killed or injured by direct physical attack by orders of magnitude.[10] And yet accountability for the former remains exceedingly rare.

3. The distinctive harm associated with this practice demands specific legal recognition and prohibition. Unlike direct physical violence against persons, starvation operates gradually, with the prolonged and cumulative nature of this harm entailing a particular kind of wrong. It tears at its victims slowly, turning the imperative to overcome suffering against the human capacity to sustain social, political, and even familial commitments. By doing so, it dehumanizes its victims, with destructive and torturous effects on both individuals and their society. Moreover, the impact of starvation is worse than indiscriminate – it systematically discriminates *against* the most vulnerable members of society, including children, the elderly, and the disabled, who are the least able to battle for scarce resources and who are forced to watch their caregivers struggle with the impossible decision of how to divide food and water among them. In addition to elevated mortality, children who suffer malnutrition are likely to have worse health outcomes, suffer stunting, and experience impaired cognitive development. Meanwhile, a lack of access to adequate food or clean water elevates vulnerability to illness, including various lethal diseases.

4. While there is frequently some overlap between starvation and other enumerated crimes, those overlapping categories are insufficient to capture the unique harm of starvation or the extent of its wrongfulness. For example, although conflict remains a major driver of acute food insecurity, most of those facing "crisis" or worse levels of acute food insecurity are outside contexts of armed conflict, rendering the starvation war crime inapt.[11] Within crimes against humanity, extermination "includes the the intentional infliction of conditions of life, *inter alia* **the deprivation of access to food and medicine,** calculated to bring about the destruction of part of a population".[12] However, like murder, it is limited to deprivation that kills or – at a minimum – attempts to kill.[13] Both murder and extermination exclude the suffering of those who survive such deprivation. Torture is

[10] Global Report on Food Crises (n 2). For comparison, see e.g. Siri A Rustad, 'Conflict Trends: A Global Overview, 1946–2024', *PRIO Paper* (2025) (including data on battle deaths); Jennifer Dathan, 'A Decade of Explosive Violence Harm', *Action on Armed Violence* (2021) (including data on deaths and injuries from explosive weapons).
[11] Global Report on Food Crises (n 2).
[12] UNGA, 'Report of the International Law Commission (71st Session), Text of the Draft Articles on Prevention and Punishment of Crimes Against Humanity and Commentaries Thereto' (20 August 2019) UN Doc A/74/10 [hereinafter "ILC Draft Articles"], art 2(2)(b) (emphasis added); Rome Statute (n 1), art 7(2)(b) (same). It is understood that when starvation is utilized to bring about the mass killing of part of a population, the existing crime against humanity of "extermination" covers such conduct.
[13] See ICC, Elements of Crimes (2013), art 7(2)(b) element 1 ("The perpetrator killed [either directly or indirectly] one or more persons").

limited by the requirement of personal custody or control,[14] thus omitting broader forms of starvation such as impeding humanitarian aid to a targeted population or destroying its agricultural resources. Persecution concerns a deprivation of rights based on group identity,[15] but does not apply in the absence of that discriminatory intent and does not express the distinctive suffering associated with starvation.

5. Although starvation could be charged under Draft Article 2(1)(k) as an "other inhumane act", its inclusion as a distinct, enumerated crime would have both expressive and practical significance, insofar as it will empower agents of accountability, guide the action of the law's addresses, and help to overcome prosecutorial or judicial hesitancy and doctrinal uncertainty in the effort to end impunity for these practices.

6. Starvation as a crime against humanity has both historical and contemporary pedigree.
   a. Shortly after World War II, during the development of the Nuremberg Principles, UN Secretary-General Trygve Lie issued a memorandum asking rhetorically "whether deprivation of means of sustenance might not be considered as an 'inhumane act.'"[16] Israel's 1950 Nazis and Nazi Collaborators (Punishment) Law included "starvation" as an enumerated crime against humanity.[17] The provision underpinned part of Adolf Eichmann's conviction eleven years later, which included findings on the severe caloric deprivation of those in the Warsaw and Vilna Ghettos.[18]
   b. In the contemporary context, various authorities have held that starvation could constitute a crime against humanity, whether in the form of extermination,[19] murder,[20] persecution,[21] or other inhumane acts.[22]

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[14] ILC Draft Articles, art 2(2)(e); Rome Statute (n 1) art 7(2)(e).
[15] ILC Draft Articles, art 2(2)(g); Rome Statute (n 1) art 7(2)(g).
[16] UN, 'The Charter and Judgment of the Nürnberg Tribunal: History and Analysis, Memorandum Submitted by the Secretary-General' (1949) UN Doc A/CN.4/5, 67.
[17] Law No 64, Nazis and Nazi Collaborators (Punishment) Law, 5710–1950 (Israel), <https://m.knesset.gov.il/EN/About/Documents/ShoahNaziCollaboratorLaw_eng.pdf> art 1(b).
[18] *Attorney General v Eichmann*, District Court of Jerusalem (Judgment) Criminal Case No 40/61 (11 December 1961) paras 16, 130, 200-201, 244(5), 244(7); *Attorney General v Eichmann*, Supreme Court of Israel (Judgment) Criminal Appeal 336/61 (29 May 1962) paras 2, 10(1) (stating that "[t]he crimes created by the Law and of which the Appellant was convicted must be deemed today to have always borne the stamp of international crimes, banned by international law and entailing indvividual criminal liability").
[19] *Co-Prosecutors v Khieu* (Judgment) Case 002/19-09-2007-ECCC/SC (23 December 2022) paras 554-558, 585.
[20] ICC, Press Release (n 9).
[21] Ibid; HRC, 'Report of the Independent International Fact-Finding Mission on Myanmar. (2019); HRC, 'Detailed Findings of the Independent International Fact-Finding Mission on Myanmar' (16 September 2019) UN Doc A/HRC/42/CRP.5 <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.5.pdf> paras 172, 175.
[22] HRC, 'Report of the International Commission of Human Rights Experts on Ethiopia' (19 September 2022) UN Doc A/HRC/51/46, paras 76-84, 98; Myanmar FFM Detail Findings (n 21) paras 172, 175; HRC, 'Report of the

7. The *actus reus* of the proposal is rooted in other widely recognized international crimes.
    a. The deprivation of objects indispensable to survival is central to both the war crime of starvation of civilians as a method of warfare and the underlying act of genocide involving the infliction of conditions of life calculated to bring about the destruction of a group.
    b. As noted above, in its lethal form, the deprivation of objects indispensable to survival is an explicitly recognized form of extermination.

8. The *mens rea* of this proposal entails two alternative thresholds.
    a. The first draws on that of other enumerated crimes in the Draft Articles. "Calculated to deny" parallels "calculated to bring about" in the crime against humanity of extermination and in the relevant underlying act of genocide.[23] Precisely because starvation occurs over time, with effects that can be difficult to trace, when a perpetrator engages in deprivation in a way calculated to deny the indispensable objects' sustenance value, it is appropriate for criminal responsibility to attach regardless of the provable impact.
    b. The second draws on standard principles of *mens rea* in relation to wrongful consequences, including in international criminal law. When it *is* sufficiently clear that the acts of deprivation would cause or exacerbate acute malnutrition within the population, criminal liability ought to attach based on the *mens rea* thresholds ordinarily applicable to foreseeable consequences, whether or not it is established that the deprivation was calculated to deny the objects' sustenance value.

9. Starvation violates and endangers human dignity, health, life, and the social, moral, and political fabric of functioning society. Across each of those underlying values, its enumerated proscription would align with the existing list of crimes against humanity.

Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea' (7 February 2014) UN Doc A/HRC/25/63, paras 76, 78.

[23] ILC Draft Articles, art 2(2)(b); Rome Statute (n 1) arts 6(c), 7(2)(b); Genocide Convention (n 1) art II(c).

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ENVIRONMENTAL DESTRUCTION AS A CRIME AGAINST HUMANITY

Proposed Revised Text for Article 2 of the Draft Articles on the Prevention and Punishment of Crimes against Humanity [ILC Draft]

Article 2 Definition of crimes against humanity

1. For the purposes of the present draft articles, "crimes against humanity" means any of the following acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

[…]

(k) widespread, long-lasting, or severe destruction of the environment, including biodiversity, natural resources, agricultural production, or landscape, as a means of harming any civilian population;

Explanatory Notes

This proposal is intended to strengthen environmental protection within the framework of international law, consistent with efforts at the International Criminal Court to integrate environmental crimes as chargeable offenses.[1] It builds upon the 2022 Resolution of the General Assembly which recognized "the right to a clean, healthy and sustainable environment as a human right", and acknowledged that the consequences of environmental damage "are felt most acutely by women and girls and those segments of the population that are already in vulnerable situations".[2]

This proposal advances the text put forward by the IUCN World Commission on Environmental Law,[3] and seeks to give voice to the call by Burkina Faso, Cameroon, Côte

[1] ICC Statement, 'ICC Office of the Prosecutor Launches Second Public Consultation on a Policy Initiative to Advance Accountability for Environmental Crimes under the Rome Statute' (18 December 2024) <https://www.icc-cpi.int/news/icc-office-prosecutor-launches-second-public-consultation-policy-initiative-advance>.

[2] UNGA Res 76/300 (28 July 2022) UN Doc A/RES/76/300, 2 and para 1 (this resolution passed by a vote of 161 in favor, 0 against, and 8 abstentions).

[3] International Union for Conservation of Nature (IUCN), World Commission on Environmental Law (WCEL), 'Proposed Addition to Article 2 of the Draft Articles on the Prevention and Punishment of Crimes against Humanity: "Widespread, Long-lasting, or Severe Destruction of the Natural Environment as the Means of Destruction, Damage, or Injury to any Civilian Population"' (14 May 2024)

d'Ivoire, Eritrea, Ethiopia, Morocco, Niger, Nigeria, the Philippines, Sierra Leone, and Togo to consider adding an environmental crime to Draft Article 2.[4]

1. While environmental destruction could potentially be charged under Draft Article 2 as an "other inhumane act", its inclusion as a distinct punishable act is warranted by the increasing likelihood of environmental harm targeting civilians, as well as the need to safeguard the environment for both present and future generations.

2. The proposed addition adapts the definition proscribing environmental destruction in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), which features a diverse cross-section of 78 parties.[5] In this respect, the qualitative elements, "widespread, long-lasting, or severe," are definitionally anchored in ENMOD.[6]

3. The demonstrative examples are definitionally rooted in widely ratified international legal instruments:
    (a) "biodiversity" from the Convention on Biological Diversity;[7]

<https://iucn.org/sites/default/files/2024-09/iucn-wcel-cah-convention-art.-2-environmental-destruction_0.pdf>.

[4] UNGA Sixth Committee (78th Session) 'Summary Record of the 10th Meeting' (12 October 2023) UN Doc A/C.6/78/SR.10, paras 76 (Cameroon), 83 (Burkina Faso), 103 (Eritrea); UNGA Sixth Committee (78th Session) 'Summary Record of the 11th Meeting' (12 October 2023) UN Doc A/C.6/78/SR.11, para 74 (Sierra Leone); UNGA Sixth Committee (78th Session) 'Summary Record of the 41st Meeting' (2 April 2024) UN Doc A/C.6/78/SR.41, paras 30 (Eritrea), 35 (Ethiopia), 46 (Morocco); UNGA Sixth Committee (79th Session) '8th Meeting' (9 October 2024) <https://webtv.un.org/en/asset/k1y/k1yi0hpcye> (Philippines 2:09:34-2:10:19); UNGA Sixth Committee (79th Session) '9th Meeting' (10 October 2024) <https://webtv.un.org/en/asset/k1a/k1al9u453w> (Nigeria 2:31:28-2:32:48); UNGA Sixth Committee (79th Session) '10th Meeting' (10 October 2024) <https://webtv.un.org/en/asset/k10/k1039hd3hb> (Togo 10:06-10:29), (Niger 2:44:24-2:45:07).

[5] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (adopted 10 December 1976, entered into force 5 October 1978) 1108 UNTS 151. Afghanistan, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Bangladesh, Belarus, Belgium, Benin, Brazil, Bulgaria, Cabo Verde, Cameroon, Canada, Chile, China, Costa Rica, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Denmark, Dominica, Egypt, Estonia, Finland, Germany, Ghana, Greece, Guatemala, Honduras, Hungary, India, Ireland, Italy, Japan, Kazakhstan, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Lithuania, Malawi, Mauritius, Mongolia, Netherlands, New Zealand, Nicaragua, Niger, Norway, Pakistan, Panama, Papua New Guinea, Poland, Republic of Korea, Romania, Russian Federation, Sao Tome and Principe, Slovakia, Slovenia, Solomon Islands, Spain, Sri Lanka, St. Lucia, St. Vincent and the Grenadines, State of Palestine, Sweden, Switzerland, Tajikistan, Tunisia, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Uzbekistan, Viet Nam, and Yemen.

[6] The Understandings underlying the ENMOD indicate that "widespread" is to be interpreted as "encompassing an area on the scale of several hundred square kilometres", "long-lasting" as "lasting for a period of months, or approximately a season", and "severe" as "involving serious or significant disruption or harm to human life, natural and economic resources or other assets". UN 'Report of the Conference of the Committee on Disarmament' (1976) Vol 1, UN Doc A/31/27[Vol.I](Supp), 91.

[7] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (196 parties) art 2 ("'*Biological diversity*' means the variability among living organisms from all sources

(b) "natural resources" from the African Convention on the Conservation of Nature and Natural Resources;[8]
(c) "agricultural production" from the Treaty on the Functioning of the European Union;[9] and
(d) "landscape" from the Council of Europe Landscape Convention.[10]

4. These examples, referenced above, represent environmental aspects that are already recognized, either in whole or in part, as forming part of the common or the natural heritage of humankind.[11] While international consciousness began coalescing around the necessity of environmental protection in the 1960s, and international consensus began to build legal structures to do so in the subsequent decades, it is only now that recognizing environmental destruction as a crime against humanity has come into its own. The Convention on the Prevention and Punishment of Crimes Against Humanity must reflect this broader international effort. Failing to do so would miss a rare opportunity, the context and timing of which is perfect, to maximize the foresight and impact of this treaty for the benefit of present and future generations.

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including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.").

[8] Revised African Convention on the Conservation of Nature and Natural Resources (adopted 11 July 2003, entered into force 23 July 2016) (33 parties) art V(1) ("'Natural Resources' means renewable resources, tangible and non tangible, including soil, water, flora and fauna and non renewable resources.").

[9] Treaty on the Functioning of the European Union (adopted 13 December 2007, entered into force 1 December 2009) (27 parties) art 38(1) ("'Agricultural products' means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products.").

[10] Council of Europe Landscape Convention, European Treaty Series No 176 (adopted 20 October 2000, entered into force 1 March 2004) (41 parties) art 1(a) ("'Landscape' means an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors.").

[11] Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151 (196 parties) art 2 ("natural heritage" is comprised of "natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty."). See also United Nations Convention on the Law of the Sea, (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, 1834 UNTS 3, 1835 UNTS 3 (170 parties), art 136 ("The [sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction] and its resources are the common heritage of mankind.").

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SCOPE, GENERAL OBLIGATIONS, AND OBLIGATION OF PREVENTION

Proposed Revised Text for Articles 1, 3, and 4 of the Draft Articles on the Prevention and Punishment of Crimes against Humanity [ILC Draft]

Article 1 Scope

This Convention applies ~~The present draft articles apply~~ to the prevention and punishment of crimes against humanity**, which are crimes under international law whether or not committed in times of armed conflict**.

Article 3 General obligations

1. **No State shall** ~~Each State has the obligation not to~~ engage in acts **or omissions** that constitute crimes against humanity**, whether directly or indirectly**.
2. Each State **shall** ~~undertakes to~~ prevent and ~~to~~ punish crimes against humanity~~, which are crimes under international law, whether or not committed in time of armed conflict~~.
3. No exceptional circumstances whatsoever, such as **the existence or threat of** armed conflict, internal political instability, or other public emergency, may be invoked as ~~a~~ justification **for the commission** of crimes against humanity **or for a State's failure to discharge its obligations under this Article**.

Article 4 Obligation of prevention

Each State **shall** ~~undertakes to~~ prevent **and suppress** crimes against humanity~~, in conformity with international law,~~ through:

(a). effective legislative, administrative, judicial, **diplomatic,** or other appropriate ~~preventative~~ measures **with respect to any person or group under its jurisdiction, control, direction, or influence** ~~in any territory under its jurisdiction~~; and

(b). cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

Explanatory Notes

1. This proposal for **Article 1** supplements the ILC Draft by relocating from Draft Article 3(2) the affirmation that crimes against humanity are "crimes under international law, whether or not committed in times of armed conflict". Including this at the outset will allow States to affirm the status of crimes against humanity in international law, and thereby to frame the Convention accordingly, before turning to the definition of crimes against humanity in Article 2. A similar approach can be found in the Genocide Convention, where the corresponding clauses likewise appear in Article I.[1]

2. The proposal for **Article 3(1)** seeks to clarify two aspects of Draft Article 3(1). First, it spells out that no State is permitted to engage in acts or omissions that constitute crimes against humanity, in light of the well-established principles that State responsibility can arise through acts or omissions,[2] and that crimes against humanity can be committed or facilitated through acts or omissions.[3] Second, it affirms that States may not engage in crimes against humanity either directly or indirectly, as State responsibility encompasses not only a State's commission of an internationally wrongful act but also its direction, control, coercion, or aiding or assistance in the commission of such an act.[4] This proposal reflects that State obligations in respect of *jus cogens* crimes can extend to non-State actors,[5] who are often the direct perpetrators of crimes against humanity.

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[1] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art I ("The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.").

[2] UNGA Res 56/83, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (12 December 2001) UN Doc A/Res/56/83, art 2 ("There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State."); Commentaries to the UNGA, 'Report of the International Law Commission (53rd session), Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001), UN Doc A/56/10(supp), art 2, commentary para 4 ("Conduct attributable to the State can consist of actions or omissions. Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two.").

[3] International Covenant on Civil and Political Rights (adopted 16 December 1996, entered into force 23 March 1976) 999 UNTS 171, art 15(1)-(2) (recognizing that a crime may be committed through an "act or omission"); *Nahimana et al v Prosecutor* (Appeal Judgment) ICTR-99-52-A (28 November 2007) para 478 (recalling that commission of a crime includes not only physical perpetration but also a culpable omission of an act that is mandated by a legal duty); *Prosecutor v Mrkšić and Šljivančanin* (Appeal Judgment) IT-95-13/1-A (5 May 2009) paras 49, 103 (entering a conviction for aiding and abetting murder by omission); *Prosecutor v Nyiramasuhuko et al* (Appeal Judgment) ICTR-98-42-A (14 December 2015) paras 2189, 2213, 2258, 3539 (affirming a conviction for aiding and abetting by omission extermination as a crime against humanity and other international crimes).

[4] UNGA, 'Report of the International Law Commission (71st Session), Text of the Draft Articles on Prevention and Punishment of Crimes Against Humanity and Commentaries Thereto' (20 August 2019) UN Doc A/74/10 [hereinafter "ILC Draft Articles"] art 3, commentary paras 5-6, referring to Draft Articles on Responsibility of States for Internationally Wrongful Acts (n 2) arts 16-18.

[5] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, paras 430 (assessing a State's responsibility to prevent genocide based, in part, on the links "between the authorities of that State and the main actors in the events"), 432 (a State cannot be deemed complicit in genocide

3. In **Articles 3(1) and 3(2),** this proposal uses "shall" in place of "has the obligation" and "undertakes" from the Draft Articles for three reasons. First, these terms have equivalent meanings, as seen for instance in the recognition by the ICJ and the ILC that "undertakes" is "not merely hortatory or purposive" but is "intended to express the same kind of legally binding obligation upon States",[6] entailing that a State "take all measures within its power" to fulfil its obligation.[7] Second, the word "shall" is more readily understandable and can be easily construed without reference to legal jurisprudence, unlike the other terms for which clarification may needed based on a contextual reading.[8] Third, this will align these two paragraphs with the remainder of the text, which uses "shall" in nearly every article, including when addressing State obligations.[9]

4. The proposed text for **Article 3(2)** is otherwise identical to the text of Draft Article 3(2), except for the clauses relocated to Article 1.

5. In **Article 3(3)**, the proposal reflects two changes from Draft Article 3(3). First, the proposal incorporates the fact that a threat of an armed conflict cannot justify crimes against humanity, mirroring a similar provision in the Convention Against Torture,[10] while placing this term in the paragraph to clarify that the threat of other exceptional circumstances would likewise provide no justification for crimes against humanity. Second, this text refers to "a State's failure to discharge its obligations under this Article" to avoid any ambiguity as to whether this paragraph addresses "the obligations of States as set forth in [both] paragraphs 1 and 2", as was the intention.[11]

6. This proposal seeks to enhance **Article 4** in important but limited ways. First, it uses "shall" rather than "undertakes", for the reasons explained above in relation to

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unless it becomes aware of the crime's impending or ongoing commission, and afterwards aids or assists "the perpetrators of the criminal acts"). For the *jus cogens* nature of crimes against humanity, see ILC Draft Articles (n 4) preamble, commentary para 5.

[6] ILC Draft Articles (n 4) art 3, commentary para 8, referring to *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 5) para 162 ("The ordinary meaning of the word 'undertake' is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation.").

[7] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Provisional Measures) [2020] ICJ Rep 3, para 79; *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and Netherlands v Syrian Arab Republic)* (Provisional Measures) [2023] ICJ Rep 587, para 79. See also *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 5) para 430 ("A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of 'due diligence', which calls for an assessment *in concreto*, is of critical importance.").

[8] See n 6.

[9] See ILC Draft Articles (n 4) arts 5-15.

[10] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 2(2) ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.").

[11] ILC Draft Articles (n 4) art 3, commentary para 22.

Articles 3(1) and 3(2), namely equivalence of meaning, clarity, and alignment with the remainder of the text. Second, it adds a reference to States' obligation to "suppress" crimes against humanity, which is framed as a companion to the duty to prevent crimes in a number of relevant conventions, such as those pertaining to genocide, apartheid, and human trafficking.[12] This change more robustly reflects States' obligation to take *all* measures reasonably within their power to intervene in the face of ongoing or impending crimes against humanity. Third, this proposal removes "in conformity with international law", as it is duplicative of the Preamble,[13] and additional emphasis here and not in other articles may give the wrong impression that international law could potentially override a State's obligation under Article 4.

7. With respect to **Article 4(a)**, this proposal first removes the limitation "preventative" in "other appropriate measures", which is doubly warranted if there are appropriate suppressive measures that States may take as well. Second, it adds "diplomatic" to the list of appropriate measures that could be implemented by a State in an effort to discharge its obligations. Third, it removes the territorial limitation so that – just as for the Genocide Convention – the substantive obligations "apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question" without being constrained by territorial jurisdiction.[14] Fourth, and relatedly, it recognizes that such measures may be with respect to "any person or group" under the State's jurisdiction, "control, direction, or influence", which incorporates ICJ pronouncements in relation to State obligations under the Genocide Convention and the Torture Convention.[15]

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[12] Genocide Convention (n 1) art VIII (Contracting Parties may call upon UN organs to take action "for the prevention and suppression" of genocide or other punishable acts); International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243, arts VI (undertaking to carry out UN Security Council decisions "aimed at the prevention, suppression and punishment of the crime of apartheid"), VIII; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319, preamble para 5 (referring to the need for "an international instrument for the prevention, suppression and punishment of trafficking in persons, especially women and children, [which] will be useful in preventing and combating that crime").

[13] ILC Draft Articles (n 4) preamble para 5 ("*Affirming* that crimes against humanity, which are among the most serious crimes of concern to the international community as a whole, must be prevented in conformity with international law").

[14] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 5) para 183 ("The substantive obligations arising from Articles I and III are not on their face limited by territory.").

[15] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (n 7) paras 79-80 ("Bearing in mind Myanmar's duty to comply with its obligations under the Genocide Convention, the Court considers that […] Myanmar must […] ensure that its military, as well as any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject to its control, direction or influence, do not commit acts of genocide"); *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and Netherlands v Syrian Arab Republic)* (n 7) para 79 ("Syria must, in accordance with its obligations under the Convention against Torture, take all measures within its power to prevent acts of torture […] and ensure that its officials, as well as any organizations or persons which may be subject to its control, direction or influence, do not commit any acts of torture").

CRIMES AGAINST HUMANITY INITIATIVE

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MODES OF LIABILITY

ABILA STUDY GROUP

CRIMES AGAINST HUMANITY

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MODES OF LIABILITY

Proposed Revised Text for Article 6 of the Draft Articles on the Prevention and Punishment of Crimes against Humanity [ILC Draft]

Article 6 Criminalization under national law

1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.

2. Each State shall take the necessary measures to ensure that the following acts **or omissions** are offences under its criminal law:

(a) committing a crime against humanity **or contributing to the commission or attempted commission of such a crime by a group of persons acting with a common purpose**;

(b) attempting to commit ~~such~~ a crime **against humanity**;~~ and~~

(c) ordering, soliciting, inducing, **instigating**, **planning,** aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of ~~such~~ a crime **against humanity**;

(d) directly and publicly inciting the commission of a crime against humanity; and

(e) conspiring to commit a crime against humanity.

3. Each State shall also take the necessary measures to ensure that commanders and other superiors are criminally responsible for crimes against humanity committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.

[…]

Explanatory Notes

1. This proposal only addresses Draft Article 6(2) in relation to various modes of liability other than superior responsibility. It does not address other provisions of Draft Article 6. In the view of the Study Group, it might be useful for States to separate Draft Article 6's provisions into distinct articles, as the ILC Draft's approach of combining discrete issues could otherwise lead to some confusion.

2. This proposal is intended to clarify the various modes of liability that should be criminalized under national law. Specifically, it seeks to strengthen the Convention by including **common purpose liability** and expanding the list of accessory liability conduct to include **instigating** and **planning.** It also creates two new paragraphs to address the inchoate crimes of **directly and publicly inciting** and **conspiring** to commit crimes against humanity. The proposed additions help preserve essential tools for holding perpetrators accountable for international crimes, while also bringing the language more closely in line with the Convention's core objective of preventing and punishing crimes against humanity.[1]

3. The addition of **common purpose liability** to paragraph 2(a) serves to expressly clarify the scope of responsibility to be criminalized within each State's legal system. This addition is crucial as crimes against humanity are rarely perpetrated by a single individual. Rather, they are almost always the result of coordinated group action. At the same time, the collective nature of group criminal conduct often obscures individual roles and responsibilities, making it challenging to attribute responsibility to group members using theories of criminal liability for individual conduct. As a result, nearly all legal systems, whether rooted in civil law[2] or common law[3] traditions, have developed specific doctrines to address the

[1] The proposed additions do not suggest any hierarchy among the modes of liability but rather aim to ensure comprehensive liability.

[2] See, e.g., German Criminal Code (StGB) (1998) s 25(2) (providing "[i]f several persons commit an offence jointly, each person incurs a penalty as an offender (joint offenders)") (unofficial translation); Peruvian Penal Code (Legislative Decree No 635 of 1991) art 23 (recognizing concept of co-perpetration); Colombian Penal Code (Ley 599 de 2000) art 29 (same); Cambodian Criminal Code (2011) art 26 (same); Federal Penal Code of Mexico (1931) art 22 (same); Ethiopian Criminal Code (Proclamation No 414/2004) art 35 (providing that two or more persons who commit crimes shall all be punished unless they can prove they played no part in the commission of the crime); Ukrainian Criminal Code (2010) arts 26-28 (providing that accomplices who share a common intent are held liable for the principals' crime). See also International Commission of Jurists, 'Accountability Through the Specialized Criminal Chambers: Modes of Individual Criminal Liability Under Tunisian and International Law, Practical Guide 4' (April 2023) <https://www.icj.org/wp-content/uploads/2023/04/ICJ-Practical-guide-4-en-F-1.pdf> 67 (noting same recognized in Tunisian case law).

[3] See, e.g., *McAuliffe v The Queen* (1995) 183 CLR 108 (Australia) (recognizing joint enterprise liability to address group-based criminal conduct); *R v Jogee* (2016) UKSC 8 (United Kingdom) (same); Penal Code of Botswana (1964) art 22 (recognizing doctrine of common purpose liability); Shannon Hoctor, 'The Genesis of the Common Purpose Doctrine in South Africa' (2023) 26 *Potchefstroom Electronic Law Journal* 2 (discussing same regarding South Africa). See also Singaporean Penal Code (Chapter 224) (1872) sec 34

complexities of collective criminal conduct.

4. This approach is also utilized by international criminal tribunals, which have similarly applied a variety of legal approaches to hold individuals responsible for their role in collective criminal conduct. While terminology has varied across international criminal institutions, commonly used concepts include direct co-perpetration, indirect co-perpetration, contribution to a crime by a group of persons acting with a common purpose, and joint criminal enterprise, which are briefly explained in the paragraphs that follow.

5. **Direct co-perpetration** is a doctrine developed within the jurisprudence of the International Criminal Court ("ICC") which permits it to impose criminal liability on individuals for crimes committed jointly by two or more persons.[4] It requires: (i) the existence of a common plan among a plurality of persons; (ii) an essential contribution made by each co-perpetrator resulting in the implementation of that plan; and (iii) the requisite *mens* rea with respect to the crimes committed in implementing that plan.[5]

6. The concept of **indirect co-perpetration**, also a product of ICC jurisprudence, combines elements of co-perpetration and indirect perpetration, and is particularly useful when individuals from different parts of an organization—or from distinct organizations—collaborate to achieve a common criminal purpose that is physically executed by subordinates under the authority of someone other than the accused. It requires: (i) a common agreement or plan; (ii) that the accused exercised control over the direct perpetrators, either physically or through an organization through which the crime is committed; (iii) an essential contribution by each co-perpetrator; and (iv) awareness of the factual circumstances that enabled the accused to exercise control over the crime.[6]

7. Another theory developed through ICC jurisprudence is liability for **contributing "in any other way" to a group crime**. It requires proof that the perpetrators belonged to a group acting pursuant to a common criminal purpose, and that the accused intentionally contributed in a way that influenced the commission of the crime and

(rendering liable persons who commit a crime in furtherance of the common intention); Nigerian Criminal Code Act (Chapter 77) (1916) ch 2, sec 8 (same); Bharatiya Nyaya Sanhita (Indian Criminal Code) (No 45 of 2023) art 3(5) (same).

[4] *Prosecutor v Ntaganda* (Appeal Judgment) ICC-01/04-02/06 (30 March 2021) para 1040 (citing *Prosecutor v Lubanga* (Appeal Judgment) ICC-01/04-01/06 A 5 (1 December 2014) para 473)). See also Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 25(3)(a).

[5] *Prosecutor v Ntaganda* (n 4) paras 23, 918, 1060.

[6] *Prosecutor v Ongwen* (Appeal Judgment) ICC-02/04-01/15 (15 December 2022) paras 6-11, 635-638; *Prosecutor v Katanga* (Trial Judgment) ICC-01/04-01/07 (7 March 2014) para 1399.

that this contribution was made either to further the group's criminal activity or with knowledge of the group's intent to commit the crime.[7] This theory of accountability has been described as a "residual form of accessoryship [...] to vest the Court with jurisdiction over accessories whose conduct does not constitute aiding or abetting the commission of a crime".[8] It should be noted that the ICC caselaw on modes of liability has been the subject of vigorous dissents and has been often criticized by scholars, suggesting it may not be particularly helpful to national systems that already have well-established approaches to collective criminality.

8. An alternative approach to common purpose liability can be found within the doctrine of **joint criminal enterprise**, which evolved from the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda, and other hybrid or internationally supported tribunals.[9] Joint criminal enterprise doctrine seeks to hold individuals accountable for their participation in collective criminal conduct when they make a significant contribution to the execution of a group's common criminal plan or purpose.[10] The ICTY identified three forms of joint criminal enterprise distinguished by context and *mens rea*: (i) all members shared the same criminal intent to commit a crime;[11] (ii) the accused member knowingly participated in a system of organized ill treatment with the intent to further that system;[12] and (iii) when a crime occurred as a natural and foreseeable consequence of a group's actions and the accused member foresaw and voluntarily assumed that risk.[13]

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[7] *Prosecutor v Al Hassan* (Trial Judgment) ICC-01/12-01/18 (26 June 2024) paras 1232-1248; *Prosecutor v Katanga* (n 6) para 1620. See also Rome Statute (n 4) art 25(3)(d).

[8] *Prosecutor v Katanga* (n 6) para 1618. See also *Prosecutor v Al Hassan* (n 7) para 1243 ("The Chamber recalls the drafting history which shows that this provision was carefully crafted to reflect a balance between the approaches in different legal tradition[s].").

[9] See, e.g., *Prosecutor v Tadić* (Appeal Judgement) IT-94-1-A (15 July 1999); *Prosecutor v Ntakirutimana and Ntakirutimana* (Appeal Judgment) ICTR-96-10-A and ICTR-96-17-A (13 December 2004) paras 461-468; *Prosecutor v Kvočka et al* (Appeal Judgment) IT-98-30/1-A (28 February 2005) paras 79-119; *Prosecutor v Brđanin* (Appeal Judgement) IT-99-36-A (3 April 2007) paras 363-365, 392-432; *Prosecutor v Brima et al* (Appeal Judgment) SCSL-2004-16-A (22 February 2008) paras 72-80; ECCC (Appeal Judgement) Case 002/01 (23 November 2016) paras 773-789; *Prosecutor v Mustafa* (Trial Judgment) KSC-BC-2020-05 (16

[10] *Prosecutor v Tadić* (n 9) para 227. This mode can also be utilized when the accused or another member of the joint criminal enterprise did not perpetrate the crime themselves, but rather used other persons as tools to do so. *Prosecutor v Brđanin* (n 9) paras 410-413.

[11] For example, this may apply to all members of a paramilitary group that set out to kill civilians, even if it cannot be established that all members killed civilians themselves.

[12] For example, this may apply to persons responsible for running a concentration camp, even if they did not personally harm the victims.

[13] *Prosecutor v Tadić* (n 9) para 228. For example, this framework may be used to charge with murder members of a unit sent to forcibly remove civilians from their home in violation of international law, provided the killing of some civilians was a natural and foreseeable result of the removal process and this risk was wilfully accepted by the accused members.

9. Ultimately, although the doctrines vary with respect to the terminology used and specific elements required, all hold individuals liable for forms of collective criminality.

10. This proposal recommends using the general phrase "**contributing to the commission or attempted commission of such a crime by a group of persons acting with a common purpose**",[14] rather than listing all such variations, to provide States with the flexibility necessary to comply with the provision by implementing a doctrine compatible with their existing national law frameworks.

11. The proposal also calls for the inclusion of **instigating** and **planning** in the list of accessory modes of liability, as these terms are well-established in the jurisprudence of the *ad hoc* tribunals and thus recognized in international practice.[15] Their inclusion would ensure comprehensive coverage of conduct involving the prompting or preparation of crimes against humanity, and align the provision with customary international law.[16]

12. Planning requires that one or more persons design the criminal conduct constituting the crime that is later perpetrated.[17] Instigating implies prompting another person to commit a crime.[18] Both modes of liability require evidence that the instigation or planning substantially contributed to the commission of the crime[19] and that the perpetrator either intended to instigate or plan the crime, or was aware of the substantial likelihood that the crime would be committed as a result of the instigation or planning.[20]

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[14] The proposed language is drawn from Article 25(3)(d) of the Rome Statute and therefore already familiar to States Parties to the Statute.

[15] See, e.g., *Prosecutor v Kordić and Čerkez* (Appeal Judgment) IT-95-14/2-A (17 December 2004) paras 26-27, 31-32; *Prosecutor v Nahimana et al* (Appeal Judgment) ICTR-99-52-A (28 November 2007) paras 479-80.

[16] In addition, although instigation is similar to inducement—a mode of liability recognized by the Rome Statute and included in the Draft Articles—the limited ICC jurisprudence on this concept supports its explicit inclusion. In *Bemba et al,* the ICC Trial Chamber addressed the requirements of inducement and convicted one of the accused, Aimé Kilolo, and the Appeal Judgment affirmed that conviction. *Prosecutor v Bemba et al* (Trial Judgment) ICC-01/05-01/13 (19 October 2016) paras 72-82; *Prosecutor v Bemba et al* (Appeal Judgment) ICC-01/05-01/13 (8 March 2018) para 1085. More recently, however, in the case of *Al-Rahman*, the Trial Chamber recharacterized confirmed inducement charges as ordering. See *Prosecutor v Al-Rahman* (Decision on the Confirmation of Charges) ICC-02/05-01/20 (9 July 2021) para 133; *Prosecutor v Al-Rahman* (Trial Decision on the Prosecution's Application for Notice to be Given Pursuant to Reg. 55(2)) ICC-02/05-01/20 (18 March 2022) para10; *Prosecutor v Al-Rahman* (Trial Judgment) ICC-02/05-01/20 (6 October 2025) para 1012.

[17] *Prosecutor v Nahimana et al* (n 15) para 479.

[18] Ibid, para 480.

[19] Ibid, paras 479-80.

[20] In *Akayesu*, for instance, the Trial Chamber concluded that the accused expected those he encouraged to perpetrate sexual violence. *Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998) para 452. See also *Prosecutor v* Boškoski *& Tarčulovski* (Appeal Judgment) IT-04-82-A (19 May 2010) para 68.

13. The addition of two new paragraphs 2(d) and 2(e) revitalize the suggestions of Iceland (on behalf of the Nordic countries) and Sierra Leone to include **incitement** and **conspiracy** in Draft Article 6.[21]

14. Including direct and public incitement and conspiracy would encourage broader accountability for crimes against humanity. Unlike inducing or instigating, which require prompting another to commit a crime that is actually carried out or attempted,[22] incitement and conspiracy are both inchoate offenses, meaning they criminalize conduct that is "capable of constituting a step in the commission of another crime, even if that crime is not in fact committed".[23] Consistent with the draft treaty's prevention mandate, these modes of liability not only punish harm once it occurs but also seek to prevent it.[24]

15. Given the *jus cogens* nature of the prohibition of crimes against humanity,[25] on par with genocide,[26] the inclusion of direct and public incitement and conspiracy increases accountability by contributing to prevention as well as punishment, and thus better promotes the object and purpose of a Crimes against Humanity Convention.

16. Notably, although contemporary international criminal tribunals limit direct and public incitement to the crime of genocide, its application to crimes against humanity is supported by precedents dating back to Nuremberg, where the International Military Tribunal convicted Julius Streicher of persecution as a crime against humanity for inciting murder and extermination.[27]

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[21] Sean D Murphy, Special Rapporteur 'Fourth Report on Crimes against Humanity' (18 February 2019) UN Doc A/CN.4/725, para 138. It is worth noting that several States raised the need for the inclusion of incitement even earlier, during the 2016 plenary discussion of the Second Report. See Leila Nadya Sadat, 'A Contextual and Historical Analysis of the International Law Commission's 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity' (2018) 16 Journal of International Criminal Justice 683, 701-702.

[22] See Rome Statute (n 4) art 25(3)(b); para 12 above.

[23] *Prosecutor v Nahimana et al* (n 15) para 720 (discussing direct and public incitement to commit genocide and conspiracy to commit genocide).

[24] See, e.g., ibid para 678 (observing that the drafters of the Genocide Convention criminalized direct and public incitement with the goal of forestalling the occurrence of genocide).

[25] See, e.g., UNGA, 'Report of the International Law Commission (71st Session), Text of the Draft Articles on Prevention and Punishment of Crimes Against Humanity and Commentaries Thereto' (20 August 2019) UN Doc A/74/10, preamble para 4.

[26] See, e.g., UNGA, 'Peremptory Norms of General International Law (*Jus Cogens*) (73rd Session), Text of the Draft Conclusions and Annex Adopted by the Drafting Committee on Second Reading' (11 May 2022) UN Doc A/CN.4/L.967, annex.

[27] *Trial of the Major War Criminals before the International Military Tribunal* (Judgment) (30 September-1 October 1946) XXII Blue Series 411, 549.

17. It is also worth noting that some States do not limit incitement to genocide. For instance, the Norwegian Penal Code applies incitement to all atrocity crimes equally.[28] Such laws reflect the reality that "the dangers of propaganda are general and equally valid for other international crimes, which are often no less horrendous than genocides.".[29]

18. Moreover, the inclusion of direct and public incitement and conspiracy comports with the approach of international agreements, such as the Convention on the Prevention and Punishment of the Crime of Genocide.[30]

19. Further, conspiracy is already available in multiple common law[31] and civil law[32] countries.

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[28] Penal Code of Norway (2005) sec 108. Other countries, such as Germany and Sweden, sanction incitement to hatred of a group. See Criminal Code of Germany (StGB) (2021) sec 130 ("Whoever, in a manner suited to causing a disturbance of the public peace incites hatred against a national, racial, religious group or a group defined by their ethnic origin, against sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population, or calls for violent or arbitrary measures against them.") (informal translation); Swedish Criminal Code (1962) ch 16, sec 8 (allowing for prosecution of a person who issues a "statement or other communication that is disseminated, threatens or expresses contempt for a population group by allusion to race, colour, national or ethnic origin, religious belief, sexual orientation or transgender identity or expression") (informal translation). Ukraine likewise prohibits "wilful actions inciting national, racial or religious enmity and hatred". Ukraine Criminal Code (2001), art 161 (informal translation). Other countries such as Botswana, Burkina Faso, Cambodia, and Colombia prohibit incitement to any criminal offense. Criminal Code of Botswana (1964) art 391; Criminal Code of Cambodia, art 495 (2009); Penal Code of Colombia (2000) art 348; Penal Code of Burkina Faso (2018) art 69. India prohibits the publication or circulation of false information that incites a class or community "to commit an offence against any other class or community". Bharatiya Nyaya Sanhita (India) (2024) art 353(1)(c).

[29] Wibke K Timmerman, 'Incitement in International Law' (Routledge, 2015) 220; Jérôme de Hemptinne, 'Incitement', in Jérôme de Hemptinne et al, 'Modes of Liability in International Criminal Law' (CUP, 2019) 396. Moreover, international agreements already prohibit public incitement for purposes other than averting genocide. For instance, the Council of Europe Convention on the Prevention of Terrorism sought to achieve its goal by mandating States to criminalize the "public provocation to commit a terrorist offence.", which entails "the intent to incite the commission of a terrorist offence". Council of Europe Convention on the Prevention of Terrorism (adopted 16 May 2005, entered into force 1 June 2007) CETS 196, art 5.

[30] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art III(b)-(c).

[31] See, e.g., Criminal Law Act of England and Wales (1977) sec 1.1; The Criminal Attempts and Conspiracy (Northern Ireland) Order 1983, art IV. Similarly, the United States Code contains dozens of criminal conspiracy provisions, including conspiracy to commit any other federal crime, see US Code Title 18, Crimes and Criminal Procedure (2023) sec 371, and conspiracy to commit some specific form of misconduct, ranging from civil rights violations to drug trafficking, see ibid sec 241 (civil rights conspiracies); US Code Title 21, Food and Drugs sec 846 (drug trafficking conspiracies).

[32] See, e.g., Tunisian Criminal Code (1913) art 131 (criminal association is punishable); French Penal Code (1994) art 450-1 (regarding "any group formed or agreement established" aimed at committing a crime) (unofficial translation); German Criminal Code (1998) sec 30(2) (agreeing to commit a crime is punishable); Act on Punishment of Organized Crimes and Control of Proceeds of Crime of Japan (1999) art 6-2 (planning to commit a serious crime); Law No 10.001 on the Central African Penal Code (2010) art 412 (joining a group or participating in an agreement is punishable); Comprehensive Organic Criminal Code of Ecuador (2014)

20. There is also State support for the inclusion of these modes of liability. Numerous States indicated agreement with the proposal submitted by Iceland (on behalf of the Nordic countries) and Sierra Leone on the inclusion of conspiracy and incitement.[33] For example, the Russian Federation noted that the list should include incitement.[34] Jordan, Cameroon, and Palestine also issued statements in support of the inclusion of direct or indirect incitement.[35] The United Kingdom recognized that arguments to include conspiracy and incitement might exist and that it is appropriate for Draft Article 6(2) to conceive of various modes of liability.[36] The United States also recognized that addressing indirect and direct liability is "vital".[37]

21. For these reasons, expanding the list of modes of liability to include common purpose liability, instigation, planning, conspiracy, and direct and public incitement not only preserves essential mechanisms for holding perpetrators accountable for crimes against humanity, but also more closely aligns with the Convention's core objective of preventing and punishing crimes against humanity.

art 370 (illicit association is punishable); Colombian Penal Code, Ley 599 de 2000, art 340 (conspiring to commit a crime is punishable).

[33] See Murphy, 'Fourth Report on Crimes against Humanity' (n 21) para 138.

[34] 'Compilation of Government Statements at the Sixth Committee Resumed Session on Crimes Against Humanity, April 1-5 and April 11, 2024: Russian Federation' (September 2024) 91 <https://bpb-us-e2.wpmucdn.com/sites.wustl.edu/dist/b/2004/files/2024/10/2024-Second-Resumed-Session-Compilation-of-Government-Statements-1.pdf>.

[35] 'Jordan Statement Before the Resumed Session of the Sixth Committee on Crimes Against Humanity Cluster 3' (April 2024) 3 <https://www.un.org/en/ga/sixth/78/pdfs/statements/cah/41mtg_jordan_3.pdf>; Cameroon 'Cluster III: Articles 6, 7, 8, 9 et 10' (April 2024) 2 <https://www.un.org/en/ga/sixth/78/pdfs/statements/cah/42mtg_cameroon_3.pdf>; 'Compilation of Government Statements at the Sixth Committee Resumed Session on Crimes Against Humanity April 1-5 and April 11, 2024: Palestine' (September 2024) 154 (n 34).

[36] 'Compilation of Government Statements at the Sixth Committee Resumed Session on Crimes Against Humanity, April 10-14, 2023: United Kingdom of Great Britain and Northern Ireland' (June 2023) 70 <https://bpb-us-e2.wpmucdn.com/sites.wustl.edu/dist/b/2004/files/2024/10/2024-Second-Resumed-Session-Compilation-of-Government-Statements-1.pdf>.

[37] United States Statement, April 2023 Resumed Session of the Sixth Committee (12 April 2023) <https://www.un.org/en/ga/sixth/77/pdfs/statements/cah/41mtg_us_3.pdf> ("With respect to the modes of liability encompassed by Draft Article 6, paragraph 2(c), we note that it would be vital for any future convention on crimes against humanity to address both direct and indirect modes of liability. However, we recognize that States' domestic criminal systems vary, and States may take different approaches to questions of complicity, whether they view it primarily through the lens of accomplice liability, conspiracy, participation in a joint criminal enterprise, common purpose, or another mode of responsibility. Accordingly, we think it would be important for any future convention to allow for flexibility in how States implement their obligations in that regard.").

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REPARATIONS

Proposed Revised Text for Article 12 of the Draft Articles on Prevention and Punishment of Crimes against Humanity [ILC Draft]

Article 12 Victims, witnesses and others

1. Each State shall ~~take the necessary measures to~~ ensure that:

(a) any person who alleges that acts **or omissions** constituting crimes against humanity have been or are being committed has the right to complain to the competent authorities**, with a view to obtaining urgent measures of protection in the case of ongoing acts or omissions, as well as redress for all such acts as elaborated in paragraph 3 of this draft article**; and

(b) complainants, victims, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, **and, where appropriate, others at risk on account of any complaint, information, testimony or other evidence given by witnesses,** shall be protected against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given. Protective measures shall be without prejudice to the rights of the alleged offender referred to in draft article 11.

2. Each State shall, in accordance with its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 11.

3. Each State shall ~~take the necessary measures to~~ ensure in its legal system that ~~the~~ victims of a crime against humanity, committed through acts **or omissions** attributable to the State under international law or committed ~~in any territory under its jurisdiction~~ **by any person or group under its jurisdiction, control, direction, or influence**, ~~have the right to~~ obtain **redress and have an enforceable right to full and effective** reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate **and proportional to the gravity of the violations and circumstances of each case**, of ~~one or more of the following or other forms~~: restitution; compensation; ~~satisfaction;~~ rehabilitation; **satisfaction;** cessation and guarantees of non-repetition. **Each State shall take the necessary measures to preclude any statute of limitations on civil claims related to reparations.**

4. In designing and implementing programs of reparations for crimes against humanity, States should ensure the meaningful participation of victims and their representatives, as well as other members of the public.

5. For purposes of the draft articles, victims are persons who 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 constitute crimes against humanity. A person should be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim, persons who have suffered harm in intervening to assist victims in distress or to prevent victimization, and any other indirect victim.

Explanatory Notes

1. Reparations is a critical component of justice, reconciliation, as well as the restoration of peace and security. It is in States' own interests to ensure that they meet their obligations to guarantee and provide effective reparations systems. Drawing on best practices in the field, this proposal seeks to clarify and bolster the ways in which States can enable reparation in the event of crimes against humanity.

2. The proposed text of **Article 12(1)(a)** seeks to add further protection to the rights of victims and witnesses by clarifying that they can complain to States Parties in order to trigger an investigation, protection for complainants and witnesses from retaliation, and urgent action to stop ongoing crimes against humanity. In this sense, the proposed text complements States Parties' general obligation to prevent crimes against humanity set forth in Draft Article 4 as well as other provisions. Moreover, by emphasizing victims' right to complain with a view to seeking protection, the proposed addition would minimize Draft Article 12(1)'s apparent redundancy with Draft Article 8, which calls for "a prompt, thorough, and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed".

3. The International Law Commission (ILC) commentary to Draft Article 12(1) notes that the proposed text draws, *inter alia*, on the precedents of international conventions

on torture and disappearance, which also use the word "complain".[1] Draft Article 12(1)(b) improves on these treaty precedents by extending the protections set forth in Draft Article 12 to complainants other than the alleged victim. The proposed amendment to **Article 12(1)(b)** further extends these protections in line with best practices of international and international(ized) tribunals.[2]

4. **Article 12(3)** sets forth States Parties' obligation to ensure victims' fundamental right to seek and obtain reparations. Because the words "redress", "remedy", and "reparations" are often used interchangeably or inconsistently, it is noted that this proposal follows the approach set forth in paragraph 11 of the 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 (Basic Principles), which specifies that the right to a remedy includes each victim's procedural right of "[e]qual and effective access to justice," as well as the substantive right to obtain "[a]dequate, effective and prompt reparation for harm suffered".[3] In line with this approach, the ILC commentary to Draft Article 12(3) suggests that it intends the word "reparation" to connote both "procedural and substantive" aspects of State obligations to provide redress.[4] The proposed revision underscores both dimensions of States' obligations in this respect.

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[1] UNGA, 'Report of the International Law Commission (71st Session), Text of the Draft Articles on Prevention and Punishment of Crimes Against Humanity and Commentaries Thereto' (20 August 2019) UN Doc A/74/10 [hereinafter "ILC Draft Articles"] art 12, commentary para 7, referring to Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (Torture Convention) art 13 ("Each State Party shall ensure that any individual who alleges *he has been subjected to torture* in any territory under its jurisdiction *has the right to complain to*, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.") (emphasis added); International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (Enforced Disappearance Convention) art 12 (elaborating similarly but in somewhat greater detail the obligations of States Parties in response to a complaint, which include instituting a prompt, thorough, and impartial investigation and protecting complainants and others from retaliation—obligations explicitly addressed in Draft Articles 12(1) and 12(3)).

[2] See Rules of Procedure and Evidence before the Kosovo Specialist Chambers (30 April 2020) KSC-BD-03/Rev3/2020, Rule 80(1).

[3] UNGA Res 60/147 (16 December 2005) UN Doc A/Res/60/147 (Basic Principles) para 11(a)-(b). See also Committee against Torture, 'General Comment No. 3 (2012): Implementation of Article 14 by States Parties' (13 December 2012) UN Doc CAT/C/GC/3 (Committee against Torture General Comment No. 3) para 2 (considering that "redress" in article 14 of the Torture Convention "encompasses the concepts of 'effective remedy' and 'reparation'").

[4] ILC Draft Articles (n 1) art 12, commentary para 18, referring to Committee against Torture General Comment No 3 (n 3) para 5.

5. As the ILC commentary to the Draft Articles notes, the right to a remedy is recognized in numerous international instruments, including the Universal Declaration of Human Rights,[5] as well as regional human rights treaties, as well as key international humanitarian law (IHL) conventions; it is also well established under customary international law.

6. Particularly important guidance on this right as it pertains to victims of crimes against humanity is provided in the Basic Principles, which were adopted by the UN General Assembly in 2005.[6] The resolution to do so was co-sponsored by 59 States and was adopted without a vote.[7] Commanding the widespread support of a cross-section of the global community, the Basic Principles are now the leading reference clarifying how States can meet their existing obligations to ensure redress with respect to gross violations of human rights law and serious violations of international humanitarian law.[8]

7. Although Draft Article 12(3) evokes portions of the Basic Principles, it is more restrictive than the Basic Principles, and problematically so. In particular, Draft Article 12(3) frames the scope of reparation due to victims more narrowly than the

[5] UNGA Res 217 (III) A (10 December 1948) UN Doc A/810, art 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."). See also ECOSOC, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity' (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, principles 1, 31-34.
[6] See n 3 above.
[7] See UNGA Meeting Record (16 December 2005) UN Doc A/60/PV.64, p 10 (adoption without a vote); UNGA Third Committee Report (1 December 2005) UN Doc A/60/509/Add.1, para 8 (co-sponsorship by Albania, Argentina, Armenia, Austria, Azerbaijan, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Chile, Congo, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Estonia, Finland, France, Georgia, Greece, Guatemala, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Japan, Kenya, Latvia, Liechtenstein, Luxembourg, Mexico, Monaco, Netherlands, Nigeria, Norway, Panama, Paraguay, Peru, Poland, Portugal, Republic of Moldova, Romania, Sierra Leone, Slovenia, South Africa, Spain, Sweden, Switzerland, Timor-Leste, United Kingdom of Great Britain and Northern Ireland, Uruguay, Venezuela, and the former Yugoslav Republic of Macedonia). In addition to these 59 co-sponsoring States, a further 16 States voted in favour of the Basic Principles as they advanced towards the General Assembly. See UN Commission on Human Rights Report (19 April 2005) UN Doc E/CN.4/2005/L/10/Add.11, para 68 (adopting the resolution advancing the Basic Principles by 40 votes to none, with 13 abstentions, and including votes in favour by Bhutan, Burkina Faso, Canada, China, Cuba, Gabon, Guinea, Indonesia, Malaysia, Pakistan, Republic of Korea, Russian Federation, Sri Lanka, Swaziland, Ukraine, and Zimbabwe).
[8] The Basic Principles take a comprehensive approach, with Principle 19 stipulating that restitution "should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred" and "includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property".

Basic Principles. A side-by-side comparison of relevant text in Draft Article 12(3) and Basic Principle 18 highlights key differences in this respect (emphasis added):

Draft Article 12(3)	Basic Principle 18
Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity, committed through acts attributable to the State under international law or committed in any territory under its jurisdiction, have the right to obtain reparation for material and moral damages, on an individual or collective basis, consisting, **as appropriate, of one or more of the following or other forms**: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition.	In accordance with domestic and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, **as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation [...] which include the following forms**: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

8. While both texts use the phrase "as appropriate", Basic Principle 18 helpfully recognizes, in line with long-established law, that States' discretion is not unlimited. Instead, what is "appropriate" must also be "proportional to the gravity of the violations".

9. Also of concern, Draft Article 12(3) introduces the phrase "one or more of the following" before enumerating the forms of reparation that may be "appropriate" in a given case. In contrast, Basic Principle 18 emphasizes that reparations must be "full and effective". While "one or more" can be interpreted to mean simply that, in specific circumstances, one form of reparation may fully satisfy victims' right to reparation, the omission of "full and effective" in Draft Article 12(3) could invite Governments to insist that a single form of reparation, such as an apology, fully discharges their responsibility to provide reparation even if it is not in fact adequate.

10. This risk is compounded by the fact that, in line with the approach taken in the Basic Principles, Draft Article 12(3) includes guarantees of non-recurrence as a type of reparation. Should a Government undertake a measure aimed at preventing a

recurrence of crimes against humanity, the current draft text may invite that Government to argue it has discharged its obligation to provide "one or more" measure of reparation. Yet as the first UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff, has rightly emphasized, what is distinctive about the right to a remedy is that it provides benefits to victims directly, and not just indirectly, as part of a State's broader efforts to ensure human rights through guarantees of non-recurrence.[9]

11. Unfortunately, the "scandalous" gap[10] between international legal norms on reparation and implementation of those norms is due in no small part to Governments' reluctance to provide reparations even when able to do so.[11] Draft Article 12(3)'s flexibility may all too easily be exploited by Governments to avoid their responsibility to provide adequate reparations. The ILC commentary to the Draft Articles reinforces this concern. While recognizing that, in the aftermath of crimes against humanity "all traditional forms of reparation are potentially relevant",[12] it also states that various factors make it appropriate to provide States "some flexibility and discretion to determine the appropriate form of reparation", including the limited resources of a State "struggling to rebuild itself".[13]

12. State practice demonstrates, however, that such concerns need not preclude effective reparation. For instance, since 2007 Peru has provided material, symbolic, individual, and collective reparations to victims of the civil conflict (1980-2000) through its *Plan Integral de Reparaciones*,[14] several aspects of which represent best practices in reparations, including: (i) extensive consultations with victims' organizations and other sectors of civil society; (ii) comprehensiveness; and (iii) explicit acknowledgment that reparations are a moral, political and legal obligation of the State and that recognition of victims as human beings whose fundamental

[9] Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (14 October 2014) UN Doc A/69/518, paras 10, 21.
[10] Ibid paras 6, 80.
[11] Ibid paras 48-61.
[12] ILC Draft Articles (n 1) art 12, commentary para 20.
[13] Ibid art 12, commentary para 21.
[14] Ley que crea el Plan Integral de Reparaciones (Ley No. 28592) (28 July 2005) <https://ihl-databases.icrc.org/en/national-practice/law-creating-programme-comprehensive-reparation-law-no-28592>. See Fiorella P Vera-Adrianzen, 'Reclaiming Justice from Below: Victim Participation and Reparations in Post-Conflict Peru', University of Mechanism Digital Repository (December 2022). <https://digitalrepository.unm.edu/pols_etds/96> viii.

rights were violated is "the central goal" of reparations.[15] In Colombia, legislation adopted in 2011 provided for land restitution and reparations in both national and transitional justice procedures, and while challenges remained, by 2020 this had "produced tangible results as over two million internally displaced persons [...] have returned, resettled or have been integrated locally".[16]

13. Other aspects of Draft Article 12(3) could also be improved.[17] In particular, the introductory language, "Each State shall take the necessary measures to ensure in its legal system that [...]", could be strengthened by borrowing language from the Convention on Enforced Disappearance that: "Each State Party *shall guarantee* the right of victims of enforced disappearance to an effective remedy".[18] Another model, which this proposal adapts, is Article 14 of the Convention against Torture, which begins similarly to Draft Article 12(3) but continues with more robust language:

> Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress *and has an enforceable right* to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.[19]

14. **Proposed Article 12(4)** reflects a broad consensus, reflected in standard-setting instruments and other sources, that the participation of victims and other members of the public is crucial to the effective design and implementation of programs of reparations. As former Special Rapporteur Pablo de Greiff noted in his 2014 report on reparations, "[t]here are many reasons for including participatory processes in the design and implementation of reparation programmes",[20] among them ensuring that reparations respond to victims' actual needs. As with participation in criminal and other proceedings, ensuring victims'

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[15] ECOSOC, 'Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity, by Professor Diane Orentlicher' (27 February 2004) UN Doc E/CN.4/2004/88, paras 58-60.
[16] Olympia Bekou, 'State of Play for Existing Instruments for Combating Impunity for International Crimes', European Parliament Directorate-General for External Policies, EP/EXPO/B/COMMITTEE/FWC/2019-01/LOT6/R01 (13 August 2020) 47.
[17] For explanation of the changes to refer to "acts **or omissions** attributable to the State under international law or committed **by any person or group under its jurisdiction, control, direction, or influence**", see ABILA Study Group Proposal on Prevention (17 November 2025) <https://www.ila-americanbranch.org/wp-content/uploads/2025/11/Prevention-art.-1-3-4_ABILA_CAH_final.pdf>.
[18] Enforced Disappearance Convention (n 1) art 8(2) (emphasis added).
[19] Torture Convention (n 1) art 14(1) (emphasis added).
[20] Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (n 9) 74. See also ibid paras 75-80, 91-92.

meaningful participation in the design and implementation of reparations programmes "requires guaranteeing their safety".[21]

15. This principle is also reflected in the United Nations Updated Principles to Combat Impunity, which provide the following guidance with respect to collective reparations processes:

> Victims and other sectors of civil society should play a meaningful role in the design and implementation of such programmes. Concerted efforts should be made to ensure that women and minority groups participate in public consultations aimed at developing, implementing, and assessing reparations programmes.[22]

As the quoted language suggests, "meaningful participation" must include the participation of those who are often excluded, or whose interests are frequently underrepresented, in the design and implementation of programs of repair. "Meaningful participation" should be understood to be inclusive, culturally appropriate, gender-sensitive, trauma-informed, and intergenerational, involving good-faith dialogues with affected communities, including children consistent with their evolving capacities, in order to design and implement reparations measures that are adequately funded and led by affected populations.

16. **Proposed Article 12(5)** comports with the emerging trend to provide a definition of "victim" in new treaties.[23] The Basic Principles, for the reasons described above, represent an ideal core for any such definition, and are used as such here.[24] As highlighted in the ILC commentary, the enumerated classes of harm find support in practice associated with comparable treaties and under customary international law,[25] including the jurisprudence of international criminal courts

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[21] Ibid para 91.

[22] 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity' (n 5) principle 32. This principle recognizes that, when it comes to societies that have endured crimes against humanity and other mass atrocities, there is no "one-size-fits-all" response. See Report of the Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (23 August 2004) UN Doc S/2004/616, p 1; 'Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity, by Professor Diane Orentlicher' (n 15) para 5.

[23] See Enforced Disappearance Convention (n 1) art 24(1); Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010) 2688 UNTS 39, art 2(1).

[24] See Basic Principles (n 3) paras 8-9.

[25] ILC Draft Articles (n 1) art 12, commentary paras 3-5; Convention on Cluster Munitions (n 23) art 2(1); Committee against Torture General Comment No. 3 (2012) (n 3) para 3; African Commission on Human and Peoples' Rights, 'General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel,

and tribunals.[26] The fact that reparations can not depend on action taken against the perpetrator enjoys similar acceptance and support.[27] Finally, the idea that victims include the family or dependants of the direct victim, and, more generally, that victim status can derive from both direct and indirect harm, are principles supported by treaty and tribunal practice.[28]

Conclusion

17. Several of the above proposals seek to strengthen the text of Draft Articles 12(1) and 12(3) by clarifying the language of those provisions. The proposed revisions would also bring Draft Article 12(3) into line with the established international law on reparations, which already incorporates appropriate flexibility.

18. Likewise, proposed Article 12(4) would reflect the strong international consensus that victims and other members of civil society should participate in the design and implementation of programs of reparation following mass atrocities. The proposed text also complements the guarantees set forth in Draft Articles 12(1)(b)

Inhuman or Degrading Punishment or Treatment (Article 5)' (4 March 2017) (ACHPR General Comment No 4) para 16.

[26] ILC Draft Articles (n 1) art 12, commentary para 6; *Prosecutor v Lubanga* (Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008) Case No ICC-01/04-01/06 (11 July 2008) para 39; *Prosecutor v Ongwen* (Reparations Order) Case No ICC-02/04-01/15 (28 February 2024) para 168 (discussing physical harm, moral harm, material harm, community harm, and transgenerational harm).

[27] ILC Draft Articles (n 1) art 12, commentary paras 4-5; Committee against Torture General Comment No. 3 (n 3) para 3 ("A person should be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted"); ACHPR General Comment No 4 (n 25) para 17 ("An individual is a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted").

[28] ILC Draft Articles (n 1) art 12, commentary paras 4-6; Committee against Torture General Comment No. 3 (n 3) para 3; *Vallianatos and Others v Greece* (Grand Chamber Judgment) ECtHR app nos 29381/09 and 32684/09 (7 November 2013) para 47; *Çakici v Turkey* (Grand Chamber Judgment) ECtHR app no 23657/94 (8 July 1999) para 98; *Elberte v Latvia* (Judgment) ECtHR app no 61243/08 (13 January 2015) para 137; *Villagrán Morales et al v Guatemala* (Judgment) IACtHR (19 November 1999), paras 174-177, 238; *Bámaca Velásquez v Guatemala* (Judgment) IACtHR (25 November 2000) paras 159-166. See *Prosecutor v Lubanga* (Decision on "Indirect Victims") Case No ICC-01/04-01/06 (8 April 2009) paras 44-52. In the context of the destruction of cultural heritage, an ICC Trial Chamber has identified persons "affected" by the crime as "not only the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community". *Prosecutor v Al Mahdi* (Reparations Order) Case No ICC-01/12-01/15 (17 August 2017) para 51. The Chamber, however, limited its assessment for the purpose of reparations "only to the harm suffered by or within the community of Timbuktu, *i.e.* organisations or persons ordinarily residing in Timbuktu at the time of the commission of the crimes or otherwise so closely related to the city that they can be considered to be part of this community at the time of the attack". Ibid para 56.

and 12(2), which addresses the participation-related rights of victims and others in criminal proceedings.

19. Finally, given the central importance of victims, adding the definition of "victim" in Article 12(5) is inclusive and embodies the emerging trend of setting forth a treaty definition of "victim".

CRIMES AGAINST HUMANITY INITIATIVE

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SETTLEMENT OF DISPUTES

ABILA STUDY GROUP

CRIMES AGAINST HUMANITY

INTERNATIONAL LAW ASSOCIATION
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SETTLEMENT OF DISPUTES

Proposed Revised Text for Article 15 of the
Draft Articles on Prevention and Punishment of Crimes against Humanity [ILC Draft]

Article 15 Settlement of disputes

1. States Parties shall endeavour to settle disputes concerning the interpretation ~~or~~, application**, or fulfilment** of the ~~present draft articles~~**Convention** through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation ~~or~~**,** application**, or fulfilment** of the ~~present draft articles~~**Convention**, **including those relating to the responsibility of a State Party for engaging in acts or omissions constituting crimes against humanity or a State Party's responsibility to prevent and punish crimes against humanity,** that is not settled through negotiation shall, at the request of one of those States Parties, be submitted to the International Court of Justice, unless those States Parties agree to ~~submit the dispute to arbitration~~ **a different mode of dispute settlement**.

3. Any State Party may invoke the responsibility of another State Party under this Convention in accordance with the procedures set out in this article.

~~3. Each State may declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.~~

~~4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.~~

Explanatory Notes

1. This proposal is intended to clarify the scope of the dispute settlement clause of the Draft Articles and the process by which States Parties may adjudicate disputes thereunder.

2. The proposal suggests the addition of disputes concerning the **"fulfilment"** of treaty obligations in the first and second paragraphs of Draft Article 15. This language would parallel Article IX of the Genocide Convention.[1] Early drafts of the Genocide

[1] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art IX ("Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the

Convention did not include "fulfilment", prompting States to consider "whether there was a difference between the *application* and the *fulfilment* of a convention and whether, therefore, it was necessary to retain both words in the text".[2] The representative of India argued that "the word 'application' included the study of circumstances in which the convention should or should not apply, while the word 'fulfilment' referred to the compliance or non-compliance of a party with the provisions of the convention".[3] States ultimately adopted a joint amendment expanding the dispute settlement clause to include disputes "relating to the interpretation, application *or fulfilment* of the Convention".[4] While the significance of the word "fulfilment" continues to be discussed today,[5] its addition to the dispute settlement provision will ensure its applicability in all relevant circumstances.

3. The proposal also suggests clarifying that such disputes include those **"relating to the responsibility of a State Party for engaging in acts or omissions constituting crimes against humanity or a State Party's responsibility to prevent and punish crimes against humanity",** in the second paragraph of Draft Article 15. This language reflects the framing in Draft Article 3, the commentary to which recognizes that:

> [a] formula that calls for States not to engage in "acts that constitute" crimes against humanity is appropriate since States themselves do not commit crimes; rather, crimes are committed by persons, but the "acts" that "constitute" such crimes may be acts attributable to the State under the rules on the responsibility of States for internationally wrongful acts.[6]

This language also mirrors, in part, Article IX of the Genocide Convention, which provides for the inclusion of disputes "relating to the responsibility of a State for

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responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.").

[2] UNGA Sixth Committee (103rd meeting) (12 November 1948) UN Doc A/C.6/SR.103, 432 (emphases added).

[3] Ibid 437.

[4] UNGA Sixth Committee, 'Draft Convention on Genocide: Report of the Economic and Social Council' (3 December 1948) UN Doc A/760, para 15 (emphasis added).

[5] In *Sudan v United Arab Emirates*, Sudan argued that the word "fulfilment" in Article IX of the Genocide Convention is a "unique feature [...] among compromissory clauses in conventions concerning human rights" and "supports the view that Article IX [...] should be considered to constitute part of the '*raison d'être* of the treaty'". *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Sudan (Sudan v United Arab Emirates)* Verbatim Record CR 2025/1 (10 April 2025) paras 42, 45. But see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para 168 (observing that the addition of the word "fulfilment" "does not appear to be significant in this case"), Separate Opinion of Judge Tomka, paras 51-52 (opining that "the word 'fulfilment' adds nothing legally relevant to the obligation to apply the Convention" and "does not expand the jurisdiction *ratione materiae* of the Court in comparison with the concept of 'application of the Convention' as it appears in Article IX"), Declaration of Judge Skotnikov, 373 (observing that "the addition of 'fulfilment' is not particularly significant").

[6] UNGA, 'Report of the International Law Commission (71st Session), Text of the Draft Articles on Prevention and Punishment of Crimes Against Humanity and Commentaries Thereto' (20 August 2019) UN Doc A/74/10 [hereinafter "ILC Draft Articles"] art 3, commentary para 2.

genocide or for any of the other acts enumerated in article III".[7] But in contrast to the Genocide Convention,[8] the Draft Articles include an explicit obligation for States to refrain from engaging in acts that constitute crimes against humanity.[9] By incorporating this language into the dispute settlement clause, there would be no question that violations of that obligation fall within the scope of the dispute settlement mechanism and the jurisdiction of the International Court of Justice ("ICJ"). This explicit reference is particularly important given the historical debate under the Genocide Convention as to whether the ICJ could determine State responsibility for genocide. The ICJ ultimately relied on the State responsibility language in Article IX to confirm that its jurisdiction extended not only to the attribution of acts of genocide to a State, but also to determining whether such acts had been committed.[10] Since crimes against humanity similarly implicate both individual criminal responsibility and State responsibility, having a clear reference to State responsibility in the dispute settlement clause would remove any ambiguity regarding the scope of the provision and the ICJ's competence for this purpose.

4. The ABILA Study Group considered but intentionally does not suggest imposing **a required time limit for negotiation** prior to submitting the dispute to the ICJ.[11] Although some treaties impose comparable restraints on the arbitration precondition,[12] almost no treaty specifies the amount of time required for

[7] Genocide Convention (n 1) art ix.

[8] The Genocide Convention does not expressly prohibit States from committing genocide. See *Bosnia and Herzegovina v Serbia and Montenegro* (Merits) (n 5) para 166 ("The Court next considers whether the Parties are also under an obligation, by virtue of the Convention, not to commit genocide themselves. It must be observed at the outset that such an obligation is not expressly imposed by the actual terms of the Convention.").

[9] ILC Draft Articles (n 6) art 3(1) ("Each State has the obligation not to engage in acts that constitute crimes against humanity."). The commentary to this Article notes that under this obligation, States may neither "commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law" nor aid or assist, direct, control, or coerce, another State in the commission of an internationally wrongful act. Ibid art 3, commentary paras 3, 6. See also the ABILA Study Group Proposal on Scope, General Obligations, and Obligation of Prevention.

[10] *Bosnia and Herzegovina v Serbia and Montenegro* (Merits) (n 5) paras 180-182.

[11] This was also considered and purposefully omitted by the ILC. See Sean D Murphy, Special Rapporteur 'Third Report on Crimes against Humanity' (23 January 2017) UN Doc A/CN.4/704, paras 248-251.

[12] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 30(1) ("Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. *If within six months from the date of the request for arbitration* the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.") (emphasis added); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, art 29(1) ("Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. *If within six months from the date of the request for arbitration* the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.") (emphasis added).

negotiations prior to resorting to inter-State compulsory dispute settlement.[13] The appropriate duration for a period of negotiation is context-dependent and fact-specific. Moreover, the ICJ has indicated that negotiations must be carried out in good faith.[14] The proposal thus preserves a wide margin of discretion for the Court to determine when the requirement for good faith negotiation has been met, including by assessing whether the duration of negotiations was appropriate and whether either Party unduly prolonged negotiations.

5. The proposal also recommends replacing the phrase "agree to submit the dispute to arbitration" in Draft Article 15 with the phrase **"agree to a different mode of dispute settlement"**. This language parallels Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD").[15] CERD's *travaux préparatoires* demonstrate that negotiating States also considered the following draft language:

> 1. If there should arise between two or more Parties a dispute relating to the interpretation or application of this Convention, the said Parties shall consult together *with a view to the settlement of the dispute by*

[13] See Sean D Murphy (n 11) para 251. See also Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105, art 12(1) ("Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiations, shall, at the request of one of them, be submitted to arbitration."); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNST 167, art 13(1); International Convention Against the Taking of Hostages (17 December 1979, entered into force 3 June 1983) 1316 UNTS 205, art 16(1); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 12) art 30(1); International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, art 42(1). Some bilateral and multilateral investment agreements do impose a time-limited period for negotiations.

[14] See, e.g., *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* (Merits) [2018] ICJ Rep 507, para 86 ("While States are free to resort to negotiations or put an end to them, they may agree to be bound by an obligation to negotiate. In that case, States are required under international law to enter into negotiations and to pursue them in good faith."); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)* (Provisional Measures) [2018] ICJ Rep 406, para 36 (negotiations "require a genuine attempt by one of the parties to engage in discussions with the other party, with a view to resolving the dispute. Where negotiations are attempted or have commenced, the precondition of negotiation is only met when the attempt to negotiate has been unsuccessful or where negotiations have failed, or become futile or deadlocked."); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70, para 157 (for a negotiation precondition to be fulfilled, there must be "at the very least […] a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute").

[15] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, art 22 ("Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.").

negotiation, investigation, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their choice.

2. Any such dispute which cannot be settled in the manner prescribed shall be referred to the International Court of Justice for decision.[16]

While this was later condensed to "another mode of settlement", the drafting history indicates that States supported a broad range of options beyond arbitration.[17] The Draft Articles would benefit from the same broad language, which would permit alternative means of peaceful dispute settlement, including conciliation and mediation, in addition to arbitration.

6. The proposal further suggests including the following sentence as a third paragraph of Article 15: **"Any State Party may invoke the responsibility of another State Party under this Convention in accordance with the procedures set out in this article."** In recent years, there have been robust developments in the ICJ's jurisprudence recognizing the standing of any State to a multilateral convention to invoke the responsibility of another State for violations of *erga omnes partes* obligations.[18] While the Convention will undoubtedly impose such *erga omnes partes* obligations, it is nevertheless advisable to include a dispute settlement provision **that immediately clarifies this**. Such an express recognition may also avoid any debate that could

[16] ECOSOC, Draft International Convention on the Elimination of All Forms of Racial Discrimination, Final Clauses, Working Paper Prepared by the Secretary-General (17 February 1964) UN Doc. E/CN.4/L.679, draft art 8-D (emphasis added).

[17] It was observed by Belgium, for example, that the clause "provided for various modes of settlement offering ample opportunity for agreement before the Court was resorted to". UNGA Third Committee (1367th meeting) (7 December 1965) UN Doc. A/C.3/SR.1367, para 40.

[18] See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) [2012] ICJ Rep 422, para 69 ("The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party."); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Preliminary Objections) [2022] ICJ Rep 477, para 107 (recalling that "the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case"); *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and Netherlands v Syrian Arab Republic)* (Provisional Measures) [2023] ICJ Rep 587, para 50 ("any State party to the Convention against Torture may invoke the responsibility of another State party with a view to having the Court determine whether the State failed to comply with its obligations *erga omnes partes*, and to bring that failure to an end"); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Provisional Measures) [2024] ICJ Rep 3, para 33 ("The common interest in compliance with the relevant obligations under the Genocide Convention entails that any State party, without distinction, is entitled to invoke the responsibility of another State party for an alleged breach of its *obligations erga omnes partes*"); *Obligations of States in respect of Climate Change* (Advisory Opinion) (23 July 2025), paras 440-441 (finding that "States' obligations pertaining to the protection of the climate system and other parts of the environment from anthropogenic [greenhouse gas] emissions, in particular the obligation to prevent significant transboundary harm under customary international law, are obligations *erga omnes*" and that "the obligations of States under [the United Nations Framework Convention on Climate Change and the Paris Agreement] are obligations *erga omnes partes*" and that, consequently, "all States parties [...] may invoke the responsibility of other States for failing to fulfil them").

prolong litigation regarding one State Party's right to bring a claim against another State Party under the Convention.

7. Lastly, the proposal recommends **the deletion of current paragraphs three and four** of Draft Article 15, which provide an express opt-out to the dispute settlement provision in paragraph two. These paragraphs are superfluous as, under the 1969 Vienna Convention on the Law of Treaties, States inherently retain the right to formulate a reservation when signing, ratifying, accepting, approving, or acceding to a treaty, unless the treaty provides otherwise.[19] If the Convention does not prohibit reservations, the express opt-out clause in the dispute settlement provision would be redundant.[20] More importantly, given the *jus cogens* nature of the prohibition of crimes against humanity,[21] as with genocide, not including an express opt-out from dispute settlement better promotes the object and purpose of a Convention on Prevention and Punishment of Crimes Against Humanity.[22]

[19] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 19.

[20] Provided the reservation is not incompatible with the object and purpose of the treaty. Ibid art 19(c); UNGA, 'Report of the International Law Commission (63rd session), Guide to Practice on Reservations to Treaties' (2011) UN Doc A/66/10 19, para 4.2.6 ("A reservation is to be interpreted in good faith, taking into account the intention of its author as reflected primarily in the text of the reservation, as well as the object and purpose of the treaty and the circumstances in which the reservation was formulated.").

[21] ILC Draft Articles (n 6), Preamble, para 4.

[22] There is growing support for the position that dispute settlement is vitally important to the object and purpose of a convention of this nature. See *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda*) (Jurisdiction and Admissibility) [2006] ICJ Rep 6, Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, paras 19-21; *Sudan v United Arab Emirates* Verbatim Record CR 2025/1 (n 5) para 35. Indeed, Brazil, Croatia, Mexico, and the Netherlands expressly characterized reservations to the dispute settlement provision of the Genocide Convention as incompatible with its object and purpose. See Multilateral Treaties Deposited with the Secretary-General, Status as at 1 April 2009, Volume I, Part I, Chapters I to VII (2009) UN Doc ST/LEG/SER.E/26, 150-151, 154.

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NON-DISCRIMINATION PROVISION

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NON-DISCRIMINATION PROVISION

Proposed Article XX of the Draft Articles on Prevention and Punishment of Crimes Against Humanity [ILC Draft]

Article XX Application and Interpretation

The present Convention shall be interpreted and applied in a manner consistent with international law, including international human rights law, international humanitarian law, and international criminal law, without any adverse distinction founded on grounds such as race, colour, language, gender, age, disability, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Explanatory Notes

1. This proposed article is intended to affirm that the Convention on the Prevention and Punishment of Crimes against Humanity will be interpreted in accordance with States' pre-existing obligations. These include obligations contained in customary international law and international human rights and humanitarian law treaties.

2. For the purposes of this article, "adverse distinction", an international law norm,[1] is to be interpreted consistent with the definition of "discrimination" in the International Covenant on Civil and Political Rights: "any distinction, exclusion, restriction or preference which is based on any ground such as [those enumerated],[2] and which has

[1] The Convention's intended application covers attacks directed against a civilian population, which can arise in times of peace as well as periods of armed conflict. The international law norm to prevent and protect from adverse distinction, regarding civilians in armed conflict, is reflected in provisions such as Common Article 3 of the Geneva Conventions, Articles 13 and 27 of the Fourth Geneva Convention, and Article 4(1) of Additional Protocol II, as well as in Rule 88 of the International Committee of the Red Cross's synthesis of Customary International Humanitarian Law. See nn 9-11 below.

[2] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 26. For the complete list of enumerated grounds in the ICCPR, see n 8 below.

the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms".[3]

3. The proposed provision draws from Article 21(3) of the Rome Statute.[4] With respect to the enumerated grounds, it is identical to Article 21(3) with two exceptions. First, it follows the ILC's Draft Articles in omitting reference to a definition of the term "gender".[5] Second, it adds "disability" as an enumerated ground, in line with the Convention on the Rights of Persons with Disabilities, which was adopted subsequent to the Rome Statute and has since been widely ratified.[6]

4. The obligation to interpret and apply terms "consistent with" international legal obligations, particularly human rights and humanitarian law, can also be found in *The 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*, adopted without a vote by the General Assembly.[7]

5. Non-discrimination clauses are commonplace in human rights treaties applicable both in peacetime and in war.[8] During armed conflict, Common Article 3 of the Geneva

[3] Human Rights Committee, 'General Comment No. 18: Non-discrimination' (10 November 1989) <https://www.legal-tools.org/doc/9883e4> paras 6-7, referring to Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, art 1; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, art 1.

[4] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 21(3) ("The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.").

[5] UNGA, 'Report of the International Law Commission (71st Session), Text of the Draft Articles on Prevention and Punishment of Crimes Against Humanity and Commentaries Thereto' (20 August 2019) UN Doc A/74/10, art 2, commentary paras 41-42 (explaining that the definition of "gender" found in Article 7(3) of the Rome Statute "was not retained" by the ILC). See also ABILA Study Group Proposal on Gender Competency, Inclusivity, and Non-Discrimination (1 December 2025) <https://www.ila-americanbranch.org/abila-study-group-on-crimes-against-humanity/>.

[6] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) (193 Parties), arts 3(b), 4(1), 5 (providing, *inter alia*, that States Parties must prohibit discrimination on the basis of disability).

[7] UNGA Res 60/147, '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' (16 December 2005) UN Doc A/RES/60/147, paras 1-2, 25.

[8] See e.g. Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (196 Parties), art 2 ("States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."); ICCPR (n 2) (175 Parties), art 26 ("[T]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); International

Conventions expressly prohibits adverse distinction among persons taking no active part in hostilities,[9] which is spelled out further in the Third and Fourth Geneva Conventions as well as Additional Protocols I and II.[10] The prohibition of such discrimination forms part of customary international law.[11] The proposed provision would clarify the continuing State obligation to apply and interpret the Convention in a non-discriminatory way, consistent with existing and developing obligations.

Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (173 Parties), art 2(2) ("The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status."). See also CRPD (n 6) (193 Parties), arts 3(b), 4(1), 5 (States Parties shall, *inter alia*, prohibit discrimination on the basis of disability).

[9] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) art 3(1) ("Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria."); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) art 3(1) (same); Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) (Third Geneva Convention) art 3(1) (same); Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) (Fourth Geneva Convention) art 3(1) (same).

[10] Third Geneva Convention (n 9) art 16 ("Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria."); Fourth Geneva Convention (n 9) arts 13 ("The provisions of Part II [General Protection of Populations Against Certain Consequences of War] cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war."), 27 ("Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion."); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) art 75(1) ("In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol [...] shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, birth or other status, or on any other similar criteria"); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) art 4(1) ("All persons who do not take a direct part or who have ceased to take part in hostilities [...] shall in all circumstances be treated humanely, without any adverse distinction").

[11] International Committee of the Red Cross, Jean-Marie Henckaerts, Louise Doswald-Beck 'Customary International Humanitarian Law, Volume I: Rules' (Cambridge University Press, 2005) Rule 88 <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule88> ("Adverse discrimination in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria is prohibited.").

6. The proposed addition would also facilitate the incorporation by national courts of developments in international law, including the ongoing crystallization of customary international law, the continuous work of State negotiation and adoption of new treaties, treaty bodies' comments and observations, and the jurisprudence of international courts.

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MONITORING MECHANISM

Proposed Article(s) XX of the Draft Articles on Prevention and Punishment of Crimes Against Humanity [ILC Draft]

Article(s) XX

There shall be established XX (hereinafter referred to as XX) which shall carry out the following functions to give effect to States Parties' obligations under the Convention to:

(a) provide consistent interpretation and guidance on the terms of the Convention and their application;
(b) coordinate capacity-building and technical assistance;
(c) facilitate international cooperation and mutual assistance; and
(d) monitor and promote treaty compliance across States Parties to the Convention.

[…]

Explanatory Notes

INTRODUCTION

1. This text proposes new Article(s) that would establish a mechanism for monitoring the Convention on the Prevention and Punishment of Crimes against Humanity. A treaty-based monitoring mechanism is necessary for implementing the Convention's object and purpose. The proposed mechanism would focus on States' responsibilities to do everything within their power to prevent and punish these international crimes. Such crimes deeply shock the conscience of humanity, are prohibited as peremptory norms, and constitute a threat to international peace and security.[1]

[1] UNGA, 'Report of the International Law Commission (71st Session), Text of the Draft Articles on Prevention and Punishment of Crimes Against Humanity and Commentaries Thereto' (20 August 2019) UN Doc A/74/10 [hereinafter "ILC Draft Articles"], preamble. See also Sierra Leone's comments on the ILC Draft Articles, stating that "such a [monitoring] body should reflect the lessons learned and best practices developed by such bodies to lessen reporting burdens on states. It should, of course, be comprised of independent experts serving in their personal capacities. That might better assist in the proper monitoring and implementation of a future crimes against humanity convention." International Law Commission, 'Crimes against Humanity: Comments and Observations Received from Governments, International Organizations and Others' (21 January 2019) UN Doc A/CN.4/726, 19.

2. This proposal envisages three separate mechanisms: (1) a Conference of States Parties; (2) a Committee; and (3) a Secretariat. It also envisages the establishment of a Voluntary Trust Fund to assist States with capacity-building and implementation of the Convention.

3. A treaty-based monitoring mechanism is required to facilitate States Parties' implementation of the obligations enumerated in the Convention, nationally and internationally. Such a mechanism is needed to: (1) provide consistent interpretation and guidance on the terms of the Convention and its application; (2) coordinate capacity-building and technical assistance; (3) facilitate international cooperation and mutual assistance; and (4) monitor and promote treaty compliance across States Parties to the Convention.

4. While a number of existing mechanisms are able to monitor certain situations of crimes against humanity—including organs, subsidiary bodies, or offices of the UN system, treaty bodies established by human rights instruments, and international and regional tribunals[2]—these are individually and collectively insufficient as monitoring mechanisms for the Convention for a number of reasons.

5. First, the mandate or scope of jurisdiction for these bodies is either too broad or too narrow substantively and geographically for comprehensive monitoring of the full scope of obligations under the Convention.[3] Second, a number of these bodies do not have the expertise or the authority to address State compliance with *legal* obligations to prevent and to punish crimes against humanity, particularly with respect to prevention. Such bodies focus more on reporting or facilitating diplomatic negotiations to address a particular *factual* situation. Finally, international and regional criminal courts and tribunals that hear cases involving crimes against humanity are focused on individual criminal responsibility, not State responsibility. Thus, existing mechanisms are only able to serve as supplementary means for monitoring certain aspects of the Convention.

6. Likewise, recourse to the International Court of Justice is insufficient to serve as the sole implementation and monitoring mechanism for the Convention.[4] Under Draft Article 15, the International Court of Justice could provide authoritative interpretation and guidance on the terms of the treaty and its application while also promoting treaty compliance by States—but only where there is a "dispute between two or more States".[5] The requirement of a dispute to trigger the Court's jurisdiction

[2] Sean D Murphy, Special Rapporteur 'Third Report on Crimes against Humanity' (23 January 2017) UN Doc A/CN.4/704, para 214.
[3] Ibid paras 214-221.
[4] While proceedings at the International Court of Justice are not sufficient as the sole means for monitoring the treaty, it is a critical complementary mechanism for State-to-State dispute resolution and treaty interpretation. For observations and recommendations on the Draft Articles' Dispute Resolution Clause, see the ABILA Study Group Proposal on Settlement of Disputes (16 October 2025) <https://www.ila-americanbranch.org/wp-content/uploads/2025/10/ABILA-CAH-Settlement-of-Disputes-Final-with-cover.pdf>.
[5] ILC Draft Articles, art 15(2).

forecloses many instances when treaty compliance and implementation are of critical concern but: (1) may not fit the characterization of a dispute between States Parties; or (2) may qualify as such a dispute but may not animate States to take the affirmative step of bringing a case before the Court. Moreover, the Court's jurisdiction does not include—or is not well-suited for—coordinating capacity-building and technical assistance or facilitating international cooperation among States, international organizations, and other relevant actors. Further, the ILC Draft Articles include an opt-out clause whereby the Court would be foreclosed from any monitoring role.[6] Finally, the International Court of Justice is a court of general jurisdiction with limited capacity for hearing cases. Consequently, it cannot be relied upon to respond efficiently or comprehensively in all instances, for effective monitoring of States Parties' implementation of the Convention.

7. As such, this text proposes establishing a dedicated mechanism to engage in most, if not all, of the important functions listed below for comprehensive monitoring of States' implementation of their obligations under the Convention.

PROPOSED FUNCTIONS, MECHANISMS, AND PROCEDURES[7]

Provide Consistent Interpretation and Guidance on the Terms of the Convention and Their Application

8. As seen from a number of existing human rights conventions and humanitarian law treaties, a treaty-based monitoring mechanism comprised of international legal experts can promote consistent understanding and application of treaty obligations for States.[8] It could foster interpretive coherence not only with respect to the text of the Convention, but also in light of evolving international law and practice. Without such guidance, there is a risk of fragmented implementation of treaty obligations by States and their national courts, undermining the realization of the Convention's object and purpose. Such interpretive guidance fosters norm development, clarifies ambiguities, and prevents contradictory approaches to State compliance and cooperation under the Convention. A treaty-based monitoring mechanism will complement the important jurisprudence of the International Court of Justice on this matter.

9. The United Nations Office of the High Commissioner for Human Rights and the United Nations Office on Genocide Prevention and the Responsibility to Protect support the idea that treaty-based monitoring mechanisms enhance prevention by

[6] Ibid art 15(3). This Study Group recommends the removal of such an opt-out clause as superfluous and in order to better promote the Convention's object and purpose. ABILA Study Group Proposal on Settlement of Disputes (n 4) para 7.

[7] For definitions and descriptions of the mechanisms and procedures listed below, see Memorandum by the Secretariat, 'Crimes against Humanity: Information on Existing Treaty-Based Monitoring Mechanisms Which May Be of Relevance to the Future Work of the International Law Commission' (18 March 2016) UN Doc A/CN.4/698.

[8] For example, the Human Rights Committee, Committee against Torture, and Committee on Enforced Disappearances.

institutionalizing reporting and creating space for policy exchange on risk reduction strategies.[9]

- ***Proposed Mechanisms and Procedures***

  - **Committee:**
    - General Comments on Convention Articles;[10]
    - Concluding Observations and Recommendations on State Reports, Communications, and Applications, including Requests for Interim Measures;[11]
    - Concluding Observations and Recommendations on Individual Communications and Applications, including Requests for Interim Measures;[12]

[9] See International Law Commission, 'Crimes against Humanity: Comments and Observations Received from Governments, International Organizations and Others' (n 1) 131-133.

[10] See e.g. International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD) art 9(2); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 40(4); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 21(1); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 45(d); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) art 36(1).

[11] See e.g. ICCPR (n 10) arts 40(1), 40(4); International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243, arts 7, 9; CEDAW (n 10) arts 18(1), 21(1); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (Torture Convention) arts 19(1), 19(3); CRC (n 10) arts 44(1), 44(4); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (Migrant Workers Convention) arts 73(1), 74(1); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211 (Anti-Personnel Mine Ban Convention) arts 7, 11-12; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 172 (1954 Hague Convention Second Protocol) art 27(1)(d); United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 (UNTOC) arts 32(3)(d)-(e), 32(5); CRPD (n 10) arts 35(1)-(2), 36(1); International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (Enforced Disappearance Convention) arts 29(1), 29(3); Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010) 2688 UNTS 39, art 11; UNGA, United Nations Convention against Cybercrime (adopted 24 December 2024), UN Doc A/Res/79/243 annex (Cybercrime Convention) arts 57(5)(e)-(f), 57(6).

[12] See e.g. ICERD (n 10) art 14; Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 arts 1-5; Torture Convention (n 11) art 22; Migrant Workers Convention (n 11) art 77; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83 (CEDAW Optional Protocol) arts 1-7; Enforced Disappearance Convention (n 11) art 31.

- Reports and Statements based upon Fact-Finding Investigations,[13] Inquiries, Visits, and Requests for Inputs from civil society, victims, and other stakeholders.

Coordinate Capacity-Building and Technical Assistance

10. A treaty-based mechanism could provide a platform for regular meetings of States Parties to share best practices on legal, institutional, and policy frameworks for implementing the Convention. Such meetings could provide regular guidance, technical support, and peer learning to build and enhance States' institutional and administrative capacity for implementing complex obligations related to the prevention and punishment of crimes against humanity. Further, it could facilitate technical assistance and trainings to help States understand how to align national laws with Convention standards, improve investigative and prosecutorial practices, and engage in effective international cooperation.

- ***Proposed Mechanisms and Procedures***

  - **Conference of States Parties; Secretariat**[14] focused on capacity-building and technical assistance.

Facilitate International Cooperation and Mutual Assistance

11. A dedicated treaty-based mechanism could provide a centralized institutional anchor for international cooperation by States Parties with other States, UN bodies, regional organizations, and other international organizations. It could facilitate the sharing of information by States Parties while providing regular reports to the UN Security Council and General Assembly; promote mutual assistance while avoiding duplication of efforts; and enhance coherence across mechanisms involved in activities such as prevention, documentation, accountability, and technical assistance.[15]

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[13] See e.g. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (adopted 10 December 1976, entered into force 5 October 1978) 1108 UNTS 151 (ENMOD Convention) art V(2), annex; Torture Convention (n 11) art 20; 1954 Hague Convention Second Protocol (n 11) arts 24, 27; CEDAW Optional Protocol (n 12) art 8; Enforced Disappearance Convention (n 11) art 33.

[14] See e.g. Anti-Personnel Mine Ban Convention (n 11) arts 11-12; UNTOC (n 11) art 32(3)(a)-(b); Convention on Cluster Munitions (n 11) arts 11-12; Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) 3031 UNTS 269, art 17; Treaty on the Prohibition of Nuclear Weapons (adopted 7 July 2017, entered into force 22 January 2021) (TPNW) <https://treaties.un.org/doc/Treaties/2017/07/20170707%2003-42%20PM/Ch_XXVI_9.pdf> arts 7-8; Cybercrime Convention (n 11) arts 54(1), 57. See also Washington University School of Law, Whitney R Harris World Law Institute, Crimes Against Humanity Initiative, 'Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity' (August 2010) <https://bpb-us-e2.wpmucdn.com/sites.wustl.edu/dist/b/2004/files/2019/02/EnglishTreatyFinal.pdf> art 19.

[15] See Sierra Leone's comments to the ILC Draft Articles (n 1) 59 (referring to the 2005 World Summit Outcome, adopted by the General Assembly in Resolution 60/1, recognizing that all States have the responsibility to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against

- ***Proposed Mechanisms and Procedures***

  - **Conference of States Parties; Secretariat; Voluntary Trust Fund that would:**

    - ***Create a means for States Parties to exchange technical, financial, and legal support,***[16] thereby encouraging collective responsibility for prevention and punishment obligations while providing support for capacity-building and reparations for victims.

    - ***Facilitate States Parties' coordination with UN bodies, regional mechanisms, international organizations, and civil*** **society**[17] for supporting the implementation of treaty obligations by States, especially in resource-constrained settings. Engagement with entities and actors across the atrocity prevention and accountability ecosystem will increase responsiveness, broaden evidence bases, and strengthen compliance pressure.

    - ***Take urgent or extraordinary action in response to serious risks of, or ongoing, violations*** by convening extraordinary sessions or referring the situation to the competent UN or regional organs[18] in the face of situations of grave concern to the international community. Such a platform provides crucial flexibility for coordinating timely collective action in crisis contexts, which can save lives.

<u>Monitor and Promote Treaty Compliance of States Parties to the Convention</u>

- ***Proposed Mechanisms and Procedures***

  - **Conference of States Parties; Committee; Secretariat**

12. A treaty-based mechanism could provide for regular reporting and review procedures for promoting and monitoring States Parties' implementation of their treaty obligations, encouraging States to adopt all necessary legislative, judicial, administrative, and other measures for fulfilling their duties to prevent and punish under the Convention.

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humanity, and that "the international community should assist States in exercising that responsibility and in building their protection capacities"). See also UNGA Res 60/1 (16 September 2005) UN Doc A/Res/60/1, paras 138-139.

[16] See e.g. Anti-Personnel Mine Ban Convention (n 11) art 6; 1954 Hague Convention Second Protocol (n 11) art 29; UNTOC (n 11) art 32(3)(a)-(b); Convention on Cluster Munitions (n 11) art 6; Arms Trade Treaty (n 14) art 16(3); TPNW (n 14) art 7; Cybercrime Convention (n 11) arts 54(5)-(9), 56.

[17] See e.g. CEDAW (n 10) art 22; CRC (n 10) art 45; Migrant Workers Convention (n 11) art 74(2)-(6); UNTOC (n 11) art 32(3)(c); CRPD (n 10) art 38; Cybercrime Convention (n 11) art 55.

[18] See e.g. Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art VIII; ENMOD Convention (n 13) art V(3); Enforced Disappearance Convention (n 11) arts 30, 34; Arms Trade Treaty (n 14) art 17(5); TPNW (n 14) art 8(3).

13. Regular reporting and review processes for States Parties by peers and independent experts—common in treaty-based monitoring mechanisms—identify risks and gaps as well as patterns of concern before atrocities occur. They also create reputational incentives for compliance and offer a platform for constructive dialogue. Further, they signal ongoing political attention to the obligations States assume under the convention, ensuring that it remains a living instrument.

14. A treaty-based monitoring mechanism can also serve as an important conduit for centering the concerns and requests of victims, survivors, and civil society, ensuring that States Parties are responsive to those most impacted by crimes against humanity.

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CIVIL SOCIETY PARTICIPATION

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CIVIL SOCIETY PARTICIPATION

Proposed Language for Adoption by the Preparatory Committee for the United Nations Conference of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity

Invites **other interested and relevant parties and stakeholders, including individuals from civil society and representatives from relevant non-governmental organizations, academic institutions, and victims and survivors groups, taking into account the principles of transparency, accessibility, diversity, equitable geographical representation, and gender parity, to submit requests to fully and effectively participate in the Preparatory Committee and Conference as observers pursuant to paragraph 17 of resolution 79/122;**

Requests **the Chair of the Preparatory Committee to compile a list of those requests and submit the list to States and members of specialized agencies for their consideration on a non-objection basis and to bring the list to the attention of the Preparatory Committee for a final decision on participation;**

Determines **that States intending to object to such participation shall provide a detailed rationale for any objection in writing, separately for each organization, and that such rationale, if requested by one or more States or members of specialized agencies, shall be notified to the Secretariat and the requester;**

Clarifies **that approved civil society representatives may make oral interventions at formal sessions of the Preparatory Committee, Working Group, and Conference, subject to the availability of time and at the discretion of the Chair, and submit written statements to be transmitted to all delegates and observers by the Preparatory Committee Bureau and published on the web page of the Committee; and**

Encourages **the Committee Bureau and any participants that host technical briefings, side events, and intersessional consultations, including consistent with paragraph 12 of resolution 79/122, to facilitate meaningful and effective participation and inputs from a diverse range of stakeholders, with due recognition of the geographical diversity, accessibility needs, and resource limitations of civil society stakeholders.**

Explanatory Notes

In light of UN General Assembly Resolution 79/122, which determined that the Preparatory Committee shall discuss the "organization and methods of work of the Conference" and decide, at its first session, on the participation of stakeholders without non-governmental organization ("NGO") consultative status with the UN Economic and Social Council ("ECOSOC"),[1] the above proposal suggests procedural text on the potential modalities of such civil society participation.

1. Recognizing the invaluable role of civil society in the prevention and punishment of crimes against humanity and guided by the principles of transparency, accessibility, and inclusion, this proposal enumerates practical modalities to facilitate the full, meaningful, equal, and safe participation of diverse civil society actors in the elaboration of the Convention, consistent with international law, UN practice and guidance, and other treatymaking and multilateral processes.

2. The proposal understands civil society broadly to include victim/survivor associations, non-governmental organizations working on justice and accountability, human rights, humanitarian, and other relevant issues, and academic institutions, as well as individuals and groups from affected communities—as technical experts with essential knowledge and/or as individuals with directly relevant lived experiences and ties to key constituencies.

3. The proposal is consistent with the UN Charter, which provides the normative foundation for the participation of civil society in UN deliberative processes—recognizing in the preambular opening that the United Nations belongs to "We the peoples" and specifically anticipating, in Article 71, consultation with NGOs with relevant competencies.[2] The requisite participation of civil society and indeed, the fundamental right to take part in public affairs,[3] have since been further elaborated and entrenched under international law, including with respect to international deliberations.[4]

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[1] UNGA Res 79/122 (4 December 2024) UN Doc A/RES/79/122, para 8 (deciding that the Preparatory Committee "shall also decide, at its first session, on the participation of stakeholders other than those referred to in paragraph 16, and decides that, upon completion of its mandate, the Preparatory Committee shall report directly to the Conference"); see also ibid para 16 ("*Decides* that attendance at the Conference and the Preparatory Committee as observers will also be opened to relevant non-governmental organizations in consultative status with the Economic and Social Council in accordance with the provisions of Council resolution 1996/31 of 25 July 1996").

[2] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) preamble para 1, art 71.

[3] Universal Declaration of Human Rights (adopted 10 December 1948) UN Doc A/RES/217(III), art 21; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 25. See also Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) art 24; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 23.

[4] See CCPR, 'General Comment No 25, The Right to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service' (ICCPR Article 25) (12 July 1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 5 (interpreting "public affairs" to "cover [...] all aspects of public administration, and the formulation

4. The proposal draws from the UN Guidance Note on the Protection and Promotion of Civic Space, which recalls the following steps for facilitating meaningful civil society participation in intergovernmental processes: "1. Fair rules on access to information and participation modalities. 2. Transparent and fair accreditation and registration processes. 3. Diversity of civil society, including underrepresented populations. 4. Safety of persons who engage. 5. Mechanisms through which civil society can contest restrictions."[5] The Guidance Note further recognizes the role of the UN Secretariat in supporting such participation.[6]

5. In order to strengthen the diversity of voices represented at the Preparatory Committee, Working Group, and Conference, the proposal provides for the inclusion of civil society representatives lacking ECOSOC accreditation. Although the authority to accredit NGOs with formal consultative status lies with ECOSOC, the General Assembly has long recognized the need to consult and coordinate with a diverse range of civil society stakeholders, including organizations without ECOSOC consultative status.[7] Past practice, including before the General Assembly, has permitted ad hoc invitations to NGOs lacking ECOSOC accreditation.[8] For instance, the Ad Hoc Committee that elaborated the UN Convention on Cybercrime was asked by the General Assembly to facilitate the participation of organizations without ECOSOC consultative status—ultimately totaling 214 approved stakeholders.[9] The

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and implementation of policy at *international*, national, regional and local levels") (emphasis added); see also OHCHR Report, 'Draft Guidelines for States on the Effective Implementation of the Right to Participate in Public Affairs' (20 July 2018) UN Doc A/HRC/39/28, para 100 ("Participation of civil society actors in meetings of international organizations, mechanisms and other forums, at all relevant stages of a decision-making process, should be allowed and proactively encouraged.").

[5] UN Guidance Note, 'Protection and Promotion of Civic Space' (September 2020) <https://www.ohchr.org/sites/default/files/Documents/Issues/CivicSpace/UN_Guidance_Note.pdf> 8.

[6] Ibid 7 ("According to the Charter of the United Nations, international law and the 2030 Agenda for Sustainable Development, the role of the United Nations Secretariat is to support Member States in making intergovernmental processes open to civil society participation and ensuring that diverse groups are included in them.").

[7] See, e.g., UN Charter (n 1) art 71; UN Secretariat, Repertory of Practice of United Nations Organs, UN Charter, art 71, Supp 1 (1954-1955), vol 2, para 8 (conveying the General Assembly's appeal to NGOs, without reference to whether they held ECOSOC consultative status, to cooperate in the implementation of its resolutions); UN Civil Society, 'Our Services: Ad Hoc Special Accreditation" <https://www.un.org/en/page/our-services#:~:text=Ad%2Dhoc%20Special%20Accreditation%20is,Proof%20of%20Legal%20Status> (explaining the ad-hoc special accreditation process for NGOs without consultative status).

[8] See, e.g., UNGA Res 56/168 (19 December 2001) UN Doc A/RES/56/168, para 3 (inviting disabled persons organizations, including those without ECOSOC status, to contribute to the elaboration of the Convention on the Rights of Persons with Disabilities); Stephen D Goose, Mary Wareham, Jody Williams, 'Banning Landmines and Beyond,' in Jody Williams, Stephen D Goose, Mary Wareham (eds), *Banning Landmines: Disarmament, Citizen Diplomacy, and Human Security* (Rowman & Littlefield Publishers, 2008) 1, 6-7 (describing the novel "government-civil society partnership" of the Ottawa Process and the subsequent Mine Ban Treaty Process).

[9] UNGA Res 75/282 (26 May 2021) UN Doc A/RES/75/282, para 9 (requesting "a list of representatives of other relevant non-governmental organizations [without ECOSOC consultative status], civil society organizations, academic institutions and the private sector" who could participate in the Committee that elaborated the UN Convention against Cybercrime). The list of all such accredited stakeholders is in the 'Report of the Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering

1998 Rome Statute Preparatory Commission also allowed NGOs observer access by ad hoc invitation and, during the Rome Conference itself, approximately 450 NGO individuals from 236 approved NGOs participated, with 800 NGOs comprising the informal coalition of NGOs and international law experts substantively engaged on the treaty.[10]

6. The proposal stipulates the inclusion of civil society stakeholders without ECOSOC accreditation through a non-objection procedure. This draws on decades of UN practice.[11] In the spirit of inclusivity, Member States are encouraged to utilize the non-objection mechanism judiciously.[12] The proposal further requires objecting States to provide a detailed rationale for their objection,[13] to be shared upon request to the Secretariat and requester, in an effort to facilitate greater transparency, fairness, and due process.[14] The approval for participation should last for the entire duration of the Preparatory Committee, Working Group, and Conference.

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the Use of Information and Communications Technologies for Criminal Purposes' on its session on organizational matters held on 24 February 2022 (2 March 2022) UN Doc A/AC.291/6, Annex I.

[10] UNGA Res 53/105 (8 December 1998) UN Doc A/RES/53/105, paras 6-7; William R Pace, Mark Thieroff, 'Participation of Non-Governmental Organizations', in Roy S Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Martinus Nijhoff Publishers, 1999) 391, 392.

[11] See, e.g., UNGA, 'United Nations Conference on the Arms Trade Treaty: Provisional Rules of Procedure of the Conference' (7 March 2012) UN Doc A /CONF.217/L.1, Rule 63(b) (stipulating a non-objection procedure for the inclusion of "[o]ther interested non-governmental organizations relevant and competent to the scope and purpose of the Conference"); UNGA, 'United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects: Rules of Procedure of the Conference' (4 May 2016) UN Doc A/CONF.192/16, Rule 63(b) (same); UNGA Res 75/282 (n 8) para 9 (providing for a non-objection basis for the Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes to decide on the participation of "representatives of other relevant non-governmental organizations, civil society organizations, academic institutions and the private sector, including those with expertise in the field of cybercrime, who may participate in the Ad Hoc Committee"); UNGA Res 55/242 (27 February 2001) UN Doc A/RES/55/242, Annex, paras 8, 30. See also UNGA Res 55/13 (3 November 2020) UN Doc A/RES/55/13, para 13; UNGA Res 76/307 (8 September 2022) UN Doc A/RES/76/307, para 11; UNGA Res 77/275 (24 February 2023) UN Doc A/RES/77/275, para 10.

[12] See, e.g., Open-Ended Working Group on Security of and in the Use of Information and Communications Technologies 2021-2025 'Draft Final Report' (11 July 2025) UN Doc A/AC.292/2025/CRP.1, Annex I, para 15(e).

[13] See, e.g., 'Practical Modalities for Stakeholders' Participation and Accreditation: Future UN Mechanism on Cybersecurity' (June 2025) <https://docs-library.unoda.org/Open-Ended_Working_Group_on_Information_and_Communication_Technologies_-_(2021)/Practical_Modalities_to_Enable_Meaningful_Stakeholder_Participation_in_the_Future_UN_Mechanism_on_Cybersecurity_-_cross-regional_paper_-_June_2025.pdf> Annex, para 20 (with 40 States and the EU proposing that "[t]he notice of intention to object shall be made in writing and include, separately for each organization, a detailed rationale for such objection(s)").

[14] See, e.g., International Service for Human Rights (ISHR), 'Accreditation procedure threatens to undercut civil society participation at UN meeting' (24 April 2013) <https://ishr.ch/latest-updates/accreditation-procedure-threatens-undercut-civil-society-participation-un-meeting> (arguing that the UN's emerging practice of a non-objection procedure for NGO participation is vulnerable to politicization and the exclusion of legitimate NGO stakeholders, and linking to a joint letter by 23 leading human rights organizations expressing concern about this possibility); OHCHR, 'Attacks on UN Civil Society Allies Raise Alarm' (22 November 2018) <https://www.ohchr.org/en/stories/2018/11/attacks-un-civil-society-allies-

7. Due consideration should be given to equitable geographical representation, gender equity and parity,[15] and the inclusion of underrepresented groups and individuals[16]—including children,[17] Indigenous Peoples,[18] and persons with disabilities[19]—in an ethical, safe, and inclusive manner. The practical modalities for implementing these principles could draw from the UN's internal procedures and guidance documents, including the UN Geographical Diversity Strategy and UN System-wide Strategy on Gender Parity. The proposal's references to "accessibility" and "accessibility needs" recognize that, in practice, reasonable accommodations should be made to facilitate full, meaningful, and effective participation and squarely tackle any physical, communication, institutional, and attitudinal barriers. This may require proactive and targeted outreach, augmented communication formats or channels, establishment of dedicated focal points or mechanisms, and allocation of necessary resources or other forms of support for those least represented.[20]

8. The proposal builds on the scope of observer participation stipulated in paragraphs 16 and 17 of General Assembly Resolution 79/122, including participation in both the Preparatory Committee and Conference through attendance at formal meetings, access to official documents, and the opportunity to

raise-alarm> (with the ISHR expressing concern that "NGOs are denied accreditation without any hearing; all it takes is an objection of a member state without, in most cases, any substantiation").

[15] For further guidance on ensuring gender competency, parity, and equity in the preparatory and negotiation process, please see the ABILA Study Group Proposal on Gender Competency, Inclusivity, and Non-Discrimination.

[16] See UN Guidance Note on the 'Protection and Promotion of Civic Space' (n 4) 5 (recognizing that facilitating diverse participation "may require special efforts to reach out to people and groups whose voices may otherwise not be heard, especially members of ethnic and religious minorities, indigenous peoples, land rights and environmental defenders, young people, children, migrants, refugees, asylum-seekers and stateless persons, persons with disabilities, older persons, women, and lesbian, gay, bisexual, transgender and intersex persons").

[17] See, e.g., HRC Res 56/5 (10 July 2024) UN Doc A/HRC/RES/56/5, para 5 ("*Requests* the working group to ensure the meaningful participation of children, in an ethical, safe and inclusive manner, and in particular to give children the opportunity to express their views on the topic and substance of the proposed optional protocol, to facilitate their expression, including through child-friendly information, to listen to children's views and to act upon them, as appropriate").

[18] For example, emerging practice at the UN has facilitated the participation of Indigenous Peoples without requiring organizational affiliation. See, e.g., OHCHR, 'Participation of Indigenous Peoples at the UN is crucial for advancing their rights' (24 September 2024) <https://www.ohchr.org/en/stories/2024/09/participation-indigenous-peoples-un-crucial-advancing-their-rights>.

[19] See, e.g., UNSC Res 2475 (20 June 2019) UN Doc S/RES/2475 (2019) para 6 ("*Urges* Member States to enable the meaningful participation and representation of persons with disabilities, including their representative organizations, in humanitarian action, conflict prevention, resolution, reconciliation, reconstruction and peacebuilding, and to consult with those with expertise working on disability mainstreaming"); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 29(a) (obliging States Parties to undertake to "ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others").

[20] UN Guidance Note on the 'Protection and Promotion of Civic Space' (n 4) 5-8; HRC, 'Procedures and Practices in Respect of Civil Society Engagement with International and Regional Organizations: Report of the United Nations High Commissioner for Human Rights' (18 April 2018) UN Doc A/HRC/38/18.

make materials available to delegates and speak at the meetings, "as appropriate".[21] The proposal envisions the equal participation of all approved civil society stakeholders—whether or not ECOSOC-accredited—and understands participation in the "Preparatory Committee" to encompass the Working Group. The proposal further seeks to clarify the precise modalities of such participation, particularly vis-à-vis formal oral and written interventions,[22] at the discretion of the Chair.[23] Recognizing the temporal and other limitations anticipated during the Preparatory Committee and Conference, civil society stakeholders are encouraged to work together to consolidate their inputs and deliver joint statements, as appropriate. Other conference committees have managed such limitations while preserving the participation of civil society to not only attend sessions, but also make oral statements (time permitting) and provide written submissions (with word limitations), which are then made publicly available.[24] Moreover, States are encouraged to increase efforts to engage civil society stakeholders including, for example, through co-sponsorship of side events and technical briefings.[25]

9. With regard to both the formal negotiations and intersessional consultations, the facilitation of civil society participation should account for common systemic barriers, such as visa denials, financial constraints, and lack of access to interpretation. States should consider potential support and intervention by the UN Department of Economic and Social Affairs, which provides support to the ECOSOC Committee on NGOs, and the UN Committee on Relations with the Host Country, *inter alia*, in facilitating the in-person participation of approved civil society stakeholders at the Preparatory Committee, Working Group, and Conference. States

[21] UNGA Res 79/122 (n 1) para 8.

[22] See, e.g., Committee on the Rights of Persons with Disabilities, 'Rules of Procedure' (19 April 2024) UN Doc CRPD/C/1/Rev.2, Rule 52 ("Non-governmental organizations may be invited by the Committee to make oral or written statements and provide information or documentation relevant to the Committee's activities under the Convention to meetings of the Committee.").

[23] See, e.g., Open-Ended Working Group on Security of and in the Use of Information and Communications Technologies 2021-2025 'Draft Final Report' (n 11) para 15(d).

[24] See, e.g., 'Report of the Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes' on its session on organizational matters held on 24 February 2022 (n 8) Annex II, para 3 ("The participation of multi-stakeholders will consist of the following: (a) Attending any open formal sessions of the Ad Hoc Committee; (b) Depending on the time available, making oral statements, at the end of discussions by Member States, on each substantive agenda item. Given the limited time available at the meetings, multi-stakeholders may consider selecting from among themselves spokespersons, in a balanced and transparent way, taking into account the equitable geographical representation, gender parity and diversity of the participating multi-stakeholders; (c) Submitting written materials. Such submissions should be limited to 2,000 words. The submissions will be posted, in their original language, on the website of the Ad Hoc Committee."). See also 'Practical Modalities for Stakeholders' Participation and Accreditation Future UN Mechanism on Cybersecurity' (n 12) Annex, para 10 (with 40 States and the EU proposing "at least one hour per day of meetings for oral contributions by non-governmental organizations [...] provided at rotating timeframes to accommodate various geographical regions"); HRC, 'NGO Participation in the Human Rights Council' <https://www.ohchr.org/en/hr-bodies/hrc/ngo-participation> (providing for online registration for oral interventions).

[25] UNGA Res 79/122 (n 1) para 12 (encouraging consultations on issues of substance prior to the Conference being convened).

are also encouraged to explore remote participation options and UN Webcast[26] of the plenary sessions, with due consideration of any security risks and safety concerns of participating civil society stakeholders. For intersessional consultations, the proposed text on the participation of civil society stakeholders calls for "due recognition of the geographical diversity, accessibility needs, and resource limitations of civil society stakeholders". This provision encourages the convening of in-person, hybrid, and remote multi-stakeholder consultations at the regional level, potentially in partnership with regional organizations and through joint multi-stakeholder funding.[27]

10. Lastly, the meaningful participation of civil society should extend beyond the elaboration of the Convention, to its eventual implementation and enforcement. Such inclusion is particularly important to ensure transparency in the process, responsiveness to on-the-ground experiences of the enumerated crimes, and effective implementation of the Convention by States.

[26] See, e.g., UN, 'Agreement on Marine Biological Diversity of Areas beyond Natural Jurisdiction', Webcast <https://www.un.org/bbnjagreement/en/media/webcast>.

[27] Financial support for civil society participation could include drawing from existing UN funding mechanisms and establishing a voluntary multilateral fund specific to the Convention and/or UN treatymaking processes more broadly. See, e.g., OHCHR 'UN Voluntary Fund for Indigenous Peoples' <https://www.ohchr.org/en/about-us/funding-budget/indigenous-peoples-fund> (supporting Indigenous Peoples to engage in UN meetings); UN Women's Peace & Humanitarian Fund, 'The WPHF Funding Window for WHRDs' <https://wphfund.org/whrds> (supporting women human rights defenders with advocacy support through funding and direct logistical assistance).

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ABILA STUDY GROUP
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CHILDREN

Proposed Additions to the Articles 2 and 6 of the Draft Articles on the Prevention and Punishment of Crimes against Humanity [ILC Draft]

Article 2 Definition of crimes against humanity

1. For the purpose of the present draft articles, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

[…]

(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, **age,** or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph; […]

Article 6 Criminalization under national law

[…]

7. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.

7bis. No person who was under the age of 18 at the time alleged conduct occurred shall be criminally punished for an offence enumerated in Article 2 of this Convention.

[…]

Explanatory Notes

1. With nearly one-third of the world's population under 18, children are at the center of nearly all of humanity's affairs. This is surely true – as the UN Secretary-General's annual Report on Children and Armed Conflict establishes – with regard to the violent situations that produce crimes against humanity.[1] Children are killed and maimed, deprived of homes, health care, sustenance, and schooling. They are separated, often forcibly and sometimes permanently, from their loved ones. Children of all ages and genders are subjected to sexual and gender-based violence, and sometimes children are born as a result. Some children are recruited into armed service, and some are slave traded or enslaved. In short, all crimes within the jurisdiction of international criminal tribunals affect children. Such conduct also often constitutes what the UN calls the "Six Grave Violations".[2]

2. Crimes against humanity may have a disproportionate effect on persons whose age renders them more vulnerable than others. Younger persons are more likely both to bear war's traumas longer and to transmit them to future generations. Children's age-related vulnerabilities – alone and in intersection with gender, ethnicity, socio-economic status, and other identities – likewise differ from those of adults. So, too, age-related capacities: Children often are capable of deeper thoughts and greater action than adults presume.

3. These factors underscore the urgent need to ensure that children's issues are duly included in the forthcoming Convention on Crimes against Humanity. At a minimum, States should consider two concrete additions.

4. First, **Draft Article 2(1)(h)** should recognize that **"age"** is a ground on which persecution can be and frequently is perpetrated. Committing persecution against a child inevitably violates multiple provisions of the almost universally ratified Convention on the Rights of the Child, [3] thus constituting an "intentional and severe

[1] UN Secretary-General, "Children and Armed Conflict: Report of the Secretary-General" (3 June 2024) UN Doc A/78/842-S/2024/384, paras 4-10 (identifying more than 30,000 grave violations against children in 2023 – "a shocking 21 per cent increase" in one year – and proceeding to discuss "situations" in more than 20 countries).

[2] UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict, 'The Six Grave Violations' <https://childrenandarmedconflict.un.org/six-grave-violations> (listing these violations as: (i) killing and maiming of children; (ii) recruitment or use of children as soldiers; (iii) sexual violence against children; (iv) abduction of children; (v) attacks against schools or hospitals; and (vi) denial of humanitarian access for children).

[3] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) (196 parties). For regional counterparts, see African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) (ACRWC); European Convention

deprivation of fundamental rights contrary to international law by reason of the identity of the group".[4] But sole reliance on that catchall phrasing of "other grounds" in Draft Article 2(1)(h) runs the risk that instances of child-targeting will not be recognized as such. This is enhanced by the fact that children's experiences of persecution may differ from those of adults, further urging that "age" be included as an enumerated ground of persecution to facilitate recognition.

5. Examples of targeting that have constituted crimes against humanity include child-takings by the Nazis and child-killings by the Khmer Rouge (among other groups),[5] as well as child-conscription in far too many situations. Children may be targeted "as a calculated means to harass, intimidate or undermine the resistance of their parents or the 'group' or 'side' to which they belong".[6] Children also are targeted on the premise that "they are weaker and cannot defend themselves as well as adults", or that they are "more malleable and more easily coerced or convinced to serve a range of purposes – from servants to sexual slaves – in addition to participating in combat, as well as to commit atrocities and terrorise populations".[7]

6. A decade ago, the ICC Office of the Prosecutor recognized that age may be a ground of persecution as a crime against humanity,[8] which it recently reaffirmed.[9] In 2025, the ICC Pre-Trial Chamber affirmed multiple charges of persecution on "age and

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on the Exercise of Children's Rights (adopted 25 January 1996, entered into force 1 July 2000) ETS 160 (ECECR). See also Mary Beloff, 'The Rights of the Child According to the Inter-American Court of Human Rights: A Latin American Translation' in Armin von Bogdandy et al, *The Impact of the Inter-American Human Rights System: Transformations on the Ground* (OUP, 2024) 326.

[4] UNGA, 'Report of the International Law Commission (71st Session), Text of the Draft Articles on Prevention and Punishment of Crimes Against Humanity and Commentaries Thereto' (20 August 2019) UN Doc A/74/10, art 2(2)(g) (defining "persecution" in Draft Article 2(1)(h)).

[5] *Trial of the Major War Criminals before the International Military Tribunal* (Judgment) (30 September-1 October 1946) XXII Blue Series 411, 480 (discussing the crimes against humanity as part of "a plan to get rid of whole native populations by expulsion and annihilation", and quoting Heinrich Himmler's statement that Nazi Germany would take any "good blood of our type" including "by kidnapping their children and raising them here with us"); ECCC (Appeal Judgment) Case 002/01 (23 November 2016) paras 449, 453, 455-460 (addressing murder as a crime against humanity, and upholding the finding that "children in particular [...] died from a combination of exhaustion, malnutrition or disease" during the course of forced evacuations).

[6] Cécile Aptel, *Atrocity Crimes, Children and International Courts: Killing Childhood* (Routledge, 2023) 23.

[7] Ibid 23-24.

[8] ICC Office of the Prosecutor, *Policy on Children* (November 2016) <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF> para 51 (stating that "acts targeting children on the basis of age or birth may be charged as persecution on 'other grounds'" and adding that "children may also be persecuted on intersecting grounds, such as ethnicity, religion and gender").

[9] ICC Office of the Prosecutor, *Policy on Children* (December 2023) <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-children-en-web.pdf> (ICC OTP Policy on Children 2023) para 35.

gender grounds" as crimes against humanity against Joseph Kony, the leader of the Lord's Resistance Army in Uganda.[10]

7. In addition to accounting for the unique experiences of children, including "age" as a recognized ground of persecution will also cover adults who are targeted due to their age. This includes adults of military age, adults of reproductive age, and older persons, all of whom can be expected to experience persecution in situations of crimes against humanity.[11]

8. Second, the Study Group proposes a **new paragraph** in Draft Article 6 to **exclude children, meaning persons under the age of 18, from criminal punishment for crimes against humanity**. This would reflect international human rights law and treaty obligations, which already require States to treat alleged juvenile offenders differently.[12]

9. The threshold of age 18 was set in the 1989 Convention on the Rights of the Child, and confirmed unequivocally in the 1990 African Charter on the Rights and Welfare of the Child, the 1996 European Convention on the Exercise of Children's Rights, a 2002 advisory opinion of the Inter-American Court of Human Rights, and the 2024 European Union Guidelines on Children and Armed Conflict.[13] Other instruments with this threshold include the 2000 UN Trafficking Protocol, the 1999 International

[10] ICC, Press Release 'Kony case: ICC Pre-Trial Chamber III confirms the charges of war crimes and crimes against humanity; accused still at large' (6 November 2025) <https://www.icc-cpi.int/news/kony-case-icc-pre-trial-chamber-iii-confirms-charges-war-crimes-and-crimes-against-humanity>.

[11] See, e.g., UNGA, 'Report of the Open-ended Working Group on Ageing on its Fourteenth Session' (31 May 2024) UN Doc A/AC.278/2024/2, para 21; UN Human Rights Council, "Open-ended intergovernmental working group for the elaboration of a legally binding instrument on the promotion and protection of the human rights of older persons" (28 March 2025) UN Doc A/HRC/58/L.24/Rev.1, para 1 (establishing a working group to elaborate and submit a draft internationally legally binding instrument on the human rights of older persons).

[12] See, e.g., CRC (n 3) arts 37, 40; ACRWC (n 3) art 17 (titled "Administration of Juvenile Justice"); ECECR (n 3) arts 3-15 (concerning "Procedural measures to promote the exercise of children's rights").

[13] CRC (n 3) art 1 ("For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."); ACRWC (n 3) art 2 ("For the purposes of this Charter, a child means every human being below the age of 18 years."); ECECR (n 3) art 1 ("This Convention shall apply to children who have not reached the age of 18 years."); *Juridical Condition and Human Rights of the Child* (Advisory Opinion) (28 August 2002) OC-17/2002, para 42 ("taking into account international norms and the criterion upheld by the [Inter-American Court of Human Rights] in other cases, 'child' refers to any person who has not yet turned 18 years of age"); European Union, EU Guidelines on Children and Armed Conflict 2024 (24 June 2024) <https://www.eeas.europa.eu/sites/default/files/documents/2024/EEAS-EU-Guidelines-CAAC%20v5.pdf> para 7 ("The EU will continue to ensure the full realization of the obligations in the Convention on the Rights of the Child [...] including with regard to the definition of the child as every human being below the age of 18").

Labour Organization Convention on the Worst Forms of Child Labour, the ICC Elements of Crimes, and the UN Convention against Cybercrime.[14]

10. No international criminal tribunal prosecutes children. The Rome Statute forbids the ICC to exercise jurisdiction over children,[15] and the Special Court for Sierra Leone held fast to its first Prosecutor's refusal to do so: "The children of Sierra Leone have suffered enough both as victims and perpetrators. [...] I want to prosecute the people who forced thousands of children to commit unspeakable crimes".[16] Indicative of such views, there have been few, if any, State prosecutions of children for crimes against humanity.

11. A range of international law instruments prescribes special protection for children in situations of conflict and similar violence. Of special note is the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, which was adopted after the Rome Statute and which entered into force after the establishment of the Special Court for Sierra Leone, both courts that have adjudicated crimes against children.[17] This Optional Protocol's 173 Parties include all UN Security Council Permanent Members, plus many other States from Africa, the Americas, Asia, Europe, and Oceania.[18] It emphasizes that children need

[14] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (185 Parties), art 3(d) ("'Child' shall mean any person under eighteen years of age."); International Labour Organization Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999, entered into force 19 November 2000) 2133 UNTS 161, art 2 ("For the purposes of this Convention, the term 'child' shall apply to all persons under the age of 18."); ICC, Elements of Crimes (2013), art 6(e)(2) element 5 (for genocide by forcibly transferring children, requiring that "[t]he person or persons [transferred to another group] were under the age of 18 years"); United Nations Convention against Cybercrime (adopted 24 December 2024) UN Doc A/Res/79/243 annex, art 14(2) ("For the purposes of this article, the term 'child sexual abuse or child sexual exploitation material' shall include visual material, and may include written or audio content, that depicts, describes or represents any person under 18 years of age"). See also ICC OTP Policy on Children 2023 (n 9) 15 ("For the purpose of this Policy, a 'child' is considered to be any person from birth to the age of 18. This is consistent with the definition adopted in the UN Convention on the Rights of the Child [...] and the provisions of the Rome Statute.").

[15] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 26 ("The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.").

[16] Special Court for Sierra Leone Public Affairs Office, Press Release, "Special Court Prosecutor Says He Will Not Prosecute Children" (2 November 2002) <https://www.rscsl.org/Documents/Press/OTP/prosecutor-110202.pdf>.

[17] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222 (173 Parties) (CRC OPAC).

[18] See UN Treaty Collection, 'Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict' <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11-b&chapter=4&clang=_en>.

increased protection on account of "the harmful and widespread impact of armed conflict on children and the long-term consequences this has for durable peace, security and development".[19]

12. Subjecting a person to criminal punishment for conduct occurring when the person was a child would perpetuate such harms. Thus branding a very young person with the lifelong stigma of being a "criminal against humanity" also would contravene States' pledges, in the near-universally ratified Convention on the Rights of the Child, that they "shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts".[20]

[19] CRC OPAC (n 17) preamble para 3.
[20] CRC (n 3) art 39.

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GENDER COMPETENCY, INCLUSIVITY, AND NON-DISCRIMINATION

ABILA STUDY GROUP

CRIMES AGAINST HUMANITY

GENDER COMPETENCY, INCLUSIVITY, AND NON-DISCRIMINATION

As States come together to negotiate the Convention on the Prevention and Punishment of Crimes against Humanity, there is a clear need to incorporate gender expertise and competency into both the negotiation process and the content of the Convention itself. Adopting a gender-competent approach will be critically important to achieving substantive justice, equality, effective prevention, and implementation as well as ensuring compliance with obligations under international law.[1]

Recommendations

Preparatory Activities and Negotiations

- Ensure gender parity in the composition of State delegations, as well as the inclusion of gender experts.
- Develop modalities to ensure gender expertise on State delegations, such as creating expert rosters or establishing funds to support the participation of gender experts, especially from countries from the global majority.
- Ensure meaningful participation in the preparatory and negotiations processes of diverse, cross-regional civil society and gender experts, including those who are often underrepresented, such as victims and survivors, indigenous peoples, people with disabilities, and children and youth.

Convention Text

- Adopt a gender-competent, intersectional, and victim/survivor-centric approach to all parts of the treaty text to ensure that the Convention is comprehensive, humanity-inclusive, and promotes gender justice.
- Convene intersessional meetings focused on gender justice issues with the participation of relevant experts, including those from civil society. Ensure that

[1] See generally Patricia Viseur Sellers, 'Gender Strategy is Not a Luxury for International Courts Symposium: Prosecuting Sexual and Gender-Based Crimes Before International/ized Criminal Courts' (2009) 17(2) American University Journal of Gender, Social Policy & the Law 327. See also ICC OTP, 'Policy Paper on Sexual and Gender-Based Crimes' (20 June 2014), <https://www.icc-cpi.int/sites/default/files/Policy_Paper_on_Sexual_and_Gender-Based_Crimes-20_June_2014-ENG.pdf;>; UN International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, 'IIIM Gender Strategy and Implementation Plan – Abridged Version' (30 September 2022) <https://iiim.un.org/wp-content/uploads/2022/10/Gender-Strategy-Implementation-AbridgedEnglish.pdf>; ICC OTP, 'Policy on Gender-Based Crimes: Crimes Involving Sexual, Reproductive and Other Gender-Based Violence' (December 2023) <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf>.

gender-related issues are included in the agenda for all intersessional meetings or convenings related to the Convention.

- Use gender-inclusive language throughout the Convention.
- Include a provision that mandates that the interpretation and application of the Convention be consistent with internationally recognized human rights and the principles of non-discrimination and without adverse distinction.

Explanatory Notes

1. Adopting a gender-competent, intersectional, and non-discriminatory approach to the Convention directly aligns with commitments under the United Nations Charter,[2] the Sustainable Development Goals,[3] the Pact for the Future,[4] UN Security Council resolutions,[5] and many international instruments, including international and regional human rights treaties.[6]

2. Eliminating gender-based violence and discrimination and ensuring equal access to justice are fundamental obligations under international law.[7] These obligations

[2] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945), art 13(1).
[3] See e.g. UN , Sustainable Development, 'Goal 5: Achieve Gender Equality and Empower All Women and Girls' <https://sdgs.un.org/goals/goal5#targets_and_indicators> (which includes targets to end all forms of discrimination against women and girls everywhere, eliminate all forms of violence against women and girls, ensure women's full and effective participation and equal opportunities for leadership at all levels of decision-making, and adopt and strengthen enforceable legislation for the promotion of gender equality); UN, Sustainable Development, 'Goal 16: Promote Peaceful and Inclusive Societies for Sustainable Development, Provide Access to Justice for All and Build Effective, Accountable and Inclusive Institutions at All Levels' <https://sdgs.un.org/goals/goal16#targets_and_indicators> (which provides key targets including ensuring equal access to justice for all, and promoting and enforcing non-discriminatory laws and policies for sustainable development).
[4] UN, 'Pact for the Future, Global Digital Compact and Declaration on Future Generations' (September 2024) <https://www.un.org/sites/un2.un.org/files/sotf-pact_for_the_future_adopted.pdf> 2, 7-8, 12-13, 15, 53-54.
[5] See e.g. UNSC Res 1820 (19 June 2008) UN Doc S/RES/1820 (2008) para 4 ("*calls upon* Member States to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice, and *stresses* the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation").
[6] See n 7-8, 11-15.
[7] See e.g. Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, arts 3, 26; CEDAW Committee, 'General Recommendation No. 35 (2017) on Gender-Based Violence against Women, Updating General Recommendation No. 19 (1992)' (26 July 2017) UN Doc CEDAW/C/GC/35, para 2; UNGA Res 48/104, 'Declaration on the Elimination of Violence against Women' (20 December 1993) UN Doc A/RES/48/104; UN Fourth World Conference on Women, 'Beijing Declaration and Platform for Action' (15 September 1995) UN Doc A/CONF.177/20 4. See also UN Human Rights Council, 'Joint Statement by UN Special Procedures Mandate Holders: Reaffirming the Centrality of Gender as a Tool for Advancing Equality and All Human Rights' (28 August 2025)

are reinforced by regional instruments in Africa, the Americas, and Europe.[8] The International Law Commission has recognized that the prohibitions of slavery and crimes against humanity are peremptory norms of international law.[9] Regional jurisprudence has further supported a broader *jus cogens* norm of equal protection before the law and non-discrimination, including discrimination based on gender.[10]

3. States are obliged under the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), which has 189 States Parties, to take all appropriate measures to ensure that women have the opportunity to represent their Governments at the international level and to participate in the work of international organizations on an equal basis with men and without any discrimination.[11] This participation includes the process of negotiation and concluding the Convention. The CEDAW Committee has therefore recommended that all States Parties "[a]chieve and maintain parity in [...] the composition of all international delegations",[12] as well as "[i]nstitutionalize parity laws and transparent procedures at the national level for nomination and selection for

<https://www.ohchr.org/sites/default/files/documents/issues/sexualorientation/statements/2025-08-28-joint-statement-reaffirming-the-centrality-of-gender.pdf>.

[8] See e.g. Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), Council of Europe Treaty Series No 210 (adopted 11 May 2011, entered into force 1 August 2014) arts 4-5, 12(2), 49; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) arts II(1), IV(2), VIII; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará) (adopted 9 June 1994, entered into force 5 March 1995) art 7.

[9] UNGA, 'Report of the International Law Commission (73st Session), Text of the Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*) (5 August 2022) UN Doc A/77/10, conclusion 23 and annex (providing a non-exhaustive list of *jus cogens* norms that the ILC had previously referred to as having that status). The prohibition of crimes against humanity includes the prohibitions of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity, as set out in Draft Article 2. See also *Prosecutor v Ntaganda* (Second Decision on the Defense's Challenge to the Jurisdiction of the Court in Relation to Counts 6 and 9) ICC-01/04-02/06 (4 January 2017) paras 51-52; Patricia Viseur Sellers, '*Jus Cogens*: Redux' (2022) 116 AJIL Unbound 281, 285-286.

[10] *Juridical Condition and Rights of Undocumented Migrants* (Advisory Opinion) IACtHR Doc OC-18/03 (17 September 2003) para 101 ("Accordingly, this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*.").

[11] CEDAW (n 7) art 8.

[12] CEDAW Committee, 'General Recommendation No. 40 (2024) on the Equal and Inclusive Representation of Women in Decision-making Systems' (25 October 2024) UN Doc CEDAW/C/GC/40, para 55(a).

positions [...] in all delegations attending multilateral meetings".[13] Such parity must include the process of negotiating and concluding the Convention. Meaningful participation is essential not only for delivering justice and accountability for gender-based crimes, but also for the "effectiveness, sustainability, resilience, legitimacy and accountability of the multilateral system".[14]

Ensuring Participation, Parity, and Gender Expertise

4. To achieve substantive gender competency, the Convention's negotiation should guarantee the equal and inclusive[15] participation of women, gender-diverse individuals, and other underrepresented groups,[16] including victims and survivors[17] of crimes against humanity. Equal and inclusive participation requires meaningful engagement in the meetings of the Preparatory Committee, Working Group, and the UN Conference of Plenipotentiaries on the Prevention and Punishment of Crimes against Humanity ("Conference"), as well as any intersessional meetings, including those envisioned by paragraph 12 of General Assembly Resolution 79/122.[18]

5. Additionally, while gender parity is a critical aspect of ensuring gender competency, it should not be conflated with or seen as a substitute for gender expertise. Gender competence in multilateralism, including with respect to the Convention, also requires gender expertise. Such expertise includes understanding the meaning and role of gender in the context of law and policy, as a core proficiency for achieving successful outcomes in international lawmaking and policymaking. Specifically, gender competence requires the ability to apply a systematic, intersectional, analytical approach that examines what has occurred, who it has impacted, who is

[13] Ibid, para 57(a).
[14] Ibid, para 10. See also UNSC Res 2467 (23 April 2019) UN Doc S/RES/2467 (2019), para 16(d) (recognizing that "women's leadership and participation will increase the likelihood that transitional justice outcomes will constitute effective redress").
[15] The CEDAW Committee has defined "equal and inclusive representation" as "fifty-fifty parity between women and men in all their diversity in terms of equal access to and equal power within decision-making systems". It has further defined "decision-making systems" as "encompassing decision-making that takes place through formal and informal processes in all sectors, including in political [and] public [...] spaces". CEDAW Committee General Recommendation No. 40 (n 12), para 2.
[16] This can include, for example, people with disabilities, children and youth, and indigenous peoples.
[17] UNSC Res 2467 (n 14) para 16(d) ("*Encourages* concerned Member States to ensure the opportunity for the full and meaningful participation of survivors of sexual and gender-based violence at all stages of transitional justice processes, including in decision-making roles"). See also Amnesty International et al, 'Draft Crimes Against Humanity Convention Must Center Victims and Survivors', <https://www.globaljusticecenter.net/wp-content/uploads/2023/11/Victims-and-Survivors-Expert-Legal-Brief-CAH-Treaty.pdf>.
[18] UNGA Res 79/122 (4 December 2024) UN Doc A/RES/79/122, para 12 ("*Encourages* participants in the Conference to organize consultations on issues of substance, prior to the convening of the Conference, in order to facilitate the conclusion of its work").

responsible, and why, taking into account relevant intersecting factors such as gender, age, nationality, and ethnicity.[19] It also considers how diverse individuals relate to structural oppression and exacerbated violence within a given context. The ability to implement gender competence requires integrating gender expertise into the procedures, structure, planning, staffing, and technical cooperation related to multilateral processes.

6. States should, consistent with their obligations under international law, as well as best practices,[20] ensure gender parity in their delegations to the Conference and all related meetings. In addition, General Assembly Resolution 79/122 invites States to include "as far as possible" relevant experts within their delegations,[21] and this should include gender experts.

7. Capacity constraints, particularly for delegations with smaller budgets or limited personnel, may inhibit the ability to access and incorporate gender expertise. States, supported by the UN Secretariat, should explore and identify ways, including pooled resources, to ensure that all delegations have access to gender expertise. For example, existing networks, such as women mediator networks,[22] or rosters, such as the Justice Rapid Response-UN Women SGBV Justice Experts Roster,[23] may be a resource for States seeking to ensure gender expertise on their delegations.

8. In addition to State delegations, the participation of diverse and inclusive civil society[24] organizations will be essential to ensuring gender competency. As the CEDAW Committee has recognized, "[t]he representation of women in civil society is essential for integrating a gender perspective in decision-making and for advising States in the development of gender-responsive legislation and policies".[25] States should ensure that processes to decide on civil society participation give due consideration to gender equity and parity, and that any processes to object to the

[19] ICC OTP, 'Policy on Gender-Based Crimes' (n 1) paras 23-26.
[20] See generally UN, 'System-wide Strategy on Gender Parity' (6 October 2017) <https://www.un.org/gender/sites/www.un.org.gender/files/gender_parity_strategy_october_2017.pdf>.
[21] UNGA Res 79/122 (n 18) para 18 ("*Invites* the States referred to in paragraph 14 above to include as far as possible among their representatives experts competent in the field to be considered").
[22] See e.g. UN, 'Women Mediator Networks' <https://peacemaker.un.org/en/resources/women-mediator-networks>.
[23] Justice Rapid Response, 'The JRR Roster' <https://justicerapidresponse.org/the-roster>.
[24] For more on the importance of meaningful civil society participation, please see the ABILA Study Group Proposal on Civil Society Participation (16 October 2025) <https://www.ila-americanbranch.org/wp-content/uploads/2025/10/ABILA-CAH-Civil-Society-Participation-Final-with-cover-v2.pdf>.
[25] CEDAW Committee, General Recommendation No. 40 (n 12) para 21.

involvement of civil society are not instrumentalized to limit the participation of women and gender experts.[26]

9. The absence of women from key international bodies responsible for the development and interpretation of international law, such as the International Law Commission ("ILC")[27] and the International Court of Justice,[28] has frequently been criticized. Beyond mere numbers, the lack of women in these bodies has meant that "many of the foundational instruments of international law were made by men, without the voices and perspectives of women".[29] The negotiation of the Convention is an opportunity to shift this trajectory.

10. Historically speaking, in addition to an absence of gender parity, there has been a lack of gender expertise. As a consequence, efforts to ensure gender justice have been hampered by the need to rely on legal frameworks that have been developed without gender expertise. Parity within delegations, resource pooling for gender expertise, and the meaningful participation of women and gender experts in the Convention process are structural interventions that will advance inclusivity and strengthen not only gender competency but also the legitimacy and authority of the Convention.

Ensuring Gender Competence and Non-Discrimination in Convention Text

11. Over the past 30 years, significant progress has been made—at the international, regional, and domestic levels—in understanding the scope and nature of sexual and gender-based violence.[30] Incorporating these lessons and precedents into the Convention will ensure that any resulting treaty not only reflects the current status of the law but also looks forward to the future. For example, the ILC supported its decision to omit a definition of the term "gender" in the Draft Articles by the fact that "[s]ince the adoption of the Rome Statute, several developments in international human rights law and international criminal law have occurred,

[26] For further recommendations on the modalities for ensuring inclusivity in civil society participation, please see ABILA Study Group Proposal on Civil Society Participation (n 24).
[27] To date, only 10 women out of 249 members have been elected to the ILC. Women were first elected to the ILC in 2002. ILC, 'Membership: Present and Former Members of the International Law Commission (1949-present)' <https://legal.un.org/ilc/guide/annex2.shtml>.
[28] To date, only 7 women out of 117 judges have been elected to the ICJ. The first female ICJ judge was elected in 1995. International Court of Justice, 'All Members' <https://www.icj-cij.org/all-members>.
[29] Nilüfer Oral and Rashmi Raman, 'Symposium by GQUAL on CEDAW's GR40: Gender Parity in the ICJ and the ILC – About Time!' *Opinio Juris* (4 February 2025) <https://opiniojuris.org/2025/02/04/symposium-by-gqual-on-cedaws-gr40-gender-parity-in-the-icj-and-ilc-about-time>.
[30] See e.g. Indira Rosenthal, Valerie Oosterveld and Susana SáCouto (eds), *Gender and International Criminal Law* (OUP, 2022).

reflecting the current understanding as to the meaning of the term 'gender'".[31] The ILC further indicated that its approach would allow for the term to be applied in the Convention "based on an evolving understanding as to its meaning".[32]

12. All of the violations listed in the crimes against humanity definition in the Convention can have gendered[33] drivers, characteristics, and impacts, which are often subtle, intersectional, and context-specific. Gender also often informs the design and perpetration of the attack of crimes against humanity. Furthermore, reductive frameworks of gender must be resisted. "Gender" does not equal "women" or "women and girls". Gender-based violence may also be directed at men and boys, as well as gender-diverse individuals. An effective, inclusive treaty must address a broad spectrum of intersectional attributes, including those shaped by sexual orientation, gender identity, and age. Accordingly, a gender-competent approach to the substance of the Convention must be understood expansively to include all of humanity. In particular, the application of a gender perspective should not be limited to defining gender-based crimes. Indeed, all crimes affect victims and communities in ways that implicate and impact all genders. Thus, understanding that gendered implications can emerge across a variety of issues, proper attention should be given to applying a gender lens[34] throughout the provisions in the Convention, including but not limited to the definitions of violations.[35]

13. Since the ILC first took up the topic, civil society has proposed ways to enhance the gender competency of the Convention.[36] For instance, civil society actors pointed

[31] UNGA, 'Report of the International Law Commission (71st Session), Text of the Draft Articles on Prevention and Punishment of Crimes Against Humanity and Commentaries Thereto' (20 August 2019) UN Doc A/74/10 [hereinafter "ILC Draft Articles"], art 2, commentary para 41.
[32] Ibid, art 2, commentary para 42. Note that this development necessitates the inclusion of an article on the need to interpret concepts and terms in the Convention in line with international human rights law and the principle of non-discrimination. This is addressed in greater detail below in paragraph 19.
[33] While gender is not defined in the Draft Articles, for the purposes of this paper, we utilize the framework of gender set forth by the ICC's Office of the Prosecutor in the 2023 Policy on Gender-Based Crimes. ICC OTP, 'Policy on Gender-Based Crimes (n 1) paras 17, 19.
[34] "[G]ender is a vital analytical lens - essential for exposing the power disparities, structural inequalities, and discriminatory practices embedded in laws, institutions, and social norms. This lens acknowledges biological differences while also drawing attention to how gender roles are constructed, enforced, and experienced." HCR, 'Joint Statement by UN Special Procedures Mandate Holders: Reaffirming the Centrality of Gender as a Tool for Advancing Equality and All Human Rights' (n 7).
[35] See e.g. Susana SáCouto, Leila Nadya Sadat and Patricia Viseur Sellers, 'Collective Criminality and Sexual Violence: Fixing a Failed Approach' (2020) 33(1) Leiden Journal of International Law 207 (looking at the gendered implications of modes of liability).
[36] See e.g. MADRE, 'New Crimes Against Humanity Treaty' <https://www.madre.org/crimes-against-humanity>. See also Akila Radhakrishnan and Danielle Hites, 'Expanding Justice for Gender-Based Crimes with a Treaty on Crimes Against Humanity' *Just Security* (29 September 2021)

to the significant evolution of the understanding of the term "gender" over the past two decades, leading the ILC to remove the 1998 Rome Statute definition from the Draft Articles.[37] Similarly, following the adoption of General Assembly Resolution 77/249 and ahead of or during the ensuing discussions in the Sixth Committee, international justice and gender experts put forward substantive proposals on further developing the gender competency of the Convention,[38] including through the enumeration of the slave trade,[39] and the codification of gender apartheid,[40] forced marriage,[41] and reproductive violence.[42] Rather than revisit each substantive proposal, this paper aims to provide a framework for a structural gender approach to the text of the Convention using these proposals as a lens.

14. First, a structural gender perspective can help to identify and **close gaps** in the legal architecture of crimes against humanity. This is best reflected by the factual and legal gaps left by the failure to enumerate the slave trade as a crime against humanity in both the Rome Statute and, consequently, in the Draft Articles, despite its status as a *jus cogens* prohibition and international crime. Taking a gender-competent and intersectional lens to the criminal conduct of capturing, acquiring, transferring, selling, or otherwise bringing individuals into or maintaining them in situations of slavery—for their labor, fighting potential, reproductive capacity, or to exercise sexual control over them—uncovers the structural failure to enumerate

<https://www.justsecurity.org/78395/expanding-justice-for-gender-based-crimes-with-a-treaty-on-crimes-against-humanity>.

[37] Alexandra Lily Kather and Juliana Santos de Carvalho, 'On the Significance and Potential of a Non-Definition: The "Gender" Debate in the Draft Crimes Against Humanity Treaty' *Just Security* (2 October 2024) <https://www.justsecurity.org/103377/defining-gender-crimes-against-humanity>.

[38] Paloma van Groll, 'Draft Crimes Against Humanity Treaty: Toward a Gender Progressive, Survivor-Centric Intersectional Approach' *Just Security* (13 November 2023) <https://www.justsecurity.org/90076/draft-crimes-against-humanity-treaty-toward-a-gender-progressive-survivor-centric-intersectional-approach>. See also 'Joint Call to Advance Gender Justice in the Draft Crimes Against Humanity Convention' (5 October 2023) <https://www.globaljusticecenter.net/wp-content/uploads/2023/10/Letter-to-UN-Member-States-Re_-Gender-Justice-Approach-to-Crimes-Against-Humanity-Treaty.pdf>.

[39] Patricia Viseur Sellers, Jocelyn Getgen Kestenbaum, and Alexandra Lily Kather, 'Including the Slave Trade in the Draft Articles on Prevention and Punishment of Crimes Against Humanity' (5 October 2023) <https://www.globaljusticecenter.net/wp-content/uploads/2023/10/Slavery-and-Slave-Trade-Expert-Legal-Brief-CAH-Treaty.pdf>.

[40] End Gender Apartheid, 'Amending the Crime Against Humanity of Apartheid to Recognize and Encompass Gender Apartheid' (12 August 2024) <https://endgenderapartheid.today/download/2025/EGA%20Legal%20Brief.pdf>.

[41] Valerie Oosterveld et al, 'The Draft *Crimes Against Humanity Convention* and Forced Marriage' (5 October 2023) <https://www.globaljusticecenter.net/wp-content/uploads/2023/10/Forced-Marriage-Expert-Legal-Brief-CAH-Treaty.pdf>.

[42] Amnesty International et al, 'Draft Articles on Prevention and Punishment of Crimes Against Humanity Should Advance Justice for Reproductive Autonomy' (5 October 2023) <https://www.globaljusticecenter.net/wp-content/uploads/2023/10/Reproductive-Autonomy-Expert-Brief.pdf>.

the slave trade in Draft Article 2. The inability to legally characterize such conduct limits the holistic redress of all victims/survivors who have endured acts of the slave trade prior to, during, and after their situations of enslavement and facilitates impunity for slave traders.[43]

15. Second, the Convention should address or **correct** existing textual provisions that hinder gender justice. For example, experts have called for the deletion of the legally unnecessary caveat to the crime of forced pregnancy:[44] "This definition shall not in any way be interpreted as affecting national laws relating to pregnancy".[45] This sentence, carried over to the Draft Articles from the Rome Statute, represented a political compromise in 1998 to assuage the concerns of certain States that criminalizing forced pregnancy in the Rome Statute could be used to invalidate national abortion laws.[46] As confirmed by the ICC Appeals Chamber, the sentence serves no legal purpose,[47] and, therefore has no relevance in the Convention. Accordingly, the sentence should be deleted from the Convention.

16. Third, the Convention should accurately **reflect the current state of jurisprudence and law** regarding sexual and gender-based crimes, which have advanced significantly since the adoption of the Rome Statute. An excellent illustration of this is the proposal to enumerate forced marriage in the list of crimes against humanity.[48] To date, while forced marriage has been successfully prosecuted at the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the ICC, it has been charged under the category of "other inhumane acts" because it had not been explicitly enumerated in those courts' statutes.[49] Enumerating forced marriage in the Convention would reflect the strength of case law recognizing it as a crime against humanity, prevent ongoing litigation about the nature of forced marriage and its status in international criminal law, and satisfy the principle of legality by providing clear legal enumeration for the act of denying victims' relational autonomy.[50] Similarly, precedents from Argentina

[43] See ABILA Study Group Proposal on Slave Trade (14 November 2025) <https://www.ila-americanbranch.org/wp-content/uploads/2025/11/Slave-Trade-art.-21c-22c_ABILA_CAH_final.pdf>.
[44] Amnesty International et al, 'Draft Articles on Prevention and Punishment of Crimes Against Humanity Should Advance Justice for Reproductive Autonomy' (n 42) paras 17, 19-24.
[45] ILC Draft Articles, art 2(2)(f).
[46] *Prosecutor v Ongwen* (*Amici Curiae* Observations on the Rome Statute's Definition of "Forced Pregnancy" by Dr Rosemary Grey, Global Justice Center, Women's Initiatives for Gender Justice and Amnesty International) ICC-02/04-01/15-1938 (23 December 2021), paras 12-15.
[47] *Prosecutor v Ongwen* (Appeal Judgment) ICC-02/04-01/15 A (15 December 2022) para 1065 (confirming that this provision does not "impose a new element to the crime of forced pregnancy").
[48] Oosterveld et al, 'The Draft *Crimes Against Humanity Convention* and Forced Marriage' (n 41).
[49] Ibid, 1-2.
[50] Ibid, 1-4.

and Guatemala confirm that diverse forms of reproductive violence can constitute crimes against humanity, including forced abortion, forced contraception, and forced suppression of breastfeeding.[51] However, only two explicit acts of reproductive violence—both replicated from the Rome Statute—are enumerated in the Draft Articles: forced pregnancy and enforced sterilization.[52] To more accurately reflect international, regional, and domestic precedents that recognize reproductive violence as a crime against humanity, the term should be incorporated into Draft Article 2(1)(g) as follows: "and any other form of sexual or reproductive violence of comparable gravity".

17. Fourth, treaty-making processes such as that leading to the Convention on Crimes against Humanity can offer opportunities to **identify emerging harms or codify prohibitions on new punishable acts**. Forced pregnancy as a crime against humanity, for example, was first codified in the Rome Statute as a result of the atrocities committed in Bosnia and Herzegovina, experiences that directly informed the content of the Rome Statute.[53] Similarly, informed by the experiences of women, girls, and gender-diverse individuals in Afghanistan, legal experts, jurists, and women's rights activists have argued that the Convention should codify gender apartheid as a crime.[54] An enumerated provision would capture the harms, specifically perpetrated in the maintenance of an institutionalized regime of systematic gender-based oppression and domination, which are not covered by other gender-based crimes, including gender persecution. New patterns of abuse, such as gender apartheid, require forward-thinking provisions that can recognize and redress these evolving forms of harm.[55]

18. The proposals outlined above should not be considered exhaustive and are included to illuminate key modalities of how a structural, gender-competent approach to the Convention text can support the elaboration of a comprehensive, inclusive treaty that advances gender justice. This approach should be

[51] Amnesty International et al, 'Draft Articles on Prevention and Punishment of Crimes Against Humanity Should Advance Justice for Reproductive Autonomy' (n 42) para 5.
[52] ILC Draft Articles, art 2(1)(g) (including, as well, as residual category for "any other form of sexual violence of comparable gravity").
[53] *Ongwen*, '*Amici Curiae* Observations on the Rome Statute's Definition of "Forced Pregnancy"' (n 46) para 9.
[54] End Gender Apartheid, 'Joint Call to Amend the Draft Crimes Against Humanity Convention to Encompass Gender Apartheid' (5 October 2023) <https://endgenderapartheid.today/download/2025/EGA%20Joint%20Letter%20to%20Amend%20the%20Draft%20Crimes%20Against%20Humanity%20Convention%20-%20English.pdf>.
[55] See also ABILA Study Group Proposal on Martens Clause on the importance of ensuring that treaty codification does not prejudice the continuing development of international law.

complemented by the use of gender-inclusive language, reflecting harms to all persons, including men, children, and gender-diverse individuals.[56]

19. Finally, it is crucial for ensuring gender competence that a provision be included that mandates that the Convention be interpreted and applied in a manner consistent with international law without distinction of any kind or on any grounds.[57] Even with all the progress made in understanding gendered experiences of atrocity over the last 30 years, the landscape of gender and harm is continuously evolving, often in ways that cannot be fully anticipated. Accordingly, the inclusion of such an interpretation clause can both support the principle of legality by providing a bracketing framework for the incorporation of new norms into the Convention, while also providing flexibility to ensure its relevance and effectiveness as norms, contexts, and understandings evolve. Building flexibility into the treaty—through inclusive definitions, expansion of the scope of gendered harms, and a monitoring mechanism for ongoing interpretation and guidance[58]—will allow the Convention to respond to violations of gender autonomy or integrity as they arise.

Conclusion

20. The negotiation of the Convention presents an unprecedented opportunity to address blind spots that limit the realization of gender justice by bridging gaps, implementing corrections, reflecting current jurisprudence, and embracing emerging norms. A gender-competent approach is not only a matter of justice for those targeted by crimes against humanity, but a prerequisite for the legitimacy, durability, effectiveness, and authoritativeness of the Convention itself. By centering gender expertise, ensuring gender parity, and mandating meaningful inclusion, States can pioneer a new standard in international law—one that answers the call for accountability, redress, and justice for all.

[56] This includes, for example, replacing "children, women, and men" in the first clause of the preamble with "person", and replacing "women" in the definition of forced pregnancy with "person." See ILC Draft Articles, preamble para 1 ("*Mindful* that throughout history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity"), art 2(2)(f) ("'forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant [...]").
[57] See ABILA Study Group Proposal on Non-Discrimination Provision.
[58] See ABILA Study Group Proposal on Monitoring Mechanism (26 November 2025).

CRIMES AGAINST HUMANITY INITIATIVE

INITIATIVE SUR LES CRIMES CONTRE L'HUMANITÉ

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