

The Long Arc of Justice: Forging a Convention for Crimes Against Humanity

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ABSTRACT

This Article presents a comprehensive overview of the development, challenges, and future prospects of creating and negotiating a global treaty for crimes against humanity. It honors pioneers in the field and acknowledges the contributions of various individuals and entities to the Crimes Against Humanity Initiative, which the author established in 2007. It traces the historical context of atrocities such as slavery and the slave trade, linking them to the modern concept of crimes against humanity.

The Article reviews the evolution of international criminal law, particularly under the Rome Statute of the International Criminal Court (ICC), emphasizing the need for a new treaty to fill gaps left by existing frameworks. Highlighting contemporary examples like the Syrian Civil War, it underscores the preventive power of prosecuting crimes against humanity, as a move towards preventing the commission of atrocity cascades, before they descend into armed conflict and genocide.

The Article describes the multi-decade effort to draft and promote a new treaty, including significant milestones, such as the adoption of the International Law Commission's (ILC) 2019 Draft Articles, and the protracted and ultimately successful advocacy within the U.N. General Assembly's Sixth (Legal) Committee to achieve a consensus resolution in 2022 that allowed the process to move forward. The 2024 adoption of GA Resolution 79/122, which authorizes convening a United Nations Diplomatic Conference for crafting a comprehensive legal instrument, was a critical achievement, setting the stage for negotiations over the next several years.

The Article reflects upon the enduring struggle for justice and the imperative to adopt, ratify, and enforce a new treaty, drawing historical parallels with the abolition of the transatlantic slave trade. It concludes with a call for continued dedication to ending impunity for crimes against humanity globally.

DEDICATION

It is an honor to contribute this Article to the Symposium, *From Academic Offering to Global Treaty: Negotiating a Convention on Crimes Against Humanity*, so beautifully organized and curated by the members of the *Washington University Global Studies Law Review*. It is dedicated to four pioneers in the field who have been my mentors, friends, and colleagues. Three are no longer with us: Benjamin B. Ferencz, former Nuremberg Prosecutor and world citizen; M. Cherif Bassiouni, whose work was central to the establishment of the International Criminal Court, and whose 1994 call for the adoption of a crimes against humanity treaty inspired my work nearly twenty-five years later;¹ and Whitney R. Harris, former member of Justice Robert H. Jackson's team at Nuremberg, and benefactor of the Institute that today bears his name. And finally, the inimitable Fatou Bensouda, former Chief Prosecutor of the International Criminal Court, whom I had the honor to serve for nine years as Special Adviser on Crimes Against Humanity, and whose talent, integrity, and dedication inspire and motivate me every day.

In addition, I would like to acknowledge the important contributions of so many others to this project: the members of the Steering Committee of the Crimes Against Humanity Initiative who took an extraordinary leap of faith to join forces with me in 2007 when this was just an idea;² the scholars and civil society leaders who have contributed to our work; the students, Harris Institute fellows,³ faculty, and deans of Washington University School of Law and Yale Law School who supported this project over the years; ILC Special Rapporteur on Crimes Against Humanity Professor Sean Murphy; the many diplomats and legal advisers at the United Nations who successfully and creatively led the process that created a path forward to diplomatic negotiations, including those who participated in this *Symposium*, Ana Paula Lavalle Arroyo, Pablo Adrián Arrocho Olabuenaga and Natalia Jiménez Alegria of Mexico, and Amadou Jaiteh of The Gambia; and of course, my dear friends and colleagues who joined me on this path, of whom there are many too many to name individually.⁴

1 M. Cherif Bassiouni, *Crimes Against Humanity: The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457 (1994).

2 Together we are seven: The late Professor M. Cherif Bassiouni, Ambassador Hans Corell, Justice Richard Goldstone, Professor Juan Mendez, Professor William Schabas, Judge Christine Van Den Wyngaert, and me. *See infra* Section V.

3 Kelly Adams, Evelyn Chuang, Kate Falconer, Jing Geng, Madaline George, Shishir Jani, Amitis (Amy) Khojasteh, Yordanka Nedyalkova, Lola Oguntebei, Douglas Pivnichny, Tamara Slater, Kristin Smith, B. Don Taylor, and Neill Townsend.

4 That said, some individuals have been so supportive and present throughout the many years of the project that they deserve particular mention, including Olympia Bekou, Richard Dicker, Larry Johnson, Priya Pillai, Akila Radhakrishnan, and Hugo Relva.

Seventeen years ago, as the newly appointed Director of the Whitney R. Harris World Law Institute, I approached then-Dean Kent Syverud with the idea for this project and made a pitch for funding. I am fairly certain that he did not envisage that his “yes” could change the course of history. Likewise, the unexpected generosity of Washington University alum (and now faculty member) Steven “Cash” Nickerson, who provided the seed money we needed at the time to attract other funders and undertake a project of this magnitude was critical to the current effort. I could not have imagined *then* that we would be on the cusp of convening an international diplomatic conference of plenipotentiaries to negotiate this new global treaty *today*, although I was admittedly hopeful as I opened our first meeting in St. Louis in April 2009 with what I hoped would be inspiring words (but were probably, in retrospect, more like an embarrassing Ted Lasso speech).

During the early stages of the *Crimes Against Humanity Initiative*,⁵ as we were planning out our meetings and Cherif was circulating the skeletal outline of what a new treaty could look like, the outcome of our endeavors was unknown and we faced (and continue to face) formidable obstacles.⁶ In 2024, 192 members of the U.N. Sixth Committee and the U.N. General Assembly, astonishingly, said “yes” to opening treaty negotiations over the next few years. While this could be called a miracle, it was also preceded by nearly two decades of hard work. To paraphrase Thomas Edison, our success resulted from one percent inspiration and ninety-nine percent perspiration, on the part of many individuals, each of whom said “yes” when they could easily have given the project a hard pass.

As we head into negotiations over the next years, the critical need for this new global treaty is more evident than ever. Not just to punish the perpetrators of these crimes, but to prevent them and to reinforce the international legal order at a truly perilous moment in time.⁷ “History,” as the poet Maya Angelou writes, “despite its wrenching pain, cannot be un-lived, but if faced with courage, need not be lived again.”⁸

⁵ See *About the Initiative*, CRIMES AGAINST HUMANITY INITIATIVE, <https://sites.wustl.edu/crimesagainsthumanity/about/> [<https://perma.cc/6KRW-RWDZ>].

⁶ See, e.g., Leila Nadya Sadat, *A Comprehensive History of the Crimes Against Humanity Initiative*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 449 (2d ed. 2013).

⁷ Linda Kinstler, *Are We Witnessing The Death of International Law?*, THE GUARDIAN (June 26, 2025), <https://www.theguardian.com/law/2025/jun/26/are-we-witnessing-the-death-of-international-law> [<https://perma.cc/CQY9-SHKQ>].

⁸ Maya Angelou, *On the Pulse of Morning*, Poets.Org., <https://poets.org/poem/pulse-morning> [<https://perma.cc/6ARF-BXNT>].

I. INTRODUCTION: A DARK BEGINNING

The undisputed “father” of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide was, of course, Raphael Lemkin. Born in Bialystok in 1900 to a Jewish family, he completed his law studies at Lviv (then Lwow) University. He had a thriving career before fleeing to the United States as the Nazis invaded and occupied Poland. After traveling through Lithuania, Latvia, and Sweden, he crossed Russia and traversed Japan on his way to take up a position at Duke University where he was granted refuge.⁹

Once in the United States, Lemkin worked feverishly to communicate how the “execution of nations and races” was taking place in occupied Europe. When the United Nations was later established, Lemkin worked to promote the adoption of a resolution and a convention on the prevention and punishment of genocide¹⁰ – a term that he had intentionally coined to galvanize the public’s attention, so as to invite immediate condemnation.¹¹ Lemkin viewed genocide as a recurring feature of human history and therefore wanted “his” convention prohibiting it to be valid “for all times, situations, and cultures,”¹² although it was deeply anchored in the experience of the Holocaust, which had caused him immense personal suffering.¹³

Like Lemkin, I believe that a future crimes against humanity treaty cannot take for its starting point or limit itself by reference to the Nazi atrocities prosecuted during the Nuremberg trials. Instead, as the international community coalesces around the establishment of this new global treaty, it should develop a treaty that can account for patterns of atrocities over time and distance in the past, and future-proof the new instrument so it will accommodate the emergence of new atrocities in the future.¹⁴ Accordingly, I have not invoked the Nuremberg paradigm, with which most readers are relatively familiar, for this Article. Instead, I have chosen slavery and the transatlantic slave trade. Such a comparison best

9 RAPHAELE LEMKIN, TOTALLY UNOFFICIAL: THE AUTOBIOGRAPHY OF RAPHAELE LEMKIN 41-97 (Donna-Lee Frieze, ed., 2013).

10 *Id.* at 118-132.

11 SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 42-45 (1st ed. 2002). Lemkin was so successful in his campaign to render genocide the “crime of crime” in the eyes of the public, that unfortunately, crimes against humanity became seen as somehow of lesser importance.

12 LEMKIN, *supra* note 9, at xvi-xvii, 152.

13 *Id.* at 132 (describing the success of his work as rain falling “on a fallow plain, only this rain was a mixture of the blood and tears of eight million innocent people throughout the world [i]nclud[ing] my parents and my friends”).

14 I am grateful for long conversations with Akila Radhakrishnan on this very point, which, interestingly, I later learned was also made by Lemkin as he contemplated the negotiation of the genocide convention; See LEMKIN, *supra* note 9, at 152 (“the Nazi experience was not a sufficient basis for a definition of genocide . . . One cannot describe a crime by one example; one must rather draw on all available experiences of the past. . . . The formulation must be made valid for all times, situations, and cultures.”).

shows how the concept of crimes against humanity predated the Second World War and, alas, might emerge in the future in new and malicious forms. It also highlights how international law might be of assistance in preventing and punishing their commission.

Indeed, there are good reasons for using slavery and the slave trade as a starting point. *First*, the development of international legal tools to combat slavery and the slave trade reveals important lessons about today's effort to recodify crimes against humanity. It underscores the important connections between morality, natural law, and positive law. While the moniker "crimes against humanity" was initially applied to slavery as a form of moral condemnation, it later became used as a source of international law, first natural, then positive, condemned by both custom and treaty.

Second, the issue is not just buried in a terrible past, but is at the front and center of modern atrocity law and policy. Sierra Leone has formally proposed amendments to the International Criminal Court Statute ("ICC" or "Rome Statute") relating to slavery and the slave trade,¹⁵ and has raised the issue during meetings on the proposed crimes against humanity treaty.¹⁶ Furthermore, the International Criminal Court Prosecutor recently published a new Policy on Slavery Crimes.¹⁷ As recently as 2021, an estimated 50 million people were reported to be living in modern slavery on any given day.¹⁸ This makes it clear that slavery continues to be a global scourge of the highest order.

Third, slavery and the slave trade emerged as peacetime crimes centuries before the Nuremberg trials and before the Rome Statute made abundantly clear that crimes against humanity need not necessarily be linked to war, a legal feature of modern international criminal law that has nonetheless been contested by a handful of States over the past fifteen years.¹⁹

15 Int'l L. Comm'n, Rep. of the Working Group on Amendments on Its Twenty-Third Session, ¶ 3, ICC Doc. ICC-ASP/23/26 (Dec. 1, 2024), https://asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-23-26-ENG.pdf [<https://perma.cc/9GUL-98MA>].

16 Statement by Allieu Vandi Koroma (Counsellor, Permanent Mission of the Republic of Sierra Leone to the U.N.), *The Rule of Law at National and International Levels*, U.N. G.A., 79th Sess., 6th Comm. (Oct. 17, 2024), https://www.un.org/en/ga/sixth/79/pdfs/statements/rule_of_law/16mtg_sierraleone.pdf [<https://perma.cc/AF8E-TNFW>].

17 *Office of the Prosecutor: Policy on Slavery Crimes* INT'L CRIM. CT., (Dec. 2024), <https://www.icc-cpi.int/sites/default/files/2024-12/policy-slavery-web-eng.pdf> [<https://perma.cc/KDQ9-5KBH>].

18 *Global Slavery Index 2023*, WALK FREE (2023), <https://www.walkfree.org/resources/> [<https://perma.cc/78GV-5XY5>].

19 The International Military Tribunal at Nuremberg had found that in order to convict the accused of crimes against humanity under Article 6(c) of the Charter, which defined the crime, the accused had to have committed their actions in connection with another crime within the jurisdiction of the Tribunal, namely war crimes and crimes against peace. International Military Tribunal (*Nuremberg*), *Judgment and Sentences*, 41 AM. J. INT'L L. 172, 249 (1947)); See also *Nuremberg Judgement Against Major War Criminals*, INT'L MIL. TRIBUNAL 14, 79-80 (Oct. 1, 1946), <https://www.legal-tools.org/doc/45f18e/pdf/> [<https://perma.cc/292A-663J>] [hereinafter IMT Judgment].

Finally, as an American writing about these issues, I am deeply cognizant of the terrible impact these atrocities had and continue to have in the United States.

The transatlantic slave trade took nearly 13 million African people from their homes between 1501 and 1866.²⁰ They were brutally kidnapped, forced onto European and American ships, and crossed the Atlantic in appalling conditions to find themselves enslaved, abused, and separated from their homes, families, ancestors, and cultures.²¹ This not only fractured and devastated the African continent for centuries, but turned the Americas into a place where “race and color created a caste system defined by inequality and abuse.”²²

Slavery and the slave trade were crimes against humanity, crimes that by their cruelty and savagery traumatized not only the victim population but also forever changed for the worse and degraded the perpetrators, as

This was tied to its interpretation of the Charter, but has, since then, not been accepted as an element of customary international law. China, however, has repeatedly rejected the “detachment” of what it has referred to in its comments as the “traditional element of ‘committed in armed conflict’” in its comments on the International Law Commission’s Draft Articles. *See, e.g., Compilation of Government Reactions to the International Law Commission’s Work on Crimes Against Humanity*, WHITNEY R. HARRIS WORLD LAW INSTITUTE 38 (Feb. 2021), https://bpb-us-e2.wpmucdn.com/sites.wustl.edu/dist/b/2004/files/2024/10/2013-2020_Compilation_Update_FINAL.pdf [<https://perma.cc/RG6T-XV4S>] [hereinafter *Compilation of Government Reactions*] (referencing Statement by Xu Hong (Director-General of the Department of Treaty and Law of Ministry of Foreign Affairs), *Role of International Law and Peaceful Settlement of Disputes in Conflict-Prevention*, U.N. G.A., 72d Sess., 6th Comm. (Oct. 23, 2017)).

²⁰ It is difficult to find precise figures on the number of individuals captured and transported, as well as the number who survived. Some sources date the earliest slave ship in 1501 and estimate a total of 12,521,337 persons embarked. *See Estimates: Trans-Atlantic Slave Trade*, SLAVE VOYAGES, <https://www.slavevoyages.org/assessment/estimates> [<https://perma.cc/2JGB-5FX3>].

The United Nations lists 15 million men, women and children, with the earliest voyage dating to 1500 *International Day of Remembrance of the Victims of Slavery and the Transatlantic Slave Trade*, U.N. INT’L DECADE FOR PEOPLE OF AFR. DESCENT 2015–2024: SLAVE TRADE, <https://www.un.org/en/observances/decade-people-african-descent/slave-trade> [<https://perma.cc/M5QQ-YWET>].

The Equal Justice Initiative released a report citing 12.5 million. *The Transatlantic Slave Trade*, EQUAL JUST. INITIATIVE (2022), <https://eji.org/report/transatlantic-slave-trade/> [<https://perma.cc/5E9J-5CA7>].

The Boston African American National Historic Site estimates the figure at 12 million. *The Middle Passage*, BOSTON AFR. AM. NAT’L HIST. SITE (Mar. 6, 2025), <https://www.nps.gov/articles/the-middle-passage.htm> [<https://perma.cc/Q38Z-DWAL>].

²¹ *See, e.g.,* Nikole Hannah-Jones, *THE 1619 PROJECT: A NEW ORIGIN STORY* (Nikole Hannah-Jones, Caitlin Roper, Ilena Silverman & Jake Silverstein eds., 2021); *See also* OLAUDAH EQUIANO, *THE INTERESTING NARRATIVE OF THE LIFE OF OLAUDAH EQUIANO OR GUSTAVUS VASSA, THE AFRICAN WRITTEN BY HIMSELF* 33 (1789) (“The next day proved a day of greater sorrow than I had yet experienced; for my sister and I were then separated . . . It was in vain that we besought them not to part us; she was torn from me, and immediately carried away”); *See also* SOLOMON NORTHUP, *TWELVE YEARS A SLAVE* 45 (1853) (“Still he plied the lash without stint upon my poor body . . . A man with a particle of mercy in his soul would not have beaten even a dog so cruelly”).

²² *The Transatlantic Slave Trade*, *supra* note 20; Isabel Wilkerson, *America’s Enduring Caste System*, N.Y. TIMES (July 1, 2020) <https://law.indiana.edu/publications/faculty/2020/dau-schmidt-caste-system-nyt.pdf> [<https://perma.cc/A4N6-BG9X>].

Alexandre de Tocqueville and others observed at the time.²³ Ending the slave trade, like eliminating slavery itself, seemed impossibly difficult. Doing so required moral courage and often physical bravery. It required the creation of abolitionist networks, public advocacy, and the cultivation of allies. It also required legal innovation. Just as international law was central to slavery's establishment,²⁴ it would become critically important to its abolition. Indeed, of relevance for the negotiation of a new twenty-first century treaty to prevent and punish crimes against humanity, abolishing the slave trade – and slavery itself – in the nineteenth century also required legal tools, international cooperation, and domestic and transnational enforcement.

Many excellent works on the legal foundations of the slave trade—and the struggle against it—have been published.²⁵ However, the task here is to examine its status as a crime against humanity through the prism of international law. What is striking is the difference between the approach of most major slave-trading powers and that of the United States.

Great Britain negotiated treaties with several European countries that served to concretize the obligations of States to eliminate the slave trade and permit enforcement of the law against ships that were captured and found engaging in illegal trade.²⁶ However, the United States, while agreeing to

23 See, e.g., Sally Gershman, *Alexis de Tocqueville and Slavery*, 9 FRENCH HIST. STUD. 467, 469-70 (1976); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 360 (Henry Reeve trans., 1899) (referencing atrocities against the Indian race without respect for the “laws of humanity”).

Searches in legal databases reveal hundreds of citations to the term “crimes against humanity”; see, e.g., WILLIAM GANNAWAY BROWNLON & ABRAM PRYNE, *OUGHT AMERICAN SLAVERY TO BE PERPETUATED? A DEBATE* 61 (J.B. Lippincott & Co. 1858) (the debate between Rev. W. G. Brownlow and Rev. Abram Pryne, on slavery in the United States, in which Pryne refers to it as a crime and a “wrong upon humanity”).

24 Christopher Gevers, *Slavery and International Law*, 117 AM. J. INT’L L. UNBOUND 71, 73 (2023).

25 See, e.g., HENRY J. RICHARDSON, III, *THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW* 35 (2008) (discussing the 20 Africans brought to Jamestown in 1619 and the transatlantic slave trade more generally); see also Frederick Douglass, *The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?* (Mar. 26, 1860), in GARY Y. OKIHIRO, *LETTERS ON AMERICAN SLAVERY TO THE EDITOR OF THE LONDON NEWS* 110 (Greenwood, 2014); see also *Constitutional Intent: What the Constitution Means to Fredrick Douglass*, LAPHAM’S QUARTERLY, <https://www.laphamsquarterly.org/democracy/constitutional-intent> [<https://perma.cc/RS5Z-4SL7>] (“If the South has made the Constitution bend to the purposes of slavery, let the North now make that instrument bend to the cause of freedom and justice”); see also WILLIAM LLOYD GARRISON, *Declaration of Sentiments of the American Anti-Slavery Convention*, in *SELECTIONS FROM THE WRITINGS AND SPEECHES OF WILLIAM LLOYD GARRISON* 71 (Boston, R.F. Wallcut ed. 1852) (“Submitting this Declaration to the candid examination of the people of this country...we will do all that in us lies... to overthrow the most execrable system of slavery that has ever been witnessed upon earth”); see also SOJOURNER TRUTH, *NARRATIVE OF SOJOURNER TRUTH* 141 (Frances W. Titus ed., 1878) (“I feel safe even in the midst of my enemies; for the truth is powerful and will prevail”).

26 See, e.g., ADRIANE SANCTIS DE BRITO, *SEEKING CAPTURE, RESISTING SEIZURE: AN INTERNATIONAL LEGAL HISTORY OF THE ANGLO-BRAZILIAN TREATY FOR THE SUPPRESSION OF THE SLAVE TRADE (1826-1845)* (2023).

abolish the slave trade in 1819,²⁷ refused to ratify treaties that would impose obligations on it on a global scale. This created a paradox: a transnational activity that was deemed illegal, but which remained devoid of concrete positive law treaty obligations and accountability mechanisms.

In the United States, the illegality of the slave trade remained unclear. In fact, federal legislation not only prohibited it, but also provided that the captives fell under the President's authority and required that they be repatriated to Africa. Courts, however, often rendered judgments relegating the *legal* prohibition of the slave trade to a question of morality or natural law, thereby depriving it of real effect.

The difficulties engendered by the American approach are evidenced by the legal battles surrounding the capture of *The Antelope*, which on August 24, 1819, sailed from Havana, Cuba under a Spanish flag to acquire 350 slaves from traders in West Africa. *The Antelope* was then taken and boarded by a privateer as it lay anchored in picturesque Cabinda Bay, off the coast of modern-day Angola. The ship eventually made her way back across the Atlantic with approximately 331 captives in the hold. Many died along the way, and others perished following their arrival due to the horrific conditions in which they were held.²⁸

Because the slave trade was by then illegal in most places, *The Antelope* struggled to profit from her cargo. Eventually, the vessel made its way to the coast of Spanish Florida, setting the stage for a complex legal dispute over the fate of the survivors. As the vessel navigated towards Georgia, where slavery was legal (but not the slave trade), it was captured by the U.S. revenue cutter *Dallas* and taken ashore in Savannah.²⁹

The fate of the 258 survivors – whose average age was 14, and 41% of whom were between 5 and 10 years old – was unclear.³⁰ The captives had been taken by Spanish, Portuguese and American vessels, and claimants soon emerged, arguing that even if the slave trade had been rendered illegal, the law nonetheless required the courts to respect the property and ownership rights of the enslavers. The lower court upheld the claims of Spain and Portugal but not those of the Americans;³¹ the U.S. government appealed on behalf of the captives.

The cause was argued to the United States Supreme Court by Francis Scott Key (better known, perhaps, for penning *The Star Spangled Banner*)

²⁷ Amending the Piracy Act of 1819, the Act of 1820 made clear that “piracy” in its previous legislation meant that any American engaged in the slave trade abroad would be committing a crime punishable by death; *See* Piracy Act of 1820, H.R. 147, 16th Cong.

²⁸ JONATHAN M. BRYANT, *DARK PLACES OF THE EARTH: THE VOYAGE OF THE SLAVE SHIP ANTELOPE* 68 (2015).

²⁹ *Id.* at xvii.

³⁰ *Id.* at 73.

³¹ *The Antelope*, 23 U.S. 66, 69 (1825) (summarizing holding of the Circuit Court for the District of Georgia).

and Attorney General William Wirt.³² They relied upon a line of British and American cases, including *La Jeune Eugenie*, decided in 1822 by Supreme Court Justice Story, riding circuit. This Court held that that the slave trade was “contrary to the principles of justice and humanity,” prohibited by “universal law,” and violated natural law and the law of nations.³³ Justice Story’s opinion condemned the slave trade as “conceived in atrocious and unfeeling cruelty, and stained and sealed with blood.”³⁴ Key and Wirt thus contended, as a British court had found in *Somerset’s Case*, fifty years earlier,³⁵ that because U.S. law prohibited the slave trade,³⁶ the captives of the *Antelope* were free the moment they set foot on U.S. shores.³⁷

A closely divided Supreme Court disagreed. Chief Justice Marshall, writing for the Court, found the African slave trade to be “contrary to the law of nature” but not prohibited by the positive law of nations, unless specifically provided by particular treaties.³⁸

The story of *The Antelope* is less well known than the litigation involving the *Amistad* many years later, which was memorialized in a gripping film by Steven Spielberg³⁹ and ultimately set aside *The Antelope*’s endorsement of the slave trade.⁴⁰ *The Antelope* had a powerful impact, however, and shaped the Court’s infamous *Dred Scott* case, decided in

32 BRYANT, *supra* note 28, at 215.

33 United States v. *La Jeune Eugenie*, 26 F. Cas. 832, 847 (D. Mass. 1822). Note that Justice Story’s ultimate disposition in *La Jeune Eugenie* was disappointing; he assumed that the vessel was French and therefore engaged in illegal trade; however, he ordered the surrender of the vessel to France, leaving some to conclude that he had “simply declined jurisdiction out of comity.” Note, *International Norms and Politics in the Marshall Court’s Slave Trade Cases*, 128 HARV. L. REV. 1184, 1185 n. 39 (2015) [hereinafter *International Norms and Politics*]. The vessel, however, was American built and had an American crew, and Lieutenant Robert Stockton, who seized it, believed that the French flag was a ruse. That said, the French vice consul in Boston filed a libel, claiming the ship for its French owners. See BRYANT, *supra* note 28, at 179. The case posed difficult diplomatic issues, given that the United States and France had not entered into any treaties permitting the capture and seizure of French vessels accused of slave trading. *Id.* at 180.

34 *La Jeune Eugenie*, 26 F. Cas. at 851; See also *The Amedie* which found that the slave trade “was contrary to the principles of justice and humanity,” and contrary to both natural law and the law of nations; thus, it did not matter that the *Amedie* sailed under a neutral flag; nor did it matter that the voyage had been legal when it departed the United States. *The Amedie*, 12 Eng. Rep. 92 (1810).

35 *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1722).

36 BRYANT, *supra* note 28, at 214-18. See also *The Antelope*, 23 U.S. at 71 (summarizing argument made by the United States counsel).

37 BRYANT, *supra* note 28, at 216.

38 *The Antelope*, 23 U.S. at 66; Beth Van Schaack, *Crimes Against Humanity in the ‘Western European & Other’ Group of States: A Continuing Tradition*, 6 AFR. J. INT’L CRIM. JUST. 136, 137-38 (2020). Some have argued that Marshall’s opinion represented a careful compromise, as he rejected Portugal’s claim on the facts whilst continuing to accept Spain’s. *International Norms and Politics*, *supra* note 33. Overall, as a result of the litigation, 120 captives were saved and returned to Africa, not to their homelands but to Liberia, where they faced great hardship. JOHN THOMAS NOONAN, JR., *THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS* 134-36 (U.C. Press 1977). Those not returned spent their lives in bondage in the United States, their stories lost along with their dignity and freedom. BRYANT, *supra* note 28, at 215.

39 Steven Spielberg, Debbie Allen & Collin Wilson, *AMISTAD*, DVD (1997).

40 United States v. *The Amistad*, 40 U.S. 518, 597 (1841).

1857,⁴¹ which upheld slavery in U.S. territories and denied the legality of black citizenship in America. These decisions helped to pave the way for a horrific civil war that killed more American soldiers than World I and II together – between 620,000 and 850,000 souls.⁴²

This is an early example of what I call an “atrocities cascade,” in which crimes against humanity committed in peacetime led eventually to war.⁴³ Moreover, 200 years after the decision, we see in *The Antelope* the same tensions we are experiencing today in the face of atrocity crimes: courts cognizant of politics, that, even in the face of the 1819 U.S. law rendering the slave trade illegal,⁴⁴ nonetheless found that the prohibition was not part of the “law of nations” because it was not truly universal.

The Slavery Convention of 1926⁴⁵ finally settled whatever doubt there was about the illegality of slavery and the slave trade. However, this kind of reasoning still finds currency today as modern courts resist (or grapple with) applying international law precepts to the commission of atrocity crimes for fear of upsetting existing power structures.⁴⁶

41 *Id.* *Dred Scott v. Sandford*, 60 U.S. 393, 405 (1857); See Paul Finkelman, *Slavery in the United States: Persons or Property?*, in UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 120-24 (Jean Allain, ed., 2012); See also DAVID THOMAS KONIG ET AL., *THE DRED SCOTT CASE: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON RACE AND LAW* 203 (Ohio University Press 2010) (discussing the influence *The Antelope* and *Somerset* had on the *Dred Scott* case).

42 The estimated number of deaths in the Civil War is debated as scholars differ on counting methodology. One source determined a range of 650,000-850,000 deaths, with the most accurate estimate being 750,000. J. David Hacker, *A Census-Based Count of the Civil War*, 57 CIV. WAR HIST. 307-48 (2011); New research utilized alternative census counting methods and estimated 698,000 deaths; See Joan Barceló et al., *New Estimates of US Civil War Mortality From Full-Census Records*, 121 PROC. NAT'L ACAD. SCI. 2-3 (2024), <https://www.pnas.org/doi/10.1073/pnas.2414919121> [<https://perma.cc/DD5L-NTAW>]. Estimation of WWI American deaths from battle, accidents, and disease is 116,516. *The United States and the First World War*, NAT'L PARK SERV. (Sep. 12, 2024), <https://www.nps.gov/wwim/wwioverview.htm> [<https://perma.cc/TAS6-5RPW>]. WWII American deaths are estimated at 407,316. *Research Starters: U.S. Military by the Numbers*, NAT'L WWII MUSEUM, <https://www.nationalww2museum.org/students-teachers/student-resources/research-starters/research-starters-us-military-numbers> [<https://perma.cc/BV8X-P2BQ>].

43 See *infra* Section III.

44 The American Piracy law was amended in 1820 to provide that Americans engaged in the slave trade were deemed to be pirates and could thus be prosecuted as such. See Piracy Act of 1820, *supra* note 27.

45 Convention to Suppress the Slave Trade and Slavery art. 2, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253.

46 The Chambers of the International Criminal Court have tried to stay relatively above the geopolitical fray, but States have often pushed back. For example, when the International Criminal Court Prosecutor indicted and issued arrest warrants for Sudan's then sitting head of state, Omar Al-Bashir, in a situation referred to the Court by the U.N. Security Council, Al-Bashir continued to travel abroad, even to ICC States Parties, whose governments often advanced technical arguments anchored in his protected status as a head of state to thwart his arrest and prosecution. All the courts asked to opine upon his immunity found that he was not immune under the Rome Statute or as a matter of international law, including several Chambers of the ICC and national courts in Kenya and South Africa. However, many States continued to maintain his immunity, including ICC States Parties. In 2019, the ICC Appeals Chamber definitely found that Al-Bashir was not immune under the Rome Statute. *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09 O.A.2, Judgment in the Jordan Referral re Al-Bashir Appeal (May 6, 2019), <https://www.icc-cpi.int/court-record/icc-02/05-01/09-397-0> [<https://perma.cc/3G4Y-EDHS>]. This decision was consistent with earlier precedents, and, in the view of this writer,

The disappointing judgment in *The Antelope* and the continued horror of slavery in the United States for some decades to come, however, was not the entire story. These “crimes against humanity,” as they were widely referred to during the nineteenth century,⁴⁷ were eventually outlawed everywhere, starting with treaties the British entered into with the Netherlands,⁴⁸ Spain,⁴⁹ and Portugal.⁵⁰ These instruments not only prohibited the slave trade, but also included mutual rights of search and seizure between the contracting parties,⁵¹ outside the context of war—or what we now call interstate cooperation and mutual legal assistance, backed by enforcement jurisdiction. They even provided for trials in mixed commissions,⁵² by treaty courts including those set up in Sierra Leone, Havana, Rio de Janeiro, and Suriname, which we now call international and national justice.

As Professor Jenny Martinez has noted, slavery and the slave trade were endemic in 1800 and had been eliminated by 1900, “intentionally by people who had come to believe it was morally wrong.”⁵³ As Martinez has observed, slavery and the slave trade were “eradicated in part by military

unsurprising. Leila Nadya Sadat, *Why the ICC’s Judgment in the Al-Bashir Case Wasn’t So Surprising*, JUST SECURITY (July 12, 2019), <https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising/> [<https://perma.cc/SXF8-R37W>]; but see Dapo Akande, *ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals*, EJILTALK! (May 6, 2019), <https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/> [<https://perma.cc/8E9P-MPKY>] (finding the decision “extremely controversial,” “deeply misguided,” and “dangerous”). Conversely, the arrest warrants against Vladimir Putin by the ICC received widespread support, but objections were raised to the warrant against Israeli Prime Minister Benjamin Netanyahu, suggesting that geopolitics rather than pure legal doctrine was driving the conversation. See, e.g., Leila Nadya Sadat, *It’s Not Too Late for States Parties to Fulfill the Promise of the International Criminal Court: Three Actions They Should Take Now*, JUST SECURITY (July 2, 2025) <https://www.justsecurity.org/116069/international-criminal-court-review-conference/> [<https://perma.cc/8BT5-SXWY>].

47 Patricia M. Muhammad Esq., *The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law*, 19 AM. U. INT’L L. REV. 883 (2003).

48 Treaty Between His Britannic Majesty and His Majesty the King of the Netherlands, for Preventing Their Subjects from Engaging in Any Traffic in Slaves, Neth-U.K., May 14, 1818, 68 Consol. T.S. 403.

49 Treaty Between Great Britain and Spain for the Abolition of the Slave Trade, Spain-U.K., Sep. 23, 1817, 68 Consol. T.S. 45.

50 Treaty Between Great Britain and Portugal, signed at Vienna the Twenty-Second of January One Thousand Eight Hundred and Fifteen, Port.-U.K., Jan. 22, 1815, 63 Consol. T.S. 45 (This treaty was adopted as the “efficacious [m]eans for bringing about a gradual [a]bolition of the [s]lave [t]rade”); see also Additional Convention between Great Britain and Portugal for the Prevention of the Slave Trade, Port-U.K., July 28, 1817, 67 Consol. T.S. 373.

51 See W.E. BURGHARDT DUBOIS, THE SUPPRESSION OF THE AFRICAN SLAVE TRADE TO THE UNITED STATES OF AMERICA: 1638–1870 145-46 (1896) (summarizing the Quintuple Treaty on December 20, 1841, where England, Russia, Prussia, and Austria agreed to submit to seizure and searches pursuant to a valid warrant).

52 See Adriane Sanctis de Brito, *Anti-Slave Trade Mixed Commissions and Courts*, OXFORD PUB. INT’L L. ¶ 10 (Aug. 2024), <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e2713.013.2713/law-mpeipro-e2713> [<https://perma.cc/96KE-W4D4>].

53 JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW 13 (2012).

force, but also by coordinated international legal action—including . . . international courts” and establishment of treaty.⁵⁴

What does this legal history mean for the development of a new treaty on crimes against humanity? It tells us that treaties matter. They clarify the obligations of States; they provide for inter-state cooperation; they establish jurisdiction for courts to adjudicate cases. Without them, outcomes depend upon the whims of judges (and governments) who may sometimes, like Justice Story in *La Jeune Eugenie*, apply the law to declare an atrocity a crime; but in others, like Chief Justice Marshall in *The Antelope*, reach an opposite conclusion.

II. THE EMERGENCE OF CRIMES AGAINST HUMANITY IN MODERN INTERNATIONAL CRIMINAL LAW

Fast forward now to the modern era. What are crimes against humanity? Philosophers have pondered their epistemic meaning for decades: are they crimes against humankind itself, or “inhumane” crimes that are simply too barbaric to bear ordinary names? They have been described as “politics gone cancerous,”⁵⁵ as “*crimes contre l’esprit*” (crimes against the soul),⁵⁶ or as a manifestation of the “banality of evil.”⁵⁷ A perusal of the caselaw indicates that, as a practical matter, they are all of those things, and often more; they are perhaps more difficult to categorize than war crimes and genocide because they take different forms in different societies, and at different times.

The simplicity and clarity of Lemkin’s concept of genocide – the destruction in whole or in part of a racial, ethnic, national, or religious group – was part of its genius. However, the practical difficulty with its elegance was that the facts of modern mass atrocities are simply too messy to fit within Lemkin’s proposed conceptual framework. As Gareth Evans observed, in bemoaning the non-applicability of the Genocide Convention to most of the world’s global mass killings:

[F]or all its compelling general moral authority, the Genocide Convention had absolutely no legal application to the killing fields of Cambodia, which nearly everyone still thinks of as

⁵⁴ *Id.*

⁵⁵ David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85 (2004).

⁵⁶ See LOUIS ARAGON, *LE CRIME CONTRE L’ESPRIT: LES MARTYRS* (Les Éditions de Minuit ed. 1944).

⁵⁷ HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (Viking Press 1963). Arendt’s reference to the “banality” of evil has been controversial since the book’s publication. See, e.g., Kathleen B. Jones, *The Trial of Hannah Arendt*, NAT’L ENDOWMENT OF THE HUM. (Mar. 2014), <https://www.neh.gov/humanities/2014/marchapril/feature/the-trial-hannah-arendt> [<https://perma.cc/4C56-56FK>] (describing the “furor” when Arendt coined the phrase ‘the banality of evil’ to describe the Nazi’s acts of evil, which has overshadowed the power and excellence of the work itself).

the worst genocide of modern times. Because those doing the killing and beating and expelling were of exactly the same nationality, ethnicity, race, and religion as those they were victimizing – and their motives were political, ideological, and class-based rather than having anything to do with the characteristics described in the Genocide Convention – the necessary elements of specific intent required for its application were simply not there.

And for all the well-intentioned attempts that have been made many times since – most obviously in Darfur – to try to argue that the “g” word, properly understood, does have application to a much wider range of crimes against humanity . . . the hard truth is that this approach is a lost cause. Lawyers remain lawyers, and there will always be good and compelling legal arguments why the Genocide Convention just does not reach many of the cases we morally want it to – resulting in propaganda victories again and again for those who least deserve to have them as claims or charges are reduced by commissions or courts from genocide to ‘only’ crimes against humanity.⁵⁸

Crimes against humanity are one of four offences included in the Rome Statute of the International Criminal Court,⁵⁹ along with genocide, war crimes, and the crime of aggression. There was no genocide convention in the early 1940s, and thus it was crimes against humanity that was included in the Nuremberg and Tokyo tribunals established after World War II, as Article 6(c) of the Charter of the International Military Tribunal at Nuremberg (IMT Charter), and Article 5(c) of the Charter of the International Military Tribunal for the Far East at Tokyo (IMFTE Charter).⁶⁰ This inclusion was essentially to fill gaps in the laws and customs of war.

Together, Hersch Lauterpacht and Justice Robert Jackson brought the concept of crimes against humanity to life at Nuremberg, as beautifully

58 Gareth Evans, *Crimes Against Humanity and the Responsibility to Protect*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 3 (Leila Nadya Sadat, ed., 2013). Gareth Evans was the former Foreign Minister of Australia, and president and chief executive officer of the International Crisis Groups from 2000 until 2009.

59 Rome Statute of the International Criminal Court arts. 5, 7, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

60 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 280 [hereinafter IMT Charter]; International Military Tribunal for the Far East, art. 5(c), Jan. 19, 1946, 20 T.I.A.S. 1589.

chronicled in Philippe Sands' extraordinary book, *East West Street*.⁶¹ However, the concept had a long history, as previously discussed, as a description of slavery and the slave trade, as well as King Leopold's atrocities in the Congo,⁶² the 1904 massacre of the Herero and Nama peoples in Namibia,⁶³ and the massacre of the Armenians in the early twentieth century.⁶⁴ It also emerged in the Martens clauses of the 1899 and 1907 Hague Treaties, as follows:

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 . . . 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*.⁶⁵

This extraordinary proviso weaves morality, natural law, and the law of nations together, indicating that prohibiting some means and methods of war by treaty was not a license to use others that might be equally barbaric but were unanticipated by the treaty text.

The legal elements of crimes against humanity have been well established over the past eighty years. They are mass crimes that may take many forms:

- A State policy of torture or disappearance;
- A campaign of rape or other forms of sexual or reproductive violence;
- Arbitrary arrest and detention (typically accompanied by inhumane conditions);
- Mass expulsions or deportations (often referred to as ethnic cleansing); or

⁶¹ See, e.g., PHILIPPE SANDS, *EAST WEST STREET: ON THE ORIGINS OF GENOCIDE AND CRIMES AGAINST HUMANITY* 111–117 (2016).

⁶² It was also used to describe King Leopold's atrocities in the Congo, see e.g., Van Schaack, *supra* note 38, at 137; see also Christopher Gevers, *African and International Criminal Law*, in *THE OXFORD HANDBOOK OF INT'L CRIM. L.* 154, 158 (Kevin J. Heller, Frederic Megret, Sarah M.H. Nouwen, Jens D. Ohlin & Darryl Robinson eds., Oxford Univ. Press 2020); see also Alhagi B.M. Marong, *The ILC Draft Articles on Crimes Against Humanity, an African Perspective*, 6 *AFR. J. INT'L CRIM. JUST.* 93, 100–02 (2020).

⁶³ See, e.g., Norimitsu Onishi & Melissa Eddy, *A Forgotten Genocide: What Germany Did in Namibia, and What It's Saying Now*, *N.Y. TIMES*, (May 28, 2021), <https://www.nytimes.com/2021/05/28/world/europe/germany-namibia-genocide.html?login=smartlock&auth=login-smartlock> [https://perma.cc/LMY9-HG6H].

⁶⁴ Roger S. Clark, *History of Efforts to Codify Crimes Against Humanity*, in *FORGING A CONVENTION, FOR CRIMES AGAINST HUMANITY* 8–9 (Leila Nadya Sadat, ed., 2013).

⁶⁵ Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539.

- Mass murder of individuals by a government or non-state actors in war or peace.⁶⁶

As the late Judge Antonio Cassese observed, they are “characterized either by their seriousness and their savagery . . . or by their magnitude, or by the fact that they were part of a system designed to spread terror, or that they were a link in a deliberately-pursued policy against certain groups.”⁶⁷ After their emergence in the aftermath of World War II, however, from 1945 until the establishment of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) fifty years later, and, later, the Special Court of Sierra Leone (SCSL)⁶⁸ and the Extraordinary Chambers in the Courts of Cambodia (ECCC),⁶⁹ they were punished only by national courts.

Over time, four key features of crimes against humanity can be distilled from international and national jurisprudence. *First*, crimes against humanity protect all civilians – including a State’s own nationals – from widespread or systematic attacks on their human rights that rise to a certain level of seriousness. This is evident from the proviso of Article 6(c) of the IMT Charter itself, which provides that individuals can be held criminally and individually responsible for the acts listed as crimes against humanity in the Charter “whether or not in violation of the domestic law of the country where perpetrated.”⁷⁰ The IMT Charter references the “civilian population” as the object of the attack; subsequently, the Statutes of the ICTY and the ICTR added the language “directed against” which has given rise to some difficulties of interpretation as to when a “population” might lose its civilian character during armed conflict, and thus, who might properly be the victim of crimes against humanity.⁷¹

Second, although the crime of persecution addresses attacks undertaken on a discriminatory basis, persecution or discrimination, although often present, is not a necessary element of a crime against humanity, unlike the crime of genocide. The Nuremberg Tribunal spoke of “persecutions” in its

⁶⁶ Rome Statute, *supra* note 59, art. 7; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 3 (Nov. 8, 1994) [hereinafter ICTR Statute]; Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 5 (May 25, 1993) [hereinafter ICTY Statute]; International Crimes Act, June 19, 2003, § 2(4) (Act No. 270/2003) (Neth.).

⁶⁷ Antonio Cassese, *Crimes Against Humanity*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 353, 357 (Antonio Cassese, Paolo Gaeta & John RWD Jones eds.) (Oxford Univ. Press 2002).

⁶⁸ Statute of the Special Court for Sierra Leone, S.C. Res. 1315, art. 2 (Aug. 14, 2000); ICTY Statute, *supra* note 66; ICTR Statute, *supra* note 66.

⁶⁹ Law on the Establishment of the Extraordinary Chambers, NS/RKM/1004/006, art. 5 (Oct. 27, 2004).

⁷⁰ IMT Charter, *supra* note 60, art. 6(c).

⁷¹ See, e.g., Leila Nadya Sadat, *Putting Peacetime First: Crimes Against Humanity and the Civilian Population Requirement*, 31 EMORY INT’L. L. REV. 197 (2017).

judgment, but not extensively;⁷² however, persecution was extensively charged by the ICTY in addressing campaigns of ethnic cleansing in the former Yugoslavia.⁷³

Third, the perpetrators of crimes against humanity may be State or non-State actors, including, but not limited to, organized armed groups. This has been confirmed by the jurisprudence of the International Criminal Court.⁷⁴

Fourth, unlike war crimes, crimes against humanity may be committed during armed conflict or in peacetime. This was established by the ICTY in one of its earliest cases,⁷⁵ confirmed in the Rome Statute, and was the case for the transatlantic slave trade. During the nineteenth century, one of the primary U.S. objections to the treaties that the British entered into with other States was that they provided for mutual rights of search and seizure of vessels suspected of slave trading beyond the context of war. Having suffered British depredations at sea during the War of 1812, the United States government was loath to permit the British to board American ships during peacetime.

One of the most radical elements of the Nuremberg and Tokyo definitions of crimes against humanity were the provisions that these crimes could be prosecuted “whether or not in violation of the domestic law of the country where perpetrated.”⁷⁶ This language was necessary because the Nazi regime was killing and abusing its own countrymen and women, not just those in countries they attacked and/or occupied. One of the Nazis’ chief defenses was that everything they had done – from the attacks on Jews in their country to their deportation and extermination – was perfectly legal in Germany. Thus, they argued that State sovereignty was an absolute bar to any prosecution.⁷⁷

This required the elaboration of a new international crime that could pierce the existing immunity of States and state officials. When asked to opine as to whether these newly established offenses formed part of international law and could fairly be applied, the Nuremberg Tribunal

72 See U.N. Secretary-General, *The Charter and Judgement of the Nürnberg Tribunal – History and Analysis*, Memorandum submitted by the Secretary-General, at 4, U.N. Doc. A/CN.4/5 (1949), https://legal.un.org/ilc/documentation/english/a_cn4_5.pdf [<https://perma.cc/AW2W-9BCB>]

73 See e.g., Fausto Pocar, *Persecution as a Crime Under International Criminal Law*, 2 J. NAT’L SEC. & POL’Y 355, 357 (2008).

74 See, e.g., Situation in the Republic of Kenya, ICC-01/09-19-Corr, Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_02409.PDF [<https://perma.cc/BMK6-Y82D>].

75 Prosecutor v. Tadić, IT-94-1-A, Judgment, ¶¶ 248–55 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

76 IMT Charter, *supra* note 60, art. 6(c). It was also in Article 5(c) of the Charter of the Tokyo Tribunal. See, e.g., Viviane E. Dittrich & Jolana Makraiova, *Towards a Fuller Appreciation of the Tokyo Tribunal*, in THE TOKYO TRIBUNAL: PERSPECTIVES ON LAW, HISTORY, & MEMORY 3 (Viviane E. Dittrich, Kerstin Von Lingen, Philipp Osten & Jolana Makraiova eds., 2020).

77 See IMT Judgment, *supra* note 19, at 55.

replied that the Tribunal was not an arbitrary exercise of power on the part of the victorious nations,” but was “the expression of international law existing at the time of its creation; and to that extent [was] itself a contribution to international law.⁷⁸ The question of retroactivity remains a consistent critique of the judgment, but the principle – that domestic law is no defense to the commission of crimes against humanity – has now, some eighty years later, become part of customary international law and has been widely reaffirmed.

When the ICC Statute was negotiated during the 1990s, Cherif Bassiouni, himself an expert on crimes against humanity,⁷⁹ became the Chair of the Drafting Committee for the Rome Diplomatic Conference. In this role, he helped to craft the modern definition of crimes against humanity which is now found in Article 7 of the Rome Statute.⁸⁰ The Committee’s objective was to stay within the bounds of customary international law,⁸¹ while adding additional threshold (or context) elements given its nature as an international crime being tried before an international court.

The Rome Statute’s definition of crimes against humanity is longer than that of the Nuremberg and the *ad hoc* international criminal tribunals’ definitions. It includes additional crimes, with expanded provisions on crimes of sexual violence (while adding that they must be of “comparable gravity” to the other crimes involving sexual violence set forth in article 7(1)(g)). It also considerably expands the ambit of persecution in article 7(1)(h) beyond the narrow grounds of ethnic, racial, religious, political, and national found in the ICTR and the ECCC Statutes.⁸² Finally, it includes enforced disappearance of persons and the crime of apartheid as new specific acts constituting crimes against humanity.⁸³

The Rome Diplomatic Conference rejected appeals from some governments to add economic and environmental offenses, preferring the list to track crimes already found in other international instruments or clearly understood to be predicate acts of crimes against humanity under customary international law.⁸⁴ They may have been cautious due to the

⁷⁸ *Id.* at 52.

⁷⁹ See, e.g., M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION* (2011).

⁸⁰ Rome Statute, *supra* note 59, art. 7.

⁸¹ Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’), Case No. ICC-02/05-01/20, Judgment on the Appeal of Mr Abd-Al-Rahman Against Pre-Trial Chamber II’s Decision on the Defence Exception d’incompétence, ¶ 89 (Nov. 1, 2021).

⁸² Ken Roberts, *The Law of Persecution Before the International Criminal Tribunal for the Former Yugoslavia*, 15 LEIDEN J. INT’L. L. 623 (2002); Leila Nadya Sadat, *Crimes Against Humanity: Limits, Leverage, and Future Concerns*, in *THE FIRST GLOBAL PROSECUTOR* 45, 47-48 (Martha Minow, C. Cora True-Frost & Alex Whiting eds., 2015); Rome Statute, *supra* note 59, art. 7(1)(g–h).

⁸³ Rome Statute, *supra* note 59, art. 7(1)(j); Sadat, *Crimes Against Humanity: Limits, Leverage, and Future Concerns*, *supra* note 82, at 48.

⁸⁴ Sadat, *Crimes Against Humanity: Limits, Leverage, and Future Concerns*, *supra* note 82, at 48; Doudou Thiam (Special Rapporteur), *Second Report on the Draft Code of Offences Against the Peace*

potentially broad ambit of Article 7 of the Rome Statute, which, although it contains difficult-to-prove context elements, was nonetheless relatively capacious. Thus, the negotiators added a fifth element to crimes against humanity in addition to those found in the statutes of earlier tribunals: Article 7(2)(a) specifies that the State or organization committing the attack against the civilian population involving ICC crimes must be doing so pursuant to a policy, although that policy need not be formal or in writing. Whether this policy element is required by customary international law remains controversial.⁸⁵ The Rome Statute definition in Article 7 is the current centerpiece of the proposed new treaty, as Parts IV, V, and VI, *infra*, briefly touch upon.

III. THE ATROCITY CASCADE: WHY PREVENTING AND PUNISHING CRIMES AGAINST HUMANITY IS SO IMPORTANT

The expansive scope of crimes against humanity makes it a powerful tool to address what I refer to as an “atrocities cascade.” This is when human rights abuses deteriorate to the point of becoming criminal, and, if not staunched, descend further into war, and even into genocide.⁸⁶ A visual depiction of this idea is shown in Figure 1, below.

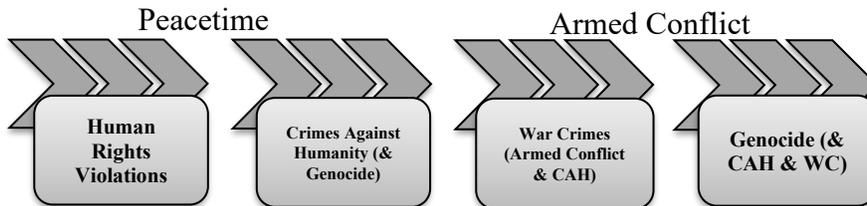


Figure 1: Depiction of the ‘Atrocities Cascade’.

Prosecutions based on crimes against humanity may occur before the onset of war or the commission of genocide, rendering crimes against humanity charges a potential tool for preventing mass atrocities.

Human rights violations occur in every country in the world. Most national systems have mechanisms to address them, however, and

and Security of Mankind, U.N. Doc. A/CN.4/377 (1984), reprinted in [1984] 2 Y.B. Intl L. Comm’n. 89; but see Rome Statute, *supra* note 59, art. 7. Twenty-five years after the amendment of the Rome Statute, there is now a push to open up the definition by including additional offenses. One is “grand corruption.” See, e.g., Naomi Roht-Arriaza & Santiago Martínez, *Grand Corruption and the International Criminal Court in the “Venezuela Situation”*, 17 J. INT’L CRIM. JUST. 1057 (2019). Another is environmental harm. A third is a new proposal to include the slave trade in article 7(1)(c) in addition to ‘enslavement.’ And finally, there have been extensive proposals to add gender apartheid and forced marriage to the statute.

⁸⁵ See, e.g., Guénaél Mettraux, *Crimes Against Humanity and the Question of a “Policy” Element*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 173-76 (Leila Nadya Sadat, ed., 2013).

⁸⁶ See Leila Nadya Sadat, *Genocide in Syria: International Legal Options, International Legal Limits, and the Serious Problem of Political Will*, 5 IMPUNITY WATCH L.J. 13, 17-18 (2015).

fortunately they are typically sporadic, so addressing them falls within the scope of a State's jurisdiction and domestic law. There are a series of treaties and institutional mechanisms that address human rights issues at the international level as well. However, sometimes both the national and international checks on human rights abuses fail. As they grow and metastasize, they overcome the ability of national systems to address them. This leaves the international system to condemn them, but with few concrete enforcement measures, outside the possibility of human rights courts operating in some regions of the world. If the violations reach a certain threshold of seriousness, they may become crimes against humanity. There is thus a frontier between human rights violations and criminal conduct during peacetime, as shown in Figure 1, where combating impunity for the commission of crimes against humanity becomes critical to preventing further descent into increasing atrocity levels.⁸⁷

The Syrian civil war is a textbook case of an atrocity cascade.⁸⁸ In the early 2000s, the regime of Syrian President Bashar al-Assad was criticized by the international community for extensive human rights violations. They became progressively worse and could, have been characterized as constituting crimes against humanity. In Spring 2011, Syrian citizens began protesting their mistreatment. Rather than addressing their concerns, the Syrian government attacked the protesters, some of whom then took up arms. The result was a full-scale civil war that killed more than 500,000 civilians, during which the government has committed war crimes and crimes against humanity, including the use of chemical weapons, attacks on hospitals and other civilian objects, torture, arbitrary arrest and detention, and sexual and gender-based violence.⁸⁹ The deterioration of the situation in Syria illustrates why it is so critical to address the commission of crimes against humanity prior to the onset of armed conflict.

This “peacetime” importance of crimes against humanity is also particularly evident in the work of the International Criminal Court, which is the world's first permanent international criminal court and operates in

⁸⁷ Because genocide is also a peacetime crime, it is possible to have a genocide occur prior to the onset of armed conflict, as figure 1 shows. Given the “intent to destroy” requirement for the commission of genocide, however, cases like this are likely to be rare. It has been alleged that the situation involving the Uyghurs in China may amount to the crime of genocide, for example. *Who Are The Uyghurs And Why is China Being Accused of Genocide?* BBCNEWS (May 24, 2022), <https://www.bbc.com/news/world-asia-china-22278037> [<https://perma.cc/5RBZ-X4AB>]. The genocide convention does not have a “State or organizational policy” requirement, although the ICC Elements of Crimes does require a “manifest pattern” for the commission of genocide, so it is also hypothetically possible that a “lone actor” could somehow commit the crime of genocide if they had access to a weapon of mass destruction. That said, the more typical situation involves increasing levels of atrocities that result in genocidal activity after a period of time.

⁸⁸ See AMNESTY INT'L, *Amnesty International Report 2022/23: The State of the World's Human Rights*, at 351–55 (Mar. 27, 2023), <https://www.amnesty.org/en/documents/pol10/5670/2023/en/> [<https://perma.cc/N4FQ-P35S>].

⁸⁹ BETH VAN SCHAACK, *IMAGINING JUSTICE FOR SYRIA* (Oxford Univ. Press 2020).

real time. Crimes against humanity have been alleged in all the situations referred to the Court and most of the cases.⁹⁰ In situations involving armed conflict, crimes against humanity charges often track war crimes charges, or they are added to target persecution or sexual violence or to fill gaps in the laws of war. In many situations, such as in Venezuela and the Philippines, as evidenced by the recent arrest warrant against former Philippine President Rodrigo Duterte,⁹¹ the crimes against humanity charges constitute the *only* basis which the ICC can exercise its jurisdiction, given the absence, at least at the outset of the referral, of an armed conflict sufficient to trigger the Court's war crimes jurisdiction and the implausibility of alleging genocide.⁹² Thus, crimes against humanity charges can serve as an important tool of genocide prevention. They can be brought before atrocity levels spin completely out of control to rein in a situation that is spiraling into conflict or catastrophic levels of atrocity crimes. Sadly, however, where the ICC has no jurisdiction, and the Security Council referral process is blocked, there is neither prevention nor deterrence. Again, the Syrian Civil War serves as a painful example of this.⁹³

In my 2013 study, the ICC was seized with eight situations—Central African Republic, Côte d'Ivoire, Darfur, Democratic Republic of the Congo, Kenya, Libya, Mali, and Uganda. In three of them, the ICC Prosecutor charged only crimes against humanity, and more than one-third of all accused before the Court faced charges exclusively for crimes against humanity.⁹⁴ While the ICC has not yet filed charges in some more recent situations, such as Burundi and Venezuela, those will also likely be “crimes against humanity only” cases. In contrast, at the ICTY and ICTR, only two accused (at each tribunal) were charged solely with crimes against humanity, representing 1.2 and 2.2 percent, respectively, of all accused.⁹⁵

90 “Situations” are “generally defined in terms of temporal, territorial and in some cases personal parameters” whereas “cases” “comprise specific incidents within a given ‘situation’ during which one or more crimes within the jurisdiction of the Court may have been committed, and whose scope are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute.” *Policy Paper on Case Selection And Prioritisation*, ICC OFF. OF THE PROSECUTOR 3 (Sep. 15, 2016), https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf [<https://perma.cc/FEY4-QBZL>].

91 *Press Release: Situation in the Philippines: Rodrigo Roa Duterte in ICC Custody*, INT'L CRIM. CT. (Mar. 12, 2025), <https://www.icc-cpi.int/news/situation-philippines-rodrigo-roa-duterte-icc-custody> [<https://perma.cc/KGM5-KWRL>]; *Situation in the Republic of the Philippines (Warrant of Arrest for Mr Rodrigo Roa Duterte)*, ICC-01/21-83, Pre-Trial Chamber I (Mar. 7, 2025), <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd180aeb09d.pdf> [<https://perma.cc/GRM5-TP4Y>].

92 See Rome Statute, *supra* note 59, art. 8; see also Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT'L L. 339-44, 355 (2013).

93 VAN SCHAACK, *supra* note 89, at 9-10, 55.

94 Sadat, *Crimes Against Humanity in the Modern Age*, *supra* note 92, at 356-57.

95 *Id.* at 356.

This difference – between the experience of the *ad hoc* international criminal tribunals and the practice at the ICC – is staggering.⁹⁶

IV. BUT WHY A NEW TREATY?

In July 2025, the ICC celebrated its twenty-seventh anniversary, and a definition of crimes against humanity had thus been enshrined in a treaty with 125 States Parties. This development raises an important question: why does the world need a new treaty on crimes against humanity? This question has been asked repeatedly over the past seventeen years, and the case for a new treaty has only grown stronger during that time period.

First, the ICC takes very few cases. This was predicted when the Rome Statute was completed in 1998; today it is a reality. According to the Court’s website, as of this writing, thirty-three cases have been filed (some with more than one suspect), and sixty-one arrest warrants have been issued.⁹⁷ While arrest warrants were recently issued in the Afghanistan, Bangladesh/Myanmar, Palestine, and Philippines situations, none of these warrants have been executed other than the warrant for former President Rodrigo Duterte. In total, thirty individuals remain at large.⁹⁸ Although the slow pace of indictments, arrests, and trials may eventually improve, an impunity gap is likely to remain. By design, the ICC is a court of last resort, with the principal responsibility for the prosecution of international crimes falling to national courts.

Second, and sadly, the world is experiencing a resurgence of atrocity crimes.⁹⁹

Third, the States Parties to the ICC Statute have no duty to criminalize the Statute’s offenses (although they are encouraged to do so), nor do they have a duty to prevent crimes against humanity. The preamble of the Rome Statute notes the “duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”¹⁰⁰ However, there is no obligation to adopt national legislation, and many States, both ICC States Parties and non-States Parties, have never adopted legislation penalizing crimes against humanity.¹⁰¹

⁹⁶ *Id.* at 377.

⁹⁷ ICC, *About the Court*, <https://www.icc-cpi.int/about/the-court> [<https://perma.cc/7EHY-FZMJ>].

⁹⁸ *Id.*

⁹⁹ For example, the ICRC recently reported in 2024 that nearly 130 armed conflicts are being fought around the world, a figure that has more than doubled in the past 15 years. INT’L COMM. OF THE RED CROSS, *ICRC Annual Report 2024* (July 9, 2025), <https://www.icrc.org/en/report/icrc-annual-report-2024> [<https://perma.cc/V5T4-JW9W>].

¹⁰⁰ Rome Statute, *supra* note 59, at pmbl.

¹⁰¹ See Arturo J. Carrillo, *Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction*, 46 GEO. WASH. INT’L L. REV. 482–83 (2014).

Fourth, prevention is a critical and neglected element when it comes to mass atrocities. This requires enhancing State capacity and imposing an enforceable duty to prevent crimes against humanity upon States, parallel to the obligation in Article I of the Genocide Convention. This duty would not typically be enforced through criminal prosecutions, but through interstate litigation (and diplomacy). The duty of States to prevent genocide was the subject of an important judgment of the International Court of Justice in *Bosnia v. Serbia*,¹⁰² but it is not explicitly present for crimes against humanity because there is no global treaty specifically related to these crimes.¹⁰³ As the ICJ has made clear, the obligation of “prevention” is different than the notion of “deterrence.” The latter refers to the possible specific or general effect of criminal prosecutions on would-be perpetrators of crimes against humanity. The former is a broader concept, requiring States that are on notice of atrocity crimes to take “all possible measures” of prevention if there is a serious risk that atrocities may occur.¹⁰⁴ An obligation to “prevent” crimes against humanity would entail a similar duty. By placing the jurisdictional nexus—the point at which human rights abuses become criminal – prior to the onset of war, crimes against humanity can assume a preventive function, as well as a punitive one.

Finally, in order to effectively investigate, prosecute, and deter crimes against humanity, States need to be able to cooperate with each other and offer each other mutual legal assistance. The ICC offers a vertical mechanism for the prosecution of crimes against humanity. In contrast, the proposed crimes against humanity treaty will be an interstate convention, offering a horizontal mechanism for prevention and punishment. This will close a significant gap. For example, the United States currently cannot prosecute individuals for crimes against humanity because there is no federal statute addressing them.¹⁰⁵ If a perpetrator from Myanmar or Syria, for example, is somehow found in the United States, they cannot be charged or arrested for committing crimes against humanity. The United States also cannot request the extradition of individuals accused of those crimes or cooperate with third States and render them legal assistance.

102 Application of Convention on Prevention and Punishment of Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 43, ¶¶ 428-42, (Feb. 26).

103 See Payam Akhavan, *The Universal Repression of Crimes Against Humanity before National Jurisdictions: The Need for a Treaty-Based Obligation to Prosecute*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 28, 30 (Leila Nadya Sadat, ed., 2013); M. Cherif Bassiouni, *Crimes Against Humanity: The Case for a Specialized Convention*, 9 WASH. U. GLOB. STUD. L. REV. 575, 582-83 (2010); Leila Nadya Sadat, *Heads of State and Other Government Officials before the International Criminal Court: The Uneasy Revolution Continues*, in THE ELGAR COMPANION TO THE INTERNATIONAL CRIMINAL COURT 96, 120-21 (Margaret DeGuzman & Valerie Oosterveld, eds., 2021).

104 *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. at ¶ 431.

105 In contrast, there are U.S. laws prohibiting the commission of genocide and war crimes.

Thus, the absence of a specialized international treaty on crimes against humanity leads to an impunity gap, a State responsibility gap, a lack of State cooperation, and definitional uncertainty.¹⁰⁶

V. THE CRIMES AGAINST HUMANITY INITIATIVE AT WASHINGTON UNIVERSITY

In 2008, I officially launched the Crimes Against Humanity Initiative. The first step was convening an international steering committee of luminaries who helped shape and direct the project. Through an iterative process, convening meetings in St. Louis, the Hague, and Washington D.C., we brought together more than 250 experts to draft the world's first international treaty for the prevention and punishment of crimes against humanity. That treaty, and the academic work that shaped its adoption, are published in *Forging a Convention for Crimes Against Humanity*.¹⁰⁷ The Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity (Proposed Convention) can be found on the Whitney R. Harris World Law Institute website.¹⁰⁸

We based our work on the many international criminal law treaties already in existence, such as the genocide, torture, apartheid, and enforced disappearances treaties, and took, as the definitional centerpiece for the model treaty, Article 7 of the Rome Statute of the International Criminal Court to avoid any potential conflict with the ICC Statute.

The 27 articles and 6 annexes of our draft Proposed Convention are available in multiple languages, including German.¹⁰⁹ The task at hand was both easier and more difficult than it might otherwise have been in 1994. It was simpler because the Rome Statute incorporated a definition that had been negotiated by 165 States and approved by 120 of them in 1998; and, for the first time since Nuremberg, a definition of crimes against humanity was thereby included in a major multilateral treaty. Yet it was also more difficult, because, paradoxically, the Rome Statute's adoption was sometimes seen as an obstacle to a stand-alone treaty on crimes against humanity. Some worried that the Convention would be superfluous; others that its adoption could somehow undermine the ICC itself.¹¹⁰

106 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*, 16 J. INT'L CRIM. JUST. 683, 685-86 (2018) [hereinafter Sadat, *A Contextual and Historical Analysis*].

107 See Sadat, *A Comprehensive History of the Crimes Against Humanity Initiative*, *supra* note 6.

108 CRIMES AGAINST HUMANITY INITIATIVE, *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, WASH. U. ST. LOUIS. (Aug. 2010), <https://sites.wustl.edu/crimesagainsthumanity/convention-text/> [<https://perma.cc/D2TM-XFKU>].

109 See generally *id.*

110 For a response to these concerns, see J. Richard Goldstone, *As the Draft Crimes Against Humanity Treaty Moves Forward, a View on How it Relates to the Rome Statute of the ICC*, JUST SECURITY (Sep. 15, 2021), <https://www.justsecurity.org/78188/as-the-draft-crimes-against-humanity->

The project rested upon four key pillars, aligned with the gaps our study identified. *First*, normative development – that all human beings have a right to be free from the commission of crimes against humanity. Moreover, the notion that crimes against humanity are somehow “lesser” than the commission of genocide or even war crimes needed refuting.

Second, preventing crimes against humanity is just as important as punishing them. Ensuring that the obligation of prevention is clear, and that States can be held responsible both for failing to prevent crimes against humanity and for punishing them was a key aspect of our project.

Third, in order to implement and make State investigations and prosecutions viable, as well as to enhance prevention, States may need assistance with capacity building measures. These could include the transfer of funds, the establishment of a treaty monitoring body, as well as requirements for police and military training, and human rights promotion.

Finally, in order to cooperate with the prevention and punishment of crimes against humanity, robust interstate cooperation mechanisms are required. Our proposal was to enhance the *de minimis* provisions of earlier treaties on genocide and war crimes, and establish a set of robust provisions on extradition, cooperation, and mutual legal assistance akin to those found in modern treaties on transnational crime, such as the U.N. Convention Against Corruption¹¹¹ and the U.N. Convention Against Transnational Organized Crime.¹¹² These appeared as annexes to our *Proposed Convention* to avoid overburdening the treaty’s substantive provisions and to render the text more accessible to the general public. These annexes were eventually incorporated into a different project known as the Mutual Legal Assistance Treaty, which was negotiated outside the United Nations system, adopted in Ljubljana, Slovenia, in May 2023, and opened for signature in February 2024.¹¹³ The International Law Commission (“ILC”) followed our approach in its 2019 Draft Articles on Crimes Against Humanity (“Draft Articles”),¹¹⁴ as well.

treaty-moves-forward-a-view-on-how-it-relates-to-the-rome-statute-for-the-icc/
[<https://perma.cc/XE7F-XYKS>].

111 U.N. Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005).

112 U.N. Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209 (entered into force Sep. 29, 2003).

113 *MLA (Mutual Legal Assistance and Extradition) Initiative*, REP. OF SLOVN. (Dec. 27, 2023), <https://www.gov.si/en/registries/projects/m-la-initiative/> [<https://perma.cc/PE6J-WZJ7>]; see also Priya Pillai, *Introducing a Symposium on Ljubljana – The Hague Convention on Mutual Legal Assistance: Critical Reflections*, OPINIO JURIS (July 24, 2023), <https://opiniojuris.org/2023/07/24/introducing-a-symposium-on-ljubljana-the-hague-convention-on-mutual-legal-assistance-critical-reflections> [<https://perma.cc/KP7X-NU96>]; see also *Final Document*, MLA DIPLOMATIC CONFERENCE (May 15-26, 2023), <https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/Final-Dokument-English.pdf> [<https://perma.cc/Y9KC-7AR8>].

114 Draft Articles on Prevention and Punishment of Crimes Against Humanity, Int’l L. Comm’n, U.N. Doc. A/74/10 (2009),

VI. THE DEVELOPMENT OF THE INTERNATIONAL LAW COMMISSION'S 2019 DRAFT ARTICLES

In 2010, the *Crimes Against Humanity Initiative* held its capstone conference at the Brookings Institution in Washington, D.C. Professor Sean Murphy of the George Washington University School of Law attended and indicated his interest in our work. In 2012, Professor Murphy was subsequently nominated by the United States and elected to the U.N. International Law Commission (“ILC” or “the Commission”). He proposed the topic of “crimes against humanity” to the Commission, which adopted it and fast tracked it in 2014. Professor Murphy served as the ILC’s Special Rapporteur for crimes against humanity from 2014-2019.

In 2014, the *Crimes Against Humanity Initiative* hosted a conference to support the ILC’s work.¹¹⁵ Over the next several years, Professor Murphy produced a report and submitted it to the Commission, as well as draft articles for consideration by its members, who debated the report and accompanying draft articles and sent them to a drafting committee. At the end of the summer, when the Commission finished its work, its report, including its work on crimes against humanity, was submitted to the Sixth (Legal) Committee of the U.N. General Assembly for consideration.¹¹⁶

This iterative process continued until 2017, when the first complete set of draft articles¹¹⁷ was published by the Commission for States to comment upon. The response of States and other entities to the Commission’s work from 2013-2017 is shown in Figure 2, below.¹¹⁸

https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf [<https://perma.cc/J2EW-CXYC>] [hereinafter 2019 Draft Articles].

¹¹⁵ See Leila N. Sadat & Douglas J. Pivnichny, *Fulfilling the Dictates of Public Conscience: Moving Forward with a Convention on Crimes Against Humanity*, WASH. U. ST. LOUIS (July 17, 2014), <https://bpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/b/2004/files/2019/02/Final-CAHGenevaReport-071714.pdf> [<https://perma.cc/EB3C-QPCX>]; see also Leila N. Sadat & Douglas Pivnichny, *Towards a New Global Treaty on Crimes Against Humanity*, EJIL:TALK! (Aug. 5, 2014), <https://www.ejiltalk.org/towards-a-new-global-treaty-on-crimes-against-humanity/> [<https://perma.cc/G3RY-PA7N>].

¹¹⁶ Int’l L. Comm’n, Rep. on the Work of Its Sixty-Eighth Session, U.N. Doc. A/71/10, at 241-80 (2016), https://legal.un.org/ilc/reports/2016/english/a_71_10.pdf [<https://perma.cc/NH4Q-76VP>].

¹¹⁷ This process is chronicled in Sadat, *A Contextual and Historical Analysis*, *supra* note 106, at 689-93.

¹¹⁸ This data has been collected by this author, along with Harris Institute Senior Fellow Madaline George and her predecessors, as well as Washington University Law School student fellows, since 2013. This *Initiative* was also supported by the Lowenstein Project at Yale Law School from 2021-2024. This particular chart is found in Leila N. Sadat & Madaline George, *An Analysis of State Reactions to the ILC’s Work on Crimes Against Humanity: A Pattern of Growing Support*, 6 AFR. J. INT’L CRIM. J. 162, 166 (2020). In the early phases of the analysis, we “counted” statements by regional groups in our tallies, as the comments were important in terms of signaling support or disapproval. This changed in later years as the ILC’s project advanced through the Sixth Committee, and it became important to see just how many governments supported sending the Draft Articles to treaty negotiations.

Thus, in 2013, we “counted” a regional statement by CELAC in our tallies. See *Compilation of Government Reactions*, *supra* note 19; however, in 2024, when assessing State support for the resolution that was eventually adopted as G.A. Resolution 79/122, we did not “count” statements by the Portuguese language group or other regional groups, but limited ourselves to including in our tallies only States that

The Response of States & Entities at the UN Sixth Committee 2013-2017								
	68th Session (2013)	69th Session (2014)	70th Session (2015)	71st Session (2016)	72nd Session (2017)	Total	%	Overall %
Strong Positive	0	3	4	5	10	22	12%	65%
Positive	10	11	22	21	33	97	53%	
Neutral	9	10	8	8	8	43	24%	24%
Negative	3	2	2	4	2	13	7%	11%
Strong Negative	2	1	2	0	2	7	4%	
TOTAL	24	27	38	38	55	182		

Figure 2: Compilation of the Response by States and Entities at the Sixth Committee (2013-2017).

In early 2019, after taking into account the comments submitted by governments and experts in 2018, Special Rapporteur Murphy produced a fourth and final report.¹¹⁹ After debate and referral to the Commission's drafting committee, the ILC adopted, on second reading, a complete set of Draft Articles on Prevention and Punishment of Crimes Against Humanity, with Commentaries, and transmitted them to the United Nations General Assembly.¹²⁰

In conformity with article 23 of the ILC Statute,¹²¹ paragraph 42 of the ILC's August 2019 report recommended "the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles."¹²² Given the historic role of the ILC in codifying international law, including its codification of the Nuremberg Principles¹²³ and its 1994 Draft Statute for the International

spoke or joined statements specifically, and the European Union, since it adopts a common foreign policy. See Leila N. Sadat, *Compilation of Government Statements at the Sixth Committee Resumed Session on Crimes Against Humanity October 10-14, 2024*, WASH. U. SCH. OF L., (Apr. 8, 2021), <https://bpb-us-e2.wpmucdn.com/sites.wustl.edu/dist/b/2004/files/2025/11/Government-Statements-at-the-6th-Committee-2025.pdf> [<https://perma.cc/N9LV-SMW6>].

119 Sean D. Murphy (Special Rapporteur on Crimes Against Humanity), *Fourth Rep. of the Special Rapporteur on Crimes Against Humanity*, U.N. Doc. A/CN.4/725 (Sep. 15, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455420 [<https://perma.cc/4CVK-2YJB>].

120 See 2019 Draft Articles, *supra* note 114.

121 G.A. Res. 174 (II), Statute of the International Law Commission, at 6 (Nov. 21, 1947).

122 Int'l L. Comm'n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10 (2019) [<https://perma.cc/EGY9-7ZJP>] [hereinafter Rep. in 71st Sess.]. The Commission took this decision at its 3,499th meeting, on August 5, 2019.

123 Int'l L. Comm'n, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, U.N. Doc. A/1316 (1950), https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf [<https://perma.cc/66C4-J37U>].

Criminal Court,¹²⁴ as well as its ongoing work on peremptory norms of international law (*jus cogens*)¹²⁵ and immunities,¹²⁶ it was a natural forum for work on a new global treaty on crimes against humanity. The Commission's broad expertise and diverse membership, with jurists from all regions, enabled wide and informed contributions to this project during the several years of its elaboration.¹²⁷

VII. FROM GENEVA TO NEW YORK: CRIMES AGAINST HUMANITY IN THE SIXTH (LEGAL) COMMITTEE OF THE U.N. GENERAL ASSEMBLY

When the ILC's text was introduced to the General Assembly's Sixth (Legal) Committee in 2019, a significant majority of States were willing to proceed quickly to a diplomatic conference to negotiate the treaty, which Austria offered to host.¹²⁸ However, a handful of States demurred, asking for more time to study the draft, and an even smaller number opposed the treaty entirely, arguing either that it was unnecessary or that the Commission's draft text was insufficiently well-developed to serve as the basis of future treaty negotiations.

Because of the consensus tradition in the Sixth Committee, which allows even a small number of States to block action on a particular proposal,¹²⁹ the result was a disappointing resolution "taking note" of the Draft Articles and promising to revisit them the following year. Austria, joined by forty-two other States, expressed its disappointment in this outcome,¹³⁰ regretting "that the Sixth Committee was not able to agree on an ambitious and

124 Int'l L. Comm'n, Draft Statute for an International Criminal Court with Commentaries, U.N. Doc. A/CN.4/448 (1994), https://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf [<https://perma.cc/TG3A-T9XJ>].

125 Int'l L. Comm'n Annual Session, Peremptory Norms of General International Law (Jus Cogens), at Ch. V, U.N. Doc. A/74/10 (2019), <https://legal.un.org/ilc/reports/2019/english/chp5.pdf> [<https://perma.cc/6EQD-EXV2>].

126 Int'l L. Comm'n Annual Session, Immunity of State Officials from Foreign Criminal Jurisdiction, at Ch. VI, U.N. Doc. A/77/10 (2022), <https://legal.un.org/ilc/reports/2022/english/chp6.pdf> [<https://perma.cc/AM44-9LUJ>].

127 The International Law Commission recently celebrated its 70th anniversary, prompting examinations of its purpose and functioning. See, e.g., Laurence Boisson de Chazournes, *The International Law Commission in a Mirror—Forms, Impact and Authority*, in SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION 133 (United Nations ed. 2020), https://doi.org/10.1163/9789004434271_016 [<https://perma.cc/FHL3-QDBW>].

128 Rep. in 71st Sess., *supra* note 122; see also Leila Nadya Sadat, *Little Progress in the Sixth Committee on Crimes Against Humanity*, 54 CASE W. RESV. J. INT'L L. 89 (2022).

129 *Options to Advance the ILC Draft Articles on the Prevention and Punishment of Crimes Against Humanity*, CRIMES AGAINST HUMAN. INITIATIVE & GLOB. JUST. CTR. ¶ 34 (June 29, 2022), https://wordpress-537312-2488108.cloudwaysapps.com/temp-uploads/2022/07/20220825_CAHmemo.pdf [<https://perma.cc/XA89-X7MR>].

130 Letter from the Permanent Mission of Austria to the United Nations in New York Addressed to the Chair of the 74th Session of the General Assembly, Explanation of Position After Adoption of the Draft Resolution Entitled "Crimes Against Humanity" (Oct. 28, 2019), <https://statements.unmeetings.org/media2/23557769/-e-austria-statement-item-79-eop.pdf> [<https://perma.cc/2753-LQ6W>].

structured approach for . . . [its] future deliberations on the recommendation of the ILC to elaborate a convention on the basis of its draft articles.”¹³¹

In 2020, the COVID-19 pandemic made advancing work on the Draft Articles even more challenging. Strict limitations on working methods were imposed, which precluded any opportunity for real debate or engagement. Furthermore, members of the civil society were not permitted to enter the United Nations building. As a result, the Sixth Committee adopted a second technical rollover resolution simply “taking note” of the Draft Articles.

Mexico, joined by thirteen other States, voiced its concern that this ran the “risk . . . of getting caught in a cycle of consideration and postponement of the articles without concrete action, which . . . may undermine the relationship between the General Assembly and the ILC.”¹³² Mexico’s statement continued:

We trust, however, that we will be able to revisit this agenda item [in 2021] with a constructive and flexible approach in order to break this inertia and to take collective decisions that would allow us to move forward into the definition of a process to consider the recommendations of the ILC, under terms that will be agreeable to all delegations.¹³³

Figure 3, below, summarizes the response of States and entities during the 2019 and 2020 sessions of the U.N. Sixth Committee.

This is where things stood in Fall 2021. Then, on October 13 and 15 of that year, the Sixth Committee again considered the ILC 2019 Draft Articles. In 2021, with the waning of the pandemic, expectations ran high in New York as State interventions in the Sixth Committee were overwhelmingly positive. Once again, however, the same handful of States opposed any action on the Draft Articles, and because States supporting the Draft Articles were unwilling to put the matter to a vote, the result was a third technical rollover to 2022.¹³⁴

131 *Id.* The General Assembly adopted the ILC’s draft on December 18, 2019, based upon the Sixth Committee’s report. G.A. Res. 74/187, U.N. Doc. A/74/425 (Dec. 18, 2019), <https://docs.un.org/en/A/RES/74/187> [<https://perma.cc/KNA4-GYNX>].

132 Letter from the Permanent Mission of Mexico to the United Nations in New York, Explanation of Position—Crimes Against Humanity (Nov. 19, 2020), https://www.un.org/en/ga/sixth/75/pdfs/statements/cah/19mtg_mexico.pdf [<https://perma.cc/GQ2G-TGUK>].

133 *Id.*

134 Leila Nadya Sadat & Akila Radhakrishnan, *Crimes Against Humanity: Little Progress on Treaty as UN Legal Committee Concludes Its Work*, JUST SECURITY (Dec. 7, 2021), <https://www.justsecurity.org/79415/crimes-against-humanity-little-progress-on-treaty-as-un-legal-committee-concludes-its-work/> [<https://perma.cc/7JCR-3S6J>].

Frustrated, Mexico dissociated from the draft resolution¹³⁵ and other States objected, including the United States,¹³⁶ the United Kingdom, Israel, and the European Union (joined by twenty-two additional States for a total of fifty). The EU statement noted that the consensus tradition of the Sixth Committee was being (mis)used to prevent the opening of a formal, structured, inclusive dialogue on the ILC's draft, failed to “captur[e] the view of the majority,” and was inconsistent with the Sixth Committee's responsibility under the U.N. Charter.¹³⁷

The Response of States & Entities at the UN Sixth Committee 2019-2020				
	74th Session (2019)		75th Session (2020)*	
	Total	Percent	Total	Percent
Explicitly favors a process to develop a convention	62	72%	36	65%
Takes no explicit view on a process (positive and/or constructive comments on the text)	8	9%	6	11%
Takes no explicit view on a process (neutral comments)	2	2%	0	0%
Opposes a process to develop a convention at this time	11	13%	12	22%
Opposes a convention	3	3%	1	2%
TOTAL (States commenting & joining statements)	86		55	

Figure 3: Compilation of the Response of States and Entities at the UN Sixth Committee (2019 & 2020).

This “infelicitous cycle” not only prevented any action with respect to the Draft Articles, but imperiled the legitimacy of the International Law Commission and the Sixth Committee itself. It was also notable that civil

135 Letter from the Permanent Mission of Mexico to the United Nations in New York, Explicación de Posición de México Sobre el Tema 83: “Crímenes de Lesa Humanidad” [Explanation of Mexico's Position on Issue 83: “Crimes Against Humanity”] (Nov. 18, 2021), https://www.un.org/en/ga/sixth/76/pdfs/statements/cah/29mtg_mexico.pdf [https://perma.cc/BRK5-9L4D].

136 Letter from the Permanent Mission of the United States to the United Nations in New York, Explanation of Position: Agenda Item 83: Crimes Against Humanity (Nov. 18, 2021), https://www.un.org/en/ga/sixth/76/pdfs/statements/cah/29mtg_us.pdf [https://perma.cc/H695-X5UP].

137 Letter from the Permanent Mission of the European Union to the United Nations in New York, Explanation of Position Before the Adoption of the Resolution on Crimes Against Humanity, https://www.un.org/en/ga/sixth/76/pdfs/statements/cah/29mtg_eu.pdf [https://perma.cc/J3LE-AUCY].

* pandemic year

society had again been excluded from the meetings, as a holdover of the pandemic measures the United Nations had implemented during the COVID-19 pandemic. The results are shown in Figure 4, below:

Results from the UN Sixth Committee 2021			
	Total	Percent	
Explicitly favors a process to develop a convention	76	84%	76 Positive
Takes no explicit view on a process (positive and/or constructive comments on the text)	0	0%	
Takes no explicit view on a process (neutral comments)	4	4%	4 Neutral
Opposes a process to develop a convention at this time	5	6%	10 Negative
Opposes a convention	5	6%	
TOTAL (States commenting & joining statements)	90		

Figure 4: Compilation of the Results from the UN Sixth Committee 2021.

In 2022, determined to avoid a repeat of 2021, a cross-regional group of eight States – Colombia, Costa Rica, The Gambia, Mexico, the Republic of Korea, the United Kingdom, and the United States – deposited a “zero-draft” resolution with the Bureau on October 5. This was shortly after the start of the Sixth Committee’s session, and prior to consideration of the agenda item on crimes against humanity scheduled for October 10, 2022.¹³⁸ Such a resolution could have led to a vote, a result most States wished to avoid. This had the effect of pressuring States to compromise. Mexico and the Gambia acted as co-facilitators, encouraging others to join them in finding a way forward within the Sixth Committee.¹³⁹

During the initial plenary debate, the zero-draft received considerable support. After weeks of difficult negotiations, during which the co-facilitators and most opponents showed flexibility, a modified draft was adopted. This resolution, which was later adopted as U.N. General Assembly Resolution 77/249, provided for an inclusive, structured, and

¹³⁸ Zero-Draft Resolution on Crimes Against Humanity (Oct. 5, 2022) (on file with author).

¹³⁹ Richard Dicker & Paloma van Groll, *UN Talks on Crimes Against Humanity Treaty Make Progress, But Also Reveal Hurdles*, JUST SECURITY (Dec. 5, 2022), <https://www.justsecurity.org/84360/un-talks-on-crimes-against-humanity-treaty-make-progress-but-also-reveal-hurdles/> [https://perma.cc/23PX-35TM].

transparent process for discussion of the Draft Articles, which were key benchmarks for the proponents.¹⁴⁰ At the same time, the proponents conceded several elements. Not only was the time period for discussion extended from one to two years, but the venue would no longer be an “Ad Hoc Committee” but the Sixth Committee itself, meeting in an “interactive format.” Perhaps of greatest concern was that, rather than reporting out to the General Assembly, in which voting is standard operating procedure, the two-year process remained within the Sixth Committee itself, which was required to “take a decision” regarding the Draft Articles in 2024,¹⁴¹ meaning that the question of voting (or not) was arguably simply pushed off for two years.

Resolution 77/249 was adopted in November 2022, with eighty-six co-sponsors, and a total of 100 States supporting the draft text, as shown below in Figure 5.¹⁴²

Results from the UN Sixth Committee 2022			
	Total	Percent	
Favors Zero Draft	63	53%	100 Positive
Favors CAH Treaty (Silent on Zero Draft)	14	12%	
Zero Draft Co-Sponsors (In Addition to Plenary)	23	19%	
Neutral to Zero Draft	4	3%	4 Neutral
Seems to Oppose Zero Draft	8	7%	15 Negative
Strongly Opposes Zero Draft	5	4%	
Opposes CAH Treaty	2	2%	
TOTAL (States commenting & joining statements)	119		

Figure 5: Summary of Results from the UN Sixth Committee 2022.

Resolution 77/249 created, for the first time, a process permitting States to address any substantive concerns they might have about the ILC’s 2019 Draft Articles. In March 2023, they did so informally in an intersessional briefing held by Germany and France at the German Mission;¹⁴³ and

¹⁴⁰ G.A. Res. 77/249, Crimes Against Humanity (Dec. 30, 2022).

¹⁴¹ Draft Resolution on Crimes Against Humanity, U.N. Doc. A/C.6/77/L.4 (Nov. 14, 2022), <https://documents.un.org/doc/undoc/ltd/n22/691/13/pdf/n2269113.pdf> [<https://perma.cc/HF7V-RAKB>].

¹⁴² *Compilation of Government Responses to the UN International Commission’s Work on Crimes Against Humanity 2022*, YALE L. SCH. & WASH. UNIV. ST. LOUIS (Feb. 2023), <https://bpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/b/2004/files/2023/02/6CCAH-final-CompilationofgovernmentreactionsFebruary2023.pdf> [<https://perma.cc/D4SL-M2T9>] [hereinafter *Compilation of Government Responses*].

¹⁴³ U.N. Secretariat, *Workshop on a Convention on the Prevention and Punishment of Crimes Against Humanity*, U.N. Doc. A/C.6/77/INF/3 (Apr. 19, 2023), <https://docs.un.org/en/A/C.6/77/INF/3> [<https://perma.cc/FN6C-JRVC>].

formally during the resumed sessions of the Sixth Committee held in April 2023, as well as the Sixth Committee's regular session in October 2023.

During the resumed sessions, the Sixth Committee's Bureau organized the meetings into "clusters,"¹⁴⁴ allowing delegations, for the first time, to provide substantive comments on the text of the Draft Articles. This approach eliminated any general debate, and adopted from the ILC its practice of "mini debates"¹⁴⁵ as a way to encourage direct State-to-State interaction on the points raised and positions taken.¹⁴⁶

The interventions in 2023 were overwhelmingly positive, reflecting the strong support for Resolution 77/249,¹⁴⁷ as shown in Figure 6, below.

Results from the UN Sixth Committee 2023			
	Total	Percent	
Very supportive of a CAH convention	92	73.0%	108 Positive
Supportive of a CAH convention, but offered some critical comments	16	12.7%	
Neutral (positive, but not supportive)	9	7.1%	9 Neutral
Negative, but with a constructive tone	6	4.8%	9 Negative
Opposes a CAH convention	3	2.4%	
TOTAL (States commenting & joining statements)	126		

Figure 6: Summary of Results from the UN Sixth Committee 2023.

The debates were skillfully managed by the chair and the co-facilitators, and the substantive discussions led to increased support for the draft, particularly as delegates built a rapport with each other. Likewise, during the second resumed session of the Sixth Committee in April 2024, States continued to discuss the Draft Articles, raising a variety of substantive issues and overwhelmingly supporting moving to treaty negotiations.¹⁴⁸

144 The five clusters chosen were: (1) introductory provisions; (2) definition and general obligations; (3) national measures; (4) international measures; and (5) safeguards.

145 About the Commission: Structure of the Commission, INT'L L. COMM'N, <https://legal.un.org/ilc/structure.shtml> [<https://perma.cc/49Z4-XHKZ>].

146 The three co-facilitators, Anna Pála Sverrisdóttir (Iceland), Sarah Zahirah Ruhama (Malaysia), and Edgar Daniel Leal Matta (Guatemala) presided and summarized the meeting at its close. Oral Report of the Co-Facilitators 78th Sess., 6th Comm. (Apr. 5, 2024), https://www.un.org/en/ga/sixth/78/pdfs/english/cah_oral_report.pdf [<https://perma.cc/E4RM-S8KJ>].

147 See *Compilation of Government Responses*, *supra* note 142.

148 Leila Nadya Sadat, *A Draft Treaty on Crimes Against Humanity Draws More Engagement from States*, JUST SECURITY (May 22, 2024), <https://www.justsecurity.org/95850/crimes-against-humanity-draft-treaty-states-engagement/> [<https://perma.cc/C7NQ-4ANQ>].

VIII. MOVING FORWARD IN 2024: THE ADOPTION OF RESOLUTION 79/122

In September 2024, Mexico and The Gambia, on behalf of a cross-regional group of States, once again tabled a “zero-draft” resolution prior to the scheduled meeting of the Sixth Committee on Crimes against Humanity. The zero-draft set forth a concrete and time-bound process for negotiations through the convening of a “United Nations Conference of Plenipotentiaries on Prevention and Punishment of Crimes Against Humanity. . . to elaborate and conclude a legally binding instrument on prevention and punishment of crimes against humanity.”¹⁴⁹

The number of State interventions¹⁵⁰ exceeded earlier meetings with 102 inscribed on the speakers list, representing 145 States and entities, including multiple representing regional or cross-sectional groups. As shown in Figure 7, below, a tally of the interventions made showed strong support for moving forward to negotiations, with 125 States expressing positive views, 7 remaining neutral, and 13 expressing negative views.

Results from the UN Sixth Committee 2024			
	Total	Percent	
Very supportive of a CAH convention	115	79.3%	125 Positive
Supportive of a CAH convention, but offered some critical comments	10	6.9%	
Neutral (positive, but not supportive)	7	4.8%	7 Neutral
Negative, but with a constructive tone	4	2.8%	13 Negative
Opposes a CAH convention	9	6.2%	
TOTAL (States commenting & joining statements)	145		

Figure 7: Summary of the Results from the UN Sixth Committee 2024.

Several States that had previously indicated concerns about the need for a treaty or the process, including Egypt¹⁵¹ and Nigeria, spoke positively in the 79th session.¹⁵² Sierra Leone, delivering a cross-regional statement on behalf of 77 States, agreed, noting that:

149 Zero-Draft Resolution on the Convening of a United Nations Conference of Plenipotentiaries on the Prevention and Punishment of Crimes Against Humanity (Sep. 2024) (on file with author).

150 *Statements Delivered*, U.N. G.A. 79th Sess., 6th Comm., <https://espeakers.unmeetings.org/670d0376bcf022aa1e0fb81114102024> [<https://perma.cc/K85T-A7VV>].

151 Dr. Mohamed Helal (Legal Advisor, Permanent Mission of the Arab Republic of Egypt to the U.N.), *Article 80: Crimes Against Humanity*, 79th Sess., 6th Comm. (Oct. 9, 2024), https://espeakers.unmeetings.org/670d0376bcf022aa1e0fb81114102024.un.org/en/ga/sixth/79/pdfs/statements/cah/08mtg_egypt.pdf [<https://perma.cc/Y66Y-97SJ>] (translation: <https://perma.cc/DZS7-D45Z>).

152 Statement by Gloria L. Dakwak (Minister, Permanent Mission of Nigeria to the U.N.), *Crime Against Humanity: Agenda Item 80*, 79th Sess., 6th Comm. (Oct.10, 2024),

In the past two years, we were delighted to see members of the Sixth Committee engaged in concluding the substantive and detailed legal dialogue on the draft articles . . . [i]t was a constructive experience for the Sixth Committee as a whole to move beyond a procedural debate and we encourage this action-oriented spirit to continue . . . with a view to adopting a draft resolution in this session that convenes to a United Nations Conference of Plenipotentiaries on Prevention and Punishment of Crimes Against Humanity.¹⁵³

While some States suggested that more time was needed for additional study and to resolve differences, most appeared to agree with Brazil that there would never “be an ideal moment” and that “time [was] of the essence when it comes to the preservation of human life and dignity.”¹⁵⁴ Other States also urged delegates to move forward, included Jordan,¹⁵⁵ Portugal, the United States,¹⁵⁶ and Sierra Leone, which offered to host a diplomatic conference to conclude the treaty (an offer previously made by Austria). Ireland,¹⁵⁷ Peru¹⁵⁸ (delivering a statement on behalf of a group of Latin

https://www.un.org/en/ga/sixth/79/pdfs/statements/cah/09mtg_nigeria.pdf [https://perma.cc/CV2S-NSTJ] [hereinafter Nigeria Statement].

¹⁵³ Statement by George Shadrack Kamanda (First Secretary, Permanent Mission of the Republic of Sierra Leone to the U.N.), *Crime Against Humanity: Agenda Item 80*, 79th Sess., 6th Comm. (Oct. 10, 2024), https://www.un.org/en/ga/sixth/79/pdfs/statements/cah/09mtg_sierraleone_group.pdf [https://perma.cc/LK5Q-E2B6] [hereinafter Sierra Leone Statement] (Sierra Leone on behalf of itself and a cross-regional group of States Albania, Argentina, Armenia, Austria, Australia, Bangladesh, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, Colombia, Comoros, Congo, Costa Rica, Croatia, Cyprus, Czechia, Denmark, Djibouti, El Salvador, Estonia, the European Union, Finland, France, the Gambia, Georgia, Germany, Ghana, Greece, Guatemala, Honduras, Hungary, Iceland, Ireland, Italy, Japan, Jordan, Latvia, Lebanon, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Malta, the Marshall Islands, Mexico, Monaco, Montenegro, Myanmar, the Kingdom of the Netherlands, New Zealand, North Macedonia, Norway, Peru, Poland, Portugal, the Republic of Korea, the Republic of Moldova, Romania, Rwanda, Samoa, San Marino, Senegal, Serbia, Slovakia, Slovenia, South Africa, Spain, the Observer State of Palestine, Sweden, Switzerland, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the United States of America).

¹⁵⁴ Statement by the Brazil’s Delegate, *Crime Against Humanity: Agenda Item 80*, 79th Sess., 6th Comm. (Oct. 9, 2024), https://www.un.org/en/ga/sixth/79/pdfs/statements/cah/08mtg_brazil.pdf [https://perma.cc/EQ6E-746W].

¹⁵⁵ Statement by Nadine Bisharat (First Secretary, Permanent Mission of the Hashemite Kingdom of Jordan to the U.N.), *Crime Against Humanity: Agenda Item 80*, 79th Sess., 6th Comm. (Oct. 10, 2024), https://www.un.org/en/ga/sixth/79/pdfs/statements/cah/08mtg_jordan.pdf [https://perma.cc/M4EF-TECK].

¹⁵⁶ Statement by Mark Simonoff (Legal Adviser, U.S. Mission to the U.N.), *Crime Against Humanity: Agenda Item 80*, 79th Sess., 6th Comm. (Oct. 10, 2024), https://www.un.org/en/ga/sixth/79/pdfs/statements/cah/08mtg_us.pdf [https://perma.cc/2G5X-X7K8].

¹⁵⁷ Statement by James Kirk (Legal Adviser, Permanent Mission of Ireland to the U.N.), *Agenda Item 80: Crimes Against Humanity*, 79th Sess., 6th Comm. (Oct. 10, 2024), https://www.un.org/en/ga/sixth/79/pdfs/statements/cah/09mtg_ireland.pdf [https://perma.cc/RF8D-62BC].

¹⁵⁸ Statement by Peru’s Delegate, *Agenda Item #80: Crimes Against Humanity*, 79th Sess., 6th Comm. (Oct. 10, 2024), https://www.un.org/en/ga/sixth/79/pdfs/statements/cah/09mtg_peru_group.pdf [https://perma.cc/C8QX-SRLR] (translation: <https://perma.cc/L9F9-NTYQ>) (on behalf of Argentina,

American States), and Cabo Verde¹⁵⁹ (speaking on behalf of the Portuguese language group of States), joined the chorus. As the discussions progressed, it became apparent that even where concerns and points of divergence existed, for most delegations, the appropriate next step was negotiations.

Occasionally, the voices of the victims of crimes against humanity echoed throughout the room. South Africa noted its own painful and wrenching history with the crime of apartheid.¹⁶⁰ The current Ambassador for Afghanistan (who does not represent the Taliban) referenced the scourge of gender apartheid specifically. Haiti¹⁶¹ and Sierra Leone¹⁶² spoke to the horrors, continuing legacy, and modern-day iterations of slavery and the slave trade. Bangladesh,¹⁶³ Israel,¹⁶⁴ Myanmar,¹⁶⁴ and the State of Palestine¹⁶⁵ spoke personally as well, referring to painful experiences in the past and in the present. Poland¹⁶⁶ condemned attacks on children, and Nigeria,¹⁶⁷ while expressing strong support for moving forward, underscored the need to address crimes of concern to African States, including colonialism, and the

Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Panama & Uruguay).

159 Statement by Tania Romualdo (Ambassador and Permanent Representative of Cabo Verde), *Crimes Against Humanity: Agenda Item 80*, 79th Sess., 6th Comm. (Oct. 10, 2024), https://www.un.org/en/ga/sixth/79/pdfs/statements/cah/09mtg_portuguese.pdf [<https://perma.cc/4DYR-N7L8>] (on behalf of the Member States of the Community of Portuguese Language Countries).

160 Statement by Keke Mantsho Anastacia Motsepe (Counsellor: Legal Permanent Mission of the Republic of South Africa to the U.N.), *Agenda Item 80: Crimes Against Humanity*, 79th Sess., 6th Comm., (Oct. 9, 2024), https://www.un.org/en/ga/sixth/79/pdfs/statements/cah/08mtg_south_africa.pdf [<https://perma.cc/F2VE-YDEU>].

161 Statement by Fritzner Gaspard (Minister Counsellor, Deputy Permanent Representative), *Crimes Against Humanity: Point 78 of the Agenda*, 79th Sess., 6th Comm. (Oct. 10, 2024), https://www.un.org/en/ga/sixth/79/pdfs/statements/cah/09mtg_haiti.pdf [<https://perma.cc/9XPJ-WMZA>] [translation: <https://perma.cc/E2CU-6FMT>].

162 Sierra Leone Statement, *supra* note 153.

163 Statement by the Bangladesh's Delegate, *General Debate on Crimes Against Humanity (Item:80)*, 79th Sess., 6th Comm. (Oct. 10, 2024), https://www.un.org/en/ga/sixth/79/pdfs/statements/cah/09mtg_bangladesh.pdf [<https://perma.cc/WCZ4-YBMX>].

164 Statement by Ambassador Kyaw Moe Tun (Permanent Representative of the Republic of the Union of Myanmar to the U.N.), *General Debate on Agenda Item 80: Crimes Against Humanity*, 79th Sess., 6th Comm. (Oct. 10, 2024), https://www.un.org/en/ga/sixth/79/pdfs/statements/cah/10mtg_myanmar.pdf [<https://perma.cc/WV9Y-7DDQ>].

165 Statement by Loureen Sayej (Third Secretary, Permanent Observer Mission of the State of Palestine to the U.N.), *Crimes Against Humanity (Agenda Item: 80)*, 79th Sess., 6th Comm. (Oct. 9, 2024), https://www.un.org/en/ga/sixth/79/pdfs/statements/cah/08mtg_palestine.pdf [<https://perma.cc/UG5-LTTV>].

166 Statement by H.E. Krzysztof Szczerski (Permanent Representative of the Republic of Poland to the U.N.), *Agenda Item 80: "Crimes Against Humanity"*, 79th Sess., 6th Comm. (Oct. 9, 2024), https://www.un.org/en/ga/sixth/79/pdfs/statements/cah/08mtg_poland.pdf [<https://perma.cc/S9MP-7364>].

167 Nigeria Statement, *supra* note 152.

need for reparations. The few States maintaining their opposition included the Russian Federation¹⁶⁸ and the People’s Republic of China.¹⁶⁹

On November 22, 2024, after an exhausting and dramatic day of negotiations conducted in person and by WhatsApp chat, the Sixth Committee adopted a draft resolution by consensus, co-sponsored by 99 States, to sustained applause. The Russian Federation disassociated from the text.

As shown below, in Figure 8, consensus continued to build slowly as the text was elaborated, socialized, debated, and discussed by civil society and State delegates over time.

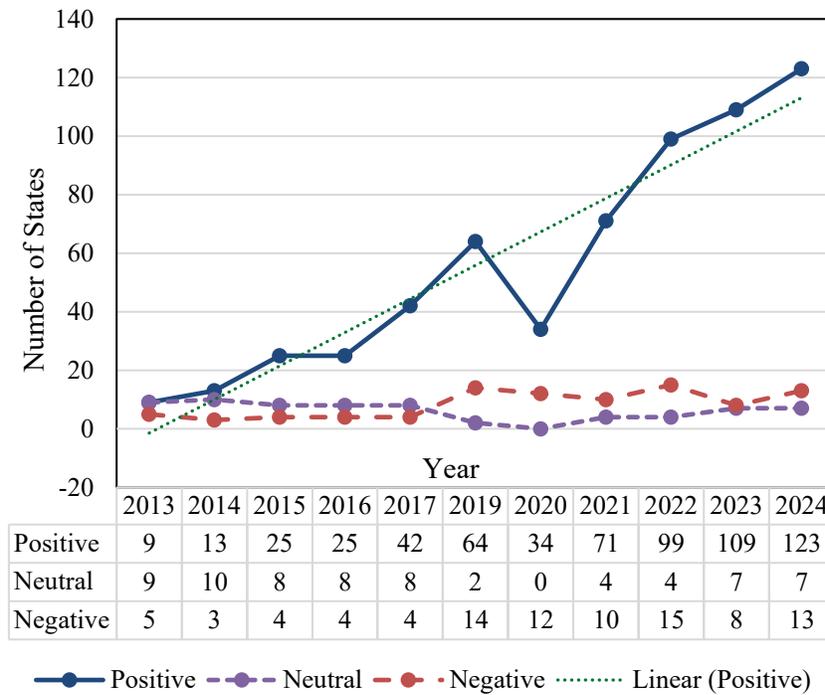


Figure 8: State Support by Number in the Sixth Committee

168 Statement by A.S. Proskuryakov (Representative of the Russian Federation, Permanent Mission of the Russian Federation to the U.N.), *Agenda Item “Crimes Against Humanity”*, 79th Sess., 6th Comm. (Oct. 15, 2024), https://www.un.org/en/ga/sixth/79/pdfs/statements/cah/10mtg_russia.pdf [<https://perma.cc/DJN5-UPUE>] [translation: <https://perma.cc/N8L5-ZVFW>].

169 Statement by Geng Shuang (Ambassador Extraordinary and Plenipotentiary, Deputy Permanent Representative of the People’s Republic of China to the U.N.), *Crimes Against Humanity*, 79th Sess., 6th Comm. (Oct. 10, 2024), https://www.un.org/en/ga/sixth/79/pdfs/statements/cah/10mtg_china.pdf [<https://perma.cc/L3QA-52FW>] [translation: <https://perma.cc/59RE-QRV6>].

On December 4, 2022, that Resolution was adopted by the U.N. General Assembly as Resolution 79/122 (again with the Russian Federation dissociating from the text).¹⁷⁰ It sets out a framework to move forward over the next four years, with a Working Group of the Conference and Preparatory Committee meetings occurring in 2026 and 2027, and a Diplomatic Conference to take place, in two three-week sessions, in early 2028 and 2029, with the possibility of an additional session if needed.

Heading into November 2022, a stronger text with a more streamlined process and timeline and robust civil society participation had been on the table. However, last-minute compromises were made, largely due to pushback by the Russian Federation. This infuriated some delegations, given that the Russian Federation dissociated from the text after extracting significant compromises from treaty proponents.

That said, even if the final text is not as strong as desired, its adoption by consensus by both the Sixth Committee and the General Assembly sets the stage for inclusive negotiations on a treaty with universal acceptability. Further, while the text prolongs the process, it preserves the core elements of the zero-draft text, and the adoption of the final text represents an extraordinary achievement in terms of building State and civil society support for this new legal instrument. The United Nations has since established an official website for the United Nations Diplomatic Conference of Plenipotentiaries on Prevention and Punishment of Crimes Against Humanity.¹⁷¹ Furthermore, a Provisional Agenda for the Conference Preparatory Committee envisaged by Resolution 79/122 has already begun to take shape,¹⁷² and States and civil society are already mapping out their negotiating strategies.

CONCLUSION: THE WAY FORWARD

The struggle to draft and win State support for a new treaty on crimes against humanity, against the backdrop of a world on fire with their commission, has been a long one, with many players and partners working to build a coalition that is deep and broad. Some have been States willing to take the lead in galvanizing world opinion and working through the challenges in the General Assembly. Mexico and the Gambia played vitally important roles as co-facilitators of the Sixth Committee process; Sierra Leone tabled a very important cross-regional statement in 2024; Canada consistently advocated for robust civil society participation; and dozens of

¹⁷⁰ G.A. Res. 77/249, *supra* note 140.

¹⁷¹ G.A. Res. 79/122, U.N. Doc. A/RES/79/122 (Dec. 4, 2024), <https://legal.un.org/diplomaticconferences/cah/> [<https://perma.cc/7N95-SLKZ>].

¹⁷² Provisional Agenda: Preparatory Comm. for the U.N. Conf. of Plenipotentiaries on Prevention & Punishment of Crimes Against Humanity, 1st Sess., U.N. Doc. A/AC.300/L.1 (Mar. 25, 2025), <https://digitallibrary.un.org/record/4080141?v=pdf#files> [<https://perma.cc/E2ZZ-6PQA>].

States from around the world came together to agree on the process for the new treaty's elaboration. Germany also played a significant role, particularly by hosting two critical intersessional meetings in 2023 and 2024 to socialize and familiarize States with the Draft Articles prior to the two April resumed sessions. The State of Palestine played a key role in bringing skeptics on board, particularly from the Arab world and the global south. In October 2024, the European Union hosted an important intersessional meeting prior to the meeting of the U.N. Sixth Committee. Indeed, the remarkable list of supporting States has continually increased over time.

Other important participants have been academics, U.N. officials, personnel who serve at international criminal courts and tribunals, including the ICC, and members of civil society, including organizations of survivors or victims. It has taken sustained effort, research, procedural innovation, diplomatic acumen, and hard work to get the project of a new global treaty this far, an effort that has truly spanned the globe.

Now comes the real push for the next five years, when, at last, the substance of the new treaty will take its final shape. The ILC's 2019 Draft Articles provide an excellent starting point for negotiations, but questions remain. The Sixth Committee Chair's Summary Report of the two April resumed sessions¹⁷³ includes many comments by States relating to the text, as do the comments already submitted by governments, not only in 2018 on the first reading of the text,¹⁷⁴ but also in 2023,¹⁷⁵ in response to the 2019 Draft Articles.

States and members of civil society may also advance new proposals. Some have already begun to organize around the issue of children's rights in the treaty,¹⁷⁶ gender issues,¹⁷⁷ and disability rights.¹⁷⁸ Questions have also been raised in relation to several other topics, including the absence of a *Martens Clause* and the unusual drafting of the definition of persecution in the text. States have also debated about incitement as a mode of criminal participation (or crime), and including a definition of 'victim'. Other issues

173 Int'l L. Comm'n, Rep. on the Work of Its Seventy-First Session, U.N. GAOR, 74th Sess., Supp. No. 10, at 10-11, U.N. Doc. A/74/10 (2019), https://legal.un.org/ilc/reports/2019/english/a_74_10_advance.pdf [<https://perma.cc/S86F-2VSE>].

174 *Id.* at 344.

175 *Workshop on a Convention on the Prevention and Punishment of Crimes Against Humanity*, *supra* note 143.

176 Zama Neff et al., *Justice for Children in a Future Crimes Against Humanity Treaty*, JUST SECURITY (May 19, 2025), <https://www.justsecurity.org/113376/justice-children-future-crimes-against-humanity-treaty/> [<https://perma.cc/9DBE-NNJ6>].

177 Leila Nadya Sadat & Akila Radhakrishnan, *Continued Positive Momentum on Crimes Against Humanity Treaty*, JUST SECURITY (Nov. 9, 2023), <https://www.justsecurity.org/90024/continued-positive-momentum-on-crimes-against-humanity-treaty/> [<https://perma.cc/W46Y-L7WE>].

178 *Guidance Note on Persons with Disabilities and Prevention of Genocide, War Crimes and Crimes Against Humanity*, U.N. OFF. ON GENOCIDE PREVENTION & THE RESPONSIBILITY TO PROTECT (Oct. 2024), https://www.un.org/sites/un2.un.org/files/guidance_note_disability_28_october_2024.pdf [<https://perma.cc/A4Y9-3JVB>].

concern the enhancement of fair trial rights of the accused, amnesties and immunities, and the option of having the treaty establish new crimes, including those involving environmental destruction, gender apartheid, forced marriage, slave trade, and starvation. Additionally, many States have supported the creation of a treaty monitoring mechanism. Finally, important questions of treaty design in terms of reservations, dispute settlement provisions (with an ICJ compromissory clause), and the geographic scope of the duty to prevent will also need to be addressed.

Under Resolution 79/122, States will have an opportunity to submit proposals until April 30, 2026, regarding these issues. However, the time for study and preparation is now. Of concern is the deletion of the provision ensuring robust civil society participation, which was removed from the zero draft as negotiations intensified in the fall of 2024. During the six years that the draft treaty languished in the Sixth Committee, we saw that participation by civil society organizations (CSOs) was critical to advancing the treaty. When civil society could get into the building, the dynamics changed. Under Resolution 79/122, while organizations accredited by the Economic and Social Council (ECOSOC) will be able to participate in the Preparatory Committee and Conference, the participation of non-ECOSOC accredited organizations and other stakeholders will be decided through an as-yet undefined process by the Preparatory Committee.

This may be less problematic than it appears. The Preparatory Committee and the Diplomatic Conference, unlike the Sixth Committee, may take decisions by voting, if necessary, as is normal within the U.N. system. While consensus is urged, it is not required. Civil society has been an active partner to both the ILC and States throughout this process, and its members will help to strengthen the negotiations with their expertise and engagement. More than 650 experts and civil society organizations signed a Declaration in Fall 2024, urging States to take the treaty to negotiations.¹⁷⁹ Indeed, the civil society organization Avaaz circulated a petition in favor of the treaty in Fall 2024, that garnered more than 500,000 signatures in three weeks.¹⁸⁰ Strong advocacy will be needed to ensure that a broad and diverse section of civil society will be able to meaningfully participate in the process.

At the end of the day, the real beneficiaries of this treaty will be those who receive justice or do not become victims of crimes against humanity to begin with. We cannot know how many people will benefit, and we cannot

179 *Joint Statement in Support of Progress Toward a Crimes Against Humanity Treaty*, CAH TREATY NOW, <https://cahtreatynow.org/joint-statement-in-support-of-progress-toward-a-crimes-against-humanity-treaty/> [<https://perma.cc/H9B2-PK6J>] (last visited Nov. 3, 2024).

180 *UN States: End Impunity for Regimes that Kill, Maim, and Torture*, AVAAZ, https://secure.avaaz.org/campaign/en/cah_treaty_loc/ [<https://perma.cc/4XV7-GP4X>] (last visited Nov. 4, 2024).

hope to stop all crimes, or punish all perpetrators. Returning, however, to the discussion at the beginning of this Article, we can learn from the experience of the slave treaties and courts of the nineteenth century. The U.S. Supreme Court's decision in *The Antelope* allowed the slave trade to continue for another forty years. This stain was only removed in 1841, when Justice Story again gained the upper hand and the Court, in a 7-1 decision in the *Amistad*, held that captives brought into U.S. waters and onto U.S. soil were free Africans, not enslaved persons.¹⁸¹

Conversely, the slavery treaties and treaty courts helped mitigate the harmful effects of the slave trade in situations where slave ships could be interdicted and their captives freed, thereby contributing to the slave trade's eventual abolition. Over the short lifespan of the treaties, these courts heard more than 600 cases and "freed almost 80,000 slaves found aboard illegal slave trading vessels."¹⁸² The court system established in Sierra Leone, in particular, resulted in the emancipation of approximately 65,000 enslaved persons between 1819 and 1846, and held more than 500 trials.¹⁸³ Eventually, the courts acquired jurisdiction over slave ships that did not yet have any cargo, leading to estimates that perhaps another 90,000 individuals may have been saved.¹⁸⁴ Perhaps it is no coincidence that one of the key amendments driving global south support for this new treaty is the addition of the slave trade to Draft Article 2(1)(c)'s incrimination of "enslavement," as the key to righting a terrible historic wrong.

As one member of civil society remarked at a recent meeting, "this new treaty, and the hope it represents, is not just a piece of paper: It is a promise to survivors." History tells us that its adoption will be a necessary, but not sufficient, first step in preventing and punishing the commission of crimes against humanity. Without it, States and the international community are missing a critical legal tool to combat international crimes, as the nineteenth-century experience with the slave trade instructs. With it, there is at least a chance to save victims, survivors, and ourselves.

As the Chief Prosecutor for the United States, Robert H. Jackson, argued nearly eighty years ago in a courtroom in Nuremberg:

Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude. . . It does not expect that you can make war impossible. It does expect that your juridical action will put the forces of international law,

¹⁸¹ *The Amistad*, 40 U.S. 518.

¹⁸² MARTINEZ, *supra* note 53, at 6.

¹⁸³ *Id.* at 79.

¹⁸⁴ *Id.* (Martinez notes that another 13,000 individuals were freed by the other courts; thus, the 90,000 figure is an estimate of the total from all the courts).

its precepts, its prohibitions and, most of all, its sanctions, on the side of peace. . .¹⁸⁵

Even once the treaty is adopted, the work will need to continue: a ratification campaign will be required, and enforcement by States will be critically important. I suspect the most difficult part of the journey lies ahead, not behind, particularly given the current geopolitical environment. Yet, we take heart from the example of the American experience with the horror of the transatlantic slave trade: that although the arc of the moral universe is often painfully long, it indeed bends towards justice, as the Reverend Dr. Martin Luther King reminded us in 1965. On a personal note, I can hear Ben Ferencz's voice in my head, with his usual admonition: "Never give up, never give up, never give up."

At this juncture, however, and at this excellent conference, it seems appropriate to pause for a moment and celebrate the adoption of a Resolution to convene a United Nations Diplomatic Conference of Plenipotentiaries on Prevention and Punishment of Crimes Against Humanity, which received support from 192 of 193 States in the U.N. General Assembly. I am privileged to have been an integral part of this journey – a small part of a long arc of history, indeed, and I have been profoundly encouraged by the support and assistance of so many along the way. In 2008, we began our journey at historic Ridgely Hall on the Washington University campus, where the Inter-Parliamentary Union first met in 1904 to call upon the great powers to convene a second Hague Peace Conference. In 2025, we met there once more to take a brief victory lap before jumping back into the fray.

¹⁸⁵ Marko Milanovic, *One of the Most Significant Tributes that Power Has Ever Paid to Reason*, EJIL: TALK (Nov. 21, 2020), <https://www.ejiltalk.org/one-of-the-most-significant-tributes-that-power-has-ever-paid-to-reason/> [<https://perma.cc/SQN3-JWCP>].