Why a UN Convention for the Prevention and Punishment of Crimes against Humanity? The Six (Plus One) Rationales For A New Treaty

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JUSTICE, NOT REVENGE: WINNING THE HEARTS AND MINDS OF THE (WOULD-BE) PERPETRATORS OF CRIMES AGAINST HUMANITY

In a time of unspeakable atrocities and armed conflicts in which the most powerful actors appear to have abandoned the notion that justice should replace revenge in a rules-based (international) order, this article is based on the contribution to the Symposium *From Academic Offering to Global Treaty: Negotiating a Convention on Crimes Against Humanity*,[1] organized and curated by the members of the *Washington University Global Studies Law Review* and convened by Professor Leila Sadat, the world's leading academic in the process towards a Crimes Against Humanity Treaty.

As Zej Moczydłowski, *Global Studies Law Review* Volume 24's Managing Editor, stated at the beginning of the Symposium, we must be "winning the hearts and minds" of those who are called to consider, discuss, negotiate, and eventually adopt the new treaty, regarding which the UN General Assembly set up a law-making process that should culminate with decision-making in 2029.[2]

But I humbly believe that a major goal of the new treaty will be to try to win the hearts and minds of the would-be perpetrators of crimes against humanity. This corresponds to the main goal of international law, in particular International Human Rights Law and International Criminal Law, which are aimed at putting an end to crimes against humanity.[3] What we are missing now is an instrument that, in a comprehensive way, presents a case against their planning and commission to the decision makers of the world, because these crimes are, by definition, widespread or systematic. They are not committed by random individuals, not exercising any significant form of power. Perpetrators (including would-be perpetrators), need to have the means to commit crimes against humanity: They need to have effective control and capacity to mobilize efforts of what we call "mass-criminality" or organized and complex crimes. Therefore, our main goal for a new treaty outlawing crimes against humanity needs to be to win the hearts and minds of leaders to not commit them anymore including stop retaliating for the commission of mass atrocities with the perpetration of other mass atrocities. The imperative for peace and stability in any given society, including the

1 *From Academic Offering to Global Treaty: Negotiating a Convention on Crimes Against Humanity*, AM. SOC'Y OF INT'L L. (Mar. 20, 2025), https://www.asil.org/event/academic-offering-global-treaty-negotiating-convention-crimes-against-humanity [https://perma.cc/2ZV9-8D27] [hereinafter *From Academic Offering to Global Treaty*].

2 This reference is made to G.A. Res. 79/122, United Nations Conference of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity (Dec. 4, 2024) a treaty-making conference scheduled to take place in 2028 and 2029 at U.N. Headquarters in New York.

3 Brenda Nanyunja & Vito Todeschini, *The 'Obligation to Prevent' in a Future Crimes Against Humanity Convention*, JUST SECURITY (Sep. 27, 2024), https://www.justsecurity.org/100036/crimes-against-humanity-obligation-prevent/ [https://perma.cc/8Z8W-5PFM].

international society, is justice —not revenge.[4] And so, to have a comprehensive treaty ahead of time before the crimes are committed could certainly be a useful tool to this end.

PREVENTION

The biggest added value of a crimes against humanity convention lies in its title. It is supposed to be the new UN Convention for the Prevention and Punishment of Crimes Against Humanity, and the label must reflect the reality. Prevention *as such* may not be found in other existing instruments concerning crimes against humanity, the most notable one being the Rome Statute of the ICC. The most detailed and sophisticated definition of crimes against humanity, which is largely reflected in customary international law, is undoubtedly the one of Article 7 of the Rome Statute[5] adopted on July 17, 1998.[6] Its content is essentially duplicated in the ILC Draft Articles of 2019[7] with a slight deviation that is retrogressive, in the case of the crime of persecution (which would be punishable only if connected to other crimes against humanity and not to any other international crime, as envisaged in the Rome Statute) and another modification that is intended to entail a progressive approach, i.e., the omission of paragraph 3 of Article 7. However, this final paragraph of the Rome Statute's definition of crimes against humanity represents an interpretative element of the definition, because the deleted definition of gender is not constitutive of the crime: Paragraph 3 of Article 7, Rome Statute, does not really belong there as it could have been better inserted in Article 21 or somewhere else, where there are provisions on interpretation (for example, the *non-prejudice clause* of

4 Commenting on the law of the ancient Romans and Greeks, Professor M. Cherif Bassiouni wrote in one of his last scholarly works in 2010: "[The] transformative concept of justice was designed to prevent never-ending revenge-taking and continued violence that only resulted in more human suffering. Individual responsibility replaced collective responsibility, the former to be established by an impartial judge on the basis of fair and open proceedings with popular participation." M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. *J. INT'L L.* 269, 277 (2010).

5 Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

6 Right after the adoption of the Statute, this author wrote a piece that summarized all the features, including the main innovations, of such a definition. *See* David Donat Cattin, *A General Definition of Crimes Against Humanity Under International Law: The Contribution of the Rome Statute of the ICC*, 8 L'ASTRÉE - REVUE DE DROIT PENAL ET DES DROITS DE L'HOMME 83 (1999).
In 2025, I commented on the proposals to amend the 1998 definition and their interplay with the absolutely important notion of "other inhumane acts" as the residual category of crimes against humanity. *See* David Donat Cattin, *The Unique Function of the Crime Against Humanity of Other Inhumane Acts in the Progressive Development and Codification of International Criminal Law*, 8 CARDOZO INT'L & COMPAR. L. REV. 615 (2025).

7 Draft Articles on Prevention and Punishment of Crimes Against Humanity, Int'l L. Comm'n, U.N. Doc. A/74/10 (2019), https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf [https://perma.cc/J7M2-SPEX] [hereinafter Draft Articles].

Article 10, but Article 21, paragraphs 2 and 3, also deal with the interpretation of the "applicable law").

Nevertheless, the International Law Commission was very loyal to the consensus definition of 1998: In fact, while there was a vote on the Rome Statute with 120 States in favor, twenty-one abstaining and only seven opposing its adoption, such a vote was not on the definitions of crimes, but on the precondition for the exercise of the Court's jurisdiction (i.e., Article 12 of the Rome Statute).[8] Hence, there had been unanimity in the Committee on the Whole of the Rome Diplomatic Conference concerning the text of Article 7, containing the definition of crimes against humanity. We are referring to a 1998 consensus on a substantive definition within the framework of a treaty instrument that focuses on a "[c]ourt of last resort," which reaffirms the primary responsibility of States to put an end to impunity for crimes under international law, as defined in the Rome Statute, if they ratify the treaty.[9] And by admitting that the ICC is complementary to national jurisdiction, it is not explicitly stipulated that States are expected to criminalize the conduct constituting international crimes domestically. Yet, such a reality is, in my humble view, implicitly inferred by a systematic interpretation of the Rome Statute in light of its object and purpose, which is to put an end to impunity for international crimes. How can there be a "[c]ourt of last resort" if there will not be a functioning court of first resort at the national level? Nevertheless, the majority of scholars have interpreted the Rome Statute as not entailing an obligation to domesticate or implement crimes against humanity into national law.[10] And this is something that will be explicitly addressed by a crimes against humanity treaty, which will include a suppression convention clause obligating states to domesticate based on Article 6 of the ILC Draft Articles ("Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law") and Article 4(a) on the domestication of the "obligation of prevention."[11]

The goal of *prevention as such* of crimes against humanity, which bears the principle of state responsibility, is absent from the Rome Statute given that the mandate of the International Criminal Court is *also to prevent*, because the deterrence goal will be achieved by way of repression of international crimes (i.e., general and special prevention via investigation

8 *See* Melissa K. Marler, *The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute*, 49 DUKE L.J. 825 (1999).

9 *What is Complementarity?*, ICTJ.ORG., https://www.ictj.org/sites/default/files/subsites/complementarity-icc/ [https://perma.cc/4TSB-LCX2].

10 The "minority view" of this author is presented in this writing: David Donat Cattin, *Approximation or Harmonization as a Result of Implementation of the Rome Statute*, in THE DIVERSIFICATION & FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW 361, (Larissa van den Herik & Carsten Stahn eds., Cambridge Univ. Press 2012).

11 Draft Articles, *supra* note 7, arts. 4, 6.

and prosecution of crimes). As the Rome Statute's Preamble eloquently states:

> The States Parties to this Statute, . . .
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> **Affirming** that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
>
> **Determined** to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,
>
> **Recalling** that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, . . .
>
> Have agreed as follows:[12]

So, the Rome Statute system, comprising national jurisdictions and the ICC, is designed to have a deterrent effect through the adjudication of the most serious crimes of international concern, which did not materialize *yet* due to the primitive and horizontal framework of the international legal system and, above all, the problematic state of affairs of contemporary international relations, which have been marked by more than two decades of dramatic decadence after the historic progresses that characterized the 1990s.[13] However, with the upcoming pre-trial proceedings and expected subsequent trial of the former President of the Republic of the Philippines,

12 Rome Statute, *supra* note 5, at Preamble (emphasis added).

13 *From Academic Offering to Global Treaty*, *supra* note 1. UN Secretary-General Boutros Boutros-Ghali, the only International Law scholar who headed the largest International Organization with a universal mandate, strongly supported the implementation of UN General Assembly resolution 44/23 of November 17, 1989, which declared the period 1990 to 1999 as the United Nations Decade of International Law. Boutros Boutros-Ghali, *Seventy Years of the United Nations*, UN CHRONICLE (Sep. 15, 2015), https://www.un.org/en/chronicle/article/seventy-years-united-nations [https://perma.cc/N7WG-399E]. This historic resolution was adopted eight days after the "Fall of the Berlin Wall" marked the concrete end of the so-called 'Cold War'. There is no doubt that the international community deserves, nowadays, a new decade of international law to bring itself back to the hopes and certainties of the 1990s. Nanyunja & Todeschini, *supra* note 3. Yet, such a development may be possible only when the current era—characterized by a "piecemeal World War III" ("una terza guerra mondiale a pezzi"), as prophetically anticipated by His Holiness Pope Francis in September 2014 in the face of armed conflicts, destruction and mass atrocities—may have come to an end. *See Pope Francis Warns on 'Piecemeal World War III'*, BBC NEWS (Sep. 13, 2014), https://www.bbc.com/news/world-europe-29190890 [https://perma.cc/R4YH-5ZC2].

Rodrigo Duterte, for crimes against humanity,[14] the world may *finally* be witnessing a major case at the Court (geared to become a "leading case" in the jurisprudence),that might have a certain resonance with many leaders, making them think twice about what can happen if they grossly abuse their powers through the commission of crimes against humanity against the people that elected them, which they are constitutionally mandated to protect. This scenario might indeed have a preventative effect. Yet, it will be a secondary effect of the Rome Statute. Instead, in the new convention for the prevention and punishment of crimes against humanity, the obligation of prevention will be clearly outlined as a primary obligation on States Parties, which shall take any reasonable policy and legislative means to prevent and punish the commission of crimes against humanity.

What does this obligation of prevention concretely mean? By way of example, one could quote a piece of legislation signed into law by the 45th President of the United States of America, the "Elie Wiesel Atrocity Prevention Act."[15] It stipulates a number of conducts and administrative practices that the United States, through its various governmental bodies and agencies, including the army, must undertake to prevent atrocity crimes, not only internally, but also externally. Such measures entail an effort to educate the population at large to the imperatives of prevention of gross human rights abuses, as well as specific training programs that should also fulfill the pre-existing obligations under the Geneva Conventions' system for the members of the armed forces on International Humanitarian Law, which may be well subsumed by the letter of Article 1 common to the four Geneva Conventions of 1949: "The High Contracting Parties undertake to respect and **to ensure respect** for the present Convention in all circumstances."[16]

The best way to ensure respect of International Humanitarian Law (IHL) is to educate the general public and train State officials that any violations of IHL shall be prevented and, when perpetrated, investigated and—in the case of war crimes or crimes against humanity committed during armed conflict—prosecuted. The Elie Wiesel Act[17] extends this obligation to crimes against humanity, genocide, and other mass atrocities regardless of whether these offenses are committed in time of peace or war. Similarly, every national law that will implement the obligations contained in the new

14 *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/3H3T-FR2V].

15 Elie Wiesel Genocide and Atrocities Prevention Act of 2018, Pub. L. No. 115–441, 132 Stat. 5586 (2019) [hereinafter Elie Wiesel Act].

16 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, https://www.ohchr.org/en/instruments-mechanisms/instruments/geneva-convention-relative-protection-civilian-persons-time-war [https://perma.cc/UP4F-WR86] (emphasis added).

17 Elie Wiesel Act *supra* note 15.

convention on the prevention and punishment of crimes against humanity will entail that States will need to plan and realize relevant prevention programs domestically. This is certainly a new obligation that does not exist in existing treaties, which are not applicable to the full spectrum of crimes against humanity[18] and under customary international law. Since preventative programs entail positive actions by the state, such an obligation cannot be implicitly inferred.

STATE RESPONSIBILITY AND INDIVIDUAL CRIMINAL RESPONSIBILITY

The obligation of prevention will be reinforced by the application of the principle of State responsibility in case of violations of the convention in all the situations in which the acts of (i) State organs, (ii) individuals operating on behalf of, or with the acquiescence of the State, or even (iii) non-state actors effectively controlled by the State, can be imputed to the responsibility of a State, according to the law of state responsibility as codified in the ILC Draft Articles of 2001.[19] This is very different from the current status quo of the applicable law in the statutes of international criminal tribunals, like the one on the ICC, which is essentially focusing on the principle of individual criminal responsibility. This is confirmed, for example, by the legal institute of reparations. If former President Duterte will be convicted for crimes against humanity by the ICC on the basis of proceedings that may last several years (i.e., if he will be found guilty beyond a reasonable doubt in a final judgment), we will move to the phase of reparations, but the reparation will not be provided to the victims in terms of restitution, compensation, and rehabilitation—including satisfaction and guarantees of non-repetition—by the State (i.e., the Republic of The Philippines), but will only be borne by the perpetrator and will be limited to liability for harm provoked by the specific crimes for which he will be convicted.[20]

Here. instead, through a new legally binding instrument that comprehensively outlaws crimes against humanity, we are creating a system

18 For example, existing conventions on the crime of apartheid (*see* G.A. Res. 3068 (XXVIII), International Convention on the Suppression and Punishment of the Crime of Apartheid (Nov. 30, 1973)), the crime of torture (*see* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85), and the crime of enforced disappearances of persons (*see* G.A. Res. 61/177, International Convention for the Protection of All Persons from Enforced Disappearance (Dec. 20, 2006)) contain prevention clauses, which, however, may not be extended by analogy to all the other categories of crimes against humanity.

19 *See* G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts (Dec. 12, 2001). For the text of the Draft Articles with commentaries, *see* Int'l L. Comm'n, Rep. of the ILC on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001).

20 For a description of the law on reparations applicable before the ICC, refer to this author's contribution to the largest volume devoted to the Rome Statute, namely: D. Donat Cattin, *Article 75: Reparations to Victims*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 2240–2075 (Kai Ambos ed., C.H. Beck/Hart/Nomos 2021).

with broader accountability. In this system, a State that either failed to prevent such crimes or actively participated—or was an accomplice—in their perpetration can be held responsible. Although crimes against humanity must be attributable to individuals under international criminal law, the State itself can be made accountable for reparations when crimes against humanity can be qualified as *internationally wrongful acts* attributable to a State. These reparations would be directed toward the community of victims and survivors, addressing the full pattern of crimes committed in the situation in question. This set of obligations should be appropriately reflected in the norms and principles of the new convention, as they align with customary international law standards applicable to reparations, which were largely applied by Germany after World War II. The ILC Draft Articles already outline these principles in a significant manner. These principles need not be too detailed because they can be interpreted in light of the object and purpose of the new crimes against humanity treaty: to put an end to the perpetration of crimes against humanity and bar any form of impunity for such crimes through securing access to justice, truth and reparations for the victims, including, but not limited to, the survivors of such crimes.

Additionally, the second main "accountability goal" of the new treaty would be to achieve *punishment through written law*, as Prosecutor Brenda Hollis taught us in her enlightening intervention[21], reaffirming predictability and certainty in the application of the principle of individual criminal responsibility. All the inhumane acts arising to the gravity threshold of crimes against humanity—a widespread or systematic attack directed against any civilian population—are prohibited under customary international law, as interpreted by relevant courts and tribunals. The view of this author is that the new treaty under consideration before the United Nations General Assembly diplomatic mechanism is *de facto* not bringing about any substantive innovation. Even some proposals that are aimed at ameliorating the definition, through the integration in the list of prohibited conduct of specific inhumane acts, are based on existing law, such as in the cases of slavery and the slave trade, forced marriage, environmental destruction or massive degradation leading to biodiversity loss,[22] etc.

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21 Brenda J. Hollis, *From Academic Offering to Global Treaty: Negotiating A Convention on Crimes Against Humanity Keynote Address and Reflections*, 25 WASH. U. GLOB. STUD. L. REV. 290, 296-97 (2025) ("Because today there is an increasing danger of governments committing widespread or systematic crimes against their civilian populations . . . These are all reasons why accountability for commission of crimes against humanity must remain one of the fundamental guards against such violations of rights").

22 *See Environmental Destruction*, ABILA STUDY GROUP: CRIMES AGAINST HUMANITY (Oct. 20, 2025), https://www.ila-americanbranch.org/wp-content/uploads/2025/10/ABILA-CAH-Environmental-Destruction-Final-v2.pdf [https://perma.cc/9LR6-5P9P] (The environmental destruction subgroup included M.J. Kelly, C. Lentz, D. Donat Cattin, and M.N. Basmaci).

So, this author humbly submits that States can refine the definition and make it more in tune with the existing law as of 2029, when a decision will need to be taken— a deadline that imposes to think ahead of time. Hopefully, there will be more jurisprudence by then, but States will have a written text that will be conducive to enhanced familiarization by States' delegations with the new treaty and the imperative to adopt it. Needless to say, this decision-making process will be particularly important for the largest States, most of which are not yet Parties to the Rome Statute of the ICC. Reference is made not only to the United States of America, but also to India and Indonesia, the largest world democracies together with the US, which did not ratify the Rome Statute and could instead consider ratifying, in the first place, this treaty, especially Indonesia. As of today, the Indian position appears very controversial and restrictive, but governmental delegations can change positions as governments themselves can change in functioning democratic systems.

THE NORMATIVE GOAL

A treaty for the prevention and punishment of crimes against humanity provides a unique opportunity to advance the law and, therefore, refine the definition of crimes against humanity. So, there is a normative plus that can be attached to this treaty-making process, which is triggering significant interest and support within the global civil society.

In particular, this process can focus on the extremely important crime against humanity of persecution, and fix a problem created by the Rome Diplomatic Conference of 1998, which, to a certain extent, can be traced back to Nuremberg, where we had two major types of crimes against humanity, i.e., those reflecting a mass atrocity dimension, or "murder-type" crimes, and "persecution-type" crimes against humanity, which were instrumental in capturing most of the preparatory steps towards a genocide before a genocidal plan is even orchestrated and implemented. Unfortunately, in Rome, persecution was not treated as a crime against humanity *per se*, but it was linked to the perpetration of other crimes falling under the Court's jurisdiction, namely, other crimes against humanity (murder-type crimes), war crimes, genocide, or the crime of aggression. In other terms, from a jurisdictional perspective that might dangerously percolate in a definitional perspective, the ICC can adjudicate a case of persecution if such a case is connected with charges of other crimes under international law. Such a requirement is retrogressive vis-à-vis the customary international law interpretation of persecution, rendered by the jurisprudence of the two *ad hoc* tribunals established by the UN Security

Council in the 1990s, with the mandate to apply customary international law to the former Yugoslavia and Rwanda.[23]

The text of the ILC Draft Articles of 2019 is even more retrogressive than Article 7 of the Rome Statute, as it makes persecution a punishable crime against humanity only if it is connected to other crimes against humanity.[24] This poses an inappropriate and excessive definitional restriction that must be remedied. The best solution would be to get rid of this "jurisdictional link" or connection requirement, and go back to the Nuremberg or ICTR definition.[25] Alternatively, a compromise could be to broaden this requirement to all the other crimes under international law.

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23 The U.N. Security Council (U.N.S.C.) established the two ad hoc Tribunals in the 1990s on the basis of the specific powers enshrined in the U.N. Charter, Chapter VII (in particular, Articles 39 and 41), combined with Chapter I, Article 1 (*see* "The Purposes of the United Nations [is to] . . . maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law"), entails that the Council had the authority to set up jurisdictional mechanisms contributing to peace that would have applied existing norms and principles of international law. This foundational statement is reflected in the dictum of the famous U.N. Secretary-General Report annexed to S.C. Res. 808 (Feb. 22, 1993), which paved the way for S.C. Res. 827 (May 25, 1993) establishing the ICTY. Inter alia, the U.N. Secretary-General stated as follows:

> A. Competence ratione materiae (subject-matter jurisdiction)
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> 33. According to paragraph 1 of resolution 808 (1993), the international tribunal shall prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. This body of law exists in the form of both conventional law and customary law. While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.
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> 34. In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.

U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25705 (May. 3, 1993). This report also contains the text of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY). While crimes against humanity were viewed in the above report as connected to the armed conflicts causing the disintegration of the former Yugoslavia during the U.N.S.C. 1993 decision-making process establishing the ICTY, in 1994 the same deliberative UN organ set up the International Criminal Tribunal for Rwanda (ICTR), thereby delinking the punish-ability of crimes against humanity from any situation of armed conflict in adherence with customary international law (and beyond the limited spectrum of IHL): *See* S.C. Res. 955 (Nov. 8, 1994).

24 *See* Draft Articles *supra* note 7, at art. 2, ¶ 1(h): "[P]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph".

25 *See* Proposed Revised Text of Article 2(1)(h) of the Draft Articles on the Prevention and Punishment of Crimes Against Humanity for Persecution, *ABILA Study Group on Crimes Against Humanity*, INT'L L. ASS'N, https://www.ila-americanbranch.org/abila-study-group-on-crimes-against-humanity/ [https://perma.cc/HG4Q-V49Y].

THE OBLIGATION TO COOPERATE AMONGST STATES

The new treaty provides us with an opportunity to improve horizontal cooperation among States in the fight against international crimes. Early 2024 marked the adoption of the Ljubljana-Hague Convention on Mutual Legal Assistance (MLA),[26] an excellent tool drafted and adopted for this purpose. But as of today, not a single state has ratified that treaty. So, it would still be an added value to have effective international cooperation provisions in a crimes against humanity treaty, empowering States to better cooperate in investigations, prosecution, extradition and other areas of mutual legal assistance.

THE RIGHTS OF VICTIMS, INCLUDING SURVIVORS, AND THE POTENTIAL ROLE OF A MONITORING MECHANISM ON VICTIMIZATION

Last but not least, one goal of a new treaty will be to reaffirm and crystallize the rights of victims of crimes against humanity, including survivors. While these rights already exist as they derive from universally accepted rules of International Human Rights Law (e.g., Article 2, Paragraph 3 of the International Covenant on Civil and Political Rights[27]), when they will be written down in a binding treaty outlawing crimes against humanity, States will know precisely what to do (never underestimate the power of black letter law) as they will know what their obligations are vis-à-vis the victims and communities affected by crimes against humanity.

Too often, we only mention the names of the perpetrator. We think about Vladimir Putin or Slobodan Milosevic, or other powerful individuals who may have locus standi in a courtroom as accused persons, but we never name and remember the hundreds of thousands who died, were tortured, detained, forcibly disappeared, enslaved, persecuted, etc. They are the real people for whom justice is being done and seen to be done, and this treaty offers an opportunity to do much better in this crucial area of recognition of victimhood.

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26 *See Joint Statement: The ICJ Joined Other NGOs In Calling For States To Accede To The Ljubljana - The Hague Convention*, ICJ (Feb. 21, 2025), https://www.icj.org/joint-statement-the-icj-joined-other-ngos-in-calling-for-states-to-accede-to-the-ljubljana-the-hague-convention/ [https://perma.cc/U5VN-U4YD]; *MLA (Mutual Legal Assistance and Extradition) Initiative*, GOV.SI, https://www.gov.si/en/registries/projects/mla-initiative/ [https://perma.cc/6BNL-KCJY]; *see also Convention Signed to Combat International Crime More Effectively*, GOVT OF NETH. (Feb. 14, 2024), https://www.government.nl/latest/news/2024/02/14/convention-signed-to-combat-international-crime-more-effectively [https://perma.cc/FL3R-92VL]; *Treaty: Ljubljana - Hague Convention on International Cooperation in the Investigation and Prosecution of The Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes*, OVERHEID.NL, https://treatydatabase.overheid.nl/en/Treaty/Details/013717_p.html [https://perma.cc/UC7L-32GK].

27 International Covenant on Civil and Political Rights art. 2(3), Dec. 16, 1966, 999 U.N.T.S. 171, 173.

As an academic, making reference to Patricia Galvao's contribution concerning the lack of a monitoring mechanism that initially was considered by the ILC for the Draft Article, and was dropped largely due to a "fatigue" with the Geneva system on human rights protection, I believe that adding some sort of mechanism to look into compliance by States with the new convention will be instrumental in linking the new treaty with international human rights law practitioners, who are generally looking with skepticism or an (excessively) critical approach to this treaty-making process and, more generally, to international criminal law practitioners and advocates. Suffice it to cite the enlightening title of a recent publication, "Criminalizing Human Rights,"[28] by NYU Law Professor Philip Alston, who eloquently sends an alarm to our community of scholars and lawyers that we do not need to wait for human rights violations to escalate to mass atrocities for them to become important issues in international relations and international law. The UN/Geneva mechanisms and special procedures on human rights remain essential safeguards to ensure that human rights violations do not escalate to crimes against humanity, and it is absolutely essential to combat any form of "fatigue" or resistance against these pivotal mechanisms and standards.

Therefore, the setting up of a mechanism to monitor *not only* the perpetration of crimes against humanity, but also what states are doing to domestically implement the convention, starting with policies and measures aimed at preventing steps taken towards such perpetration (and human rights violations) may represent a first step in this direction, even before their systematic or widespread patterns qualify as crimes against humanity. A mechanism to monitor crimes against humanity could be a crucial first step to advance the line of protection for victims of persecution and other crimes against humanity since the stage of their planning or preparation, which may, or may not, fulfil the requirements of the attempt to commit such crimes.[29] This mechanism would not only track the commencement of

28 Philip Alston, *Criminalizing Human Rights*, 15 J. HUM. RTS. PRAC. 660 (2023).

29 Scholars and practitioners are generally underestimating the importance of the punish-ability of the attempt to perpetrate crimes under international law, which has been crystallized in a clear provision inserted in Article 25 of the Rome Statute on "individual criminal responsibility" that anticipate the possibility to investigate, prosecute and adjudicate international before their actual commission. Attempt is defined as follows in the illuminating third paragraph of Article 25:

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
>
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

the perpetration or attempted perpetration of such crimes, but also assess what states are doing to implement the convention domestically. It would begin by evaluating policies and measures aimed at preventing actions that could lead to crimes against humanity, which could encompass rigorous analysis of patterns of human rights violations. This monitoring can occur even before these actions develop into systematic or widespread patterns of inhumane acts targeting any civilian population that qualify as crimes against humanity. Last, but not least, a monitoring mechanism can also offer States technical assistance when States need support for their legislative and/or administrative efforts (e.g., implementing legislation, establishing funds for victims, implementing preventative measures, etc.). Additionally, a monitoring mechanism can be crucial in the quality control of national training programs, i.e. what type of tangible policies States are undertaking to educate their military, their population, their leaders, their social media influencers and any other societal actor, in respecting human rights and not using any type of language or materials that could incentivize and bring about the perpetration of crimes against humanity. All these steps do not form part of the traditional realm of criminal law but fall under the domain of administrative law and policy and educational policy, mainstreaming internal issues in governmental affairs, including States' communication strategies.

> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime.

Rome Statute, *supra* note 5, at art. 25 ¶ 3.