



DEVELOPING THE CRIMES AGAINST HUMANITY CONVENTION:

Implementation and enforcement
of treaty obligations

January 2026

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GLOSSARY

ACHPR	African Charter on Human and Peoples' Rights
BBNJ	Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction
CAH	Crimes against humanity
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CERD	Convention on the Elimination of all Forms of Racial Discrimination
CPRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICPPED	International Convention on the Protection of All Persons from Enforced Disappearance
ILC	International Law Commission
MLA	Mutual legal assistance
OAS	Organization of American States
OAU	Organisation of African Unity
OHCHR	UN Office of the High Commissioner on Human Rights
OPCAT	Optional Protocol to the Convention against Torture
SGBV	Sexual and gender-based violence
UDHR	Universal Declaration on Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
UN	United Nations
UNGA	United Nations General Assembly

A.

INTRODUCTION

On 4 December 2024, in an historic step, the United Nations (UN) General Assembly (UNGA) resolved to convene a negotiating conference to elaborate and conclude a new Convention on the Prevention and Punishment of Crimes against Humanity (the Convention).¹ The Resolution followed two years of deliberations by the UNGA's Sixth Committee² and marked a long-awaited milestone for the advancement of the *Draft Articles on the Prevention and Punishment of Crimes against Humanity* (Draft Articles), developed between 2014 and 2019 by the International Law Commission (ILC).³

As States now work to revise the Draft Articles, there are gaps in the text that will need to be considered and potentially addressed. Among the most critical is the absence of a treaty mechanism for facilitating and monitoring implementation and enforcement⁴ of the Convention in the Draft's provisions. While the Draft Articles articulate obligations to prevent and punish crimes against humanity and, to that end, would establish the obligation for States to fulfil the right of victims and survivors to reparations, they only include a minimal, and arguably toothless, framework for monitoring and enforcement, relying on international cooperation (articles 13 and 14) and inter-State dispute settlement (article 15).

This omission seems unfortunate, given that experience with modern multilateral treaties in the international criminal law, humanitarian and human rights fields, as well as transnational crime treaties, demonstrates the critical importance of monitoring and enforcement bodies in providing interpretive guidance, coordinating technical assistance and capacity building, facilitating international cooperation, promoting and assessing State compliance, receiving communications and issuing determinations. No doubt headwinds in today's political and fiscal climate may engender some resistance to adding new treaty mechanisms.⁵ Nonetheless, there are good reasons to consider that such mechanisms will be critical to the Convention's effectiveness. As the UN Office of the High Commissioner on Human Rights (OHCHR) has indicated in its

¹ UN General Assembly, 79th Session, Resolution adopted by the General Assembly on 4 December 2024, UN Doc. A/Res/79/122, 12 December 2024. See also UN General Assembly, 79th session, Crimes Against Humanity: Report of the Sixth Committee, UN Doc. A/79/470, 25 November 2024.

² See <https://www.un.org/en/ga/sixth/>.

³ See International Law Commission, *Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries*, UN Doc. A/74/10 (2019) ("ILC Draft Articles commentary"), at: https://legal.un.org/ilc/texts/instruments/english/commentaries/7_7_2019.pdf. For all reports of the International Law Commission (ILC), see https://legal.un.org/ilc/guide/7_7.shtml.

⁴ As discussed further below, treaty mechanisms can fulfil one or more functions, from technical assistance and capacity building to the issuance of determinations in response to complaints, the latter of which might be characterized as "enforcement."

⁵ Borne of both practical (see e.g. UNGA Resolution 68/268, *Resolution adopted by the General Assembly on 9 April 2014: Strengthening and enhancing the effective functioning of the human rights treaty body system*, UN Doc. A/RES/68/268, 21 April 2014) and financial (see, e.g., OHCHR, Meeting Summaries: Treaty Bodies, *Human Rights Committee Holds Emergency Meeting with States Parties as the United Nations' Financial Crisis Threatens its Survival*, 10 July 2025, at: <https://www.ohchr.org/en/meeting-summaries/2025/07/human-rights-committee-holds-emergency-meeting-states-parties-united>).

submissions to the ILC, treaty monitoring mechanisms “guarantee that States regularly review their implementation of the obligation to take steps to ensure that everyone under their jurisdiction can enjoy the rights set out under the relevant treaty.”⁶

This Briefing Paper explores several options for filling this gap.⁷ In addition to making recommendations on amendments to Draft Articles 3, 4, 6, 7, 10, 13, 14 and 15, it aims to provide States with concrete proposals for strengthening implementation and enforcement of the Convention through the creation of an institutional mechanism, with a view to having one or more of such proposals submitted to the UN Secretary-General by 30 April 2026, the date presently designated as the deadline for inclusion in the compilation of materials for the Conference of Plenipotentiaries.⁸

⁶ *Crimes Against Humanity: Comments and Observations received from Governments, International Organizations and Others*, International Law Commission, Seventy-first session, Geneva, 29 April -7 June and 8 July-9 August 2019, UN Doc. A/CN.4/726 (“ILC Comments and Observations 2019”), p. 132.

⁷ The International Commission of Jurists is publishing two additional papers, which will address (i) the preamble of the Convention and underlying acts of crimes against humanity (CAH) (preamble and Draft Article 2); and (ii) the rights of the victims and the accused (Draft Article 12).

⁸ The Briefing Paper builds upon a discussion paper disseminated to States in advance of the International Commission of Jurists’ side event in New York on 22 October 2025 on *Facilitating implementation of obligations under the Crimes Against Humanity Convention – Gaps and Opportunities*, supported by the Mexican mission.

B.

MECHANISMS FOR IMPLEMENTING STATE OBLIGATIONS to prevent and punish crimes against humanity under the Draft Articles

The prohibition of crimes against humanity is “clearly accepted and recognized” as a peremptory norm of international law,⁹ meaning that it overrides any other legal obligation not also of a peremptory character. The primary prohibition necessarily contains correlative State obligations to prevent and punish crimes against humanity and provide victims and survivors with access to effective remedies

and reparations. These are derived from a patchwork of sources under international law and standards. States have clear obligations to criminalize conduct that amounts to crimes against humanity, to adopt legislative, administrative, judicial and other measures necessary to ensure their prevention and to prosecute and punish perpetrators. At the same time, however, divergent approaches as to the precise scope and specific conduct required to meet these obligations have resulted in uneven implementation in domestic law and inconsistent cooperation at the international level, underscoring the need for a consolidated treaty framework that provides clarity and coherence across jurisdictions.

The Draft Articles contain provisions essential for ensuring implementation of the obligations to prevent and punish crimes against humanity, including through criminalization, effective legislative, administrative, judicial or other preventative measures (Draft Articles 3 to 5), the investigation and prosecution or extradition (*aut dedere aut judicare*) of alleged perpetrators and international cooperation (Draft Articles 6 to 10). They also would require States to provide victims and survivors with access to remedies and reparations (Draft Article 12). While these provisions should be retained, they should at the same time be strengthened.

1. The obligation to prevent crimes against humanity

1.1 The international legal framework

The obligation to prevent crimes against humanity is set forth in numerous treaties applying to specific acts (the underlying acts) that may qualify as crimes against humanity if committed as part of a widespread or systematic attack against a civilian

⁹ Yearbook of the International Law Commission 2001, Vol. II (Part Two) and Corrigendum, p. 85, para. 5 of the commentary to art. 26 of the draft articles on responsibility of States for internationally wrongful acts. See also *Draft Conclusions on Peremptory Norms of General International Law (jus cogens) adopted by the Commission on first reading, Conclusion 23*, at https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf; *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682 and Corr.1 and Add.1 (13 April 2006), para. 374.

population. While variable as to specific language, the 1948 *Convention on the Prevention and Punishment of Genocide* (Genocide Convention),¹⁰ 1949 Geneva Conventions and their 1977 Additional Protocols,¹¹ *Apartheid Convention*,¹² *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT),¹³ *Convention on the Elimination of all Forms of Racial Discrimination* (CERD),¹⁴ *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW),¹⁵ *International Convention on the Protection of Persons from Enforced Disappearances* (ICPPED)¹⁶ and others¹⁷ each require States Parties to prevent violations of their respective provisions by, *inter alia*, enacting legislative, administrative, judicial and/or other measures. To varying degrees, these treaties also impose further obligations on States Parties, such as training military or law enforcement personnel¹⁸ or inter-State cooperation.¹⁹

¹⁰ Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), arts. I, III, V and VIII. The International Court of Justice (ICJ) has repeatedly found that the Convention requires States to “take all measures within their power to prevent the commission of [genocidal] acts...”. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Provisional Measures, Order of 26 January 2024, I.C.J. Reports 2024 (“ICJ *South Africa v. Israel* 2024 Provisional Measures”), para. 78. See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, I.C.J. Reports 2007 (“ICJ *Bosnia v. Serbia* 2007 Judgment”), paras. 429-431; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020 (“ICJ *The Gambia v. Myanmar* 2020 Provisional Measures”), para. 79.

¹¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (“Geneva Convention I”), art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85 (“Geneva Convention II”), art. 50; Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135 (“Geneva Convention III”), art. 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (“Geneva Convention IV”), art. 146.

¹² International Convention on the Suppression and Punishment of the Crime of Apartheid (“Apartheid Convention”), art. 4(a).

¹³ UN Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (“CAT”), art. 2(1).

¹⁴ International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), art. 3.

¹⁵ Convention on the Elimination of all Forms of Discrimination against Women (“CEDAW”), art. 2.

¹⁶ International Convention on the Protection of Persons from Enforced Disappearances (ICPPED), art. 25(1) (a) and (b).

¹⁷ For example, the Inter-American Convention to Prevent and Punish Torture, arts. 1 and 6; Inter-American Convention on Forced Disappearance of Persons, art. 1(a), (d).

¹⁸ CAT, *supra* note 13, arts. 10 and 11; ICPPED, *supra* note 16, art. 23(1)(a), (b).

¹⁹ Inter-American Convention on Forced Disappearance of Persons, *supra* note 17, art. 1(c). Similar provisions are found in treaties to prevent and suppress transnational crimes whose underlying acts could amount to CAH. See, e.g. International Convention against the Taking of Hostages, art. 4(a); International Convention for the Suppression of Terrorist Bombings, art. 15(a); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (“UNTOC Trafficking Protocol”), art. 9(1); Convention against Cybercrime, art. 53(1) and (3).

These obligations are reinforced by the UN Charter,²⁰ UNGA Resolutions²¹ and the fundamental principles of State responsibility, as reflected, for example, in the ILC's 2001 *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*,²² which together articulate a collective duty to act—jointly and separately—to prevent and end crimes against humanity.

Broadly reflecting customary international legal obligations to prevent crimes against humanity, these instruments reinforce the State obligation to take necessary preventative action, including through legislative, administrative, judicial and/or other measures to establish criminality, promote detection and facilitate cooperation to suppress respective violations and abuses. Moreover, States should periodically review, and as necessary update these measures²³ and work directly with police, military and other relevant personnel on training and education programs.²⁴

Preventative infrastructure is essential in achieving the future Convention's object and purpose. Without it, post-fact accountability efforts would be incomplete and performative.

1.2 International Law Commission Draft Articles

Draft Articles 3 to 5 address general and specific prevention obligations, which should be maintained and strengthened in a number of ways.²⁵

²⁰ UN Charter, arts. 1(3) (Establishing that one of the purposes of the Charter is to “achieve international cooperation in solving international problems of ... [a] humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all.”), 55 and 56 (Establishing that all UN Member States pledge “to take joint and separate action” to achieve “universal respect for, and observance of, human rights and fundamental freedoms for all”).

²¹ The UNGA has recognized the general responsibility of States to cooperate and take “necessary” action to prevent the commission of CAH. See *Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity*, General Assembly resolution 3074 (XXVIII) of 3 December 1973, para. 3.

²² While never adopted by the UNGA and not formally binding, the Draft Articles are influential source for interpreting the scope of State obligations under international law and are reflective of customary international law. For a compilation of authorities, see Report of the UN Secretary General, *Responsibility of States for Internationally Wrongful Acts: Compilation of decisions of international courts, tribunals and other bodies*, U.N. Doc. A/71/80, 21 April 2016. See also ILC, *Texts of the draft conclusions and Annex adopted by the Drafting Committee on second reading Identification and legal consequences of peremptory norms of general international law (jus cogens)*, UN Doc. A/CN.4/L.967 (“Additional Protocol I to the 1949 Geneva Conventions”), 11 May 2022, Annex.

²³ CAT, *supra* note 13, art. 11 (obligation to keep interrogation rules/instructions/methods/practices and custody/treatment arrangements under systematic review to prevent torture and ill-treatment).

²⁴ CAT, *supra* note 13, art. 10 (education/information on the prohibition must be fully included in training of law enforcement, civil or military personnel and other relevant officials); ICPPED, art. 23 (education/information must be included in training of law enforcement, civil or military personnel and other persons who may be involved in custody/interrogation/treatment of persons deprived of liberty); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art. 83 (dissemination and inclusion in military instruction).

²⁵ For recommendations consistent with or in addition to those set out below, see International Law Association American Branch, *Prevention: ABILA Study Group Crimes Against Humanity* (17 November 2025), at: <https://www.ila-americanbranch.org/wp-content/uploads/2025/11/Prevention-art.-1-3-4-ABILA-CAH-final.pdf>; Human Rights Watch, *Recommendations for the International Convention on Prevention and Punishment of Crimes Against Humanity* (15 December 2025), at: <https://www.hrw.org/news/2025/12/15/recommendations-for-the-international-convention-on-prevention-and-punishment-of>.

(i) Draft Article 3: General obligations

Draft Article 3 would require States to desist from engaging in acts constituting crimes against humanity and to prevent and punish them and affirms that no circumstances may be invoked as justification for commission of crimes against humanity. To ensure that the prohibition in Draft Article 3(1) is not limited to direct acts, **it should make explicit reference to *direct and indirect acts and omissions***. It is well established under international law that a State can be held responsible through both acts and omissions, and through direct or indirect engagement, including rendering “aid or assistance,” “direction or control” and “coercion.”²⁶

Draft Article 3(3) is an important provision which would preclude justification for the commission of crimes against humanity. This approach is consistent not only with the Convention Against Torture,²⁷ which provides that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture,” but also with the non-derogability framework under international human rights law. In particular, the International Covenant on Civil and Political Rights (ICCPR) prohibits derogation from certain core rights even “in time of public emergency which threatens the life of the nation,” including the prohibition of torture and cruel, inhuman or degrading treatment or punishment.²⁸ Regional instruments similarly restrict derogation in emergencies, including by prohibiting any derogation from the prohibition of torture or inhuman or degrading treatment.²⁹ In the African system, the *African Charter on Human and Peoples’ Rights* contains no derogation clause, and the African Commission has affirmed that limitations on Charter rights cannot be justified by emergencies or special circumstances.³⁰ Accordingly, Draft Article 3(3) should be broadened to ensure that both the existence, and threat, of armed conflict does not justify the commission of crimes against humanity.

²⁶ Draft Articles on States’ Responsibility for Internationally Wrongful Acts 2001, arts. 16-18. See also ILC Draft Articles commentary, supra note 3, p. 49, para. 6.

²⁷ CAT, supra note 13, art. 2(2).

²⁸ International Covenant on Civil and Political Rights (“ICCPR”), art. 4(2) (rights from which no derogation is permitted), art. 7 (prohibition of torture and cruel, inhuman or degrading treatment or punishment).

²⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5, arts. 3 (prohibition of torture and inhuman or degrading treatment or punishment) and 15(2) (no derogation from certain provisions); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS TS No 36, arts. 5(2) (prohibition of torture and cruel, inhuman or degrading punishment or treatment) and 27(2) (non-derogable rights / limits on suspension in emergencies).

³⁰ African Charter on Human and Peoples’ Rights (“ACHPR”), arts. 5 and 27(2); African Commission on Human and Peoples’ Rights, *Media Rights Agenda and Others v. Nigeria*, Communication Nos. 105/93, 128/94, 130/94 and 152/96, Decision of 31 October 1998, paras. 67-69.

Draft Article 3 should be amended as follows:

Article 3

General obligations

1. **No State shall** engage in conduct, whether by act **or omission**, that constitutes crimes against humanity, **whether directly or indirectly**.
2. Each State ~~undertakes to~~ **shall take all necessary and effective measures** to prevent and to punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict.
3. No exceptional circumstances whatsoever, such as **the existence or threat** of armed conflict, internal political instability or other public emergency, may be invoked as a justification for **conduct constituting** crimes against humanity **or a State's failure to discharge its obligations to prevent or punish crimes against humanity**.

(ii) Draft Article 4: Obligation of prevention

Draft Article 4 would require (a) effective legislative, administrative, judicial or other preventative measures in any territory under its jurisdiction and (b) cooperation with States and intergovernmental and other organizations, and contains essential but limited obligations. These preventive measures are insufficient in light of the scale and gravity of crimes against humanity.

The obligation to “prevent crimes against humanity” should be **amended to an obligation to “prevent and suppress,”** consistent with the Genocide Convention, the Apartheid Convention and other instruments.³¹ The obligation contained in Draft Article 4(a) to exercise effective legislative, judicial and other preventative measures **should also be expanded to expressly include diplomatic measures to prevent CAH.**

³¹ Genocide Convention, *supra* note 10, art. VIII (Contracting Parties may call upon UN organs to take action “for the prevention and suppression” of genocide or other punishable acts); Apartheid Convention, arts. VI (“aimed at the prevention, suppression and punishment of the crime of apartheid”) and VIII; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, preamble para 5 (“an international instrument for the prevention, suppression and punishment of trafficking in persons, especially women and children”).

The obligation **should also be expanded beyond “any territory under [a State’s] jurisdiction” within a State’s capacity to act.** Obligations regarding crimes against humanity, including in respect of certain underlying conduct engaging human rights obligations, are not territorially limited, but may extend extraterritorially. In particular, State obligations may extend to any circumstance where a State can exercise *de jure* or *de facto* control or influence over groups or persons, whether or not such control is exercised in accordance with international law.

The International Court of Justice,³² Inter-American Commission on Human Rights,³³ European Court of Human Rights³⁴ and UN treaty bodies,³⁵ among others, have recognized that States are obligated to prevent and punish human rights violations, including crimes against humanity, extraterritorially.³⁶ In the *Bosnia v. Serbia* case, for example, the International Court of Justice confirmed that the duties to prevent and punish under Articles I and III of the Genocide Convention respectively are not “limited by territory” and “apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question.”³⁷ With respect to control, direction or influence over groups or persons, in *The Gambia v. Myanmar* case, the International Court Of Justice (ICJ) found that Myanmar was required to “ensure that its military, as well as any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject to its control, direction or influence, do not commit acts of genocide.”³⁸ The Court made a similar finding with respect to Syria’s obligations under the Torture Convention.³⁹ In these circumstances, a State has an obligation to “use their best efforts (a due diligence standard) when it has a ‘capacity to influence effectively the action of persons likely to commit, or already

³² *Armed Activities on the Territory of the Congo* (DRC v. Uganda), 2005 I.C.J. 26 (19 December 2004); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I. C. J. 136, para. 109 (9 July 2004).

³³ *Victor Saldano v. Argentina*, Petition, Report No. 38/99, Inter-Am. C.H.R., OEA/Ser.L/V/ II.95 Doc. 7 rev. at 289 (1998), para. 19; Saldano, Report No. 38/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. para. 17.

³⁴ *Case of Al-Skeini and Others v. The United Kingdom*, App. No. 55721/07, 2011 Eur. Ct. H.R., paras. 133 and 138–39; *Ilascu and Others v. Moldova and Russia*, Appl. No. 48787/99, 2004 Eur. Ct. H.R., para. 317.

³⁵ Communication No. 1539/2006 (*Munaf v. Romania*), adopted 30 July 2009, U.N. GAOR, Human Rights Committee, 96th Session, U.N. Doc. CCPR/C/96/D/1539/2006 (2009), Annex, para. 14.2; UN Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, U.N. Doc. CAT/C/GC/2 (2008), para. 16.

³⁶ For further discussion, see Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (January 2013) (“Maastricht Principles”), at: https://www.etoconsortium.org/wp-content/uploads/2023/01/EN_MaastrichtPrinciplesETOs.pdf; Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon and Ian Seiderman, “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights,” *Human Rights Quarterly* 34 (2012) 1084–1169 (“Maastricht Principles Commentary”), in particular principles 8-9 and 29-35.

³⁷ ICJ *Bosnia v Serbia* 2007 Judgment, supra note 10, para. 183.

³⁸ ICJ *The Gambia v. Myanmar* 2020 Provisional Measures, supra note 10, paras. 79-80.

³⁹ *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and Netherlands v Syrian Arab Republic)* (Provisional Measures) [2023] I.C.J. Rep 587, para 79. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment, I.C.J. Reports 1986, paras. 109-115 (establishing test for ‘effective control’); *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022, para. 81.

committing' the acts, which in turn depends on the State party's geographic, political and other links to the persons or groups at issue."⁴⁰ These and other sources confirm that States have obligations to respect, protect and fulfil rights in any of the following: (a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law; (b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of rights, whether within or outside its territory; and (c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize rights.⁴¹

Article 4(b) would require States to engage in cooperation with other States and intergovernmental and other organizations to prevent crimes against humanity and should be retained. The provision could be strengthened by including a phrase consistent with Article VIII of the Genocide Convention, which provides that any ratifying State can "call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts." Given the collective nature of the obligation to prevent, and the complex environments in which such obligations arise, Draft Article 4(b) should be expanded so that States are required to invoke the UN's preventative and other relevant infrastructure.

⁴⁰ ILC Draft Articles commentary, supra note 3, p. 49, para. 7, citing ICJ *Bosnia v. Serbia* 2007 Judgment, supra note 10, p.221, para. 431.

⁴¹ See Maastricht Principles, supra note 36, principle 9; Maastricht Principles Commentary, supra note 36, principle 9.

Draft Article 4 should be amended as follows:

Article 4

Obligation of prevention

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

- (a) effective legislative, administrative, judicial, **diplomatic** or other ~~appropriate preventive~~ measures in any territory or **with respect to any person** under its jurisdiction, **control, direction or influence**;
- (b) cooperation with other States, relevant intergovernmental organizations, and, ~~as appropriate~~, other organizations, **including by engaging the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts**; and
- (c) **monitoring, reporting and acting on risk factors, early warning signs and the ongoing commission of crimes.**

2. The obligation to provide for criminal liability for CAH

2.1 The international legal framework

The obligation to provide for criminal liability was historically reflected in criminal jurisdiction exercised by the International Military Tribunals in Nuremberg and Tokyo over CAH,⁴² and has been affirmed⁴³ and elaborated by the UNGA,⁴⁴ UN Security

⁴² 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) (London, 8 August 1945), United Nations, Treaty Series, vol. 82, No. 251, p. 279; Charter of the International Military Tribunal for the Far East, art. 5 (c) (Tokyo, 19 January 1946) (as amended on 26 April 1946), Treaties and Other International Agreements of the United States of America 1776–1949, vol. 4, C. Bevans, ed. (Washington, D.C., Department of State, 1968), p. 23, art. 5 (c). Opining on the scope of jurisdiction, the Nuremberg Tribunal affirmed that “individuals can be punished for violations of international law... [and that] only by punishing individuals who commit such crimes can the provisions of international law be enforced.” See The Judgment of 30 September 1946, International Military Tribunal, in Trial of the Major War Criminals Before the International Military Tribunal (Nuremberg 14 November 1945–1 October 1946), vol. 22 (1948), p. 466.

⁴³ Affirmation of the principles of international law recognized by the Charter of the Nürnberg Tribunal, UNGA Resolution 95(I) of 11 December 1946. See <https://ihl-databases.icrc.org/en/ihl-treaties/un-res-95-i-1946/resolution?activeTab=> (affirming the “principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal”).

⁴⁴ UNGA Resolution 2583 (XXIV) of 15 December 1969 on the question of the punishment of war criminals and of persons who have committed CAH, paras. 1 and 4 (States must take all necessary measures to investigate, detain, arrest, extradite and punish all persons responsible).

Council,⁴⁵ international courts and tribunals⁴⁶ and treaties spanning international humanitarian law, international criminal law and international human rights law.⁴⁷ While the precise expression of obligations varies among treaties, they require States to: (a) ensure that the prohibited conduct is an “offence” or “punishable” under its national law;⁴⁸ (b) establish jurisdiction over proscribed conduct;⁴⁹ and (c) investigate and prosecute or extradite alleged offenders when present in their territory.⁵⁰ Many States now have legislation providing for universal jurisdiction over crimes against humanity.⁵¹

Holding perpetrators accountable through criminal prosecutions is both an

⁴⁵ UN Security Council Resolution 1894, UN Doc. S/RES/1894 (2009), 11 November 2009, para. 10.

⁴⁶ Rome Statute of the International Criminal Court, preambular paras. 4 and 6; Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 1; Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 1; Statute of the Special Court for Sierra Leone, art. 6; United Nations Transitional Administration in East Timor, Regulation No. 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences, UN Doc. UNTAET/REG/2000/15, sec. 14.3 (a) (2000); Extraordinary Chambers of Cambodia Law, art. 29. See also Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (Phnom Penh, 6 June 2003), United Nations, Treaty Series, vol. 2329, No. 41723, p. 117; Statute of the Iraqi Special Tribunal, International Legal Materials, vol. 43 (2004), p. 231, art. 15 (2004); Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad between 7 June 1982 and 1 December 1990, International Law Materials, vol. 52 (2013), p. 1028, arts. 4 (b), 6 and 10.2. While never adopted by the UN General Assembly, the Draft Code contributed to the development of the Rome Statute and is an illustrative instrument as to the ILC’s understanding of the scope of the progressive development of international criminal law. For the relevant provisions and commentaries regarding ensuring criminal liability for crimes against humanity, see Yearbook of the International Law Commission 1996, vol. II (Part Two), pp. 17, 22, 27 (arts. 1, 3, 8 and 18 of the draft Code of Crimes against the Peace and Security of Mankind).

⁴⁷ See also Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment, I.C.J. Reports 2002, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 51 (“The series of multilateral treaties with their special jurisdictional provisions reflect a determination by the international community that those engaged in war crimes, hijacking, hostage taking, torture should not go unpunished. Although CAH are not yet the object of a distinct convention, a comparable international indignation at such acts is not to be doubted”).

⁴⁸ Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146; CAT, supra note 13, art. 4; Inter-American Convention to Prevent and Punish Torture, art. 6; ICCPED, supra note 16, art. 7(1); Inter-American Convention on Forced Disappearance of Persons, art. III; International Convention for the Suppression of Terrorist Bombings, art. 4; UNTOC Trafficking Protocol, art. 5, para. 1; Convention for the Suppression of Unlawful Seizure of Aircraft, art. 2; International Convention against the Taking of Hostages, art. 2; International Convention for the Suppression of Terrorist Bombings, art. 4; Association of Southeast Asian Nations Convention on Counter Terrorism, art. IX, para. 1.

⁴⁹ CAT, supra note 13, art. 5; Inter-American Convention to Prevent and Punish Torture, art. 12; ICCPED, supra note 16, art. 9 (1)-(2); Inter-American Convention on Forced Disappearance of Persons, art. IV; International Convention against the Taking of Hostages, art. 5; International Convention for the Suppression of Terrorist Bombings, art. 6; Convention for the Suppression of Unlawful Seizure of Aircraft, art. 4; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 5, para. 1 (a)-(b); OAU Convention on the Prevention and Combating of Terrorism, art. 6(1); Convention against Transnational Organized Crime, art. 15.

⁵⁰ CAT, supra note 13, arts. 5 and 8; Inter-American Convention to Prevent and Punish Torture, art. 14; ICCPED, art. 9(2); Inter-American Convention on Forced Disappearance of Persons, art. VI; Inter-American Convention on International Traffic in Minors, art. 9; Council of Europe, Convention on Cybercrime (Budapest, 23 November 2001), art. 24, para. 6; Council of Europe Convention on Action against Trafficking in Human Beings, para. 3; Organization of American States (OAS), Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, art. 5; Organization of African Unity Convention for the Elimination of Mercenarism in Africa, arts. 8 and 9(2) and (3); European Convention on the Suppression of Terrorism, art. 7.

⁵¹ See Clooney Foundation for Justice, Justice Beyond Borders: Global Mapping Tool to Increase Survivors’ Access to Justice, <https://cfj.org/wp-content/uploads/2023/02/Justice-Beyond-Borders.pdf>. See also Amnesty International, *Universal jurisdiction: A preliminary survey of legislation around the world – 2012 update*, <https://www.amnesty.org/en/documents/ior53/019/2012/en/>.

independent obligation and may also constitute a form of satisfaction as a reparative measure for victims and survivors of crimes against humanity. However, it is a necessary, but not in itself sufficient, form of reparation. Under international law, including all international human rights law treaties, victims and survivors have the right to an effective remedy and reparation for crimes against humanity, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁵²

2.2 International Law Commission Draft Articles

Draft Articles 6 to 10 contain essential provisions addressing the obligation to hold perpetrators of crimes against humanity criminally accountable, which should be retained. Draft Articles 6 and 7 should be strengthened so as to remove barriers to accountability and ensure the widest possible scope of liability. Draft Articles 8, 9 and 10 collectively address the specific actions States must take to implement their obligation to punish (and deter) crimes against humanity, including the timely investigation, prosecution and extradition of alleged perpetrators. These measures and procedures, and the principle of *aut dedere aut judicare* in Draft Article 10, are indispensable to eliminating safe havens.

(i) Draft Article 6: Criminalization under national law

Draft Article 6 would require States to criminalize crimes against humanity in their domestic legal frameworks through offences punishable by appropriate penalties, including by providing for multiple modes of liability beyond commission and attempt to commit, such as superior orders and ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.⁵³ The draft provision also provides that States should establish “under

⁵² See International Commission of Jurists, *Practitioners' Guide No. 2: The Right to a Remedy and Reparation for Gross Human Rights Violations* (Revised Edition, 2018) (“International Commission of Jurists’ Practitioners’ Guide No. 2”) (for sources of law and scope of this obligation). The right to a remedy has been recognized as a basic principle of general international law and affirmed in multiple instruments (Universal Declaration of Human Rights, art. 8; ICCPR, supra note 28, art. 2(3); CERD, supra note 14, art. 6; CAT, supra note 13 art. 14; Convention on the Rights of the Child (“CRC”), art. 39; ICCPED, supra note 16, art. 24; Additional Protocol I to the 1949 Geneva Conventions, art. 91; Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907, art. 3; ACHPR, art. 7; Rome Statute, art. 75). Under the International Convention on Economic, Social and Cultural Rights (ICESCR), the Committee on Economic, Social and Cultural Rights has affirmed that appropriate remedies—judicial and/or administrative—must be available and effective. See Committee on Economic, Social and Cultural Rights, *General Comment No. 9 on the Domestic Application of the Covenant*, UN Doc. E/C.12/1998/24 (1998), para 9. Moreover, it is a general principle of public international law that any wrongful act – i.e. any violation of an obligation under international law – gives rise to an obligation to make reparations. *Factory at Chorzów (Claim for Indemnity) (Germany v. Poland)* (Merits), 1928, P.C.I.J., Series A, No. 17, p. 29; *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184; *Certain procedural questions relating to the interpretation of peace treaties with Bulgaria, Hungary and Romania*, I.C.J. Reports, 1950, p. 228. See also ILC, Draft Articles on State Responsibility for Internationally Wrongful Acts, UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001, art. 1. Reparation may include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Human Rights Committee, *General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para 16; Committee against Torture, *General Comment No. 3 on the Implementation of Article 14 by States Parties*, UN Doc. CAT/C/GC/3 (2012), para 2; UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, UN Doc. A/RES/60/147 (2005), principles 18-23.”

⁵³ Draft Article 6(1)-(3), (7).

[their] criminal law” the principle that superior orders, a perpetrator’s official position and statutory limitations are not grounds for excluding criminal liability,⁵⁴ and that legal persons shall be held liable “where appropriate.”⁵⁵ These provisions need to be better tailored for purpose, so that they ensure that there are no substantial impunity gaps. As it stands, they contain limitations that unduly limit the scope of State obligations and perpetrator liability. Each of these barriers to accountability—amnesties, pardons, immunities and statutes of limitations (prescription)—are building blocks of impunity that must be unambiguously removed from the Draft Articles with unequivocal and enforceable provisions.

Draft Article 6(5) appears to preclude reliance on official capacity as a ground for excluding criminal responsibility for crimes against humanity when committed by individuals holding official positions.⁵⁶ However, it operates in the sphere of substantive liability and does not itself regulate the distinct question of procedural immunities before foreign domestic courts. The commentaries to the Draft Articles make clear that Draft Article 6(5) is “without prejudice” to the ILC’s ongoing work on the immunity of State officials from foreign criminal jurisdiction, and that paragraph 5 “has no effect on any procedural immunity that may exist under international law.”⁵⁷ In turn, the ILC’s 2022 report on that work states that Heads of State, Heads of Government and Ministers of Foreign Affairs enjoy immunity *ratione personae* during their term in office.⁵⁸ The ILC asserts that “[d]uring – and only during – the term of office, immunity *ratione personae* extends to all the acts carried out by the Head of State, Head of Government and Minister for Foreign Affairs, both those carried out in a private capacity and those performed in an official capacity.”⁵⁹ At the same time, the scope (and permissibility) of immunities in the context of crimes under international law remains the subject of ongoing and contested debate in the ILC process, State practice, and academic literature—including in particular whether (and to what extent) immunity *ratione materiae* may be relied on to bar foreign criminal jurisdiction for crimes under

⁵⁴ Draft Article 6(4)-(6).

⁵⁵ Draft Article 6(8)

⁵⁶ Draft Article 6(5) in its entirety states, “Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility.”

⁵⁷ International Law Commission, Yearbook of the International Law Commission, 2019, Vol. II, Part Two, p. 63, para. 31.

⁵⁸ International Law Commission, Report of the International Law Commission, Seventy-third session, UN Doc. A/77/10 (2022), Draft articles on immunity of State officials from foreign criminal jurisdiction, draft art. 4(1).

⁵⁹ International Law Commission, Report of the International Law Commission, Seventy-third session, UN Doc. A/77/10 (2022), p. 223, para. 5.

international law.⁶⁰ Against this backdrop, Article 6(5) should be strengthened and clarified so that it cannot be read to preserve, endorse, or otherwise facilitate the continued operation of immunities that would impede investigation and prosecution for crimes against humanity. Accordingly, Article 6(5) should be changed to adopt the text of the Genocide Convention,⁶¹ which leaves no doubt as to the irrelevance of official capacity as a defence: “Persons committing crimes against humanity and any of the other enumerated acts set forth in this Convention shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”⁶² This recommendation is also consistent with the approach reflected in the Rome Statute of the International Criminal Court (ICC), which rejects official capacity as a bar to criminal responsibility before the Court.

Draft Article 6(6) would impose an obligation on States to take measures to ensure that, under criminal law, statutory limitations do not apply to offences prescribed by the convention. Imposing a bar to statutory limitations is essential for ensuring accountability for crimes against humanity—the investigation and prosecution of which can take years if not decades—and consistent with customary international law.⁶³ While a restriction on time bars should be maintained in the CAH Convention, it is too limited as currently worded. The obligation on States is limited to criminal law, and as such does not apply to civil or administrative proceedings which may be instigated in pursuit of remedies, such as compensation, contrary to a developed norm that statutory limitations should not apply irrespective of the type of proceeding. For example, the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* and the *UN Updated Set of Principles for the protection and promotion of human rights through action to combat impunity* provide that statutory

⁶⁰ See e.g., *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v Belgium), International Court of Justice, Judgment, *I.C.J. Reports* 2002, p. 3 (*immunity ratione personae* of certain high office-holders while in office before foreign criminal jurisdiction); *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC 147 (HL) (Torture Convention context and functional-immunity arguments); International Law Commission, *Draft articles on immunity of State officials from foreign criminal jurisdiction*, with commentaries (first reading) (and States’ comments thereto); Concepción Escobar Hernández (Special Rapporteur), *Fifth report on immunity of State officials from foreign criminal jurisdiction* (2015) (concluding that sufficient practice could be observed to support an exception to *immunity ratione materiae* in relation to certain crimes under international law). See also e.g., Dapo Akande and Sangeeta Shah, “Immunities of State Officials, International Crimes, and Foreign Domestic Courts”, in *European Journal of International Law*, Volume 21, 2010, p. 815; Roger O’Keefe, “An ‘International Crime’ Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely”, in *AJIL Unbound*, Volume 109, 2015, p. 167; Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford University Press, Oxford, 2008; Paola Gaeta, “Does President Al Bashir Enjoy Immunity from Arrest?”, in *Journal of International Criminal Justice*, Volume 7, 2009, p. 315.

⁶¹ See Genocide Convention, *supra* note 10, art. 4.

⁶² See also Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6 (29 March 2004) para. 18.

⁶³ See International Commission of Jurists’ Practitioners’ Guide No. 2, *supra* note 52, pp. 270-282.

limitations should not apply to reparations proceedings.⁶⁴ The Inter-American Court on Human Rights in the *Órdenes Guerra et al. v. Chile* case concluded that “insofar as the facts that gave rise to the civil actions for damages for acts characterized as crimes against humanity, such actions should not be subject to the statute of limitations.”⁶⁵ Further examples of international and domestic law, guidelines and cases are set out in the International Court of Jurists’ *Practitioners’ Guide No. 2 on the Right to Remedy and Reparation*.⁶⁶ The provision should be augmented to include the non-applicability of statutes of limitations to civil and administrative processes related to the pursuit of remedies and reparations for crimes against humanity. Additionally, the provision requires States to take positive steps before the prohibition on statutory limitations takes effect. It should instead be self-executing.

Draft Article 6(8) qualifies the obligation on States to provide for the liability of legal persons “subject to the provisions of its national law” and “where appropriate.” As noted by the ILC, States have recognized the liability of legal persons in a range of instruments governing crimes under international law and other gross human rights violations.⁶⁷ Recognition of liability of legal persons was almost included in the Rome Statute pursuant to a proposal by France but ultimately did not make it into the final agreed text.⁶⁸ It modelled the provision on the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.⁶⁹ In its commentary to the Draft Articles, the ILC noted that “the obligation is ‘subject to’ the State’s existing approach to liability of legal persons for criminal offences under its national law,”⁷⁰ and that the qualifier “where appropriate” gives States discretion to decide whether “such a measure is inappropriate in the specific context of crimes against humanity.”⁷¹ The Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to

⁶⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (21 March 2006), para. 7 (Guideline 4) (“Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.”); UN Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1 (8 February 2005), Principle 23 (“Prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries”).

⁶⁵ Inter-American Court of Human Rights, *Órdenes de Guerra et al. v. Chile (Merits, Reparations and Costs)*, Judgment of 29 November 2018, Series C No. 372, § 89, in generally §§ 78- 95.

⁶⁶ International Commission of Jurists’ *Practitioners’ Guide No. 2*, supra note 52, pp. 270–282.

⁶⁷ ILC Draft Articles commentary, supra note 3, pp. 82-83, para. 46.

⁶⁸ “Summary records of the plenary meetings and of the meetings of the Committee of the Whole” in Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, Vol. II, UN Doc. A/Conf.183/C.1./L.3, 133, at: <https://digitallibrary.un.org/record/472480?ln=en&v=pdf>.

⁶⁹ ILC Draft Articles commentary, supra note 3, p. 83, para. 47.

⁷⁰ ILC Draft Articles commentary, supra note 3, p. 83, para. 49.

⁷¹ ILC Draft Articles commentary, supra note 3, p. 83, para. 50.

Human Rights, established by the Human Rights Council in 2014, is currently working to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises with respect to human rights, including to codify the liability of legal persons.⁷²

Both phrases therefore leave States with significant latitude to determine whether they will in fact enact law to hold legal persons liable for crimes against humanity, how legal persons may be defined and what the scope and modalities of such liability will be. Given the gravity of crimes against humanity, this provision should be strengthened to impose an obligation on States to ensure legal persons shall be held liable under domestic law for offences under the Convention, irrespective of its current legal framework.

The Draft Articles do not contain any provisions prohibiting amnesties and pardons for crimes against humanity, which frustrate the performance of States' obligations to prevent and punish. Under contemporary international law, amnesties are generally prohibited. UN treaty and other bodies and domestic and international courts have progressively rejected amnesties and pardons for gross human rights violations.⁷³ In the words of the Pre-Trial Chamber of the ICC, "granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights."⁷⁴ The *UN Updated Principles Set of Principles for the protection and promotion of human rights through action to combat impunity* stipulate that amnesties, "even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation," should not benefit perpetrators of serious crimes under international law.⁷⁵ A specific provision barring amnesties and pardons for crimes against humanity should be included.

⁷² See UN Human Rights Council Resolution 26/9, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, UN Doc. A/HRC/RES/26/9 (14 July 2014), para. 1. See also UN Human Rights Council, *Report on the eleventh session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, UN Doc. A/HRC/61/XX (24 October 2025), paras. 40–42.

⁷³ See International Commission of Jurists' Practitioners' Guide No. 2, *supra* note 52, pp. 250-270; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted and opened for signature, ratification and accession by UN General Assembly Res. 2391 (XXIII) (26 November 1968), arts. I and IV.

⁷⁴ International Criminal Court, Pre-Trial Chamber I, *Prosecutor v Saif Al-Islam Gaddafi*, Case No. ICC-01/11-01/11, Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to arts. 17(1)(c), 19 and 20(3) of the Rome Statute", 5 April 2019, para. 77. See also Inter-American Court of Human Rights, *Barrios Altos v Peru*, Judgment of 14 March 2001, Series C No. 75, para. 41; International Commission of Jurists, International Commission of Jurists' Practitioners' Guide No. 7 (2015), fn. 1174.

⁷⁵ Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/2005/102 (2005), Principle 24 (chapeau and para. (a)).

Draft Article 6 should be amended as follows:

Article 6 Criminalization under national law

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

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

(a) committing a crime against humanity;

(b) attempting to commit such a crime; and

(c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

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

4. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.

~~5. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility.~~ **Persons committing crimes against humanity and any of the other enumerated acts set forth in this Convention shall be subject to criminal liability, whether they are constitutionally responsible rulers, public officials or private individuals.**

~~6. Each State shall take the necessary measures to ensure that, under criminal law, the offences referred to in this draft article~~ **Convention shall not be subject to any statute of limitations, amnesties or pardons, whether in criminal, civil or administrative proceedings.**

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

8. Each State shall take **the necessary** measures, ~~where appropriate,~~ to establish the liability of legal persons for the offences referred to in this draft article 6. ~~Subject to the legal principles of the State,~~ Such liability of legal persons ~~may~~ **shall** be criminal, civil or administrative.

(ii) Draft Articles 7 and 10: Establishment of national Jurisdiction and aut dedere aut judicare

Draft Article 7 would require States to establish territorial and active and passive personality jurisdiction over crimes against humanity (Draft Article 7(1)), as well as jurisdiction over perpetrators within their territory where it does not extradite them in accordance with the provisions of the convention (Draft Article 7(2)). Importantly, it does not impose a hierarchy in which one form of jurisdiction takes precedence over another, which should be maintained.⁷⁶

The provision must also be read in conjunction with Draft Article 10, which would require States to submit a case to competent authorities for the purposes of prosecuting a perpetrator when the perpetrator is present in its territory, if it does not extradite or surrender the person to another State or competent international criminal court (the *aut dedere aut judicare* principle). Article 10 when read in the context of Article 7 would impose a primary obligation on States to prosecute the perpetrator where it has jurisdiction to do so, with the requirement to extradite the perpetrator being a secondary alternative option.⁷⁷ As noted by the ILC in its study on the *aut dedere aut judicare* principle, “[o]nly in the event that a request for extradition is made does the State concerned have the discretion to choose between extradition and prosecution.”⁷⁸ Draft Article 10 then requires the authorities to make their decision “in the same manner as in the case of any other offence of a grave nature under the law of that State.” The custodial State may refuse a request for extradition, potentially on the basis that it

⁷⁶ For further discussion, see Human Rights Watch, *Recommendations for the International Convention on Prevention and Punishment of Crimes Against Humanity* (15 December 2025), p. 18, at: <https://www.hrw.org/news/2025/12/15/recommendations-for-the-international-convention-on-prevention-and-punishment-of>.

⁷⁷ ILC Draft Articles commentary, supra note 3, p. 92, para. 1. Similarly to the Convention Against Torture, prosecution is an obligation established under international law, whereas extradition is an option where prosecution is not possible. ILC Draft Articles commentary, supra note 3, p. 94, citing International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, p. 456, para. 95.

⁷⁸ International Law Commission, Final Report of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) UN Doc. A/CN.4/L.844 (5 June 2014), para. 25 (fn. omitted).

is conducting its own investigation.⁷⁹ Any decision not to prosecute where jurisdiction is established, but instead to extradite, must be made in the context of Draft Article 13 governing extradition, and subsections (9) and (10)-(11) in particular (discussed further below). These provisions are essential components of ensuring accountability for crimes against humanity and should be retained.⁸⁰

Draft Article 7 should be strengthened in two ways. First, Draft Article 7(1)(b) and (c) include qualifying language requiring States to establish jurisdiction over alleged offenders and in relation to victims and survivors if “that State considers it appropriate.” This qualifier does not appear in the recently concluded *Ljubljana—The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity, War Crimes and Other International Crimes* (“*Ljubljana—The Hague Convention on International Cooperation*”),⁸¹ nor does it appear in the equivalent provisions of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*⁸² and the *International Convention on the Protection of Persons from Enforced Disappearance*,⁸³ and should be removed. With respect to perpetrators who are stateless persons under Draft Article 7(1)(b), States should be obliged to investigate and prosecute them given no other State would have active personality jurisdiction over them. Similarly, with respect to victims who are nationals under Draft Article 7(1)(c), granting States discretion as to whether to exercise passive personality jurisdiction—a well-established basis of jurisdiction—may give rise to an impunity gap in which victims are unable to seek remedies, particularly where the crimes are committed in the territory of another State unwilling or unable to investigate and prosecute the perpetrators.

Second, Draft Article 7(1)(c) should require States to exercise jurisdiction when the victim or survivor is a stateless person or refugee who is habitually resident in that State’s territory. This would ensure persons who are unable to exercise their right to remedy in another State have an avenue to do so.

⁷⁹ This is a ground for refusal in Article 51(2)(d) of the *Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity, War Crimes and Other International Crimes* (“*Ljubljana—The Hague Convention on International Cooperation*”), adopted 26 May 2023 (MLA Diplomatic Conference, Ljubljana, 15–26 May 2023), discussed further below.

⁸⁰ See also Trial International, *Towards a Convention on the Prevention and Punishment of Crimes against Humanity: Recommendations to States* (March 2024), pp. 8-9, at: https://trialinternational.org/wp-content/uploads/2024/03/CAHC_Briefing-paper_website-v2.pdf.

⁸¹ *Ljubljana—The Hague Convention on International Cooperation*, supra note 79, art. 8.

⁸² CAT, supra note 13, art. 5.

⁸³ ICCPED, supra note 16, art. 9. See also the Apartheid Convention, supra note 12, art. 4.

Draft Article 7 should be amended as follows:

Article 7 Establishment of national jurisdiction

1. Each State shall take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in the following cases:

(a) when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State or, if that State ~~considers it appropriate~~, a stateless person who is habitually resident in that State's territory;

(c) when the victim is a national of that State if that State considers it ~~appropriate~~ **or a stateless person who is habitually resident in that State's territory.**

2. Each State shall also take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles.

3. The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law.

(iii) Draft Articles 13 and 14: Extradition and Mutual Legal Assistance

As noted, Draft Articles 13 and 14 govern extradition and mutual legal assistance respectively. Both Draft Article 13 on extradition and Draft Article 14 on mutual legal assistance rightly exclude dual criminality requirements, ensuring that States who do not meet their criminalization obligations do not then enjoy reduced obligations regarding international cooperation. Given the severity of harms that crimes against humanity necessarily entail, as well as the technical and legal complexity often at play in prosecuting alleged perpetrators, seamless international cooperation is essential to successful prosecution and accountability.

Both Draft Article 13 and 14 should be strengthened. Draft Article 13(11), which lists permissible grounds for refusal of extradition, should include any grounds which are discriminatory in purpose or effect, and should specifically incorporate such

internationally recognized grounds as race, colour, sexual orientation or gender identity, age, gender, religion, language political or other opinion, citizenship, nationality or migration status, national, social or ethnic origin, descent, health status, disability, property, socio-economic status, birth or other status.⁸⁴

Likewise, Draft Article 13(11) should permit refusal where the requesting State would impose the death penalty in the event of a conviction. The death penalty is a violation of the prohibition on torture and cruel, inhuman and degrading punishment and the right to life.⁸⁵ In December 2024, the UN General Assembly, by an overwhelming majority, adopted its 10th resolution “call[ing] upon all States to establish a moratorium on executions, with a view to abolishing the death penalty”.⁸⁶ To ensure consistency with the UNGA, the Convention should prohibit the extradition of suspects where they may be subject to it.

Concerning Draft Article 14(3), States should include seizing and confiscating assets as a basis for mutual legal assistance (MLA). The seizure and confiscation of assets is a basis for mutual legal assistance in the Convention Against Corruption—the model for the drafting of Article 14⁸⁷—yet does not appear in the Draft Articles. In its discussion of Draft Article 14(3)(h), which would provide for mutual legal assistance for the purposes of “identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes,” the ILC notes the text in Article 46 of the Convention Against Corruption included reference to the seizure of assets but did not provide an explanation of why it removed this from the Draft Articles.⁸⁸ Similarly, there is no reference to the confiscation of assets, for which there are extensive provisions in the Convention on Corruption and the *Ljubljana-The Hague Convention on International Cooperation* among others.⁸⁹ While Draft Article 14(3)(j) indeed contains a catch-all

⁸⁴ See International Commission of Jurists, *The Tunis Declaration on Reinforcing the Rule of Law and Human Rights* (2019), para. 9(l), at: <https://www.icj.org/wp-content/uploads/2019/04/Universal-ICJ-The-Tunis-Declaration-Advocacy-2019-ENG.pdf>. Draft Article 13(11) reads in full: “Nothing in the present draft articles shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person’s gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group, political opinions or other grounds that are universally recognized as impermissible under international law, or that compliance with the request would cause prejudice to that person’s position for any of these reasons.”

⁸⁵ See United Nations General Assembly, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/67/279 (9 August 2012), at: [https://docs.un.org/en/a/67/279#:~:text=inhuman%20or%20degrading-,treatment%20or%20punishment,degrading%20treatment%2C%20or%20even%20torture.](https://docs.un.org/en/a/67/279#:~:text=inhuman%20or%20degrading-,treatment%20or%20punishment,degrading%20treatment%2C%20or%20even%20torture.;); International Commission of Jurists, *Submission of the International Commission of Jurists (ICJ) to the UN Secretary-General in View of His Forthcoming Report on the Question of the Death Penalty to the 27th Session of the Human Rights Council*, September 2014 (March 2014), at: <https://www.icj.org/wp-content/uploads/2014/04/SGreportDeathPenalty-AnalysisBrief-2014.pdf>.

⁸⁶ UN General Assembly Resolution 79/179, *Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms*, UN Doc. A/RES/79/179 (19 December 2024), para. 8(e). See also UN Human Rights Committee, *General Comment No. 36, Article 6: Right to Life* (3 September 2019), paras. 50-51, at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/GC/36&Lang=en.

⁸⁷ ILC Draft Articles commentary, *supra* note 3, p. 124, para. 6.

⁸⁸ ILC Draft Articles commentary, *supra* note 3, p. 126, para. 14.

⁸⁹ UN Convention Against Corruption, art. 31; *supra* note 79, *The Hague Convention on International Cooperation*, art. 45. See also, e.g. UN Convention Against Transnational Organized Crime, art. 12.

provision relating to “any other type of assistance that is not contrary to the national law of the requested State,”⁹⁰ the exclusion of seizure and confiscation from a provision dedicated to the proceeds and instrumentalities of crime could give States latitude to reject them. Given the importance of seizure and confiscation of assets for ensuring access to effective remedies reparations, including compensation and restitution,⁹¹ the Draft Articles should explicitly refer to these processes as a basis for MLA.

More generally, Draft Articles 13 and 14 were drafted prior to the negotiation of the *Ljubljana-The Hague Convention on International Cooperation* and the latter did not serve as a basis upon which the ILC relied.⁹² States should consequently conduct a fuller review of the *Ljubljana-The Hague Convention on International Cooperation* with a view to assessing the extent to which some of its provisions may be incorporated in the CAH Convention and ensuring consistency in their respective provisions.

Draft Articles 13 and 14 should be amended as follows:

Article 13 Extradition

...

11. Nothing in the present draft articles shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person’s gender, **sexual orientation, gender identity or expression or sex characteristics**, race, **colour**, religion, nationality, **language, citizenship, migration status**, ethnic origin, **descent**, culture, membership of a particular social group, **socio-economic status**, property, political opinions, **health status, disability, age, birth** or other grounds that are universally recognized as impermissible under international law, **or where the person to be extradited may be subject to the death penalty**, or that compliance with the request would cause prejudice to that person’s position for any of these reasons.

⁹⁰ See ILC Draft Articles commentary, supra note 3, p. 125, para. 10.

⁹¹ See ILC Draft Articles commentary, supra note 3, p.126, para. 14; FIDH, Global Survivors’ Fund, Redress and Trial International, *Victims’ and Survivors’ Rights in a Convention on the Prevention and Punishment of Crimes Against Humanity, Policy Submission: Recommendations to States* (March 2024), pp. 14-15, at: <https://trialinternational.org/wp-content/uploads/2024/03/Victims-Rights-in-a-Convention-on-the-Prevention-and-Punishment-of-Crimes-Against-Humanity.pdf>.

⁹² ILC Draft Articles commentary, supra note 3, pp. 122-123, para. 2.

Article 14 Mutual legal assistance

...

3. Mutual legal assistance to be afforded in accordance with this draft article may be requested for any of the following purposes:

- (a) identifying and locating alleged offenders and, as appropriate, victims, witnesses or others;
- (b) taking evidence or statements from persons, including by video conference;
- (c) effecting service of judicial documents;
- (d) executing searches and seizures;
- (e) examining objects and sites, including obtaining forensic evidence;
- (f) providing information, evidentiary items and expert evaluations;
- (g) providing originals or certified copies of relevant documents and records;
- (h) identifying, tracing, or freezing, **seizing or confiscating the** proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes;
- (i) facilitating the voluntary appearance of persons in the requesting State; or
- (j) any other type of assistance that is not contrary to the national law of the requested State.

...

3. Settlement of Disputes under Draft Article 15

Article 15(1) provides that States Parties “shall endeavour to settle disputes concerning the interpretation or application of the present Draft Articles through negotiations.”⁹³ Article 15(2) goes on to state that, in the event the dispute is not settled through negotiation, the dispute “shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration.”⁹⁴ Article 15 contains no delimitation for the duration of negotiations before

⁹³ Draft Article 15(1).

⁹⁴ Draft Article 15(2).

recourse to the ICJ, leaving room for States to strategically delay or defer negotiations or otherwise engage in them in bad faith. Other treaties applying to underlying acts that may qualify as CAH provide a six-month time limit for initiating contentious litigation at the International Court of Justice.⁹⁵ States should include a similar timeframe in Article 15.

Article 15(3) also contains a reservation clause, permitting States to declare that they do not consider themselves bound by article 15(2), thereby limiting avenues to resolve State to State disputes about the implementation of Convention obligations. Article IX of the Genocide Convention does not contain such a clause and article 15(3) should be removed.

Draft Article 15 should be amended as follows:

Article 15 Settlement of disputes

1. States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiations.
2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that is not settled through negotiation **within six months** shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration.
- ~~3. Each State may declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.~~
4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.

⁹⁵ See e.g. CAT, supra note 13, art. 30(1); ICPPED supra note 16, art. 42(1); CEDAW, supra note 15, art. 29(1).

C.

Facilitating implementation of obligations under the CAH Convention

While the Draft Articles would impose a number of substantive obligations on future States Parties relating to national implementation, settlement of State disputes at the ICJ is the only means in the present provisions that go towards supporting and enforcing implementation of those obligations at the international level. This is patently insufficient.

The ICJ provisions, while appropriate, do not serve the purposes of promoting prevention of crimes against humanity or monitoring implementation and enforcement of the Convention. In the first instance, a “dispute” would be necessary to trigger the Court’s jurisdiction, which only comes into play when a situation has reached a degree of extraordinary gravity, which would not include situations where treaty compliance and implementation are of concern or where preventive attention may be required. Second, resort to the ICJ would be entirely State initiated, making it reliant on a State’s political will, courage and capacity to bring a peer before the Court. Many breaches of the Convention will occur entirely domestically or without affecting a special or material interest of a third-party State. Historically, few States have been willing to incur the diplomatic, political and, in some instances, economic costs that may be involved in initiating bilateral dispute resolution procedures for crimes against humanity happening far away.⁹⁶ An authentic dispute may therefore not animate States to take the affirmative step of bringing a case before the Court because of political, diplomatic, economic or other disincentives.

Indeed, where a State instigates proceedings, the ICJ’s provisional measures regime can also be slow and ponderous, potentially rendering moot highly time sensitive obligations relating to preventative action and *non-refoulement* in the context of extradition in particular. States, as such, do not have access to effective urgent action or inquiry procedures.

State-to-State adversarial adjudication in no way advances other important avenues of international cooperation, including those geared to capacity building, peer exchange and technical assistance. This is especially problematic given the ILC’s work was envisioned as “gap filling” to assist States in their individual and collective efforts to

⁹⁶ The ICJ’s current cases under the Genocide Convention—*The Gambia v. Myanmar* and *South Africa v. Israel*—are exceptions to the rule. There are few, if any, third-party States initiating proceedings under other international conventions for the situations in Belarus, Burkina Faso, Democratic Republic of Congo, El Salvador, Egypt, Ethiopia, Georgia, Mali, Sudan and elsewhere.

combat crimes against humanity.⁹⁷ Relatedly, an enforcement system limited to dispute resolution offers no mechanism for independent review of compliance, development of recommendations for progressive interpretation or venue for collective action.

The other significant limitation of Draft Article 15, and the Draft Articles more broadly, is the lack of provision to ensure access to effective remedies and reparations for victims and survivors, despite the inclusion of Article 12(3).⁹⁸ While potentially contributing to the reparative satisfaction, the right to truth and guarantees of non-repetition, experience has shown that ICJ proceedings have limited capacity to meet the right to reparation under Draft Article 12. In any event, victims and survivors do not have standing to participate in the Court's proceedings. Victim participation is limited to the extent to which States consult with them and incorporate their views in litigation strategies. It is also limited to the extent to which information about violations committed against them is included in Court filings, which is ordinarily derived from publicly available information, such as reports of non-government organizations and fact-finding bodies, including UN investigative mechanisms,⁹⁹ and decisions of other courts and tribunals.¹⁰⁰ Victims and survivors are not accorded a right under the Draft Articles to apply for a determination of State responsibility for CAH committed against them or failure to implement obligations, including to provide reparations. The Draft Articles consequently fall significantly short on taking a victim-centered approach when their only enforcement mechanism relegates them to the sidelines during the adjudication of atrocities concerning them.

⁹⁷ ILC Draft Articles Commentary 2019, *supra* note 3, p. 17 (Sierra Leone); Report of the Commission of the General Assembly on the work of its sixty-fifth session (6 May - 7 June and 8 July - 9 August 2013), *Yearbook of the International Law Commission*, UN Doc. A/CN.4/SER.A/2013/Add.1 (Part 2), 2013, Vol. II (Part Two), paras. 22, 168, 170; Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions (6 May - 7 June and 8 July - 9 August 2013), *Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session*, 23 January 2014, UN Doc. A/CN.4/666, para. 72.

⁹⁸ Draft Article 12(3) provides: "Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity, committed through acts attributable to the State under international law or committed in any territory under its jurisdiction, have the right to obtain reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition."

⁹⁹ See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*), Preliminary Objections, Judgment, I.C.J. Reports. 2022, para. 66 (where the Court relied upon reports of the UN Fact-Finding Mission on Myanmar).

¹⁰⁰ See e.g. ICJ *Bosnia v Serbia* 2007 Judgment, *supra* note 10, para. 223 (where the Court concluded it could rely upon findings of the International Criminal Tribunal for the Former Yugoslavia).

1. Prior consideration of a treaty mechanism

1.1 International Law Commission examination of a treaty mechanism

The ILC sought guidance on treaty body models while developing the Draft Articles.¹⁰¹ Provisions on individual criminal responsibility¹⁰² and State responsibility¹⁰³ were included, but the ILC declined to propose a treaty mechanism, in part because, as explained by Rapporteur Sean Murphy:

Selection of a particular mechanism or mechanisms...turns less on legal reasoning and more on policy factors, the availability of resources and the relationship of any new mechanism with those that already exist.¹⁰⁴

The characterization of the establishment of monitoring or enforcement mechanism as a mere “policy” choice is misleading, since it conceals the fact that such mechanisms are important, and may in fact be critical for, the effective discharge of legal obligations under the Convention. At the very least, the obligations to prevent, punish and remedy CAH are more likely to be fulfilled where international procedures to monitor and enforce compliance are in place. A convention that creates legal duties without complimentary mechanisms for enforcement risks being rendered inert and leaving victims with illusory protections.¹⁰⁵ Of course, State decisions as to what to include in the Convention, whether regarding enforcement mechanisms or any other area, are questions of “policy.” Many of the other provisions in the treaty also have both legal and policy components, which States by necessity must navigate. It is critical that the policy choice ensures optimal and effective implementation of any treaty States choose to adopt, which requires international monitoring, enforcement and capacity building.

Preceding this conclusion, the ILC summarized the mandates of existing international bodies, including human rights treaty bodies, special procedures and regional or international courts, to address, for example, gross human rights violations or abuses, that may constitute crimes against humanity.¹⁰⁶ However, they do not have the jurisdiction to address these in full, in terms of the range of obligations articulated in the draft Convention.

¹⁰¹ ILC, Sixty-ninth session, Third report on crimes against humanity, by Mr. Sean D. Murphy, Special Rapporteur, UN Doc. A/CN.4/704 (23 January 2017) (“ILC Third Report on Crimes Against Humanity”), Part VII; ILC, Sixty-eighth session, Crimes against humanity: Information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission, UN Doc. A/CN.4/698 (18 March 2016). For example, under CAT, States created the UN Committee Against Torture to determine State responsibility and issue general recommendations in parallel to the mandates of the UN Human Rights Committee and ICJ.

¹⁰² Namely, the obligation of States to investigate and prosecute crimes against humanity and cooperate with other States in doing so, including the principle of *aut dedere aut judicare* (prosecute or extradite). See Draft Articles 7-10.

¹⁰³ Namely, the negotiation of disputes or adjudication at the ICJ. See Draft Article 15.

¹⁰⁴ ILC Third Report on Crimes Against Humanity 2017, *supra* note 101, para. 238.

¹⁰⁵ Leila Sadat, A Contextual and Historical Analysis of the International Law Commission's 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity (September 2018), 16(4) *Journal of International Criminal Justice* 683-704, 701.

¹⁰⁶ See ILC Third Report on Crimes Against Humanity, *supra* note 101, paras. 214-221.

Even where an existing treaty body might take up elements of the Draft Articles under the terms of the primary law they are interpreting or monitoring (e.g. criminalization),¹⁰⁷ their overall scope of competency is too narrow to include any kind of supervisory role for interpretation or monitoring of enforcement of the Convention. For example, the commission of enforced disappearances is already addressed by the UN Working Group on Enforced Disappearance¹⁰⁸ and a treaty body, the UN Committee on Enforced Disappearances,¹⁰⁹ in addition to regional mandates. While these bodies are not precluded from addressing enforced disappearances when taking place in the context of ongoing crimes against humanity, their jurisdiction is focused *only* on enforced disappearance, without extending to the broader context or co-occurring crimes that would fall under the scope of the Convention. But most critically, they have neither the competence to nor will address the full range of obligations under the putative Convention.

Other arguably relevant mechanisms are too narrow in their mandates. For example, the UN Offices of Genocide Prevention and Responsibility to Protect are not empowered to determine States' compliance with legal obligations to prevent and punish crimes against humanity. In fact, the UN Genocide Prevention Office has expressly endorsed the inclusion of a monitoring body in the Draft Articles to nurture compliance with the prevention provisions.¹¹⁰

A dedicated mechanism would fill a structural gap by enabling holistic, sustained and legally grounded means to review State efforts to implement the treaty's core obligations—something no existing institution is mandated or equipped to provide. Establishing a dedicated mechanism would therefore not duplicate existing bodies. Instead, it would fill a structural gap by enabling holistic, sustained and legally grounded means to review State efforts to implement the treaty's core obligations—something no existing institution is mandated or equipped to provide.

1.2 State positions in the UN General Assembly Sixth Committee

Throughout the process of elaborating the Draft Articles, a number of States and UN entities emphasized the value of including an enforcement mechanism. Sierra Leone, for instance, noted that such a body could assist in the proper monitoring and implementation of the Convention.¹¹¹ Similarly, the OHCHR reflected that treaty monitoring bodies had proven to be an effective tool to keep treaties alive, including by regularly reviewing compliance and implementation.¹¹²

¹⁰⁷ For example, the Human Rights Committee, Committee against Torture and Committee on Enforced Disappearance.

¹⁰⁸ See <https://www.ohchr.org/en/special-procedures/wg-disappearances>.

¹⁰⁹ See <https://www.ohchr.org/en/treaty-bodies/ced>.

¹¹⁰ ILC Draft Articles commentary, supra note 3, p. 132-133 (UN Office for Genocide Prevention).

¹¹¹ ILC Draft Articles commentary, supra note 3, p. 19 (Sierra Leone).

¹¹² ILC Draft Articles commentary, supra note 3, p. 132 (OHCHR).

One stated concern was that a treaty mechanism would lead to diverging interpretations of the scope of the Convention.¹¹³ But as with any international treaty, there may be numerous authorities interpreting and construing the treaty's provisions, including the courts, prosecutors and legal advisors of every State Party. In some instances, this is not necessarily a problem, as aspects of a treaty may be implemented in different ways in accordance with domestic choices. However, for certain core precepts, divergence in interpretations will be problematic. Indeed, the absence of an institutional framework does not eliminate interpretive divergence but may instead facilitate it.¹¹⁴ An authoritative mechanism to offer guidance will help to avoid excessive fragmentation in the interpretation of how core treaty obligations are to be implemented.

At least one State raised concern about the risk of a treaty body being apprehended by bad-faith actors and politically instrumentalized.¹¹⁵ Avoiding independent oversight is not a safeguard against politicization. In the absence of a structured, impartial mechanism, States are left to frame allegations of violations of the future Convention in fragmented and *ad hoc* ways with no common interpretive framework or institutional check.

More recently, as preparations for the negotiation of the Convention based on the Draft Articles commenced, numerous States expressed their support for the establishment of a treaty monitoring and enforcement body. In October 2025, at the last session of the Sixth Committee of the UNGA General Assembly—the body responsible for resolving to move the Draft Articles to a negotiating conference—States from a diverse range of regions expressed support for a treaty body or for the inclusion of provisions related to functions treaty bodies typically undertake. Sierra Leone stated that it “supports the establishment of an independent monitoring mechanism within the future convention.” It noted that “[a] credible monitoring body, composed of independent experts serving in their personal capacity, would assess compliance, issue recommendations, and crucially, provide capacity-building and technical assistance to States. Such a mechanism, modeled on existing treaty bodies like the Human Rights Committee and

¹¹³ ILC Draft Articles commentary, *supra* note 3, p. 11 (Germany). See also UN General Assembly Sixth Committee, Summary record of 26th Meeting, Seventy-first session, 5 December 2016, para 36 (“Germany welcomes the fact that the Commission as a result of the first reading does not propose any institutionalised mechanism under the draft Convention as this would bear the danger of creating space for different interpretations”).

¹¹⁴ At the ICC, for example, the organs of the Court and independent experts have relied upon interpretive guidance issued by treaty bodies in their submissions on points of law before the Court. See, e.g. Situation in Uganda, *The Prosecutor v. Joseph Kony and Vincent Otti*, OPCD Observations on the Prosecution’s Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence, Case No. ICC-02/04-01/05 (30 March 2023), para. 45; Situation in the Islamic Republic of Afghanistan, Request of Former UN Special Rapporteurs for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, Case No. ICC-02/17 (15 October 2019), para. 9, fn. 20.

¹¹⁵ UN General Assembly Sixth Committee, Summary record of 265th Meeting, Seventy-first session, 22 November 2016, UN Doc. A/C.6/71/SR.25, para. 43 (Israel) (“Caution was needed when considering the establishment of mechanisms for the enforcement of or adherence to the proposed treaty on the matter, as such mechanisms could potentially be abused by States and other actors in order to advance their political goals rather than protect the rights of victims”).

the Committee against Torture, should be efficient, minimize reporting burdens, and foster cooperation rather than confrontation.”¹¹⁶

Timor-Leste stated the Convention “should complement, not duplicate, the Rome Statute” and that its “added value should lie in reinforcing national capacities and deepening international cooperation.” They noted that the “the treaty should include: robust capacity-building measures to support national authorities in investigation and prosecution; technical assistance frameworks to help States strengthen their legal systems; and effective mechanisms for mutual legal assistance and extradition, which are indispensable for small and developing nations.”¹¹⁷ Switzerland also stated that “[t]he treaty must contain a clear and reliable mechanism to ensure implementation and resolve disputes about its interpretation or application, thereby providing legal certainty.”¹¹⁸ The European Union, speaking on behalf of its Member States and States seeking accession, stated that they “have always remained open and receptive to possible amendments aimed at updating and improving the Draft Articles, including on substance, on how to facilitate implementation, and on international monitoring.”¹¹⁹ Togo expressed its desire for the Convention to “include concrete commitments regarding technical and financial assistance,” referring to the need to strengthen national capacities and ensure the “genuine transfer of skills, resources, and expertise to the States that request it.”¹²⁰

Currently, there are no provisions in the Draft Articles which would provide a basis for negotiation of the establishment, structure and mandate of a Convention monitoring and enforcement body despite such expressions of interest. To ensure full debate, a concrete proposal should be included in the package of materials being prepared by the

¹¹⁶ Permanent Mission of the Republic of Sierra Leone to the United Nations, Statement by George Shadrack Kamanda, First Secretary, at the 80th Session of the United Nations General Assembly Sixth Committee Plenary Meeting on Agenda Item 81: Crimes Against Humanity Trusteeship Council Chamber, UNHQ, 13 - 14 October 2025, para. 9, at: https://www.un.org/en/ga/sixth/80/pdfs/statements/cah/12mtg_sierraleone.pdf.

¹¹⁷ Permanent Mission of the Democratic Republic of Timor-Leste to the United Nations in New York, *Statement delivered by H.E. Ambassador Dionisio Babo Soares Permanent Representative of the Democratic Republic of Timor-Leste to the United Nations Sixth Committee of the 80th Session of the United Nations General Assembly Crimes against humanity (Agenda item 81)*, 14 October 2025, Trusteeship Council Chamber, UNHQ, New York, pp. 2-3, at: https://www.un.org/en/ga/sixth/80/pdfs/statements/cah/14mtg_timor_lemte.pdf.

¹¹⁸ Confédération suisse, 80e session de l'Assemblée générale, Sixième Commission, Point 81 de l'ordre du jour, Crimes contre l'humanité / Crimes against humanity, New York, le 13 octobre 2025 Déclaration de la Suisse, p. 3, at : https://www.un.org/en/ga/sixth/80/pdfs/statements/cah/12mtg_switzerland.pdf.

¹¹⁹ Statement on behalf of the European Union and its Member States by Mr. Fabio Cannizzaro Counsellor, Delegation of the European Union to the United Nations at the Sixth Committee on the Agenda item 81: “Crimes against humanity”, p. 3, at: https://www.un.org/en/ga/sixth/80/pdfs/statements/cah/12mtg_eu.pdf.

¹²⁰ 80e Session de L'assemblee Generale des Nations Unies, Sixieme Commission, Point 81 De L'ordre du Jour, Thème: Crimes contre L'humanité, Declaration de: Monsieur Tchakpidè Ouro-Bodi, Premier Conseiller à la Mission Permanente du Togo auprès des Nations Unies, p. 2, at : https://www.un.org/en/ga/sixth/80/pdfs/statements/cah/13mtg_togo.pdf (original text: « Deuxièmement, le respect de la souveraineté et le renforcement des capacités nationales. La prévention et la répression des crimes contre l'humanité doivent d'abord s'ancrer dans les juridictions nationales. Cela suppose un véritable transfert de compétences, de ressources et de savoir-faire vers les États qui en expriment le besoin. La convention devra donc inclure des engagements concrets en matière d'assistance technique et financière. Troisièmement, la reconnaissance des mécanismes régionaux. L'Afrique a développé des institutions qui doivent être reconnues et soutenues, notamment la Cour africaine des droits de l'homme et des peuples et le Protocole de Malabo, qui étend son mandat aux crimes internationaux »).

UN Secretary General for discussion and negotiation at the Conference of Plenipotentiaries. The remainder of this briefing paper aims to provide States with the basis for, and concrete language of, such a proposal.

2. The functions of existing treaty bodies

With inter-State dispute resolution as the Draft Articles' only enforcement mechanism, the Convention as presently drafted lacks many of the features contemporary treaties employ to translate obligations from paper to practice. For more than 75 years, core treaties in the international human rights, humanitarian, criminal and transnational criminal law space have included one or more bodies or secretariats. These authorities perform such functions as issuing authoritative interpretation and guidance of the terms of treaties; coordinate capacity building, technical assistance, and international exchange; facilitate periodic monitoring and promote compliance; and receive communications and issue determinations. In some cases, such mechanisms include a trust fund to support implementation, particularly focusing on supporting less developed States with capacity building and the provision of technical assistance.

2.1 Interpretation and Guidance

A treaty mechanism composed of independent legal experts can play a vital role in promoting the coherent interpretation and effective implementation of treaty obligations.¹²¹ All nine core human rights treaties have supervisory mechanisms in the form of treaty bodies that can perform such functions,¹²² which typically include: issuing general comments, general recommendations or other interpretive statements on substantive treaty provisions;¹²³ delivering concluding observations and/or

¹²¹ For example, the Human Rights Committee, Committee against Torture and Committee on Enforced Disappearance. Committees were also created under the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques ("Environmental Modification Treaty"), Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines ("Landmines Treaty") and on their Destruction, Convention on Cluster Munitions ("Convention on Cluster Munitions") and Chemical Weapons Treaty to fulfil a range of functions, including to coordinate and support implementation and promote and monitor compliance.

¹²² ICCPR, supra note 28, Part VI; art. CAT, supra note 13, Part II; ICPPED, supra note 16, Part II; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("CPRMW"), Part VII; CEDAW, supra note 15, Part V; CERD, supra note 14, Part II; CRC, supra note 52, Part II; Convention on the Rights of Persons with Disabilities ("CRPD"), art. 35. The Committee on Economic, Social and Cultural Rights was established through a resolution of the Economic and Social Council. See Economic and Social Council Resolution 1985/17, *Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. A/RES/1985/17 (28 May 1985), para. 1.

¹²³ See e.g., CEDAW, supra note 15, art. 21(1); CRC, supra note 52, art. 45(d); CRPD, supra note 121, art. 36(1); CERD, supra note 14, art. 9(2); ICCPR, supra note 28, art. 40(4).

recommendations based on periodic State reports or communications;¹²⁴ and making findings or recommendations in response to individual or inter-State communications.¹²⁵

As noted above, interpretive guidance issued by such bodies has been used by international courts and tribunals to determine accountability for crimes under international law.¹²⁶ For example, in the ICJ's *Diallo* case, while noting that it is not bound to follow UN Human Rights Committee determinations, the Court indicated that it should "ascribe great weight" to the Committee's interpretation of the International Covenant on Civil and Political Rights.¹²⁷ In the *Furundžija* Trial Judgment, the International Tribunal for the Former Yugoslavia found that, while no international law instrument bars sexual and gender-based violence (SGBV), multiple human rights bodies have linked SGBV to torture and the cruel, inhuman or degrading treatment or punishment, including the UN Human Rights Committee.¹²⁸ These functions have proven indispensable in developing consistent understandings of complex legal obligations across diverse legal system, which are particularly important with respect to prevention, where jurisprudence remains limited.¹²⁹

2.2 Periodic Monitoring of State Compliance

Regular reporting, expert review and follow-up are cornerstones of existing treaty-monitoring systems and have proven effective in identifying implementation and performance gaps and supporting reform measures and thereby facilitating State compliance. Periodic reporting encourages States to adopt and maintain legislative, judicial and other measures necessary to comply with their obligations; serve as vehicle through which States and independent actors exchange information and views on the discharge of Convention obligations; enable early warning and constructive dialogue by

¹²⁴ See, e.g., CAT, supra note 13, art. 19(1), (3); ICCPR, supra note 28, art. 40(1), (4), CEDAW, supra note 15, art. 18(1), 21(1); CRC, supra note 52, art. 44(1), (4); CRPD, supra note 121, art. 35(1)-(2), 36(1); CPRMW, supra note 121, arts. 73(1), 74(1); ICPPED, supra note 16, art. 29(1), (3); Landmines Treaty, supra note 118, art. 7; Convention on Cluster Munitions, supra note 118, art. 11; Second Protocol to 1954 Hague Convention, art. 27(1)(d); Convention on Transnational Organized Crime ("UNTOC"), art. 32(3)(d)-(e), (5); Convention against Cybercrime, art. 57(5)(e)-(f), (6); Apartheid Convention, supra note 12, Arts. 7, 9.

¹²⁵ See e.g. Optional Protocol to the ICCPR, arts. 1-5; CAT, supra note 13, art. 22; Optional Protocol to CEDAW, arts. 1-7; CERD, supra note 14, art. 14; ICPPED, supra note 16, art. 31; CPRMW, supra note 121, art. 77.

¹²⁶ See Part C.1.2.

¹²⁷ Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), Merits, Judgment, I.C.J. Reports 2010 (II), p. 664, para. 66). In another case, while not explicitly stating as such, the ICJ made a finding on the interpretation of "based on" in article 1 of the Convention on the Elimination of All Forms of Racial Discrimination consistent with the Committee General Recommendation No. 19. See Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (*Ukraine v. Russian Federation*), Judgment, I.C.J. Reports 2024, p. 78, paras. 183, 196. See also Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), Judgment, I.C.J. Reports 2012, p. 422, paras. 101, 102. In another case, the ICJ made a finding at odds with guidance issued by the Committee on the Elimination of Racial Discrimination. See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v. United Arab Emirates*), Preliminary Objections, Judgment, I.C.J. Reports 2021, p. 71.

¹²⁸ *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Trial Judgment, 10 December 1998, para. 170, fn. 196 ("Article 7 of the ICCPR prohibits cruel, inhuman or degrading treatment, and complaints alleging State failure to prevent or punish rape and serious sexual assaults have been brought to the Human Rights Committee under this provision").

¹²⁹ There is little in this regard beyond ICJ's judgment in ICJ *Bosnia v Serbia* 2007 Judgment, supra note 10, paras. 428-438, in particular paras. 430-432. See also W. Schabas, *Prevention of Crimes against Humanity* 16 Journal of International Criminal Justice 705-728 (2018), p. 711.

detecting structural risks and implementation gaps; and create avenues for the inclusion of survivors' voices and civil society more broadly.

There are various models of review.¹³⁰ All nine core human rights treaty body committees are tasked with reviewing periodic reports on implementation made by States, issuing related guidance and recommendations to those States and reporting to the UN General Assembly.¹³¹ Under other treaties, treaty-based committees report on States' periodic reports to a Conference of States Parties or similar process.¹³² Under the *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction* ("otherwise known as the "BBNJ"), an Implementation and Compliance Committee, composed of members with expertise elected by States, is mandated to "facilitate and consider the implementation of and promote compliance with the ... Agreement" and report periodically to the Conference of States Parties established under the Agreement.¹³³ It must "function in a manner that is transparent, non-adversarial and non-punitive."¹³⁴

2.3 Capacity Building, Technical Assistance and International Coordination

The obligations in the Draft Articles—particularly those concerning prevention, investigation, prosecution and inter-State cooperation—require not only strong political will but also sustained institutional, legal, technical and financial capacity. This is a fundamental form of international cooperation, which States are obligated to promote under article 56 of the UN Charter. States may face significant challenges in implementing the treaty due to gaps in expertise, infrastructure or resources.

Several treaties include provisions and mechanisms for facilitating capacity building, technical assistance and international cooperation. The *Convention on Cluster Munitions*,

¹³⁰ Another means of review is a State peer review mechanism, such as the Universal Periodic Review (UPR) by the UN Human Rights Council (<https://www.ohchr.org/en/hr-bodies/upr/upr-home>) or the review process by the Conference of States Parties under the *Arms Trade Treaty* (Arms Trade Treaty, art. 17(4)(a)-(b)). These procedures have limitations, including because State decision-makers are not independent and many critical recommendations suggested by States do not make it into the final commitments. Moreover, they elicit political commitments from States, whereas treaty bodies assess legal compliance.

¹³¹ See <https://www.ohchr.org/en/treaty-bodies>. For example, under ICPPED, States Parties are required to submit reports to the Committee on Enforced Disappearances within two years of entry into force for the State party then as required. ICPPED, supra note 16, arts. 29 and 36. Similar reporting procedures have been adopted under CAT (within one year then every four years) (CAT, supra note 13, arts. 19 and 24), CEDAW (after one year then every four years) (CEDAW, supra note 15, arts 18 and 20), *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (CPRMW) (after one year then every five years) (CPRMW, supra note 121, arts. 73 and 74), CERD (after one year then every two years) (CERD, supra note 14, art. 9(1) and (2)), CPRD (within two years then every four years) (CPRD, supra note 121, art. 35), CRC (after two years then every five years) (CRC, supra note 52, art. 44) and the International Convention on Economic, Social and Cultural Rights (ICESCR) (within two years then every five years) (ICESCR, supra note 52, arts. 15-16; ECOSOC Resolution 1988/4, *International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/CN.12/RES/1988/4 (24 May 1988) para.6).

¹³² For example, the Committee for the Protection of Cultural Property in the Event of Armed Conflict also reviews State compliance by monitoring and supervising implementation, considering and commenting on reports of the Parties and, after seeking any clarifications required, preparing a report on implementation for the Meeting of the Parties. *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, art. 27(1).

¹³³ *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction* ("BBNJ"), art. 55(1)-(3).

¹³⁴ *Ibid*, art. 55(2).

the *Arms Trade Treaty* and the *Convention Against Cybercrime* require States to provide one another legal, institutional, technical, material and/or financial assistance, including through the United Nations system, international, regional or national organizations or institutions or non-governmental organizations or institutions, or on a bilateral basis.¹³⁵ Under all three treaties, States must periodically convene a meeting / conference of States Parties to consider implementation of the treaty and international cooperation and assistance, among other things, and adopt related decisions.¹³⁶ The *Optional Protocol to the CAT* (“OPCAT”) also provides that the Subcommittee on Prevention, established under the Optional Protocol, must “[m]aintain direct, and if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities.”¹³⁷

A treaty mechanism can help to coordinate support, facilitate cooperation and enable effective collective action, including by creating a means for States to exchange technical, technological, financial and legal support,¹³⁸ by promoting peer learning, exchanging good practices, supporting legal harmonization efforts and developing investigative, prosecutorial and preventive capacities across diverse national contexts.¹³⁹ In parallel, a mechanism could play a key role in facilitating international cooperation by institutionalizing mutual legal assistance and information sharing—helping coordinate with UN bodies, regional organizations,¹⁴⁰ civil society and international courts¹⁴¹ and thereby avoiding unnecessary duplication, reducing fragmentation and reinforcing the broader atrocity prevention and accountability architecture.

In the context of preventing and punishing crimes against humanity and providing victims with access to reparations, criminal justice authorities, UN and regional bodies, non-government organizations and other domestic and international actors have experience and expertise that can be shared to facilitate greater compliance with obligations under the CAH Convention. For example, in addition to international courts and tribunals, criminal justice authorities in States such as Argentina, Belgium,

¹³⁵ Convention on Cluster Munitions, supra note 121, art. 6(1) and (2); Arms Trade Treaty, art. 16(1); Convention Against Cybercrime, arts. 54 and 56.

¹³⁶ See Convention on Cluster Munitions, art. 11; Arms Trade Treaty, art. 17; Convention Against Cybercrime, art. 57. Under the *Convention on Cluster Munitions*, non-States Parties, the UN, other relevant international organizations or institutions and relevant non-governmental organizations may be invited to attend as observers. See Convention on Cluster Munitions, art. 11(3).

¹³⁷ Optional Protocol to the CAT, art. 11(1)(b)(ii).

¹³⁸ See e.g. Landmines Treaty, supra note 121, art. 6; Convention on Cluster Munitions, supra note 121, art. 6; Treaty on the Prohibition of Nuclear Weapons, art. 7; Arms Trade Treaty, art. 16(3); Second Protocol to the Hague Convention art. 29; UNTOC, supra note 124, art. 32(3)(a) and (b); Convention against Cybercrime, arts. 54(5)-(9) and 56.

¹³⁹ See, e.g., Landmines Treaty, supra note 121, arts. 11-12; Convention on Cluster Munitions, supra note 121, arts. 11-12; Treaty on the Prohibition of Nuclear Weapons, art. 8; Arms Trade Treaty, art. 17; UNTOC, supra note 124, art. 32(3)(a) and (b); Convention against Cybercrime, arts. 54(1) and 57.

¹⁴⁰ E.g. Eurojust and its EU Genocide Network.

¹⁴¹ See e.g. CRPD, supra note 119, art. 38; CRC, supra note 52, art. 45; CEDAW, supra note 15, art. 22; CPRMW, supra note 121, art. 74(2)-(6); UNTOC, supra note 124, art. 32(3)(c); Convention against Cybercrime, art. 55.

Bosnia & Herzegovina, Canada, Croatia, the Democratic Republic of Congo, France, The Gambia, Germany, Lithuania, The Netherlands, South Africa, Sweden, Switzerland and the United Kingdom have investigated prosecuted multiple cases involving crimes against humanity, gaining experience that can be shared with criminal justice authorities in other States.¹⁴² EUROJUST’s Genocide Network is a network of European investigators, prosecutors and contact points for mutual legal assistance which meets biannually to exchange operational information and share experience and best practice. It serves as a resource which could be tapped to support such work globally. UN bodies such as the UN Office on Drugs and Crimes also facilitate technical assistance, capacity building and cooperation at the regional and international level on transnational crimes, which may be called upon to share expertise and facilitate similar engagement on crimes against humanity, particularly where their mandates overlap.¹⁴³

As similar models have shown, a dedicated regular forum in which to facilitate the provision of technical assistance, capacity building and international cooperation would increase the likelihood States would seek and provide support need to meet their obligations under the Convention.

2.4 Disbursing trust funds

A voluntary trust fund linked to the mechanism could serve multiple critical functions. In addition to financing technical assistance and/or supporting under-resourced States, a fund could play a transformative role in helping victims of CAH access reparative support.¹⁴⁴

A number of treaties create trust funds to facilitate the provision of technical assistance and other support to more under-resourced States.¹⁴⁵ For example, the *Optional Protocol to the Convention Against Torture*, the OPCAT establishes a fund comprised of voluntary contributions “to help finance the implementation of recommendations made by the Subcommittee on Prevention ... and education programmes of the national preventive

¹⁴² See Eurojust National jurisprudence database on core international crimes, at <https://www.eurojust.europa.eu/judicial-cooperation/practitioner-networks/genocide-prosecution-network>; Trial International, *Universal Jurisdiction Annual Review 2025*, at <https://trialinternational.org/latest-post/universal-jurisdiction-annual-review-new-developments-in-2024/>; Trial International, *Universal Jurisdiction Interactive Map*, at <https://ujim.trialinternational.org/>.

¹⁴³ For example, with respect to human trafficking and organized crime. See <https://www.unodc.org/unodc/index.html>.

¹⁴⁴ See UN Trust Fund for Victims of Torture, <https://www.ohchr.org/en/about-us/funding-and-budget/trust-funds/united-nations-voluntary-fund-victims-torture>; UN Trust Fund in Support of Victims of Sexual Exploitation and Abuse, <https://www.un.org/preventing-sexual-exploitation-and-abuse/content/trust-fund>; UN Voluntary Trust Fund for Victims of Human Trafficking in Persons, <https://www.unodc.org/unodc/en/human-trafficking-fund/unvtfhomepage.html>; and the International Criminal Court’s Trust Fund for Victims, <https://www.icc-cpi.int/tfv>.

¹⁴⁵ In addition to those set out below, trust funds are established under the *Convention on Cybercrime* (art. 56(2)(c)), *Arms Trade Treaty* (art. 16) and the *Convention on Cluster Munitions* (art. 6(9)). Although established by the UN Secretary General, the Voluntary Fund for Technical Cooperation (VFTC) in the Field of Human Rights supports “activities aiming at building up or strengthening national and regional institutions and infrastructures in the field of human rights.” See Although established by the UN Secretary General, the Voluntary Fund for Technical Cooperation (VFTC) in the Field of Human Rights supports “activities aiming at building up or strengthening national and regional institutions and infrastructures in the field of human rights.”

mechanisms.”¹⁴⁶ The fund is managed by the OHCHR, upon the advice of an OPCAT Special Fund Working Group of the Subcommittee.¹⁴⁷

The *Second Additional Protocol to the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict* establishes a trust fund, administered by the Committee for the Protection of Cultural Property in the Event of Armed Conflict “to provide financial or other assistance” during peacetime or armed conflict or after the end of hostilities.¹⁴⁸ It consists of *inter alia* voluntary contributions by States Parties, contributions, gifts or bequests made by other States, UN bodies including UNESCO, other intergovernmental or non-governmental organizations and public/private bodies/ individuals.¹⁴⁹

The more recently passed BBNJ establishes a voluntary trust fund under the authority of the Conference of States Parties to facilitate the participation of representatives of developing States Parties in meetings of the bodies established under the Agreement.¹⁵⁰ It also includes a “special fund,” derived of annual assessed and extrabudgetary contributions and the “Global Environment Facility Trust Fund,” to fund capacity-building projects, implementation of the BBNJ, conservation and sustainable use programmes and public consultations.¹⁵¹ Access to the funds is limited to “developing States Parties on the basis of need.”¹⁵²

A Trust Fund could also be used to provide direct and indirect assistance to victims, operationalizing the Draft Articles’ commitment to remedy and reparation, particularly in situations where domestic remedies are unavailable, ineffective or retraumatize victims and survivors. Several trust funds have been established by UNGA or UN Human Rights Council to support victims of gross human rights violations.¹⁵³ The United Nations Voluntary Fund for Victims of Torture provides “humanitarian, legal and financial aid to individuals whose human rights have been severely violated as a result of torture and to relatives of such victims.”¹⁵⁴ The UN Voluntary Trust Fund on Contemporary Forms of Slavery also aims to support enslaved persons by awarding grants to civil society organizations to provide humanitarian, psychological, social,

¹⁴⁶ Optional Protocol to CAT, art. 26(1). See also <https://www.ohchr.org/en/about-us/funding-budget/trust-funds/the-special-fund-focus-torture-prevention>.

¹⁴⁷ See <https://www.ohchr.org/en/about-us/funding-budget/trust-funds/the-special-fund-focus-torture-prevention/how-fund-managed>.

¹⁴⁸ Second Additional Protocol to the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict (“Additional Protocol II to the Hague Convention”), arts. 24 and 29(1), (3).

¹⁴⁹ Ibid, art. 29(4).

¹⁵⁰ BBNJ, supra note 133, arts. 14(6) and 52(3)-(4) and (9). See also art. 47.

¹⁵¹ Ibid, art. 52(4)(b)-(c) and (6).

¹⁵² Ibid, art. 52(12).

¹⁵³ See <https://www.ohchr.org/en/about-us/funding-and-budget/trust-funds>. These include: the United Nations Voluntary Fund for Victims of Torture; the UN Voluntary Fund for Indigenous Peoples; and the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery.

¹⁵⁴ UN General Assembly Resolution 36/151, *United Nations Voluntary Fund for Victims of Torture*, UN Doc. A/36/151 (16 December 1981), para. 1(a) and (b).

legal, medical, financial and other assistance.¹⁵⁵ The ICC has a Trust Fund for victims to provide reparations and assistance to victims¹⁵⁶ and physical, psychological, and material support to victims and their families prior to a conviction.¹⁵⁷

2.5 Receiving Communications and Issuing Determinations

Communications procedures—a feature of nearly all core human rights treaties and optional protocols—provide victims, civil society organizations and States with formal channels to complain about violations, with a view to seeking a remedy or triggering a wider inquiry by the mechanism.¹⁵⁸ Where they result in concrete determinations of non-compliance and recommendations for States to adopt corrective measures, individual and State communications are especially valuable. Drawing on information submitted by victims, civil society, experts and States, monitoring mechanisms in other treaty contexts issue findings and recommendations based on material facts—thereby complementing judicial accountability efforts and reinforcing early warning and prevention goals.

All human rights treaties, except for the CPRMW, have optional communications mechanisms, pursuant to which States may issue a declaration to Committees established under the conventions to “receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation” by a State Party to the Convention.¹⁵⁹ More detailed guidance is developed by the Committees and OHCHR on the rules for submitting complaints.¹⁶⁰ The relevant committee submits findings and recommendations to the petitioner and State Party.¹⁶¹

¹⁵⁵ See <https://www.ohchr.org/en/about-us/funding-and-budget/trust-funds/united-nations-voluntary-trust-fund-contemporary-forms-slavery>.

¹⁵⁶ In the context of the creation of the Council of Europe’s Compensation Commission for Ukraine, States have been discussing the possibility of used seized funds or duties in imports/exports. See European Commission, “Commission signs Convention to establish the International Claims Commission for Ukraine on behalf of the EU” (16 December 2025), at: https://ec.europa.eu/commission/presscorner/detail/en/ip_25_3052; Ivan Horodysky, “Claims Commission for Ukraine: Analysis of the Draft Convention,” Dnistrianskyi Center (13 November 2025), at: <https://dc.org.ua/en/news/pretenziyna-komisiya-dlya-ukrayiny-analiz-proektu-konvenciyi>; Ruth Green, “Russia’s invasion of Ukraine: EU’s €90bn deal signals growing strength of ‘coalition of the willing,’” International Bar Association (15 January 2026), at: <https://www.ibanet.org/EUs-90bn-deal-signals-growing-strength>.

¹⁵⁷ See <https://www.trustfundforvictims.org/node/50>. With respect to reparations, under articles 75(2) and 93(1)(k) of the Rome Statute, the Court can order that fines or forfeitures from a convicted individual be given to the Trust Fund to be directed towards individual or collective reparations, including restitution, compensation and rehabilitation. This requires coercive powers to order the forfeiture of assets that could be redirected towards reparations, which a treaty body would not have.

¹⁵⁸ See e.g. Optional Protocol to the ICCPR, arts. 1-5; ICESCR, supra note 52, art. 16; CAT, supra note 13, art. 22; CERD, supra note 14, arts. 11, 14; CEDAW Optional Protocol, arts. 1-7; ICPPED, supra note 16, arts. 31-32; CRPD, supra note 119, art. 35; CPRMW, supra note 121, art. 77.

¹⁵⁹ CAT, supra note 13, art. 22; ICPPED, supra note 16, arts. 30, 31 and 33; CERD, supra note 14, art. 14.

¹⁶⁰ See, for example, *Guidance for Submitting an individual communication to UN Treaty Bodies*, at: <https://www.ohchr.org/en/treaty-bodies/individual-communications-procedures-treaty-bodies>; Committee Against Torture, *Guidelines on third-party submissions under article 22 of the Convention*, UN Doc. CAT/C/86 (21 July 2023), at: <https://www.ohchr.org/en/documents/legal-standards-and-guidelines/guidelines-third-party-submissions-under-article-22>.

¹⁶¹ CAT, supra note 13, art. 22(6)-(7); CERD, supra note 14, art. 14(7)(b); ICPPED, art. 31(5). Other Conventions, such as the ICCPR, the ICESCR, CEDAW, CRC and CRPD, include an optional protocol under which States can sign up to an individual complaints’ procedures with roughly similar models.

All human rights treaties or their relevant optional protocols—CAT,¹⁶² ICPPED,¹⁶³ CERD,¹⁶⁴ CPRMW¹⁶⁵ ICCPR,¹⁶⁶ the Optional Protocol to ICESCR,¹⁶⁷ the Optional Protocol to CRC,¹⁶⁸ the Optional Protocol to CEDAW¹⁶⁹ and the Optional Protocol to CRPD¹⁷⁰—also permit States to submit complaints about another State, following which a similar procedure to victim-based complaints is followed and the committees issue findings and recommendations.

2.6 Conducting inquiries

Inquiry procedures enable treaty mechanism to proactively or reactively examine patterns of violations and publish findings. Several conventions, including the ICPPED and CAT, provide optional mechanisms for treaty body inquiries to be conducted *proprio moto* where information is brought to their attention that a State may be violating their convention obligations.¹⁷¹ Under ICPPED and CAT, the relevant Committees can conduct inquiries, including through a visit to the State concerned, if they “receives reliable information” indicating a State Party the respective conventions, following which it must submit its findings to the State.¹⁷² The Committee on Enforced Disappearances may also urgently bring the matter to the attention of the UN General Assembly if enforced disappearance is being practiced on a widespread or systematic basis in the territory of a State Party, after seeking information from the State Party concerned.¹⁷³

3. Options for creating a treaty mechanism

International experience in a variety of fields, from human rights law to the law of the sea, has shown that the availability of such international mechanisms or procedures is important for facilitating effective implementation of multilateral treaties. This is especially crucial for treaties whose primary beneficiaries are rights holders; actual or potential victims and survivors of atrocity crimes. To this end, States should create a Crimes Against Humanity Committee composed of a diverse range of independent

¹⁶² CAT, supra note 13, art. 21.

¹⁶³ ICPPED, supra note 16, arts. 31-32.

¹⁶⁴ CERD, supra note 14, arts. 11-14.

¹⁶⁵ CPRMW, supra note 121, art. 76.

¹⁶⁶ ICCPR, supra note 28, arts. 41-43.

¹⁶⁷ Optional Protocol to ICESCR, arts. 1-10.

¹⁶⁸ Optional Protocol to the CRC on a Communications Procedure.

¹⁶⁹ Optional Protocol to CEDAW, arts. 1-7.

¹⁷⁰ Optional Protocol to CRPD, arts. 1-5.

¹⁷¹ CAT, supra note 13, art. 20; ICPPED, supra note 16, art. 33. See also Optional Protocol to ICESCR, supra note 52, arts. 11-12; CRC, supra note 52, arts. 13-14; Optional Protocol to CEDAW, supra note 15, arts. 8-10; Optional Protocol to the CRPD, arts. 6-8; Environmental Modification Treaty, supra note 121, art. V(2) and Annex; Additional Protocol II to Hague Convention, supra note 148, arts. 24-27. Under CERD, the Committee can conduct an “examination” if a State is “significantly overdue” in submitting its periodic report on implementation of the convention. See CERD, supra note 14, art. 36(2).

¹⁷² ICPPED, supra note 16, art. 33; CAT, supra note 13, art. 20.

¹⁷³ ICPPED, supra note 16, art. 34.

experts with a mandate to issue interpretive and practical guidance and assist States through technical assistance and capacity building, including through allocation of funding from a voluntary trust fund. The Committee would also assess and make recommendations to better achieve compliance and could, if a State accepts its competency to do so, make determinations on individual and State communications and *proprio moto* inquiries.¹⁷⁴

As illustrated above, there are numerous models for such a mechanism that can be borrowed from existing international frameworks. For illustrative purposes, the ICPPED, which is the most recent human rights treaty (adopted in 2006) and contains subject matter overlap with the CAH Convention, and the Sub-Committee on the Prevention of Torture provide useful guidance.

3.1 Mandate to support States through interpretive guidance, technical assistance and capacity building

A Committee for the Prevention and Punishment of Crimes Against Humanity should have a mandate to issue interpretive guidance and assist States to implement the Convention through technical assistance and capacity building. A treaty body composed of independent experts would provide States with authoritative guidance and assistance to implement treaty obligations, absent which States may apply the treaty inconsistently, leading to fragmentation that undermines the treaty's object and purpose. Such guidance and assistance is particularly important for ensuring implementation of the obligation to prevent crimes against humanity and the application of gender-competent, child-sensitive and intersectional approaches to applying the Convention, as well as for keeping pace with technological developments relevant to how crimes against humanity are committed and what harms are experienced.

With respect to **composition**, States should elect ten¹⁷⁵ independent experts with equitable representation from all geographic regions, with diversity of membership from various legal traditions, including an equitable gender representation.¹⁷⁶ They should only be appointed according to clear criteria, which should include that experts:

- Be persons of high moral standing;¹⁷⁷

¹⁷⁴ For a similar recommendation, see International Law Association, ABILA Study Group: Crimes against humanity, *Monitoring Mechanism* (26 November 2025), at: https://www.ila-americanbranch.org/wp-content/uploads/2025/12/Monitoring-Mechanism_ABILA_CAH_final.pdf.

¹⁷⁵ Each option would ensure the five regions are equally represented. The number of members varies between existing treaty bodies. For example, the Committee Against Torture and the Subcommittee on the Prevention of Torture have ten members; the Committee on Enforced Disappearances has ten members; the Human Rights Committee, the Committee on the Rights of the Child and the Committee on the Elimination of Racial Discrimination have 18 members; the Committee on the Elimination of Discrimination against Women has 23 members.

¹⁷⁶ For further discussion on these criteria, see *Checklist—criteria for membership of the committee against torture* (2017), at: <https://www.icj.org/wp-content/uploads/2017/10/Universal-CriteriaMembership-News-2017-ENG.pdf>.

¹⁷⁷ The same criteria are provided for in the CAT, *supra* note 13, art. 17(1).

- Have “recognized competence and experience in the fields” of international criminal law, international humanitarian law and international human rights law;¹⁷⁸ and
- Serve in their personal capacity.¹⁷⁹

With respect to **mandate**, the Committee for the Prevention and Punishment of Crimes Against Humanity should be primarily tasked with supporting States Parties to implement the Convention, including to (i) adopt legislative, administrative, judicial and other measures necessary to ensure their prevention and to prosecute and punish perpetrators and (ii) implement such measures once adopted. As provided for under several other treaties, including CAT, ICCPED, ICESCR, CEDAW, CERD, CRC, CPRD and CPRMW,¹⁸⁰ States should include provisions requiring periodic reports on implementation of the Convention to the Committee for the Prevention and Punishment of Crimes Against Humanity, including on steps taken to ensure gender-competent, child-sensitive and intersectional approaches are adopted. The Committee for the Prevention and Punishment of Crimes Against Humanity can review the reports on a rolling basis and include summaries of their comments and recommendations in reports to the UNGA, providing States with a forum to consider Convention compliance. This would contribute to the assessment of States Parties’ need for interpretive guidance, technical assistance and capacity building, including by identifying areas compliance and recommendations to address gaps and facilitate consistency across national jurisdictions. As such, the Committee for the Prevention and Punishment of Crimes Against Humanity should be tasked with:

- Reviewing State Parties’ implementation of obligations under the Convention;
- Issuing interpretive guidance on the provisions of the Convention, both in general terms and in terms of application by individual States Parties;
- Providing States Parties with technical assistance and capacity building measures to implement the Convention; and
- Overseeing a voluntary trust fund to support States to implement the Convention.

A **trust fund** should be dedicated to facilitating the provision of technical assistance and capacity building, especially to States with resource constraints.¹⁸¹ The fund should be financed through voluntary contributions by States Parties. Applications by States Parties for access to funds should be decided by a working group composed of five

¹⁷⁸ See CAT, *supra* note 13, art. 17(1); UN General Assembly Resolution 68/268, *Strengthening and enhancing the effective functioning of the human rights treaty body system*, 21 April 2014, at: http://www.ohchr.org/Documents/HRBodies/TB/HRTD/A-RES-68-268_E.pdf.

¹⁷⁹ See CAT, *supra* note 13, art. 17(1). For further discussion on these criteria, see *Checklist-criteria for membership of the committee against torture* (2017), at: <https://www.icj.org/wp-content/uploads/2017/10/Universal-CriteriaMembership-News-2017-ENG.pdf>.

¹⁸⁰ See Part C.2.2.

¹⁸¹ See e.g. BBNJ, *supra* note 133, art. 52(3)-(4), (6) and (12)-(14).

members of the Committee with equitable geographic and gender representation, as well as diversity of membership (such as based on age, indigenous status and (dis)ability).¹⁸²

The Committee for the Prevention and Punishment of Crimes Against Humanity should be supported by a **secretariat**, which should be responsible for assisting the Committee in the organization of its activities, including preparing documentation for meetings and implementing Committee decisions and managing the trust fund.¹⁸³

Based on these criteria, and drawing from provisions in existing treaties, and particularly the ICPPED and the BBNJ—the most recently promulgated instruments creating similar mechanisms—the following additional provisions could be included in the Convention text:

Article X. Establishment of a Committee for the Prevention and Punishment of Crimes Against Humanity

X. There shall be established a Committee for the Prevention and Punishment of Crimes Against Humanity (hereinafter referred to as the Committee) which shall carry out the following functions to give effect to States Parties' obligations under the Convention to:

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

X. The Committee shall consist of 10 experts of high moral standing and recognized competence in the field of international criminal law, international humanitarian law and international human rights law, who shall serve in their personal capacity and be independent and impartial. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and diversity of membership, including gender diversity, and to the usefulness of the participation of persons having legal experience.¹⁸⁴

X. The committee shall be supported by a secretariat in the exercise of its functions.

¹⁸² See Part C.2.4.

¹⁸³ See e.g. CERD, *supra* note 14, arts. 10(3) and 12(5); Additional Protocol II to the Hague Convention, *supra* note 148, art. 28. The Special Committee under the Optional Protocol to the Convention Against Torture provides advice to the OHCHR on management of the related voluntary trust fund. See <https://www.ohchr.org/en/about-us/funding-budget/trust-funds/the-special-fund-focus-torture-prevention>.

¹⁸⁴ Drawn from ICPPED, *supra* note 16, art. 26. See article 26(2)-(5) for provisions on the election process for members and article 26(6)-(9) for provisions on adoption of rules of procedure, support to be provided by the UN Secretary General, the privileges and immunities of committee members and State Party cooperation with the committee. See also CAT, *supra* note 13, arts. 17-18.

Article X. Establishment of voluntary trust fund

X. A Special Fund shall be set up in accordance with the relevant procedures of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations made by the Committee.

X. The Special Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations and other private or public entities.¹⁸⁵

X. Eligibility for access to funding under this Agreement shall be open to States Parties on the basis of need. Funding under the special fund shall be distributed according to equitable sharing criteria, taking into account the need for assistance of States Parties. The special fund shall be aimed at ensuring efficient access to funding through simplified application and approval procedures and enhanced readiness of support for such States Parties.¹⁸⁶

X. A Working Group composed of five members of the CAH Committee with equitable geographical distribution and diversity of membership, including gender diversity, should be established by the Committee to assess applications for access to funds.

X. Disbursements from the Fund shall be used only for such purposes as the Working Group shall decide. The Working Group may accept contributions to be used only for a certain programme or project, provided that the Working Group shall have decided on the implementation of such programme or project.¹⁸⁷

Article X. State reports on implementation

X. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within X year/s after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports [every X years] on any new measures taken and such other reports as the Committee may request.

X. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

X. Each report shall be considered by the Committee, which shall issue such comments, observations or recommendations as it may deem appropriate. The comments, observations or recommendations shall be communicated to the

¹⁸⁵ Drawn from ICPPED, supra note 16, art. 26.

¹⁸⁶ Drawn from BBNJ, supra note 133, art. 52(12).

¹⁸⁷ Drawn from Additional Protocol II to the Hague Convention, supra note 148, art. 29(3).

State Party concerned, which may respond to them, on its own initiative or at the request of the Committee.

X. The Committee may also request States Parties to provide additional information on the implementation of this Convention.¹⁸⁸

Article X. Annual reports

X. The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

X. Before an observation on a State Party is published in the annual report, the State Party concerned shall be informed in advance and shall be given reasonable time to answer. This State Party may request the publication of its comments or observations in the report.¹⁸⁹

3.2 Mandate to conduct inquiries

States should also provide the Committee with the authority to conduct inquiries *proprio moto*, similarly to the committees for the CAT and ICCPED. Such inquiries could be carried out where information is brought to the Committee's attention that the State is in violation of, or not fully meeting its obligations under, the Convention. Such authority would contribute to the work of the Committee in providing such a State with technical assistance and capacity building where its inquiry finds it necessary. A State could "opt out" of recognizing this competency by making a declaration at the time of ratification or accession.

Accordingly, States should include the following provision in the Convention:

Article X. Confidential inquiries

X. If the Committee receives reliable information which appears to it to contain well-founded indications that crimes against humanity are being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.

X. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.

X. If an inquiry is made in accordance with paragraph X of this article, the Committee shall seek the co-operation of the State Party concerned. In

¹⁸⁸ Drawn from ICCPED, supra note 16, art. 29; CAT, supra note 13, art. 19.

¹⁸⁹ Drawn ICCPED, supra note 16, art. 36.

agreement with that State Party, such an inquiry may include a visit to its territory.

X. After examining the findings of its member or members submitted in accordance with paragraph X of this article, the Commission shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.

X. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and at all stages of the proceedings the cooperation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph X, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article X.¹⁹⁰

3.3 Mandate to issue determinations on individual communications and conduct inquiries

States could provide the Committee with authority to receive and issue determinations on communications by victims and survivors and States about violations of the Convention. Granting the Committee such authority would provide victims and survivors with an avenue to seek remedies in contexts where their territorial State violates its obligation to do so, fulfilling both the Convention's objectives to provide access to effective remedies and reparations to victims and survivors and to prevent further violations. It would also provide States with an avenue to seek enforcement against another State without requiring them to expend the resources involved in proceedings before the ICJ and in an expeditious manner, which would facilitate prevention of further crimes against humanity, particularly where the Committee can issue interim measures. States could opt out of recognizing this competency of the Committee by making a declaration upon ratification or accession.

Accordingly, States should consider including the following provision in the Convention:

Article X. Individual communications by victims

X. The Committee shall have the competence to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation by this State Party of provisions of this Convention. A State Party may at the time of ratification of this Convention or at any time afterwards declare that it does not recognize the competence to receive and consider Communications. The Committee shall not admit any communication concerning a State Party which has made such a declaration.

X. The Committee shall consider a communication inadmissible where:

¹⁹⁰ Drawn from CAT, *supra* note 13, art. 20. See also ICPPED, *supra* note 16, art. 30 (urgent inquiries regarding disappeared person).

- (a) the communication is anonymous;
- (b) the communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of this Convention;
- (c) the same matter is being examined under another procedure of international investigation or settlement of the same nature; or
- (d) all effective available domestic remedies have not been exhausted. This rule shall not apply where the application of the remedies is unreasonably prolonged.

X. If the Committee considers that the communication meets the requirements set out in paragraph X of this article, it shall transmit the communication to the State Party concerned, requesting it to provide observations and comments within a time limit set by the Committee.

X. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party will take such interim measures as may be necessary to avoid possible irreparable damage to the victims of the alleged violation. Where the Committee exercises its discretion, this does not imply a determination on admissibility or on the merits of the communication.

X. The Committee shall hold closed meetings when examining communications under the present article. It shall inform the author of a communication of the responses provided by the State Party concerned. When the Committee decides to finalize the procedure, it shall communicate its views to the State Party and to the author of the communication.¹⁹¹

Article X. Individual communications by States

X. A State Party to this Convention may at any time declare that it recognizes the competence of the Committee to receive and consider communications in which a State Party claims that another State Party is not fulfilling its obligations under this Convention. The Committee shall not receive communications concerning a State Party which has not made such a declaration, nor communications from a State Party which has not made such a declaration.¹⁹²

¹⁹¹ Drawn from ICPPED, supra note 16, art. 31.

¹⁹² Drawn from ICPPED, supra note 16, art. 32.

D.

CONCLUSION

To optimally fulfill the object and purpose of a future CAH Convention, States should go beyond adopting a static text. In line with contemporary practice, especially for multilateral treaties that exist for the benefit of ensuring the rights and interests of individuals, States must establish a means to give

effect to its obligations, facilitate implementation and sustain engagement.

To ensure the Convention can be implemented and enforced with these objectives in mind, States should propose amendments to Draft Articles 3, 4, 6, 7, 13, 14 and 15. In particular:

- Draft Article 3 setting out general obligations should prohibit direct and indirect acts and omissions that constitute crimes against humanity and require States to take all necessary and effective measures to prevent and punish them, as well as to ensure the existence or threat of armed conflict or a State's failure to discharge its obligations do not justify conduct constituting crimes against humanity.
- The obligation to prevent crimes against humanity in Draft Article 4 should be strengthened by requiring States to adopt measures, including diplomatic, with respect to territory or persons under not only their jurisdiction but under their control, direction or influence. In doing so, States should be required to engage with the competent organs of the UN and monitor, report and act on risk factors, early warning signs and the ongoing commission of crimes.
- With respect to the obligation to punish crimes against humanity, Draft Article 6 should be amended to ensure procedural immunities, amnesties and pardons do not serve as a bar to criminal, civil or administrative liability. Draft Article 7 should also be amended to ensure the establishment of national jurisdiction against stateless persons habitually resident in a given territory.
- With respect to international jurisdiction, States should be required to refuse extradition under Draft Article 13 where a request is made for the purpose of punishing a person on account of a number of express identities or characteristics or where the person may be subject to the death penalty. Mutual legal assistance should also be available for the seizure or confiscation of assets under Draft Article 14.
- With respect to the settlement of State-to-State disputes, Draft Article 15 should contain a six-month time period for the duration of negotiations, after which States may seek recourse to the International Court of Justice. The reservation clause in Draft Article 15 should also be removed.

As currently drafted, the Convention's sole enforcement pathway—Draft Article 15's dispute resolution procedure—is exceedingly narrow, reactive and not responsive to the needs of the Convention's primary beneficiaries. It is also politically contingent and

likely to do little to promote adherence to the Convention's core obligations. To fill this gap, States should adopt a dedicated treaty mechanism that could give meaningful effect to the future Convention's articles.

Such a mechanism could be equipped to perform some or all of four core functions: (i) issue interpretive guidance to clarify the scope and content of treaty obligations, in general terms and for particular States; (ii) serve as a hub for capacity building, technical assistance and State-to-State exchange; (iii) promote compliance by facilitating regular reporting, expert review and dialogue among States, as well as by enabling the participation of victims, survivors and civil society actors in monitoring how treaty obligations are being fulfilled; and (iv) provide an optional forum for receiving communications and issuing determinations as to compliance with the Convention and recommendations to remedy instances of non-compliance.

Bearing in mind that the form of the mechanism should follow from its functions, there are various institutional pathways by which those functions could be realized. An independent expert body, modeled on human rights treaty bodies or other similar multilateral mechanisms, could serve to fulfil interpretive functions, review compliance and oversee the provision of technical assistance and capacity building. A voluntary trust fund, overseen by a working group of the treaty body, could disburse funds to assist States to implement the convention. A trust fund could also be for victims and survivors, to provide reparative and rehabilitative support. Regardless of the institutional form chosen, the body must be independent, capable of acting with urgency, empowered to address non-compliance and structured to facilitate constructive engagement and cooperation between States.

Departing from the ILC's discussion of the matter, some institutional design questions should be addressed as States advance the preparatory and negotiating processes. Ultimately, a monitoring and enforcement mechanism can play a decisive role in ensuring the vitality and effectiveness of a treaty.

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