



**DEVELOPING THE CRIMES
AGAINST HUMANITY
CONVENTION:
preamble and definitions**

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GLOSSARY

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CELAC	Community of Latin American and Caribbean States
ECCC	Extraordinary Chambers in the Courts of Cambodia
EU	European Union
ICC	International Criminal Court
ILC	International Law Commission
ICPPED	Convention on the Protection of All Persons from Enforced Disappearance
ICCPR	International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the Former Yugoslavia
NGOs	Non-government organizations
OTP	Office of the Prosecutor
SCSL	Special Court for Sierra Leone
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNGA	United Nations General Assembly
VLCT	Vienna Convention on the Law of Treaties

A.

INTRODUCTION

In November 2024, the Sixth Committee of the United Nations (UN) General Assembly (UNGA) made history when it resolved to move the *Draft Articles on the Prevention and Punishment of Crimes Against Humanity* (Draft Articles)

developed by the International Law Commission (ILC) to a negotiating conference to elaborate and conclude a convention (the Convention).¹ The adoption of the resolution is a milestone in efforts to address impunity for crimes under international law, particularly in the current political climate. While most other crimes under international law, such as war crimes, genocide, torture, enforced disappearance, slavery and the slave trade, are proscribed by global treaties and accompanying standards setting out States' primary obligations, crimes against humanity are presently only codified in one international criminal law statute, the *Rome Statute of the International Criminal Court* (Rome Statute), which provides a jurisdictional basis for individual criminal liability. The lack of a treaty basis for general State obligations to prevent, protect and ensure accountability and redress for crimes against humanity has constituted a wide gap in the international legal architecture.² This situation is about to change.

Over the next four years,³ States must refine and build on the draft text put forward by the ILC⁴ to create a robust, enforceable Convention that can provide

¹ United Nations (UN) General Assembly (UNGA), 79th session, *Crimes Against Humanity: Report of the Sixth Committee*, UN Doc. A/79/470 (25 November 2024), at: <https://docs.un.org/en/a/79/470>.

² The principle purpose of the Rome Statute is to establish the International Criminal Court (ICC) with jurisdiction over international crimes and regulate its relationship with domestic criminal justice systems. The Rome Statute is also not universally ratified and the Court may only exercise jurisdiction (i) over the territory or nationals of States Parties, (ii) where a State has referred the situation to the Court or (iii) where the Security Council has issued a resolution granting the Court jurisdiction. A crimes against humanity treaty would oblige ratifying States to criminalise crimes against humanity in their domestic law, prevent the commission of crimes against humanity, investigate and prosecute or extradite the perpetrators of such crimes and ensure the provision of other remedies and reparations for victims.

³ See UNGA, 79th Session, Resolution adopted by the General Assembly on 4 December 2024, UN Doc. A/Res/79/122 (12 December 2024), at: <https://docs.un.org/en/A/RES/79/122>. The UNGA decided to convene a Conference of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity in New York for three consecutive weeks in early 2028, and for an additional three consecutive weeks in 2029, to elaborate and conclude a convention (para. 4) and to convene a preparatory committee for the Conference from 19 to 30 January 2026 and for four days in 2027 (para. 6). The UNGA also decided to convene a working group, which would meet for a period of the first session of the Preparatory Committee, to facilitate consultations on the ILC Draft Articles and to enable Governments to prepare formal proposals for amendments to them (para. 7).

⁴ See International Law Commission, *Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries* (2019) ("ILC Draft Articles commentary"), at: https://legal.un.org/ilc/texts/instruments/english/commentaries/7_7_2019.pdf.

means to facilitate victims and survivors' access to justice and to hold perpetrators accountable.

The International Commission of Jurists has developed this briefing paper as the first in a series aimed at providing guidance to States on provisions of the Draft Articles that should be amended with a view to bolstering their protective objectives. This paper will address the preamble of the Draft Articles and the underlying acts⁵ of crimes against humanity. Subsequent papers will address such issues as (i) the rights of victims and survivors, witnesses and others, and accused persons, including the need for independent judicial mechanisms in the administration of justice and (ii) legislative and political barriers to accountability, including immunities, pardons, amnesties and statutory limitations, and mechanisms for enforcement of the Convention. The papers will draw and build upon the work of a number of non-government organizations (NGOs), as well as States, experts and other key stakeholders, in advancing the Draft Articles with a view to, ultimately, enacting a long overdue crimes against humanity convention.

⁵ An underlying act is conduct which constitutes a crime when committed in the context of a widespread or systematic attack against a civilian population, such as murder, torture or rape. These acts need not be standalone crimes. For example, the intentional or severe deprivation of fundamental rights contrary to international law, committed against any identifiable group or collectivity on discriminatory grounds, may constitute persecution as a crime against humanity.

B. PREAMBLE

The preamble is vital for the interpretation of the future Convention. Article 31(1) of the Vienna Convention on the Law of Treaties (VLCT) provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty ... in their **context** and in **the light of its object and purpose.**” As to such **context**, article 31(2) expressly identifies preambles as constituting part “of the context for the purpose of treaty interpretation.” The notion that the preamble to a treaty is necessarily a critical element to the interpretation of the instrument has been affirmed the International Court of Justice.⁶

A preamble will not only identify the context of the adoption of the Convention and reflect the principles and values that underpin it, but may be highly instrumental in the interpretation of the Convention’s substantive provisions. To ensure the preamble supports the “object and purpose” of a future Convention and aligns with international legal standards, the following should be included.

The preamble should explicitly reference key international instruments that form the cornerstone of international human rights law and international humanitarian law. This will be particularly important when interpreting the treaty given the VLCT’s prescription in article 31(3)(c) that a primary source of treaty interpretation includes “any relevant rules of international law applicable in the relations between the parties.” These references provide a strong legal foundation and reaffirm the commitment of the international community to uphold these principles. Instruments that should be explicitly referenced include, at a minimum, the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Prevention and Punishment of the Crime of Genocide*, the *Supplementary Convention on the Abolition of Slavery*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the *International Convention for the Protection of all Persons from Enforced*

⁶ See, e.g., *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), Judgment, [1952] I.C.J. Rep. 176, p. 197; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* (Nicaragua v. Colombia), Preliminary Objections, Judgment, [2016] I.C.J. Rep. 100, para. 38; *Certain Iranian Assets* (Iran v USA), Preliminary Objections, Judgment [2019] I.C.J. Rep 7, para. 57.

Disappearance (ICPPED), the *International Convention on the Elimination of Racial Discrimination*, the *International Convention on the Suppression and Punishment of the Crime of Apartheid*, the *Convention on the Rights of the Child*, the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) and the *Slavery Convention*.

Relatedly, and considering the recommendations set out in Part C to ensure the definitions contained in the Convention ensure the broadest possible protection, the sentence referring to the *Rome Statute* in the preamble should be amended to state the following:

Considering inter alia the definition of crimes against humanity set forth in article 7 of the Rome Statute of the International Criminal Court,

The preamble should also reference customary international law, which is not only the primary source of law defining and imposing obligations on States in relation to crimes against humanity to date, but governs a range of relevant rights and obligations under international human rights law and international humanitarian law.

In addition to treaty and customary law sources, the Preamble should also make reference to the *UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Gross Human Rights Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by consensus of the UNGA in Resolution 60/147 of 16 December 2005,⁷ as well as the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*,⁸ which the UN Commission on Human Rights (the predecessor body to the UN Human Rights Council), in Resolution 2005/81 of 8 February 2005, affirmed should be taken into account in UN activities, including institution-building.

⁷ UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Gross Human Rights Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (21 March 2006), at: <https://www.ohchr.org/sites/default/files/2021-08/N0549642.pdf>.

⁸ 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), at: <https://digitallibrary.un.org/record/541829?ln=en&v=pdf>.

The preamble should also articulate declaratory principles that underscore the core values and “object and purpose” of the Convention. These principles guide the interpretation and application of the treaty, ensuring consistency with international law and standards, without prejudice to more protective prescriptions that may exist under international law or the domestic laws of States Parties. Declaratory principles should include:

- a. **Commitment to accountability:** Reaffirm the commitment to ending impunity for crimes against humanity and ensuring justice and effective remedies and reparations for victims and survivors.
- b. **Promotion of human Rights:** Emphasize the promotion and protection of human rights as a fundamental objective of the Convention.
- c. **Preservation of broad prevention and protection obligations:** State that the Convention is without prejudice to more protective obligations provided for in international treaties, customary international law or national law, in as much as such provisions are compliant with the Convention and other international obligations.

Further, the preamble should recognize the gendered and intersectional nature of discrimination and violence underpinning the commission of crimes against humanity, and the related importance of adopting gender-competent, child-competent and intersectional approaches to accountability. Such inclusion will acknowledge the varied experiences of individuals based on gender, age, race, ethnicity and other intersecting identities and characteristics.

- a. **Gender competency:** Highlight the need to address gender-based forms of discrimination and violence and other comparable forms of gender-based harm in the context of crimes against humanity.
- b. **Intersectionality:** Recognize that individuals may face compounded risks based on multiple, intersecting grounds of discrimination prohibited by international human rights law and arising from their real or imputed identities and characteristics, necessitating a comprehensive approach to prevention and accountability.

Additionally, the preamble should maintain the ILC's affirmation of the *jus cogens* (peremptory) character of the prohibitions against crimes against humanity currently in the preamble to the Draft Articles.⁹ A *jus cogens* norm, in accordance with article 53 of the VCLT, is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." In other words, the binding force of a *jus cogens* norm is unconditional. This characterization is critical, since it means that where there is a conflict of legal obligations between a *jus cogens* norm and an ordinary legal rule, the *jus cogens* obligation will prevail. According to the ILC, the prohibition of crimes against humanity is "one of the 'most frequently cited candidates for norms with *jus cogens* status."¹⁰ Explaining its inclusion in the preamble of the Draft Articles, the ILC noted that the peremptory status of crimes against humanity is "clearly accepted and recognised" by the international community of States, and confirmed by national courts, regional human rights bodies and international criminal courts and tribunals.¹¹ The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC), in particular, have both recognized that the prohibition on crimes against humanity is a *jus cogens* norm.¹² The International Court of Justice has also affirmed that the prohibition of torture, an underlying act of crimes against humanity, is *jus cogens*, such that it must also be when committed on a widespread and systematic basis and therefore as a crime against humanity.¹³ Indeed, all UN Member States have repeatedly reaffirmed the *jus cogens* status of the prohibition in repeated consensus resolutions of the

⁹ International Commission of Jurists, *International Law and the Fight Against Impunity: A Practitioners Guide (No. 7)* (2015), pp. 61-64, 75-76: <https://www.ici.org/wp-content/uploads/2015/12/Universal-Fight-against-impunity-PG-no7-comp-Publications-Practitioners-guide-series-2015-ENG.pdf>.

¹⁰ *Report of the International Law Commission: 71st session*, UN Doc. A/74/10 (20 August 2019) ("ILC Report 79th session 2019"), p. 205, para. 7, at: https://legal.un.org/ilc/reports/2019/english/a_74_10_advance.pdf, citing International Law Commission, *Report of the Study Group on fragmentation of international law: Difficulties arising from the diversification and expansion of international law* (finalized by Martti Koskenniemi), UN Doc. A/CN.4/L.682, A/CN.4/L.682/Corr.1 and A/CN.4/L.682/Add.1 (13 April 2006), para. 374, at: https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.

¹¹ See ILC Draft Articles commentary, *supra* note 4, p. 24, para. 5.

¹² *Prosecutor v. Zoran Kupreškić et al.*, ICTY Case No. IT-95-16-T, Judgment, 14 January 2000, para. 520; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial (18 June 2013), Trial Chamber, para. 90.

¹³ *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 457, para. 99.

UNGA, going back decades.¹⁴ The consequences of the *jus cogens* status of crimes against humanity will be addressed in subsequent briefing papers on State obligations to prevent and punish them.

In addition, the preamble should contain language acknowledging that, under international law, the prevention and prohibition of crimes against humanity constitute *erga omnes* obligations, meaning that all States have a legal interest in their fulfilment. This is because the discharge of these obligations will not be undertaken in the individual interests of any individual State Party to the Convention, but in the common interests of all States Parties and more broadly of the international community as a whole. Further, while *jus cogens* and *erga omnes* obligations are not coterminous, if a legal provision constitutes a *jus cogens* norm, it will necessarily give rise to *erga omnes* obligations. This principle was made clear by the ILC. Conclusion 17 of the ILC's report on *Peremptory norms of international law* states that "[p]eremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in which all States have a legal interest," such that "[a]ny State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*), in accordance with the rules on the responsibility of States for internationally wrongful acts."¹⁵

To ensure the preamble reflects a commitment to inclusivity and non-discrimination, references to "men, women, and children" should be replaced with "person/s" or "people." The existing language excludes other gender identities, such as non-binary and intersex persons. As noted by the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, "[a] wide range of gender identities and expressions exist in all regions of the world, as a result of long-established cultures and traditions that transcend concepts of gender considered as the

¹⁴ See, e.g. UNGA Resolution 77/209, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/RES/77/209 (15 December 2022), p.1, at: <https://docs.un.org/en/A/RES/77/209>; UNGA Resolution 74/143, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/RES/74/143 (22 January 2020), p.1, at: <https://docs.un.org/en/A/RES/74/143>; UNGA Resolution 60/148, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/RES/60/148 (21 February 2006), p.1, at: <https://docs.un.org/en/A/RES/60/148>.

¹⁵ ILC Report 79th session 2019, *supra* note 10, Conclusion 17: Peremptory norms of general international law (*jus cogens*) as obligations owed to the international community as a whole (obligations *erga omnes*), pp. 145 and 189 *et seq.*

norm in a particular place and time.”¹⁶ International and domestic courts and bodies recognize State obligations to protect persons with diverse gender identities from violence and discrimination.¹⁷ The ICC Office of the Prosecutor (OTP) *Policy on Gender-Based Crimes and Policy on Gender Persecution* recognize that gender is a social construct, that “varies within society and from society to society and can change over time.”¹⁸ The ICC OTP *Policy on Gender Persecution* also acknowledges that currently recognized gender identities, such as trans, queer and intersex persons—the T, Q and I in LGBTQI+—do not represent an exhaustive list of gender identities.¹⁹ Listing specific gender identities could exclude persons who identify otherwise, and inhibit the evolution of protections for persons in the future, as understanding of gender identity develops and evolves. As the preamble will provide interpretative guidance for the entire Convention, the limited reference to men, women and children may be utilized to limit the scope of protections and the obligations of States. This term “person/s” or “people” is more inclusive and encompasses all individuals, regardless of gender or age.

¹⁶ UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, *Reports on Gender: The Law of Inclusion & Practices of Exclusion* (2021), p. 2, at: https://www.ohchr.org/sites/default/files/Documents/Issues/SexualOrientation/IESOGI/Reports_on_Gender_Final_Summary.pdf.

¹⁷ See, e.g. UN Office of the High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, UN Doc. A/HRC/29/23 (4 May 2015), paras. 11-19, at: <https://docs.un.org/en/A/HRC/29/23>; UN Office of the High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law* (2nd edition, 2019) (“OHCHR Report Born Free and Equal”), pp. 5, 9-11, at: https://www.ohchr.org/sites/default/files/Documents/Publications/Born_Free_and_Equal_WEB.pdf; UN Human Rights Council Resolution, *Combating discrimination, violence and harmful practices against intersex persons*, UN Doc. A/HRC/55/L.9, 21 March 2024 (calling on States to combat discrimination, violence, and harmful practices against intersex people), at: <https://docs.un.org/en/A/HRC/55/L.9>; Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007), Principle 1 (All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights), at: <https://yogyakartaprinciples.org/>; Yogyakarta Principles +10 (2017), Principle 30 (States must exercise due diligence to prevent, investigate, prosecute, punish and provide remedies for discrimination, violence and other harm, whether committed by State or non-State actors), at: <https://yogyakartaprinciples.org/>; Inter-American Court of Human Rights (IACtHR), *Advisory Opinion OC-24/17 of November 24, 2017 Requested by the Republic of Costa Rica, Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples: State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and scope of articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to article 1, of the American Convention On Human Rights*, paras. 85-101, at: https://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf. See also International Lesbian, Gay, Bisexual, Trans and Intersex Association, *United Nations Treaty Bodies: References to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics (first half of 2023)* (4 December 2023), at: https://ilga.org/wp-content/uploads/2024/02/UN_treaty_bodies_SOGIESC_first_semester_2023.pdf.

¹⁸ See, e.g. International Criminal Court Office of the Prosecutor, *Policy on gender-based crimes: Crimes Involving Sexual, Reproductive and other Gender-Based violence* (December 2023) (“ICC Policy on Gender-based Crimes”), para. 17, at: <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf>; International Criminal Court Office of the Prosecutor, *Policy on the Crime of Gender Persecution* (December 2022) (“ICC Policy on Gender Persecution”), p. 3, at: <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf>.

¹⁹ ICC Policy on Gender Persecution, *supra* note 18, p. 3. See also OHCHR Report Born Free and Equal, *supra* note 17, p. 6.

Lastly, to reflect the status of children as victims and witnesses and the role they may choose to play in pursuing justice, the reference to the rights of “victims, witnesses and others” in the preamble should be amended as follows:

Considering the rights of victims and witnesses, including children, and others, in relation to crimes against humanity, as well as the right of alleged offenders to a fair trial ...

C.

UNDERLYING ACTS OF CRIMES AGAINST HUMANITY:

Revising definitions and including additional acts

The ILC has made important progress in refining definitions in the Draft Articles, including removing the outdated definition of gender derived from the Rome Statute.²⁰ However, the definitions of crimes against humanity and their underlying acts could be strengthened by relying upon other sources of law, including customary international law, instead of exclusively upon the Rome Statute. In addition, both the Rome Statute and the ILC draft omit certain underlying acts or define them in terms that are too narrow. In light of this, it is critical that the Convention should fill those normative gaps by featuring those underlying acts that are absent from both the Rome Statute and the ILC draft. Jurisprudential developments in recent years can serve as guidance to fill these gaps.

While the ILC's reliance on definitions under the Rome Statute served as a useful starting point, their narrower scope in some instances would unduly limit the domestic application of a future Convention. The more limited scope of some Rome Statute underlying acts reflects negotiation-based compromises made by States concerned about the potential for the Court's jurisdictional overreach, rather than *opinio juris* or State practice regarding their definitions. Such concerns do not apply to the Convention, which would be applied by State authorities and their domestic courts exercising various forms of jurisdiction permissively available to them, whether territorial, passive/active personality or universal jurisdiction.

²⁰ Article 7(3) of the Rome Statute states: "For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above." Subsequent OTP policies recognise that gender is a social construct distinguishable from "sex", the latter of which refers to an individual's biological or physiological characteristics, i.e. being male or female. See ICC Policy on Gender-based Crimes, *supra* note 18, paras. 17-19; ICC Policy on Gender Persecution, *supra* note 18, p. 3.

1. PERSECUTION

Draft Article 2

Definition of crimes against humanity

...

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

The phrase “in connection with any act referred to in this paragraph” (i.e. any other underlying act of crimes against humanity) was imported from the Rome Statute by the ILC to address the “concern that otherwise the text would bring within the definition of crimes against humanity a wide range of discriminatory practices that do not necessarily amount to crimes against humanity” and in recognition of the fact that the definition of crimes against humanity includes other inhumane acts.²¹ The phrase should be removed.

This limitation was included in the Rome Statute by negotiating States and does not reflect customary international law.²² The statutes and judgments of other courts and tribunals—including International Criminal Tribunal for the former Yugoslavia,²³ the International Criminal Tribunal for Rwanda,²⁴ the Special Court for Sierra Leone,²⁵ the Extraordinary Chambers in the Courts of Cambodia,²⁶ the (Kosovo) Specialist Chambers and Specialist Prosecutor’s Office²⁷ and the African Court of Justice and Human Rights²⁸—did not impose this limitation.

²¹ ILC Draft Articles commentary, *supra* note 4, para. 38.

²² See Human Rights Watch, *Apartheid and Persecution: The Forgotten Crimes Against Humanity* (30 April 2021), citing Antonio Cassese and Paola Gaeta, *International Criminal Law*, Third Edition (Oxford University Press, 31 January 2013), at: <https://www.hrw.org/news/2021/04/30/apartheid-and-persecution-forgotten-crimes-against-humanity>.

²³ *Statute of the International Criminal Tribunal for the Former Yugoslavia* (25 May 1993), annex to the Secretary Report 5/25704, art. 5(h); *Prosecutor v. Popović et al*, IT-05-88-A (ICTY), Appeal Judgement (30 January 2015), para. 762.

²⁴ *Statute of the International Criminal Tribunal for Rwanda*, 8 November 1994, S/RES/955, art. 3(h); *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Appeal Judgement (28 November 2007), para. 985.

²⁵ *Statute of the Special Court for Sierra Leone* (16 January 2002), art. 2(h).

²⁶ Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004, NS/RKM/1004/006, art. 5; *Co-prosecutor v. Kaing Guek Eav alias Duch*, ECCC Case 001, Appeal Judgement (18 July 2007), paras. 236-240.

²⁷ Law on Specialist Chambers and Specialist Prosecutor’s Office, No.05/L-053 (3 August 2015), art. 13(h).

²⁸ Protocol on the Statute to the African Court of Justice and Human Rights (Malabo Protocol) (27 June 2014), art. 28C(1)(h).

Notably, some States, such as France,²⁹ Germany,³⁰ Finland,³¹ Norway³² and Sweden,³³ did not include this limitation when implementing the Rome Statute in domestic law.

Including the phrase in the Draft Articles would impose an even narrower limitation than prescribed under the Rome Statute, which requires an act of persecution to be committed in connection with any act referred to in the *Statute*, including war crimes and acts of genocide. The Draft Articles, on the other hand, require the act to be committed in connection with another crime against humanity, a potentially narrower scope of conduct.

The severe deprivation of human rights due to the real or imputed identity of any person who is a member of a civilian population should be sufficient to give rise to the international crime of persecution.³⁴ In conclusion, the phrase “in connection with any act referred to in this paragraph” should be removed from the definition in the Draft Articles.

Additionally, to increase the visibility of age, disability and indigenous status as grounds of persecution and increase the likelihood they will be investigated and charged, “age, disability and indigenous status” should be included in the definition as grounds of persecution.³⁵ The definition of prosecution in the Convention on Crimes against Humanity should be as follows:

...persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, age, disability, indigenous status or other grounds that are universally recognized as impermissible under international law.

²⁹ *French Criminal Code*, art. 212-1.

³⁰ *German Code of Crimes against International Law* (Völkerstrafgesetzbuch – VStGB), s. 7(1)(10). Germany removed the requirement on the basis that it did not accord with customary international law. See Trial International and Open Society Justice Initiative, *Briefing Paper: Universal Jurisdiction Law and Practice in Germany* (April 2019), p. 8, at: <https://trialinternational.org/wp-content/uploads/2022/05/UJ-Germany.pdf>.

³¹ *Finnish Criminal Code*, Chapter 11, s. 3(5).

³² *Norwegian Penal Code*, s. 102(1)(h).

³³ *Swedish Act on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes*, s. 2(8)

³⁴ See International Law Commission, Special Rapporteur on crimes against humanity, *Fourth report on crimes against humanity*, A/CN.4/725 (18 February 2019), para. 64, at: <https://digitallibrary.un.org/record/3800178?ln=en&v=pdf>, citing *Crimes against humanity: Comments and observations received from Governments, international organizations and others*, A/CN.4/726, chapter II.B.4, Chile, at: https://legal.un.org/ilc/documentation/english/a_cn4_726.pdf.

³⁵ Age has been recognised as a ground of persecution by the ICC. See *In the Case of the Prosecutor v. Joseph Kony*, ICC, Case No. ICC-02/04-01/05, Pre-Trial Chamber II (19 January 2024), counts 14 and 23, paras. 82 and 88.

2. ENFORCED DISAPPEARANCE

Draft Article 2

Definition of crimes against humanity

...

*2(i) “enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, **with the intention of removing them from the protection of the law for a prolonged period of time.**”*

The definition of enforced disappearance in the Draft Articles fails to take into account internationally agreed normative developments since the Rome Statute was adopted in 1998, particularly the adoption in 2006 of an international treaty for the protection of all persons from enforced disappearance, including when it constitutes a crime against humanity.

The phrase “with the intention of removing [the disappeared person] from the protection of the law for a prolonged period of time” in the definition of enforced disappearance in the Draft Articles should be removed. The phrase is derived from the Rome Statute definition,³⁶ but does not appear in the more recently promulgated *International Convention on the Protection of Enforced Disappearances* (ICPPED),³⁷ which was agreed by the UN General Assembly in 2006 and entered into force in December 2010. The text of the treaty and its definition of “enforced disappearance” were agreed by consensus. This treaty now has 77 States Parties (as well as an additional 37 signatories that have not yet ratified it).³⁸

The phrase in the Rome Statute definition incorporates two additional elements. The first is a subjective element, which adds a specific intent requirement (in

³⁶ Rome Statute, art. 7(2)(i).

³⁷ *International Convention on the Protection of Enforced Disappearances* (ICPPED), art. 2 (“For the purposes of this Convention, ‘enforced disappearance’ is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”).

³⁸ See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&clang=en.

addition to the general intent requirement) that would be difficult to prove. It is not consistent with the *Declaration on the Protection of all Persons from Enforced Disappearance*³⁹ or the *Inter-American Convention on Forced Disappearance of Persons*⁴⁰ and was, on these bases, rejected by States when negotiating ICPPED.⁴¹ Placing a person outside the protection of the law is a consequence of refusing to reveal the whereabouts of the person, not a *mens rea* element that must be proven.⁴² The requirement of intent to remove a person from the protection of the law is onerous and facilitates impunity.

The second additional element of the Rome Statute definition—a temporal limitation requiring intent to remove someone from the protection of the law for “a prolonged period of time”—is vague and unduly limits the crime. The UN Committee on Enforced Disappearance⁴³ and the UN Working Group on Enforced and Involuntary Disappearances⁴⁴ have jointly confirmed that “duration is not a constitutive element of enforced disappearance under international human rights law.”⁴⁵ Even so-called short-term enforced

³⁹ Declaration on the Protection of all Persons from Enforced Disappearance, art. 1(2).

⁴⁰ *Inter-American Convention on Forced Disappearance of Persons*, art. 2.

⁴¹ UN Commission on Human Rights, *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, UN Doc. E/CN.4/2004/59 23 February 2004, para. 24 *et seq.*, at: <https://docs.un.org/en/E/CN.4/2004/59>; UN Commission on Human Rights, *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, UN Doc. E/CN.4/2005/66 (10 March 2005), para. 23 *et seq.*, at: <https://docs.un.org/en/E/CN.4/2005/66>; UN Commission on Human Rights, *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, UN Doc. E/CN.4/2006/57 (2 February 2006), para. 91 *et seq.*, at: <https://docs.un.org/en/E/CN.4/2006/57>.

⁴² UN Committee on Enforced Disappearances: *Concluding observations on the report submitted by Paraguay under article 29, para. 1, of the Convention*, CED/C/PRY/CO/1 (24 September 2014), para. 14, at: <https://docs.un.org/en/CED/C/PRY/CO/1>. See also Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 170; Judgment of 22 November 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, para. 97; and Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 113; Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Best practices on enforced disappearances in domestic criminal legislation, UN Doc. A/HRC/16/48/Add.3 (28 December 2010), para. 32, at: <https://docs.un.org/en/A/HRC/16/48/Add.3>.

⁴³ UN Committee on Enforced Disappearance, *General comment No. 1 (2023) on enforced disappearance in the context of migration*, UN Doc. CED/C/G/1, paras. 16-17, 20 and 35, at: <https://digitallibrary.un.org/record/4029075?ln=ru&v=pdf>. The UN Fact-Finding Mission on the Bolivian Republic of Venezuela documented cases of enforced disappearance where the victims had been missing for a few hours up to 10 days. See UN Human Rights Council, *Report of the independent international fact-finding mission on the Bolivarian Republic of Venezuela*, UN Doc. A/HRC/54/57 (15 December 2023), paras. 32 and 104, at: <https://docs.un.org/en/a/hrc/54/57>.

⁴⁴ UN Human Rights Council, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/7/2 (10 January 2008), para. 26, *General comment of the Working Group on Enforced or Involuntary Disappearances on the definition of enforced disappearances*, paras. 8-9, at: <https://documents.un.org/doc/undoc/gen/g08/101/05/pdf/g0810105.pdf>.

⁴⁵ Committee on Enforced Disappearances, *Joint statement on so-called “short-term enforced disappearances”*, UN Doc. CED/C/11 (31 October 2024) (“CEDI Joint statement on enforced disappearances”), p. 2, at: <https://digitallibrary.un.org/record/4069020?ln=en&v=pdf>. See also African Commission on Human and Peoples’ Rights, *Guidelines on the Protection of All Persons from Enforced Disappearances in Africa*, pp. 22-23 (“there is no minimum time limit for a disappearance to qualify as an enforced disappearance”).

disappearances “qualify as enforced disappearance as defined in the preamble to the Declaration and in article 2 of the Convention, and also in the case law of the Human Rights Committee, so long as they meet the constitutive elements of the definition.”⁴⁶ Under international law, the question of whether a person has been disappeared should be determined by ascertaining whether certain guarantees for all persons deprived of their liberty under any form of detention have been respected, including, chiefly, their right to challenge the lawfulness of their detention before a court and their right to recognition as a person before the law.⁴⁷ The inclusion of a temporal limitation may lower the threshold of protection against the crime of enforced disappearance at a time when detained persons are at the greatest risk of violations of their human rights. Failure to include enforced disappearances that may not be conceived of as “prolonged” within the scope of the definition will lead to impunity, such that enforced disappearances will be even more widespread and systematic.

The definition is already limited because it requires, as a crime against humanity, that an enforced disappearance be conducted pursuant to or in furtherance of a State or organizational policy. The additional elements derived from the Rome Statute should be replaced with the wording “which place such a person outside the protection of the law,” as contained in the ICCPED.

The ILC’s assertion that the inclusion of article 2(3)—which states that “[t]his draft article is without prejudice to any broader definition provided for in any international instrument, in customary international law or in national law”—is insufficient to address the difference between ICCPED and the Draft Articles and is inconsistent with the Convention objective to harmonize the law. As a more recent instrument, and given the extensive discussion on the definition which resulted in rejection of the Rome Statute definition when it was negotiated and agreed by the General Assembly,⁴⁸ the ICCPED definition should be considered reflective of general international law and adopted in the future convention.

⁴⁶ Ibid.

⁴⁷ Protected under articles 9 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 17 of the ICCPED, and article 16 of the ICCPR, respectively. See CEDI Joint statement on enforced disappearances, *supra* note 45, para. 9.

⁴⁸ ICJ, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction, A Practitioners Guide* (2015), pp. 14-20, at: <https://www.icj.org/wp-content/uploads/2015/12/Universal-Enforced-Disappearance-and-Extrajudicial-Execution-PGNo9-Publications-Practitioners-guide-series-2015-ENG.pdf>.

The definition of enforced disappearance in the Convention on Crimes Against Humanity should be as follows:

...the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

3. SLAVE TRADE

Draft Article 2(2)(c)

Definition of crimes against humanity

...

“enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

The “slave trade” is a crime under international law and therefore should be enumerated as an underlying act of crimes against humanity, together with enslavement. Consistent with articles in the 1926 Slavery Convention and 1956 Supplementary Slavery Convention, under the Rome Statute and Draft Articles enslavement requires the exercise of ownership over a person. The prohibition on the “slave trade,” as defined separately from slavery in each slavery convention, penalizes gives rise to an obligation to penalize the reduction of a person into enslavement, but does not require ownership over a person. Therefore, under international law, the slave trade is a separate crime and is intentionally not contained in the definition of enslavement.

Article 1 of the Slavery Convention prohibits slavery and the slave trade, as follows:

- (1) *Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.*
- (2) *The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.*

The “slave trade” prohibits distinct conduct, involving “bring[ing] a person into a situation of enslavement, or to acquire or dispose of an enslaved person with a view to maintaining them in a situation of enslavement.”⁴⁹ As such, the slave trade includes a distinct *mens rea*, namely intent to reduce a person into or maintain them in enslavement. The crime of the slave trade can be committed without the victim actually being reduced or maintained into such a situation.

The slave trade might have been adjudicated *via* non-explicit provisions for serious violations of customary humanitarian law, or war crimes, under Article 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and under Article 4 of the Statute of the International Criminal Tribunal for Rwanda.⁵⁰ However, the Rome Statute failed to enumerate the slave trade as a war crime under Article 8 or as a crime against humanity under Article 7. The Rome Statute only recognizes conduct constituting the enslavement as the exercise of powers attaching to the rights of ownership over an enslaved person.

The rationale for the omission of the slave trade, which constitutes a legal gap in the Rome Statute, is not readily apparent from its *travaux préparatoires*. The slave trade was included in the informal texts of the Chair of the Preparatory Committee under war crimes in non-international armed conflict. This may

⁴⁹ Global Justice Center, *Including the Slave Trade in the Draft Articles on Prevention and Punishment of Crimes Against Humanity*, Patricia Viseur Sellers, Jocelyn Getgen Kestenbaum and Alexandra Lily Kather (October 2023), para. 3, at: <https://www.globaljusticecenter.net/wp-content/uploads/2023/10/Slavery-and-Slave-Trade-Expert-Legal-Brief-CAH-Treaty.pdf>.

⁵⁰ *Statute of the International Criminal Tribunal for the Former Yugoslavia*, art. 3; *Statute of the International Criminal Tribunal for Rwanda*, art. 3.

indicate its removal was unintentional, an oversight and/or based on the erroneous legal assumption that the retained crime of enslavement captured the conduct of the slave trade.⁵¹

The prohibition of the slave trade, a crime under international law, is a *jus cogens* (peremptory) norm.⁵² The slave trade is prohibited as a war crime under treaty and customary international law⁵³ and as a non-derogable human right under numerous treaties binding States, including the *Slavery Convention*,⁵⁴ the ICCPR,⁵⁵ the *Universal Declaration of Human Rights*,⁵⁶ the *European Convention on Human Rights*,⁵⁷ the *African Charter on Human and Peoples' Rights*⁵⁸ and the *American Convention on Human Rights*.⁵⁹ The Heads of State or Government of the European Union (EU) and of the Community of Latin American and Caribbean States (CELAC), and the Presidents of the European Council and the European Commission in their Declaration of the EU-CELAC Summit in 2023 have affirmed that the slave trade is a crime against humanity.⁶⁰

⁵¹ See Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, "Missing in Action: The International Crime of the Slave Trade," *Journal of International Criminal Justice*, Volume 18, Issue 2, May 2020, pp. 517–542; Patricia Viseur Sellers, Jocelyn Getgen Kestenbaum, and Alexandra Lily Kather, *Time to Enumerate the Slave Trade as a Distinct Provision in the Crimes Against Humanity Treaty*, Just Security (15 November 2023), at: <https://www.justsecurity.org/90085/time-to-enumerate-the-slave-trade-as-a-distinct-provision-in-the-crimes-against-humanity-treaty/>.

⁵² Restatement (Third) of Foreign Relations of the United States, § 702 cmts. d–i, § 102 cmt. K (1987). See also E.J. Criddle and E. Fox-Decent, "A Fiduciary Theory of Jus Cogens," 34 *Yale J. Int'l L.* 331, 331 (2009); M. Cherif Bassiouni, "International Crimes: Jus Cogens and Obligatio Erga Omnes," 59 *Law and Contemporary Problems* 63–74 (Fall 1996), pp. 70–71.

⁵³ International Committee of the Red Cross, *Customary International Humanitarian Law, Rule 94. Slavery and the Slave Trade*, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule94>; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of NonInternational Armed Conflicts (Protocol II) 1125 UNTS 609, art. 4(2)(f).

⁵⁴ *Slavery Convention*, art. 1(2). See also *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, art. 1.

⁵⁵ ICCPR, art. 8(1).

⁵⁶ Universal Declaration on Human Rights, art. 4. See also *Cairo Declaration on Human Rights in Islam*, art. 11(a); *EU Charter of Fundamental Rights*, art. 5.

⁵⁷ European Convention on Human Rights, art. 4(1).

⁵⁸ *African Charter on Human and Peoples' Rights*, art. 5.

⁵⁹ *American Convention on Human Rights*, art. 6.

⁶⁰ Declaration of the EU-CELAC Summit 2023 No. 12000/23 of 18 July 2023, para. 10, at: <https://data.consilium.europa.eu/doc/document/ST-12000-2023-INIT/en/pdf>.

The Convention on Crimes Against Humanity should include the slave trade as an underlying act, defined as follows:

The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce them to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging them; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

4. GENDER APARTHEID

Gender apartheid should be added to the Draft Articles as an underlying act of crimes against humanity. While gender apartheid has not yet been recognized as a standalone crime or crime against humanity under any existing international law instrument, this is a gap in international law that should be filled. This need is particularly compelling given the systematic commission of inhumane acts against women, girls and LGBTQI+ persons in Afghanistan and elsewhere,⁶¹ which warrants recognition of the crime. Apartheid was similarly recognized as a crime under international law based on analogous treatment of racial groups in South Africa.⁶²

⁶¹ UN Working Group on discrimination against women and girls, *Draft articles on prevention and punishment of crimes against humanity: Recommendations from the Working Group on discrimination against women and girls*, UN Doc. A/HRC/WG.11/40/1 (15 February 2024), paras. 25-32, at: <https://docs.un.org/en/A/HRC/WG.11/40/1>; ICJ, *The Taliban's War on Women: The crime against humanity of gender persecution in Afghanistan* (March 2023), pp. 7-25, at: <https://www.icj.org/wp-content/uploads/2023/05/The-Talibans-war-on-women-the-crime-against-humanity-of-gender-persecution-in-Afghanistan-FINAL-VERSION.pdf>; Atlantic Council and Global Justice Center, *Amending the Crime Against Humanity of Apartheid to Recognize and Encompass Gender Apartheid* (undated) ("Atlantic Council and GJC gender apartheid brief"), paras. 21-25, at: <https://endgenderapartheid.today/download/brief/Gender-Apartheid-Expert-Legal-Brief-CAH-Treaty.pdf?v=20241122>.

⁶² Atlantic Council and GJC gender apartheid brief, *supra* note 61, para. 22 ("In both the South Africa and Taliban regimes of systematic domination, members of the oppressed group were/are, deliberately and thoroughly, cut off from opportunities which could have provided a path to economic advancement and autonomy through denial of access to: work in certain industries and jobs; equal education; equal healthcare; justice; political power; and movement, including travel to areas with greater opportunities. Both apartheid systems were/are maintained through the denial of key civil and political rights that would have allowed members of the oppressed groups to advocate for a change in their intentionally subordinated position. Finally, both apartheid systems invite(d) and provoke(d) public and private violence against members of the oppressed groups, for which there was/is little to no accountability" [citations omitted]).

Multiple international authorities have recognized the concept of gender apartheid and/or called for its codification as a crime against humanity, including UN Secretary General António Guterres,⁶³ the UN High Commissioner for Human Rights,⁶⁴ the UN Special Rapporteur on the situation of human rights in Afghanistan⁶⁵ and other mandate holders,⁶⁶ the UN Working Group on Discrimination against Women and Girls,⁶⁷ the UN Committee on the Elimination of Discrimination Against Women⁶⁸ and the Executive Director of UN Women.⁶⁹ Numerous States have now also supported the recognition of gender apartheid, including from Latin America, Asia-Pacific and Europe.⁷⁰ Recognition of the

⁶³ United Nations, *The Secretary-General's remarks to the Security Council on the Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security: The Rule of Law Among Nations* (12 January 2023), at: <https://www.un.org/sg/en/content/sg/statement/2023-01-12/the-secretary-generals-remarks-the-security-council-the-promotion-and-strengthening-of-the-rule-of-law-the-maintenance-of-international-peace-and-security-the-rule-of-law>.

⁶⁴ UN Human Rights Council, 58th session, UN High Commissioner for Human Rights Volker Türk, “*Turbulence and unpredictability*” amid growing conflict and in divided societies, Türk tells Human Rights Council (3 March 2025) (“In Afghanistan, women and girls are subject to State-sponsored gender apartheid that is unparalleled in today’s world”), at: <https://www.ohchr.org/en/statements-and-speeches/2025/03/turbulence-and-unpredictability-amid-growing-conflict-and-divided>; UN High Commissioner for Human Rights Volker Türk, *Gender parity is a human right, Launch of CEDAW General Recommendation No. 40 on the equal and inclusive representation of women in decision-making systems - “Gender parity: we must have the highest ambitions”* (25 October 2024), at: <https://www.ohchr.org/en/statements-and-speeches/2024/10/gender-parity-human-right>.

⁶⁵ UN Human Rights Council, 56th session, *The phenomenon of an institutionalized system of discrimination, segregation, disrespect for human dignity and exclusion of women and girls - Report of the Special Rapporteur on the situation of human rights in Afghanistan*, UN Doc. A/HRC/56/25 (13 May 2024), at: <https://docs.un.org/en/A/HRC/56/25>.

⁶⁶ See End Gender Apartheid, *UN Comments on Gender Apartheid*, pp. 7-9, at: <https://endgenderapartheid.today/download/2025/UN%20Comments%20on%20Gender%20Apartheid.pdf>.

⁶⁷ UN Working Group on discrimination against women and girls, *Draft articles on prevention and punishment of crimes against humanity: Recommendations from the Working Group on discrimination against women and girls*, UN Doc. A/HRC/WG.11/40/1 (15 February 2024), at: <https://docs.un.org/en/A/HRC/WG.11/40/1>. In a joint report, the Special Rapporteur on the situation of human rights in Afghanistan and the Working Group on discrimination against women and girls stated that the treatment of women and girls in Afghanistan constitutes both gender persecution and gender apartheid. See UN Human Rights Council, *Situation of women and girls in Afghanistan - Report of the Special Rapporteur on the situation of human rights in Afghanistan and the Working Group on discrimination against women and girls*, A/HRC/53/21 (20 June 2023), <https://www.ohchr.org/en/documents/country-reports/ahrc5321-situation-women-and-girls-afghanistan-report-special-rapporteur>, paras. 95-96. See also UN Economic and Social Council, Commission on Human Rights, *Report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution, E/CN.4/1999/58* (11 January 1999), para. 26, available at: <https://digitallibrary.un.org/record/269030?ln=en&v=pdf>.

⁶⁸ UN Committee on the Elimination of Discrimination against Women, *General Recommendation No. 40 (2024) on the equal and inclusive representation of women in decision-making systems*, UN Doc. CEDAW/C/GC/40 (25 October 2024), para. 11, at: <https://digitallibrary.un.org/record/4067705?ln=en&v=pdf>.

⁶⁹ UN Women Executive Director Sima Bahous, *Speech: The Women’s Rights Crisis: Listen to, Invest in, Include, and Support Afghan Women* (26 September 2023), at: <https://www.unwomen.org/en/news-stories/speech/2023/09/speech-the-womens-rights-crisis-listen-to-invest-in-include-and-support-afghan-women#:~:text=So%2C%20the%20future%20must%20be,they%20will%20do%20it%20again>. See also UN Security Council, 9423rd meeting, *The situation in Afghanistan*, UN Doc. S/PV.9423 (26 September 2023), p. 6, at: <https://documents.un.org/doc/undoc/pro/n23/278/14/pdf/n2327814.pdf?OpenElement>.

⁷⁰ See End Gender Apartheid, *Member State Comments on Gender Apartheid*, pp. 7-17, at: <https://endgenderapartheid.today/download/2025/Member%20State%20Comments%20on%20Gender%20Apartheid.pdf>. See also Paloma van Groll, *Signals of Support for Gender Justice in the Draft Treaty on Crimes Against Humanity*, Just Security (19 January 2024), at: <https://www.justsecurity.org/91335/signals-of-support-for-gender-justice-in-the-draft-treaty-on-crimes-against-humanity/>. See also Akila Radnakrishnan & Alyssa Yamamoto, *More States Open to Considering Gender Apartheid for Draft Crimes Against Humanity Treaty*, Just Security (24 May 2024), at: <https://www.justsecurity.org/96096/gender-apartheid-crimes-against-humanity-treaty/>.

situation in Afghanistan is not enough to hold those responsible, including individuals, States and organizations, accountable.

Even where the double criminality requirement is removed from the definition, the crime of gender persecution is not sufficient to ensure justice for victims of institutionalized regimes of systematic oppression and domination. Persecution makes individuals criminally liable for intentionally and severely depriving a person of their “fundamental rights” based on grounds such as race or gender. The focus is on the perpetrator’s general intent to deprive a person of their rights and specific intent to do so because of such grounds. Apartheid encompasses these constituent parts of persecution, but when committed in the context of an institutionalized regime of systematic oppression and domination and, in particular, where the perpetrator intends to maintain it. Under persecution, the full range of criminal conduct is accordingly not necessarily subject to criminal sanction under the Convention and the harms experienced by victims and survivors not fully captured, contrary to the related practice of cumulative charging—charging multiple crimes for the same acts or course of conduct, which may then result in cumulative convictions⁷¹—and the prioritisation of the principle of full and faithful characterization of crimes. In particular, as stated by the ICC OTP in its *Policy on Gender-based Crimes*, “[c]haracterising [gender-based crimes] fully and faithfully is necessary to capture and to convey the complexity and nuance of survivors’ experiences accurately,” such that it will “charge cumulatively and request cumulative convictions.”⁷² Notably, apartheid and persecution based on race are both covered as crimes against humanity in the Rome Statute.

While a more specific human rights instrument on gender apartheid is warranted, the Convention, given that is presently under negotiation, should also include gender apartheid as a crime against humanity. The Convention

⁷¹ The Appeals Chamber in the *Čelibići* case at the International Criminal Tribunal for the Former Yugoslavia established the “materially distinct elements” test for determining whether cumulative convictions were permissible, namely: “multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other. Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld.” See *Prosecutor v. Delalić et al*, IT-96-21-A, Appeal Judgment (20 February 2001), paras 409, 412-413.

⁷² See ICC Policy on Gender-based Crimes, *supra* note 18, para. 86.

provides a legal basis for holding both individual perpetrators and States to account, with the possibility of adjudicating crimes against humanity cases in domestic courts and the International Court of Justice respectively. A monitoring and enforcement mechanism—which could be incorporated into the Draft Articles—could also issue determinations on State responsibility in individual cases and issue general guidance on the interpretation of the crime, of benefit for adjudicative bodies and others.

5. FORCED PREGNANCY

Draft Article 2(2)(f)

Definition of crimes against humanity

...

“forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

The sentence referring to “national laws relating to pregnancy,” which is drawn from the Rome Statute, should be removed from the definition of forced pregnancy. The ICC Appeals Chamber in the *Ongwen* case confirmed that it does not constitute an element of the crime and “was inserted to alleviate the concerns raised by some States that the forced pregnancy provision might be interpreted as interfering with the States’ approach to abortion.”⁷³ Concerns about the impact of the inclusion of forced pregnancy as a crime against humanity are unfounded, given the cumulative requirements already contained in the definition (i) that the victim is made forcibly pregnant; (ii) that they are unlawfully confined; (iii) that unlawful confinement was committed with intent to

⁷³ Situation in Uganda, *In the case of the Prosecutor v. Dominic Ongwen*, Public Redacted Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgment”, Case No. ICC-02/04-01/15 A (15 December 2022) (“ICC Ongwen Appeal Judgment”), para. 1065.

affect the ethnic composition of any population or carry out other grave violations of international law; and (iv) that such acts were carried out in the context of a widespread or systematic attack on a civilian population. Some States implementing the Rome Statute in domestic law have excluded the sentence from domestic definitions of forced pregnancy.⁷⁴

Additionally, the term “woman” in the definition should be replaced with “person,” to ensure gender inclusivity. Currently, the definition excludes females identifying as non-binary, or persons with other gender identities who may be forcibly made pregnant. Alternatively, the term woman should be supplemented with “woman, girl or other person.”⁷⁵

The definition of forced pregnancy in the Convention on Crimes Against Humanity should be as follows:

“Forced pregnancy” means the unlawful confinement of a person forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.

6. FORCED MARRIAGE

The crime of forced marriage should be enumerated as an underlying act of crimes against humanity. To date, forced marriage has been found to constitute the crime against humanity of inhumane acts by the Special Court for Sierra

⁷⁴ For example, France, the Republic of Congo, the Czech Republic, Finland, Georgia, Lithuania, Montenegro, Serbia and Burkina Faso.

⁷⁵ See Children and Crimes Against Humanity Coalition, *Justice for Children in the Future Convention on the Prevention and Punishment of Crimes Against Humanity* (May 2025), p. 8, at: <https://cahtreatynow.org/justice-for-children-in-the-future-convention-on-the-prevention-and-punishment-of-crimes-against-humanity/>.

Leone (SCSL),⁷⁶ the Extraordinary Chambers in the Courts of Cambodia (ECCC)⁷⁷ and the ICC.⁷⁸ However, forced marriage involves a range of harms which ought to be given due recognition as a distinct crime. Forced marriage violates the victim's right to relational autonomy, such as the right to choose who to marry and to establish a family.⁷⁹ It can also result in a range of harms through the "imposition, against the will of the victim, of duties that are generally associated with marriage,"⁸⁰ such as forced labour, forced pregnancy, forced childrearing, forced sexual exclusivity and sexual slavery.⁸¹ The crime concerns forced conjugal association, based on socially constructed gendered expectations and roles attached to the notions of being a wife or husband,⁸² which is not necessarily or exclusively sexual or reproductive, nor constitutes enslavement,

⁷⁶ *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber, Judgment (2 March 2009) ("SCSL Sesay Trial Judgment"), paras. 1464, 1473, 2307; *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-A, Appeals Chamber, Judgment (26 October 2009), paras. 726, 849, 861-862.

⁷⁷ *Co-Prosecutors v. Nuon Chea and Khieu Samphân*, Case No. 002/19-09-2007/ECCC/TC, Trial Chamber, Judgment (16 November 2018), paras. 741, 4172, 4198, 4303-4305; *Co-Prosecutors v. Khieu Samphân*, Case No. 002/19-09-2007-ECCC/SC, Supreme Court Chamber, Judgment (23 December 2022), paras. 1444-1591. It was also found to constitute rape: *Co-Prosecutors v. Nuon Chea and Khieu Samphân*, Case No. 002/19-09-2007/ECCC/TC, Trial Chamber, Judgment (16 November 2018), paras. 741, 4172, 4198, 4303-4305; ECCC, *Co-Prosecutors v. Khieu Samphân*, Case No. 002/19-09-2007-ECCC/SC, Supreme Court Chamber, Judgment (23 December 2022), paras. 1444-1591.

⁷⁸ *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Trial Chamber IX, Judgment (4 February 2021) ("ICC Ongwen Trial Judgement"), paras. 3026, 3069, 3116; ICC Ongwen Appeal Judgment, supra note 73, paras. 978-1041.

⁷⁹ See ICC Ongwen Trial Judgement, supra note 78, para. 2748; ICC Ongwen Appeal Judgement, supra note 73, para. 1024; *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18, Pre-Trial Chamber I, Corrected Version of "Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud" (13 November 2019) ("ICC Al Hassan Confirmation Decision"), Decision, para. 554 and fn. 1479. These rights are protected under: ICCPR, art. 23(3); *Convention on the Elimination of All Forms of Discrimination Against Women* ("CEDAW"), art. 16(1)(b); *Universal Declaration of Human Rights*, art. 16(1)(b), (2); *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (11 July 2003), art. 6. The consequences might include "social stigma, mental trauma and a serious attack on [victims] dignity." See Valerie Oosterveld, Anne-Marie de Brouwer, Eefje de Volder, Kathleen M. Maloney, Melanie O'Brien, Osai Ojigbo, Indira Rosenthal and Leila Sadat, *The Draft Crimes Against Humanity Convention and Forced Marriage*, Global Justice Center (undated) ("Oosterveld et al, *Forced Marriage*"), p.3, at: <https://www.globaljusticecenter.net/wp-content/uploads/2023/10/Forced-Marriage-Expert-Legal-Brief-CAH-Treaty.pdf>.

⁸⁰ ICC Ongwen Appeal Judgement, supra note 73, para. 1023. See also ICC Ongwen Trial Judgement, supra note 78, para. 2748.

⁸¹ See Oosterveld et al, *Forced Marriage*, supra note 79, p.4.

⁸² ICC Ongwen Trial Judgement, supra note 78, paras. 2748-2751; *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15-422-Red [93], Pre-Trial Chamber, Decision on the confirmation of charges against Dominic Ongwen (23 March 2016), paras. 92-94; ICC Ongwen Appeals Judgment, supra note 73, paras. 1022-1024. See also ICC Al Hassan Confirmation Decision, supra note 79, para. 559 (the specific conduct penalized under article 7(1)(k) of the Statute, in the form of a forced marriage, occurs when a person is compelled, regardless of his or her will, into a conjugal association with another person by the use of physical or psychological force, the threat of force or the taking advantage of a coercive environment).

which requires ownership over the person.⁸³ It is therefore not alternatively captured by these crimes. Rather, these may be the consequences of the forced marriage.

While there is no universally accepted definition of forced marriage under international criminal law, the most authoritative arbiter to define forced marriage is the ICC Appeals Chamber, which recognized the distinct nature of and harms associated with forced marriage in the *Ongwen* case:

The Appeals Chamber considers that the notion of “conjugal union” is indeed associated with the imposition of duties and expectations generally associated with “marriage”. These duties and expectations may not only have a sexual component, but are related to the entire social and domestic dimension of a marital relationship. As such, the SCSL Appeals Chamber held that, “unlike sexual slavery, forced marriage implies a relationship of exclusivity between the ‘husband’ and ‘wife’, which could lead to disciplinary consequences for breach of this exclusive arrangement.”⁸⁴

The Appeals Chamber went on to define forced marriage as:

*a situation in which a person is compelled to enter into a conjugal union with another person by the use of physical or psychological force, or threat of force, or by taking advantage of a coercive environment.*⁸⁵

⁸³ ICC *Ongwen* Trial Judgement, supra note 78, para. 2750. The SCSL Appeals Chamber overruled the Trial Chamber’s finding in the *AFRC* case that forced marriage should be subsumed under sexual slavery, on the basis that the distinguishing feature of forced marriage is the forced conjugal association, which implies a relationship of exclusivity that does not apply to sexual slavery. See *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Appeal Judgement (3 March 2008) (“SCSL *Brima* Appeal Judgement”), para. 195; *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Trial Judgement (20 June 2007), paras. 704, 711. See SCSL *Sesay* Trial Judgment, supra note 76, para. 2307. Rather, the consequences of violation of the victims’ rights constitute crimes including “abduction, rape, sexual slavery, enforced exclusivity in the sexual relationship, inability to leave the conjugal union for fear of violent retribution, non-consent to being placed in a polygamous conjugal situation, forced pregnancy, forced childbearing and childrearing, physical violence, forced domestic labour such as cooking and cleaning, ...forced portering”, violation of the right to health, loss of education and interruption of family ties. See Oosterveld et al, *Forced Marriage*, supra note 79, p. 4, citing SCSL *Brima* Appeal Judgement, para. 190; SCSL *Sesay* Trial Judgment, supra note 76, paras. 460, 1154-55, 1211-13, 1293, 1295, 1408-11, 1413, 1460, 1468, 1472, 155.

⁸⁴ ICC *Ongwen* Appeal Judgement, supra note 73, para. 1023 (citations omitted).

⁸⁵ ICC *Ongwen* Appeal Judgement, supra note 73, para. 1024 (citations omitted). See also ICC *Ongwen* Trial Judgement, supra note 78, para. 2753; ICC *Al-Hassan* Confirmation Decision, supra note 79, para. 559; SCSL *Brima* Appeal Judgement, supra note 83, para. 196 (“A situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partners resulting in severe suffering or physical, mental or psychological injury to the victim”).

The Chamber noted that “such a union violates a person’s right to marry, i.e. to freely choose one’s spouse and consensually establish a family, which is recognised as a fundamental right under international human rights law.”⁸⁶

States should incorporate the *Ongwen* definition in the Draft Articles. To ensure that legal incapacity to give consent because of age is captured by the definition,⁸⁷ States should add “or a person’s inability to give genuine consent, including for reasons of age.”⁸⁸

The Convention on Crimes Against Humanity should include forced marriage as an underlying act, defined as follows:

“Forced marriage” means a situation in which a person is compelled to enter into a conjugal union with another person by the use of physical or psychological force, or threat of force, or by taking advantage of a coercive environment or a person’s inability to give genuine consent, including for reasons of age.

⁸⁶ Ibid.

⁸⁷ The age of consent must be consistent with international human rights law. The CEDAW Committee and the Committee on the Rights of the Child jointly held that “A child marriage is considered to be a form of forced marriage, given that one and/or parties have not expressed full, free and informed consent. As a matter of respecting the child’s evolving capacities and autonomy in making decisions that affect her or his life, a marriage of a mature, capable child below 18 years of age may be allowed in exceptional circumstances, provided that the child is at least 16 years of age and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity, without deference to culture and tradition.” CEDAW and CRC, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices*, Un Doc. CEDAW/C/GC/31/REV.1 - CRC/C/GC/18/Rev.1 (8 May 2019), para. 20, at: <https://docs.un.org/en/CEDAW/C/GC/31/REV.1>.

⁸⁸ See Zama Neff, Janine Morna, Véronique Aubert and Zoé Bertrand, *Justice for Children in a Future Crimes Against Humanity Treaty*, Just Security (19 May 2025), at: <https://www.justsecurity.org/113376/justice-children-future-crimes-against-humanity-treaty/>.

7. SEXUAL AND REPRODUCTIVE AUTONOMY AND INTEGRITY AND SEXUAL SLAVERY

Draft Article 2(1)(g)

Definition of crimes against humanity

...

rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

To ensure violations of sexual and reproductive autonomy or integrity are adequately proscribed in the Convention, Article 2(1)(g) should be amended to more holistically refer to “any other deprivation of sexual or reproductive autonomy or integrity of comparable gravity.” Additionally, sexual slavery is captured by the crime of enslavement and should be removed as an enumerated underlying act.

There has been increasing recognition of reproductive violence as a category of gender-based crimes, including in caselaw and by numerous scholars and practitioners, who have identified gaps in existing charging practices and legal frameworks.⁸⁹ Forced pregnancy and forced sterilization, listed in the Draft Articles and Rome Statute,⁹⁰ are not the only forms of reproductive violence that violate a person’s right to reproductive autonomy.⁹¹ Forced impregnation (which is distinct from forced pregnancy insofar as it does not require confinement or intent to affect the ethnic composition of the population or carry out other grave

⁸⁹ See, e.g., Rosemary Grey, “The ICC’s First ‘Forced Pregnancy’ Case in Historical Perspective,” 15(5) *Journal of International Criminal Justice* 905–930 (2017); Ciara Laverty, “Reproductive Violence as a Category of Analysis: Disentangling the Relationship between ‘the Sexual’ and ‘the Reproductive’ in Transitional Justice,” 15(3) *International Journal of Transitional Justice* 616–635 (2021); Aldo Zammit Borda, “Putting Reproductive Violence on the Agenda: A Case Study of the Yazidis,” 26 *Journal of Genocide Research* 94–114 (2022); Aldo Zammit Borda, “Unpacking the Harms of Reproductive Violence in Mass Atrocities: Developing a New Typology,” *International Journal of Transitional Justice* (2025).

⁹⁰ Draft Articles, arts. 2(2)(f) and (g); Rome Statute, art. 7(1)(g).

⁹¹ The Appeals Chamber in the *Ongwen* case stated that the crime of forced pregnancy “seeks to protect, among others, the woman’s reproductive health and autonomy and the right to family planning.” ICC *Ongwen* Appeal Judgement, supra note 73, para. 1063 (“The Appeals Chamber understands from the drafting history that the second sentence of this provision was inserted to alleviate the concerns raised by some States that the forced pregnancy provision might be interpreted as interfering with the States’ approach to abortion... article 7(2)(f) of the Statute does not impose a new element to the crime of forced pregnancy... Trial Chamber was not required to consider Ugandan law on abortion in its assessment of the crime of forced pregnancy. Moreover, the Defence fails to show how Ugandan law on abortion was relevant to the Trial Chamber’s disposal of this issue.”)

violations under international law),⁹² forced breastfeeding, forced abortion, forced contraception⁹³ and physical violence to reproductive organs⁹⁴ also violate a person's right to autonomy.⁹⁵ Forced abortion,⁹⁶ forced contraception,⁹⁷ forced sterilization,⁹⁸ removal of newborns and suppression of the mother's lactation⁹⁹ have been recognized as crimes against humanity and/or war crimes by courts in Colombia, Argentina and Guatemala.¹⁰⁰

Currently, the acts of reproductive violence in article 7(1)(g) of the Rome Statute—in particular forced pregnancy and enforced sterilization—appear in a list of crimes which concludes with “or any other acts of sexual violence of comparable gravity.” This text has been replicated in the Draft Articles. As noted by the ICC OTP *Policy Paper on Gender-based Crimes*, while these acts may be committed in

⁹² Forced pregnancy is defined in article 7(2)(f) of the Draft Articles as “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.”

⁹³ *Joint submission: Draft Articles on Prevention and Punishment of Crimes Against Humanity Should Advance Justice for Reproductive Autonomy* (October 2023) (“*Joint submission on reproductive autonomy 2023*”), para. 2, at: <https://www.globaljusticecenter.net/wp-content/uploads/2023/10/Reproductive-Autonomy-Expert-Brief.pdf>, citing Corte Constitucional de Colombia (Judgment) Case No SU599/19 (11 December 2019).

⁹⁴ See, for example, Organization for Justice and Accountability in the Horn of Africa and Physicians for Human Rights, “You Will Never Be Able to Give Birth’: Conflict-Related Sexual and Reproductive Violence in Ethiopia,” July 31, 2025, <https://phr.org/our-work/resources/you-will-never-be-able-to-give-birth-conflict-related-sexual-and-reproductive-violence-in-ethiopia/>.

⁹⁵ See *Joint submission on reproductive autonomy 2023*, supra note 93, pp. 1-2. See also Akila Radnakrishnan, Ashita Alag, Paloma van Groll and Rosemary Grey, *Strengthening Reproductive Autonomy in the Draft Crimes Against Humanity Treaty* (22 November 2023), at <https://www.justsecurity.org/90219/strengthening-reproductive-autonomy-in-the-draft-crimes-against-humanity-treaty/>.

⁹⁶ *Joint submission on reproductive autonomy 2023*, supra note 93, para. 5, citing Colombian Constitutional Court: Corte Constitucional de Colombia (Judgment) Case No SU-599/19, p. 9; *Colombia v. Salvatore Mancuso Gómez and others* (Judgment), Tribunal Superior de Bogotá, *Sala de Justicia y Paz* (Superior Tribunal of Bogotá, Justice and Peace Chamber) Case 11 001 22 52 000 2014 00027, paras. 2142-2162, 8692-8693 (20 November 2014); *Argentina v. Bignone, Reynaldo Benito Antonio and others* (Judgment) Tribunal Oral en lo Criminal Federal 3 (Federal Criminal Oral Court 3), Case Number 9243/2007 (1818/15) (30 October 2018) (“*Argentina Bignone case 2018*”), pp. 620-627; *Democratic Republic of the Congo v. Muyolo Mbawo Ndarumanga* (Judgment), Tribunal Militaire de Garnison D’Uvira (Military Garrison Court Of Uvira), Judgment RP 168772022 (15 May 2023), pp. 49-50, 75-76; Trial International, DRC: *Conviction for forced pregnancy and other crimes against humanity for warlord Ndarumanga* (23 August 2023) (“*Trial International DRC 2023 Press Release*”), at: <https://trialinternational.org/latest-post/drc-conviction-for-forced-pregnancy-and-other-crimes-against-humanity-for-warlord-ndarumanga/>.

⁹⁷ *Joint submission on reproductive autonomy 2023*, supra note 93, paras. 2 and 5, citing Colombian Constitutional Court: Corte Constitucional de Colombia (Judgment) Case No SU-599/19, p. 9. *Guatemala v. Esteelmer Francisco Reyes Girón, Heriberto Valdéz Asig* (Judgment) Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente (First Sentencing Tribunal on Criminal, Drug Trafficking and Environmental Offences) (26 February 2016), Case C-01076-2012-00021 pp.492-493.

⁹⁸ *Joint submission on reproductive autonomy 2023*, supra note 93, para. 5, citing *Colombia v. Salvatore Mancuso Gómez and others* (Judgment), Tribunal Superior de Bogotá, Sala de Justicia y Paz (Superior Tribunal of Bogotá, Justice and Peace Chamber) Case 11 001 22 52 000 2014 00027, paras. 2142-2162, 8692-8693 (Nov. 20, 2014).

⁹⁹ *Argentina Bignone case 2018*, supra note 96, pp. 620-627. See also DRC *Ndarumanga case 2023*, supra note 94, p. 49-50, 75-76; Trial International DRC 2023 press release, supra note 96 at: <https://trialinternational.org/latest-post/drc-conviction-for-forced-pregnancy-and-other-crimes-against-humanity-for-warlord-ndarumanga/>.

¹⁰⁰ See also Daniela Kravetz, “Gender and the Implementation of International Criminal Law in the Latin American Region,” in Indira Rosenthal, Valerie Oosterveld and Susana Sácouto, *Gender and International Criminal Law* (Oxford University Press, 2022), pp. 339-345.

a way that make them sexual in nature and, therefore, satisfy the elements of sexual violence, they may also be committed in a manner that is not sexual. For example, forced contraception, the intentional destruction of reproductive capacity through chemical exposure and the destruction of hospitals or restrictions on access to medical supplies preventing women from having safe births are not acts that are sexual in nature.¹⁰¹

Accordingly, the ICC OTP *Policy on Gender-based Crimes* acknowledges reproductive violence as a distinct category of gender-based crimes.¹⁰² The Policy defines sexual violence as “a form of gender-based violence that involves the commission or attempted commission of sexual acts.”¹⁰³ Reproductive violence, on the other hand, “violates reproductive autonomy and/or it is directed at people on account of their actual or potential reproductive capacity, or perceptions thereof,”¹⁰⁴ and is not necessarily sexual in nature. The harms experienced by the victims of sexual and reproductive violence may also differ, with the former violating the right to decide whether, when, how and in what circumstances to engage in sexual activity and the latter to decide whether and under what circumstances to reproduce, including with whom.¹⁰⁵

The ICC Trial Chamber’s recognition of reproductive autonomy in its conviction of Dominic Ongwen for forced pregnancy confirms this is a distinct category of fundamental rights that can be subject to violation.¹⁰⁶ Further advancements have been sought to be made by the ICC OTP in their charging of Joseph Kony, the leader of the Lord’s Resistance Army, a non-State armed group in Uganda. The document containing the charges refers to abducted women and girls being deprived of their reproductive autonomy, and notes that, while “boys were

¹⁰¹ See Valeria Babără, *Symposium on Reproductive Violence in International Law: A New Era of Accountability for Reproductive Violence at the ICC?*, *Opinio Juris* (5 June 2024), at: <https://opiniojuris.org/2024/06/05/symposium-on-reproductive-violence-in-international-law-a-new-era-of-accountability-for-reproductive-violence-at-the-icc/>. Babără notes that a range of conduct affecting reproductive but not sexual autonomy might include “restrictions on access to reproductive healthcare; restrictions on access to prenatal or maternal healthcare; enforcing labour conditions known to adversely affect reproductive health; exposure to environmental pollutants, radiation or chemical agents affecting fertility; enforcing genetic manipulation; deception or economic coercion regarding reproduction; and segregation or differential treatment based on fertility or reproductive status.”

¹⁰² ICC Policy on Gender-based Crimes, *supra* note 18, paras. 29-30, 36-37 and 42-44.

¹⁰³ ICC Policy on Gender-based Crimes, *supra* note 18, para. 31.

¹⁰⁴ ICC Policy on Gender-based Crimes, *supra* note 18, para. 35.

¹⁰⁵ See, e.g. Centre for Reproductive Rights, *An Examination of Reproductive Violence during the Armed Conflict in Colombia: An Overview from a Gender and Reproductive Rights Perspective* (July 2020), pp.8-9, at: <https://reproductiverights.org/wp-content/uploads/2021/09/ENG-FULL-Reproductive-Violence-Conflict-Colombia.pdf>.

¹⁰⁶ ICC Ongwen Appeal Judgement, *supra* note 73, paras. 2717, 2722.

predominantly forced to carry out military tasks ... girls were subjected to acts of sexual, *reproductive* and other gender-based violence.”¹⁰⁷ The Colombian Constitutional Court also recognized reproductive violence as a distinct form of gender-based violence in its 2019 landmark decision on forced abortion and forced contraception within the FARC.¹⁰⁸

The relative invisibility of reproductive violence in legal instruments undoubtedly impacts the extent to which its perpetrators are held accountable. In several international criminal cases—including before the ICC,¹⁰⁹ the ICTY¹¹⁰ and the ECCC¹¹¹—acts of reproductive violence were not charged despite evidence they were committed. This can be rectified in future cases by making explicit reference to deprivations of reproductive autonomy or integrity in the Convention.

With respect to sexual violence, numerous international courts and tribunals, as well as UN bodies, have “recognized that rape and other offenses in Draft Article 2(1)(g) constitute deprivations of sexual autonomy or sexual integrity.”¹¹² However, at the ICC, acts depriving victims of their sexual or reproductive autonomy or integrity—including through forced circumcision and penile amputation—have been recharacterized as “inhumane acts” because they were

¹⁰⁷ Situation in Uganda, *In the Case of the Prosecutor v. Joseph Kony*, Document Containing the Charges, ICC-02/04-01/05 (19 January 2024), paras. 89, 105, 132.

¹⁰⁸ Women’s Link Worldwide, *Historic victory! A court in Colombia recognized that forcibly recruited girls suffered reproductive violence* (2 December 2024), at: <https://womenslinkworldwide.org/en/historic-victory-a-court-in-colombia-recognized-that-forcibly-recruited-girls-suffered-reproductive-violence/>. For the Spanish language judgement, see <https://ihl-databases.icrc.org/en/national-practice/constitutional-court-judgement-su-599-2019-victims-sexual-violence-armed-conflict>.

¹⁰⁹ For example, the Trial Chamber in the *Lubanga* case found they could not recharacterize the charges to include forced impregnation and forced abortion as inhumane acts although evidence had emerged at trial because the Prosecution omitted the evidence and charges during the pre-trial stage. *In the case of Prosecutor v. Thomas Lubanga Dyilo*, Judgement pursuant to article 74 of the Statute, ICC-01/04-01/06 (14 March 2012), paras. 16, 629-630, and 896 (although the Chamber described these acts as sexual rather than reproductive violence). See also paras. 598 and 606 (regarding the exposure of children that are conscripted to “sexual violence”). Judge Odio Benito dissented, finding that “sexual violence” should have been included with the legal concept of “use to participate actively in hostilities.” See Separate and Dissenting Opinion of Judge Odio Benito, paras. 8 and 16-21. See also Rosemary Grey, “Reproductive Crimes in International Criminal Law,” in Indira Rosenthal, Valerie Oosterveld and Susana Sácouto, *Gender and International Criminal Law* (Oxford University Press, 2022), p. 233.

¹¹⁰ No charges of forced impregnation were made despite evidence that women had been forcibly impregnated in several cases. See Saeeda Verrall, “The picture of sexual violence in the former Yugoslavia conflicts as reflected in ICTY cases” in *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, 2016), pp. 328-329. See also Rosemary Grey, “Reproductive Crimes in International Criminal Law,” in Indira Rosenthal, Valerie Oosterveld and Susana Sácouto, *Gender and International Criminal Law* (Oxford University Press, 2022), p. 232.

¹¹¹ See Rosemary Grey, “Bred ‘Like Cattle’: Forced Procreation in the Extraordinary Chambers in the Courts of Cambodia,” 5(1) *Journal of Human Trafficking, Enslavement and Conflict-Related Sexual Violence* 119, pp. 133-137.

¹¹² American University Washington College of Law, War Crimes Research Office, *Proposed Revised Text of Article 2(1)(g) of the Draft Articles on Prevention and Punishment of Crimes Against Humanity* (forthcoming, January 2026).

found not to be of a sexual nature.¹¹³ This case “reflects the tendency of courts to view sexual violence against men as gender-neutral acts of torture or other inhumane acts while similar acts against women are treated as sexual violence.”¹¹⁴

To ensure violations of sexual and reproductive autonomy or integrity are adequately proscribed in the Convention, Article 2(1)(g) should be amended to more holistically refer to “any other deprivation of sexual or reproductive autonomy or integrity of comparable gravity.” While the elements of acts of sexual or reproductive violence in the ICC Elements of Crimes make clear that “physical” violence is not required,¹¹⁵ this framing would leave no doubt that certain violations of sexual autonomy and certain violations of reproductive autonomy do not involve physical “violence” *per se*, but they may, nonetheless, constitute crimes against humanity as a consequence of their gravity.¹¹⁶

Additionally, sexual slavery should be removed as an enumerated underlying act from Article 2(1)(g) of the Draft Articles, as it is already captured by the crime of enslavement. While the explicit inclusion of sexual slavery as an act of sexual violence gives visibility to sexual violence crimes,¹¹⁷ it adds an unnecessary and onerous evidentiary burden on victims of the crime. In particular, when charged as an act of sexual violence rather than as enslavement, it is necessary to prove that the perpetrator caused “a person or persons to engage in an act of a sexual nature,” in addition to exercising rights of ownership over them.¹¹⁸ By contrast, when such conduct is charged as “enslavement”, no additional evidentiary burden is required. Rather, acts of a sexual nature may provide evidence that the perpetrator exercised the rights of ownership over them. The additional evidentiary burden has led to adverse outcomes in several ICC cases, where conduct constituting indicia of ownership was not considered as evidence of

¹¹³ Ibid.

¹¹⁴ Ibid, referring to *Prosecutor v. Kenyatta*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, paras. 260, 264-266 and 270.

¹¹⁵ See ICC Elements of Crimes, art.(7)(1)(g)-6.

¹¹⁶ The alternative is to mirror article 7 of the Rome Statute by adding “or reproductive” in Article 2(1)(g) so as to include “any other form of ... reproductive violence of comparable gravity.”

¹¹⁷ Valerie Oosterveld, “Sexual Slavery and the International Criminal Court: Advancing International Law” (2004) 25(3) *Michigan Journal of International Law* 605.

¹¹⁸ Compare ICC Elements of Crimes, art. 7(1)(c)-2 with art. 7(1)(g)-2, at <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>. See also Valerie Oosterveld, “Sexual Slavery and the International Criminal Court: Advancing International Law” (2004) 25(3) *Michigan Journal of International Law* 605, 616.

enslavement, but found to constitute other crimes, including inhumane acts (forced marriage), torture, rape and forced pregnancy.¹¹⁹ The inclusion of sexual slavery as a distinct crime has also led to outcomes that are discriminatory, with conduct against men and boys charged and found to be enslavement and similar conduct against women and girls to be sexual slavery.¹²⁰ No other form of slavery is enumerated as a distinct crime and sexual slavery should be removed.

Article 2(1)(g) should be amended to include reproductive violence as an underlying act of crimes against humanity, and sexual slavery should be removed, as follows:

rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other deprivation of sexual or reproductive autonomy or integrity of comparable gravity.

¹¹⁹ ICC *Ongwen* Trial Judgement, supra note 78, paras. 3021-3043. For a discussion of the impacts of charging sexual slavery over enslavement, see Jocelyn G. Kestenbaum, “All Roads Lead to Rome: Combating Impunity for Perpetration of Slave Trade and Slavery Crimes” (2024) 5 *Journal of Human Trafficking, Enslavement and Conflict-Related Sexual Violence* 177, 191-97.

¹²⁰ See Patricia Visseur Sellers and Jocelyn Getgen Kestenbaum, “Conflict-Related Sexual Violence Symposium: Conversations under the Rome Statute –Enslavement and Slave Trade,” *Opinio Juris* (11 June 2021), referring to ICC *Ongwen* Trial Judgement.

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