THE UNIQUE FUNCTION OF THE CRIME AGAINST HUMANITY OF *OTHER INHUMANE ACTS* IN THE PROGRESSIVE DEVELOPMENT AND CODIFICATION OF INTERNATIONAL CRIMINAL LAW

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ABSTRACT

Since Nuremberg, the crime against humanity of "other inhumane acts" has been used as a ***residual category*** *capable of capturing heinous acts that had not been codified in the definition of crimes against humanity, as reflected in the scholarly interpretation and pivotal practice of Benjamin Ferencz. The author of this Essay illustrates the lists of incriminated conduct contained in the definitions of crimes against humanity from the post-World War II international military tribunals to the post-Cold War ad hoc international criminal tribunals in a process that culminated with the treaty-based definition in Article 7 of the Rome Statute of the International Criminal Court of July 17, 1998. While all these definitions contain differing elements, "other inhumane acts" are always included, with the specification made by the Rome Statute that they have to be "of comparable gravity" vis-à-vis the other crimes against humanity in order to fulfill the contemporary requirements of the principle of legality.*

Looking forward to the treaty-making process scheduled to culminate in a Diplomatic Conference of Plenipotentiaries at the United Nations in New York in 2028-29 pursuant to UNGA Resolution 79/122 (December 4, 2024), which may bring about a new U.N. Convention for the Prevention and Punishment of Crime Against

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Humanity, the author highlights the role of ***precursor*** *that the jurisprudence on "other inhumane acts" can play to anticipate the express incorporation of new forms of crimes against humanity in the new treaty's definition. Referring to proposals advanced by academics and civil society organizations, which have received considerable support by several States, the author divides such proposals in four clusters: (i) slave trade (which reflects a preexisting prohibition under customary international law and relevant treaties); (ii) forced marriage (already reflected in the jurisprudence on "other inhumane acts" by the ICC and the SCSL); (iii) gender apartheid; and (iv) the widespread or systematic destruction of the environment. In parallel to the treaty-making process towards the first, comprehensive "suppression convention" devoted to crimes against humanity as such, the author analyzes the opportunities and challenges to amend the Rome Statute's Article 7 in order to ensure harmonization between this definition and the one to be contained in a crimes Against humanity treaty. His critical analysis of the practice of the Assembly of States Parties to the Rome Statute on amendments, which has been characterized by ultra vires resolutions pretending to extend the language of the second sentence of Article 121, paragraph 5, of the Rome Statute to nationals of States Not Parties to the Statute, the author develops an in-depth scrutiny into the meaning and implications of the application of Article 121, paragraph 5, on the jurisdictional regime that would apply to amendments to Article 7 in case they would be adopted. The author concludes that this process of "****definitional alignment,****" if successful, might lead to an unintended result of "****jurisdictional misalignment****," given that Article 121, paragraph 5, alters the preconditions for the exercise of the Court's jurisdiction on new crimes requiring the cumulative, not alternative, ratification by both the territorial State (Party) and the State (Party) of nationality of the alleged perpetrator. This might mean that new crimes against humanity that are falling under the Court's territorial (automatic) jurisdiction today as "other inhumane acts of comparable gravity" might not fall under the same jurisdiction tomorrow, when they will be "called by their name" and included in the list of incriminated conduct, due to this cumulative jurisdictional factor. Therefore, the author concludes that States Parties to the Rome Statute and the relevant jurisdictional organs shall welcome the innovations eventually adopted in a new crimes against humanity treaty, and maintain an authentic interpretation of the concept of "other inhumane acts," which ensures that all the new crimes against*

humanity specifically enumerated by the new U.N. treaty can be subsumed under "other inhumane acts". In doing so, the author illustrates the fundamental principle posited by ***Article 10 of the Rome Statute****, also known as the non-prejudice clause vis-à-vis the progressive development of (substantive) international criminal law.*

I. THE CRIME AGAINST HUMANITY OF OTHER INHUMANE ACTS

Since the London Agreement established an International Military Tribunal (IMT) at Nuremberg,[1] the definition of crimes against humanity under international law consists of a chapeau and a list of incriminated conduct, which ends with the residual category of "other inhumane acts." The rationale of this open-ended cluster of

1 *See* Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter London Agreement], https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf [https://perma.cc/2V9V-9SVH].

crimes against humanity was explained by Benjamin Ferencz many times in his inspiring speeches and teachings. In 2015, he wrote "[t]he precise character of 'other inhumane acts' as crimes against humanity was left to interpretation by courts and judges. The door was deliberately left open to possible inclusion of other unforeseeable major inhumanities that might otherwise have escaped judicial scrutiny."[2] Crimes against humanity were incorporated in the subject matter of the Charter of the International Military Tribunal with the view of ensuring justiciability of the most serious atrocities against civilians who were not protected by the law on war crimes, which was deemed applicable only to the civilian population belonging to the other side of an international armed conflict. In other terms, crimes against humanity were protecting all civilians, as such, including the civilian populations of the Axis Powers, who were victimized by crimes perpetrated by their Nazi-Fascist regimes, regardless of the nationality or other status of the persons suffering from "murder, extermination, enslavement, deportation, and *other inhumane acts* committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds."[3]

With Control Council Law No. 10 of the Allied Powers for Germany, adopted on December 20, 1945, the list of incriminated conduct falling under crimes against humanity expanded to torture and rape, and the link to the armed conflict was eliminated, hence crystallizing this category of crimes under international law as occurring in times of peace or war.[4] Five decades later, the Statutes of the Ad Hoc Tribunals, established by the UN Security Council exercising Chapter VII powers under the U.N. Charter, incorporated two different definitions of crimes against humanity in so far as the chapeau was concerned, but the special part enlisted the same punishable conduct of Control Council Law No. 10 with the addition of arbitrary imprisonment.[5]

2 Benjamin B. Ferencz, *The Illegal Use of Armed Force as a Crime Against Humanity*, 2 J. ON USE OF FORCE & INT'L L. 187, 195 (2015) [hereinafter *The Illegal Use of Armed Force*].

3 London Agreement, *supra* note 1, art. 6 (emphasis added).

4 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (Dec. 20, 1945), https://www.legal-tools.org/doc/ffda62/pdf/ [https://perma.cc/SL9C-GAXF].

5 Namely: "(a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; [and] (i) other inhumane acts." S.C. Res. 827, annex art. 6 (May 25, 1993) (Statute of the International Criminal Tribunal for the former Yugoslavia); S.C. Res.

II. OTHER INHUMANE ACTS AS DEFINED IN ARTICLE 7 OF THE ROME STATUTE OF THE ICC

In the absence of a comprehensive convention dedicated to outlawing and preventing crimes against humanity, the intergovernmental negotiations of a statute for a permanent International Criminal Court (ICC) became the venue in which the international law-making authorities—i.e., States—focused on, negotiated, drafted, and adopted a legally-binding definition of crimes against humanity, which should have been confined to the ICC itself, but inevitably[6] became an exercise on the codification and progressive development of international law. This law-making process started at the end of 1995, with a U.N. General Assembly calling for a UN Diplomatic Conference of Plenipotentiaries to be held in 1998 in Rome. After two-and-half years of intense sessions of the UN Preparatory Committee for the Establishment of an ICC held at the U.N. in New York, coupled with a series of inter-sessional meetings hosted by the International Superior Institute of Criminal Sciences (ISISC) in Siracusa, Italy, the U.N. Diplomatic Conference of Plenipotentiaries was held in Rome for five working weeks of unprecedented productivity, which resulted in the adoption of the Rome Statute of the ICC on July 17, 1998, through a non-recorded vote of 120 States in favor, 21 States abstaining, and 7 States against (including the U.S., the Peoples' Republic of China, the State of Israel and the State of Qatar, as well as Iraq and Syria, which were led at the time by Baathist/Fascist dictatorships). While the U.S. called for a vote against the adoption of the Rome Statute in opposition to territorial jurisdiction as one of the two alternative preconditions for

935, annex art. 3 (July 1, 1994) (Statute of the International Criminal Tribunal for Rwanda).

6 The argument of inevitability derives from the principle of complementarity, which governs the relationship between national jurisdictions and the international jurisdiction represented by the ICC. Since the ICC jurisdiction is designed to be a complement to national jurisdictions, the Rome Statute is the term of reference for the domestic implementation of international crimes: i.e., only if, *at a minimum*, the Rome Statute definitions are incorporated in domestic laws, then States are allowed to exercise their primary responsibility to put an end to impunity for the most serious crimes of international concern. Hence, the Rome Statute's substantive law, albeit conceived and adopted only "for the purpose of [the] Statute," inevitably became the definitional benchmark of the core crimes under international law for all States Parties to the Statute and also for all the other UN Member States, as the UN Security Council can refer a situation in any State to the ICC through a legally-binding Chapter VII resolution. Rome Statute of the International Criminal Court art. 13(b), *adopted* July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

the Court's exercise of jurisdiction under Article 12, the adoption of Article 7 on crimes against humanity had taken place unanimously in the relevant negotiations within the Committee of the Whole, facilitated and chaired by Canada.[7]

The Rome Statute's adoption was hailed as a major progress for International Law and multilateralism. As Benjamin Ferencz wrote in 2000: "[Rome Diplomatic Conference's Committee of the Whole] Chairman Philippe Kirsch of Canada spoke of '*humankind's finest hour.*' UN Secretary-General Annan hailed it as '*a gift of hope to future generations*.'"[8]

Article 7 soon became the new benchmark for the definition of crimes against humanity, and it was replicated in the Statute of the Special Court for Sierra Leone (SCSL) and other instruments of international criminal law. The list of incriminated conduct was expanded to encompass a larger cluster of sexual and gender-based crimes, the enforced disappearance of persons, and the crime of apartheid,[9] which had been codified as a crime against humanity in

7 The Committee of the Whole of the Rome Diplomatic Conference was chaired by Ambassador Philippe Kirsch of Canada, who later became the Chairperson of the UN Preparatory Commission for the ICC (1999-2002) and the first President of the ICC as an elected Judge (2003-2009). The Working Group on Crimes against Humanity of the Rome Diplomatic Conference was facilitated by Darryl Robinson of Canada, who later became a prolific academic and produced critical doctrinal contributions on international criminal law and policy: *inter alia*, he authored one of the best writings on the chapeau (general part) of the definition of crimes against humanity. *See* Darryl Robinson, *Crimes against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of Public Conscience*, *in* 1 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 139 (Flavia Lattanzi & William Schabas eds., 1999).

8 *See* Benjamin B. Ferencz, *Final Chapter: International Law as We Enter the 21st Century*, *in* INTERNATIONAL LAW AS WE ENTER THE 21ST CENTURY (European Law Students Association ed., 2001) (emphasis added), *reproduced on* BENFERENCZ.ORG (Jan. 2002), https://benferencz.org/articles/2000-2004/final-chapter-international-law-as-we-enter-the-21st-century/ [https://perma.cc/996Z-HXPJ].

9 Namely:

> (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph

1973 but had not been mentioned in the ICTY and ICTR Statutes and had not been incorporated in the various versions of the draft ICC Statute until South Africa proposed its inclusion at the Rome Diplomatic Conference. While these welcomed developments took place without controversial outcomes, the crime against humanity of persecution suffered a serious jurisdictional limitation as Article 7 of the Rome Statute does not render persecution punishable as such, but only if linked with other international crimes falling under the Court's jurisdiction, namely, genocide, war crimes, the crime of aggression, or other crimes against humanity. Hence, Article 7 was also characterized by a retrogressive development of the law of the Court vis-à-vis the applicable law on persecution under previous jurisdictions and, according to some scholars,[10] customary international law.

To address the criticism brought by some States that the category of "other inhumane acts" appeared to be too vague and open-ended—hence potentially not meeting the requirements of certainty and precision of the principle of legality (*nullum crimen, nulla poena, sine lege*) and its corollaries (e.g., prohibition of application by analogy)—the Rome Diplomatic Conference legislator made recourse of the legislative drafting technique of the "*eiusdem generis*" by clarifying that other inhumane acts are punishable as crimes against humanity only when they are grossly violating the physical or moral integrity of

> 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Rome Statute, *supra* note 6, art. 7, ¶ 1(a)-(k). Additionally, Paragraph 2 contains the definition of most of the incriminated conduct, while Paragraph 3 is an interpretative (not prescriptive) provision of the concept of gender. *Id.* arts. 2-3.

10 David Donat Cattin, *A General Definition of Crimes Against Humanity Under International Law: The Contribution of the Rome Statute of the ICC*, 8 L'ASTRÉE–REVUE DE DROIT PÉNAL ET DES DROITS DE L'HOMME 83 (1999); Antonio Cassese, *Crimes Against Humanity*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 376 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002); GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 257 (2005). For a reconstruction of the negotiations on persecution, see Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 AM. J. INT'L L. 43 (1999).

civilian victims in a way that is *similar* to the other incriminated conduct. Hence, subsection (k) of paragraph 1 of Article 7 reads as follows: "[o]ther inhumane acts *of a similar character* intentionally causing great suffering, or serious injury to body or to mental or physical health."[11]

All crimes against humanity are perpetrated with intent and knowledge, and they cause great suffering as a consequence of the serious injuries resulting therefrom that violate the integrity of the person, whether physical or psychological. Hence, the real addition made by the Rome Statute drafters to the definition of other inhumane acts is the phrase "of a similar character," which ensures that these acts may fall under the scope of crimes against humanity only when their gravity threshold can be compared to those of the other conduct incriminated under in Article 7. As an additional safeguard for the principle of legality, these inhumane acts must always fulfill the requirement of being comprised within "*the most serious crimes of concern to the international community as a whole*," as expressly stipulated in Article 5 of the Statute and affirmed in its Preamble.[12]

Notwithstanding that the Rome Statute is a more elaborate and sophisticated instrument than its predecessors (i.e., the IMT,[13] ICTY, and ICTR Statutes) in enlisting and defining international crimes (hence potentially making the residual clause of "other inhumane acts" less significant), the jurisprudence of the ICC has already applied this notion in some of its judgments. Also, the Prosecutor has made frequent use of this type of crime in relevant incriminating documents (i.e., documents containing the charges that correspond to

11 Rome Statute, *supra* note 6, art. 7, ¶ 1(k) (emphasis added).

12 *Id.* pmbl. art. 5 (emphasis added).

13 Contrary to the International Military Tribunal at Nuremberg, which was created by an international treaty open to ratification by all Members of the United Nations, the International Military Tribunal for the Far East, also known as the Tokyo Tribunal, was established via a special proclamation by the Supreme Commander for the Allied Powers on January 19, 1946. International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Jan. 19, 1946, T.I.A.S. No. 1589, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf [https://perma.cc/TE2S-3Y8U]. As such, the Tokyo Tribunal was a manifestation of the powers attributed to the occupying forces on the territories of the defeated Empire of Japan. Hence, the victorious States exercised jurisdiction on behalf of the territorial State, not of the International Community as a whole. This limits the value as an international precedent of the Tokyo Tribunal and explains its historical failure of the non-prosecution of the Emperor of Japan.

indictments) at the pre-trial stage of proceedings. This practice somehow contradicted the initial, "conservative" approach of the Pre-Trial Chamber, which, in one of the first ICC cases involving "other inhumane acts" in the situation of Kenya, stated: "[T]his residual category of crimes against humanity must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity."[14]

The most well-known judgment on "other inhumane acts" is the one against the former leader of the Ugandan fundamentalist group the Lord's Resistance Army (LRA), Dominic Ongwen, who was found guilty, *inter alia*, of the crime against humanity of forced marriage under the rubric of "other inhumane acts." Since forced marriage is not expressly contemplated in the list of gender-based crimes in Article 7 of the Rome Statute (albeit, some of its constitutive elements are absorbed by the definition of enslavement and sexual slavery), the ICC Trial and Appeals Chamber affirmed that it would have been more appropriate to characterize forced marriage as a crime against humanity as such, given that the marriage status was a continuing offense that was causing profound injury and distress on the inhumanely coerced brides of Mr. Ongwen[15] within the broader framework of the widespread or systematic attacks against civilians carried out by the LRA.[16]

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14 Prosecutor v. Muthaura, ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 269 (Jan. 23, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_01006.PDF [https://perma.cc/W7WZ-L4GJ].

15 Forced marriage had been previously prosecuted by the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) under the same rubric. *See* Kathleen Maloney, Melanie O'Brien & Valerie Oosterveld, *Forced Marriage as the Crime Against Humanity of "Other Inhumane Acts" in the International Criminal Court's Ongwen Case,* 23 INT'L CRIM. L. REV. 705 (2023). This article explains in detail the rationale of the ICC jurisprudence on forced marriage and proposes the insertion of this type of gender-based crime into the text of a new UN Convention for the Prevention and Punishment of Crimes against Humanity. *See also* Neha Jain, *Forced Marriage as a Crime against Humanity*, 6 J. INT'L CRIM. JUST. 1013 (2008).

16 Crimes against humanity consist of incriminated acts (e.g., extermination, murder, torture, persecution) and a contextual element (the fact that such conduct is perpetrated within the framework of a widespread or systematic attack against any civilian population): It is worth stressing that the contextual element applies also to forced marriage when it is qualified as a crime against humanity of other inhumane acts.

"Other inhumane acts" were also part of the ICC Prosecutor's charges against Katanga (Democratic Republic of the Congo) and Al Rahman (Darfur/Sudan),[17] as well as in other cases since the commencement of the ICC's activities. Subsequently, the famous application for arrest warrants in the situation of Palestine were premised on the "other inhumane acts as a crime against humanity, contrary to Article 7(1)(k), in the context of captivity", against the three indicted leaders of Hamas,[18] constituting the first ICC case that has been primarily based on the principle of active personality under Article 12 of the Rome Statute. While the arrest warrant issued by the Pre-Trial Chamber against the commander of the al-Qassam Brigades, Mohammed Deif,[19] is not a public document at the time of writing, it is evident that the term "captivity" refers to the inhumane conditions that have been imposed by the alleged perpetrators of Hamas to Israeli hostages, inhumanely abducted on October 7 and 8, 2023. In the same situation but based on the principle of territorial jurisdiction under Article 12 of the Rome Statute, the arrest warrants against the Prime Minister and the Defense Minister of Israel include "other inhumane acts" in the announced charges, as confirmed by Judges of the Pre-Trial Chamber.[20] These charges refer to the extreme pain and suffering

17 *See* Prosecutor v. Abd-Al-Rahman, ICC-02/05-01/20, Decision on the Confirmation of Charges Against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb'), ¶¶ 41, 43, 45, 64-70 (July 9, 2021), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_06131.PDF [https://perma.cc/DM76-WTG2]. Count 6 included forced nudity as "other inhumane acts as a crime against humanity." *Id.* ¶¶ 40-45. Count 14 included humiliating and degrading treatment as "other inhumane acts as a crime against humanity." *Id.* ¶¶ 64-70.

18 *See Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine*, INT'L CRIM. CT. (May 20, 2024), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state [https://perma.cc/43JV-TEDV].

19 Press Release, Int'l Crim. Ct., Situation in the State of Palestine: ICC Pre-Trial Chamber I Issues Warrant of Arrest for Mohammed Diab Ibrahim Al-Masri (Deif) (Nov. 21, 2024), https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-issues-warrant-arrest-mohammed-diab-ibrahim [https://perma.cc/X2GA-YZDH].

20 *See* Press Release, Int'l Crim. Ct., Situation in the State of Palestine: ICC Pre-Trial Chamber I Rejects the State of Israel's Challenges to Jurisdiction and Issues Warrants of Arrest for Benjamin Netanyahu and Yoav Gallant (Nov. 21, 2024), https://www.un.org/unispal/document/icc-arrest-warrant-netanyahu-21nov24/ [https://perma.cc/9UEL-PM2E] ("[B]y intentionally limiting or preventing medical supplies and medicine from getting into Gaza, in particular anaesthetics and anaesthesia machines, the two individuals are also responsible for inflicting great suffering by means of inhumane acts on persons in need of treatment. Doctors were forced to operate on wounded persons and carry out amputations, including on

of the patients in the Gazan hospitals allegedly targeted by the Israeli military.

In respect to the situation in Ukraine, regarding which the jurisdiction of the ICC has been so far exercised based on the principle of territorial jurisdiction under Article 12, attacks against "the Ukrainian electric infrastructure from at least 10 October 2022 until at least 9 March 2023" and the consequent grave suffering of civilians have been qualified by the ICC Prosecutor and Pre-Trial Judges as "other inhumane acts . . . ."[21] While the famous arrest warrant against the Russian Federation President Vladimir Putin is exclusively confined to the crime against humanity of deportation and the war crime of forcible transfer of civilians—the legal qualifications of the illegal "Russification" of Ukrainian children removed from orphanages and their families—it is possible that the charge of "other inhumane acts" may be present in other sealed arrest warrants against Russian officials, given the fact that the Office of the Prosecutor has developed an impressive array of investigations into Ukraine, concerning which it has received unfettered cooperation from the Ukrainian government and almost unlimited territorial access.

III. OTHER INHUMANE ACTS AND IMPROVEMENTS TO THE DEFINITION OF CRIMES AGAINST HUMANITY PROPOSED FOR A NEW UN CONVENTION ON THEIR PREVENTION AND PUNISHMENT

"Other inhumane acts" were used at the ICTY to ensure that sexual and gender-based crimes—such as the forced pregnancies of Bosnian women during the Bosnian War—would not be left unpunished. Similarly, sexual mutilation was punished as "other inhumane acts" by the ICTR. The Rome Statute negotiators took stock of the importance of calling these crimes against humanity by their name and modernizing the definition of crimes against humanity in accordance with the practice of international law as of 1998. The same impulse lies behind the process of consideration of the Draft Articles

children, without anaesthetics, and/or were forced to use inadequate and unsafe means to sedate patients, causing these persons extreme pain and suffering. This amounts to the crime against humanity of other inhumane acts.").

21 *See* Press Release, Int'l Crim. Ct., Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Sergei Ivanovich Kobylash and Viktor Nikolaevich Sokolov (Mar. 5, 2024), https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-ivanovich-kobylash-and [https://perma.cc/25JL-JEVX].

on Crimes against Humanity adopted by the U.N. International Law Commission (ILC) in 2019,[22] which the U.N. General Assembly has decided to use as a basis for the commencement of negotiations towards the adoption of a new U.N. Convention for the Prevention and Punishment of Crimes against Humanity by 2029.[23] Some academics, a significant group of civil society organizations, and a few States have embarked on a process that may be conducive to amending the definition of crimes against humanity reflected in ILC Draft Article 2 (which essentially mirrors the Rome Statute's Article 7), suggesting the following proposals:

> I) Adding the "slave trade" to the crime of enslavement (Draft Article 2(1)(c))[24];
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> II) Adding "forced marriage" to the list of sexual and gender-based crimes (Draft Article 2(1)(g))[25];
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> III) Adding "gender apartheid" to the crime of apartheid (Draft Article 2(1)(j)) or, alternatively, to the list of gender-based crimes (Draft Article 2(1)(g))[26];

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22 Int'l L. Comm'n, Rep. on the Work of Its Seventy-First Session, at 10-11, U.N. Doc. A/74/10 (2019) ("At its 3499th meeting, on August 5, 2019, the Commission decided, in conformity with Article 23 of its statute, to recommend the draft articles on prevention and punishment of crimes against humanity to the General Assembly. In particular, the Commission recommended the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles"); *see also* LEILA N. SADAT, FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (2011); ON THE PROPOSED CRIMES AGAINST HUMANITY CONVENTION (Morten Bergsmo & Song Tianying eds., 2014).

23 *See* G.A. Res. 79/122, ¶¶ 2-3 (Dec. 4, 2024).

24 *See* PATRICIA VISEUR SELLERS, JOCELYN GETGEN KESTENBAUM & ALEXANDRA LILY KATHER, INCLUDING THE SLAVE TRADE IN THE DRAFT ARTICLES ON PREVENTION AND PUNISHMENT OF CRIMES AGAINST HUMAN ITY (2023), www.globaljusticecenter.net/wp-content/uploads/2023/10/Slavery-and-Slave-Trade-Expert-Legal-Brief-CAH-Treaty.pdf [https://perma.cc/NN6G-J7QS].

25 *See* VALERIE OOSTERVELD, ANNE-MARIE DE BROUWER, EEFIE DE VOLDER, KATHLEEN M. MALONEY, MELANIE O'BRIEN, OSAI OJIGHO, INDIRA ROSENTHAL & LEILA SADAT, THE DRAFT CRIMES AGAINST HUMANITY CONVENTION AND FORCED MARRIAGE (2023), www.globaljusticecenter.net/wp-content/uploads/2023/10/Forced-Marriage-Expert-Legal-Brief-CAH-Treaty.pdf [https://perma.cc/S5PG-GG52].

26 Press Release, U.N. Off. of the High Comm'nr for Hum. Rts., Gender Apartheid Must Be Recognised as a Crime Against Humanity, UN Experts Say (Feb. 20, 2024), https://www.ohchr.org/en/press-releases/2024/02/gender-apartheid-must-be-recognised-crime-against-humanity-un-experts-say [https://perma.cc/DW9Z-XFKY]; *Global: Gender Apartheid Must Be Recognized as a Crime Under International Law*, AMNESTY INT'L (June 17, 2024),

> IV) Adding a fully-fledged new enlisted conduct concerning the widespread or systematic destruction of the environment as a crime against humanity.[27]

These and other proposals may make the category of "other inhumane acts" more residual, as the list of incriminated acts and omissions under crimes against humanity may encompass a more inclusive classification of so-called "atrocity crimes" against civilians in times of peace or war. The law-making process towards the negotiation and, if decided by the U.N. Member States, adoption of a new U.N. Convention for the Prevention and Punishment of Crimes against Humanity is therefore offering a uniquely important opportunity to codify and progressively develop the law on such crimes to provide the highest possible level of protection of victims while furnishing States with more effective means for international cooperation on preventative, investigative, prosecutorial, judicial, and reparative matters. As desired by a massive number of States and supported by a significant group of NGOs and independent scholars from all regions of the world, the new Convention should fill this gap in international criminal law, given that the law of crimes against humanity has been developed through the setting up of international criminal jurisdictions

https://www.amnesty.org/en/latest/news/2024/06/gender-apartheid-must-be-recognized-international-law/ [https://perma.cc/M834-QP79]; Atl. Council Strategic Litig. Project, *Codifying Gender Apartheid As a Crime Against Humanity under International Law*, END GENDER APARTHEID TODAY (July 11, 2024), https://endgenderapartheid.today/download/PublicQAonGenderApartheidCodificationInCAHC.pdf [https://perma.cc/84HH-8FY8].

27 Env't Sec.& Conflict L. Specialist Grp, World Comm'n on Env't L., *IUCN WCEL Advances Proposal to Incorporate Environmental Destruction As a Crime Against Humanity in Forthcoming Negotiations on a Dedicated Convention*, INT'L UNION FOR CONSERVATION OF NATURE & NAT. RES. (May 14, 2024), https://iucn.org/story/202405/iucn-wcel-advances-proposal-incorporate-environmental-destruction-crime-against [https://perma.cc/85RW-QGSD]. This paper correctly reports that "a number of States have elucidated the need for a future convention to incorporate environmental crimes as crimes against humanity, including Burkina Faso, Cameroon, Eritrea, Sierra Leone and, most recently, Ethiopia, Morocco, and Nigeria." *See also* Leila N. Sadat, James Carr Professor of Int'l Crim. L., Wash. U., Remarks at the U.N. High-Level Side Event Accountability for Environmental Violations and Crimes: Advancing a More Global and Inclusive Approach to International Environmental Law (Sep. 27, 2024), https://bpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/b/2004/files/2024/10/Remarks_Crimes-Against-the-Environment_UN-High-Level-Week.pdf [https://perma.cc/C2TQ-BYPV].

or the adoption of specific types of crimes against humanity treaties[28] in the absence of a *comprehensive* legally-binding instrument, regulating this *entire* category of international crimes and attributing relevant *responsibilities to States*.[29]

U.N. General Assembly Resolution 79/122, adopted on December 4, 2024, is significantly entitled "United Nations Conference of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity" and sets a five-year law-making process pathway for such a conference. As stated therein, States have until April 30, 2026, to transmit to the U.N. Secretary-General proposals

28 These instruments include: International Convention on the Suppression and Punishment of the Crime of Apartheid, *adopted* Nov. 30, 1973, 1015 U.N.T.S. 244, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.10_International Convention on the Suppression and Punishment of the Crime of Apartheid.pdf [https://perma.cc/6RN9-3L7T]; G.A Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984), https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading [https://perma.cc/5HDK-V54C] (criminalizing torture as such, independently from the chapeau or context of crimes against humanity); G.A. Res. 61/177, International Convention for the Protection of All Persons from Enforced Disappearances (Dec. 20, 2006), https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-all-persons-enforced [https://perma.cc/5K5L-8KJV]; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *adopted* Nov. 26, 1968, 754 U.N.T.S. 73, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.27_convention%20statutory%20limitations%20warcrimes.pdf [https://perma.cc/C569-W9UG]. Prior to the conceptualization of crimes under international law in relation to the London Agreement, *supra* note 1, it is worthy to mention the Convention to Suppress the Slave Trade and Slavery, *adopted* Sept. 25, 1926, 60 L.N.T.S. 25, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.13_slavery%20conv.pdf [https://perma.cc/BS4P-V9S5], which was followed and integrated by the Fourth Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *adopted* Apr. 30, 1956, 266 U.N.T.S. 3, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVIII-4&chapter=18&Temp=mtdsg3&clang=_en [https://perma.cc/H4JR-CSV8]. Several "soft-law" instruments in the field of international human rights law have been enacted to condemn acts and omissions that may be qualified as crimes against humanity, for example G.A. Res. 77/218, Extrajudicial, Summary or Arbitrary Executions (Dec. 15, 2022), https://documents.un.org/doc/undoc/gen/n22/762/56/pdf/n2276256.pdf[https://perma.cc/Q5ND-BFBP]; G.A. Res. 60/1, 2005 World Summit Outcome (Sept. 16, 2005), https://documents.un.org/doc/undoc/gen/n05/487/60/pdf/n0548760.pdf?OpenElement&_gl=1*13ygexw*_ga*NTM0MDExMzk3LjE3MzcyMjk4MjY.*_ga_TK9BQL5X7Z*MTczNzIyOTgyNS4xLjAuMTczNzIyOTgyNi4wLjAuMA [https://perma.cc/KET3-U998].

29 *See* M. Cherif Bassiouni, *Crimes Against Humanity: The Case for a Specialized Convention*, 9 WASH. U. GLOB. STUD. L. REV. 575 (2010).

for improving or otherwise amending the text of the ILC Draft Articles submitted by the International Law Commission to the General Assembly in 2019. From January 19 to 30, 2026, a preparatory committee will meet at the United Nations in New York. This committee will also have another formal session of four working days at the U.N. in 2027. The Resolution stipulates that the Diplomatic Conference of Plenipotentiaries will take place "at United Nations Headquarters in New York for three consecutive weeks in early 2028, and for three consecutive weeks in 2029, unless otherwise agreed by the Preparatory Committee . . . ." Contrary to the proceedings on the ILC Draft Articles held within the framework of the U.N. General Assembly Sixth (Legal) Committee, where the unwritten rule is that anything must be agreed by "consensus"—which means that one or few States can effectively block any decision-making process—the Rules of Procedure of the U.N. General Assembly plenary will apply "to elaborate and conclude a legally binding instrument on prevention and punishment of crimes against humanity . . . ." Hence, the majority of States present and voting will suffice to adopt a treaty, provided that "the Conference shall [have] exhaust[ed] every effort in good faith to reach agreement on substantive matters by consensus." This is the most important aspect of Resolution 79/122, even if the time frame provided on treaty-making is rather long and may be further protracted to a third session of the Conference of Plenipotentiaries in 2029 if general agreement on substantive issues (i.e., the definition of crimes against humanity) is not achieved by the end of the planned 2029 session of the Conference.

The most important characteristic of the initial phase of this treaty-making process is that States and relevant stakeholders can focus on initiatives to promote and advance proposals for a more inclusive definition of crimes against humanity (e.g., promoting the adoption of a thematic U.N. General Assembly resolution to eradicate "gender apartheid"). Other proposals to "amend" the ILC Draft Articles may be designed to strengthen a treaty-based regime that would effectively serve as a tool for the international community to end impunity for this category of international crimes while containing precise preventative obligations and procedures for States Parties.

IV. CHALLENGES FOR THE JURISDICTIONAL REGIME OF THE ICC IN CASE OF POTENTIAL AMENDMENTS TO ARTICLE 7: DEFINITIONAL ALIGNMENT MAY LEAD TO JURISDICTIONAL MISALIGNMENT

The progressive development and codification of the law of crimes against humanity that may result from a successful diplomatic process towards a new Convention could cause a substantive departure from the definition of crimes against humanity under Article 7 of the Rome Statute, a treaty that has thus far attracted the ratification and accession by 125 States, including 124 out of the 193 U.N. Member States.[30] To ensure that the Rome Statute reflects the most appropriate standard of criminalization, States Parties might decide to promote the same amendments proposed to integrate or update the ILC Draft Articles within the framework of the Rome Statute amendment procedures. This is already the case of Sierra Leone, which tabled with the Working Group of Amendments of the Assembly of States Parties a proposal to amend the Statute by adding the slave trade to the crime against humanity of enslavement in Article 7 and slavery (enslavement) and the slave trade to the definition of war crimes in Article 8. The Sierra Leonean proposal[31] to amend ILC Draft Articles'

30 The Cook Islands is the only State Non-Party to the U.N. Charter that acceded to the Rome Statute of the ICC. It did so as an outcome of this author's address on the universality of the Rome Statute system in the plenary session of the Africa-Caribbean-Pacific—European Union Joint Parliamentary Assembly (ACP-EU JPA), held in Ljubljana, Slovenia, in 2008, and immediate follow-up action undertaken by the Speaker of Cook Islands' Parliament, Wilkie Rasmussen, MP, Co-Chair of the ACP-EU JPA, who joined Parliamentarians for Global Action and led the national ratification process. *See The ACP-EU Joint Parliamentary Assembly's Call for Universal Ratification of the Rome Statute*, PARLIAMENTARIANS FOR GLOB. ACTION, https://www.pgaction.org/ilhr/rome-statute/acp-eu-jpa.html [https://perma.cc/5L29-M7EE] (last visited Feb. 20, 2025). The Cook Islands is an independent State in free association with New Zealand: even though it is a fully-fledged independent State, it delegates certain governmental functions to the Government of New Zealand, including the issuance of passports. This appears to represent an impediment to Cook Islands' membership in the organization of the United Nations.

31 "On May 5, 2023, Sierra Leone had sent a notification via the Secretariat of the Assembly informing the Working Group of its intention to submit proposed amendments to articles 7 and 8 of the Rome Statute. The proposal submitted by Sierra Leone was circulated by the Secretariat of the Assembly on May 24, 2023 and on September 9, 2024." Assembly of States Parties, Int'l Crim. Ct., *Report of the Bureau on the Review Mechanism*, ¶ 13, ICC-ASP/23/26 (2024), https://asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-23-26-ENG.pdf [https://perma.cc/SC9T-DY5A]. The text of the Sierra Leone proposal is on file with the author, and its formal version has been circulated to States Parties by the UN

Article 2 and Rome Statute's Articles 7 and 8 was the result of the significant scholarly work of Jocelyn Getgen Kestenbaum and Patricia Sellers.[32]

Statutory amendments on crimes against humanity are governed by Article 121 of the Rome Statute,[33] which states that a qualified majority of two-thirds of State Parties may adopt amendments so long as formal notification has been given to all U.N. Member States by the depository of the treaty, namely, the U.N. Secretary-General, who must circulate any amendments to Member States a minimum of three months before any legislative action is to be undertaken within the Assembly of States Parties.[34] Hence, it appears that a similar majority of States that would be ready to adopt a new U.N. treaty outlawing and defining crimes against humanity could be equally ready, in parallel, to amend the Rome Statute and ensure alignment between the two instruments in so far as substantive law is concerned. However, this potential "*definitional alignment*" will face the serious challenge of effectively applying the new types of crimes against humanity derived from the restrictive provision of Article 121(5), which regulates the entry into force of amendments to Articles 5, 6, 7, and 8. The effect of this provision would be to alter the jurisdiction of the Court over the new crimes against humanity and, in fact, bring about a result that no proponent of amendments may wish to realize, namely, a "*jurisdictional misalignment*" impeding the punishment of new crimes against humanity that instead may be punished as "other inhumane acts" in the absence of these amendments. This paradoxical situation

Secretary-General on April 16, 2005. *See Sierra Leone: Proposal of Amendments*, UNITED NATIONS TREATY COLLECTION (Apr. 16, 2005), https://treaties.un.org/doc/Publication/CN/2025/CN.175.2025-Eng.pdf [https://perma.cc/M9PZ-EDPV]. The proposal had been illustrated in various statements of the Representatives of Sierra Leone to the United Nations: *See* Michael Imran Kanu, Ambassador, Permanent Mission of the Republic of Sierra Leone to the United Nations, Statement During the 78th Session of the General Assembly (Apr. 2, 2024), https://estatements.unmeetings.org/estatements/11.0060/20240402150000000/r3uxvCyY2j8E/Gsdsp8aDmBrQ_en.pdf [https://perma.cc/YQW8-FUK9].

32 *See generally* Patricia Sellers & Jocelyn Getgen Kestenbaum, *Missing in Action: The International Crime of the Slave Trade*, 18 J. INT'L CRIM. JUST. 517 (2020); Jocelyn Getgen Kestenbaum, *All Roads Lead to Rome: Combating Impunity for Perpetration of Slave Trade and Slavery Crimes*, 5 J. HUM. TRAFFICKING ENSLAVEMENT & CONFLICT-RELATED SEXUAL VIOLENCE 177 (2024); Jocelyn Getgen Kestenbaum, *Prohibiting Slavery & the Slave Trade*, 63 VA. J. INT'L L. 51 (2022); Jocelyn Getgen Kestenbaum, *Disaggregating Slavery and the Slave Trade*, 16 FIU L. REV. 515 (2022).

33 Rome Statute, *supra* note 6, art. 121.

34 *Id.* ¶ 1-2.

could be summarized as follows with respect to—by way of example—the proposed new crime against humanity of gender apartheid:

Scenario I - Gender apartheid is currently punishable before the ICC as an "*other inhumane act*" of comparable gravity to other crimes against humanity (e.g., racially-based apartheid or gender-based persecution), so long as the crime in question occurs either in the territory of a State that has accepted the Court's Article 12 jurisdiction or is committed by a national of a State that has accepted such jurisdiction. In other terms, the two jurisdictional criteria of territoriality and active personality are alternative, not cumulative—this was one of the greatest achievements of the Rome Diplomatic Conference negotiations in 1998.

Scenario II - When the relevant proposed amendment is adopted by the Assembly of States Parties, gender apartheid will be punishable as long as the crime in question occurs in the territories of a State that has ratified the amendment *and* is committed by a national of a State that has ratified said amendment. In other terms, the two criteria of territoriality and active personality will be cumulative, not alternative—this was one of the most serious flaws of the Rome Statute, derived from language that was inserted at the latest hour by state negotiators in Article 121(5) and was not processed by the Drafting Committee of the Rome Diplomatic Conference.[35]

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35 Article 121, paragraph 5, reads as follows:

> Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has *not* accepted the amendment, the Court shall *not* exercise its jurisdiction regarding a crime covered by the amendment when committed by that *State Party*'s nationals or on its territory.

Rome Statute, *supra* note 6, art. 121, ¶ 5 (emphasis added.). This second sentence of Article 121(5) represents an exact opposite to Article 12, *Preconditions for the Exercise of Jurisdiction*, effectively making the amended substantive law of the Statute very difficult to apply in a concrete case. However, it must be stressed that this flip-flopping in a cumulative sense the ICC jurisdictional criteria to restrict the ICC reach on "new" or amended core crimes applies to the nationals of States Parties only, not to the nationals of States Not Parties when they decide to perpetrate such "new" or amended core crimes in the territories of States Parties that have ratified the amendments in question. This is the literal meaning of Article 121(5), which must be interpreted in accordance with the ordinary meaning of the terms in the

Therefore, the status quo, as described in Scenario I, ensures wider access to justice for victims of crimes against humanity than the *new status* that will stem from a successful reform process, as described in Scenario II.

The Rome Statute's substantive law has already been amended six times, but the reformed crimes are applicable in very limited situations due to not only the restrictive jurisdictional effects of Article 121(5) but also the low rates of ratification. The definition of war crimes was amended five times between 2010 and 2019, and forty-seven States ratified the first cluster of amendments on certain prohibited weapons in non-international armed conflicts, while nineteen States ratified the last amendment on the use of starvation in non-international armed conflicts.[36] Political will at the domestic level

context of the Statute and pursuant to its object and purpose, per Article 31 of the Vienna Convention on the Law of Treaties (VCLT). The text of Article 121(5) is not ambiguous. Therefore, the "understanding" adopted by the Assembly of States Parties in all the resolutions relating to the amendments on war crimes stipulating that the jurisdiction of the ICC does apply to nationals of State Non-Parties does not meet the requirement of a subsequent agreement under Article 31 of the VCLT, given that such a subsequent agreement should have been part of the amendment itself. In all these resolutions, the Assembly of States Parties is "confirming its understanding that in respect of this amendment, the same principle that applies in respect of a State Party which has not accepted this amendment applies also in respect of States that are not Parties to the Statute" *See* Assembly of States Parties, Int'l Crim. Ct., *Resolution on Amendment to Article 8 of the Rome Statute of the International Criminal Court [Intentionally Using Starvation of Civilians]*, ICC-ASP/18/Res.5 (2019), https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/ICC-ASP-18-Res5-ENG.pdf [https://perma.cc/J27D-ZN87].

36 For a summary of the ratification status of amendments to the Rome Statute, see *Rome Statute and Other Amendments*, INT'L CRIM. CT., https://asp.icc-cpi.int/RomeStatute [https://perma.cc/Y95H-87PA] (Jan. 1, 2025). The other cluster of amendments to the substantive law of the Statute regards *the crime of aggression* (Articles 8 bis, 15 bis, and 15 ter), which is *not a new crime* vis-à-vis the Rome Statute given that it was included in the list of the most serious crimes of concern to the International Community as whole under Article 5, paragraph 1, RS, on 17 July 1998. Hence, the amendments on the crime of aggression adopted by the Kampala Review Conference in 2010 should not have been subjected to the entry into force provision of Article 121, paragraph 5, also taking into account the specific regime (*lex specialis*) on entry into force envisaged in Article 15 bis. Nevertheless, the Kampala Review Conference and the Assembly of States Parties adopted non-binding resolutions that are invoking the application of Article 121, paragraph 5, to the ratification and entry into force of the relevant amendments. Assembly of States Parties, Int'l Crim. Ct., *The Crime of Aggression*, ICC-ASP-RC/Res.6 (2010), https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf [https://perma.cc/5AAA-3H24] ; *see also* Assembly of States Parties, Int'l Crim. Ct., *Activation of the Jurisdiction of the Court Over the Crime of Aggression*, art. 15 bis, ICC-ASP/16/Res.5 (2017), https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf

[https://perma.cc/Q2V3-RD2Y]. Albeit not expressly mentioned in the Kampala resolution, the only legal justification for the reference to Article 121, paragraph 5, can be derived from the Kampala amendment deleting paragraph 2 from Article 5, which would have anyhow become an obsolete norm after the convening of the first Review Conference in 2010, given that it mandated such a Review Conference to accomplish the unfinished business on aggression of the Rome Conference.

As of mid-January 2025, forty-seven States Parties to the Rome Statute, including Ukraine—which joined the system on January 1, 2025—and Denmark (with territorial exclusion in respect of the Faroe Islands and Greenland), ratified the Kampala Amendments on the crime of aggression, which entered into force on July 17, 2018, and will be subjected to a mandatory review in a special session of the Assembly of States Parties seven years after such an entry into force, namely, in July 2025: reference is made to the Assembly's "invitation" contained in paragraph 163 of *Strengthening the International Criminal Court and the Assembly of States Parties*, which reads:

> *The Assembly of States Parties . . . Invites* the Chair of the Working Group of Amendments to convene regular meetings of the Working Group starting early in 2025 to facilitate discussions on the Kampala amendments on the crime of aggression in preparation of the Special Session of the Assembly from 7 to 9 July 2025, in accordance with the decision to Review the Kampala amendments.

Assembly of States Parties, Int'l Crim. Ct., *Strengthening the International Criminal Court and the Assembly of States Parties*, ¶ 163, ICC-ASP/23/Res.1 (2024), https://asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-23-Res.1-ENG.pdf [https://perma.cc/5Q6L-TDYJ]. This will be *the first Special Session of the ASP* and will have the pivotal task of deliberating on amendments that will be aimed at aligning or, at least, harmonizing the Court's ineffective jurisdiction on the crime of aggression to the regime of Article 12 that applies to the other core crimes falling under the ICC jurisdiction.

Ukraine's ratification of the amended Rome Statute is accompanied by a declaration under Article 124, a controversial measure that permits a State to suspend the jurisdiction of the ICC on war crimes for the first seven years after the treaty enters into force. Through the declaration, Ukraine intends to limit this restrictive jurisdictional measure to its nationals only, hence trying to ensure continuity of the ICC jurisdiction in respect of war crimes allegedly perpetrated by foreigners on its territories. However, this author respectfully believes that a ratifying State cannot pick and choose what war crimes will fall or not fall under the Court's jurisdiction given that the 'transitional provision' of Article 124 refers to war crimes under the ICC jurisdictional regime (Article 12). Since the Rome Statute provides that any matter pertaining to jurisdiction must be decided by the Court itself, ultimately Ukraine's declaration under Article 124 might be subjected to judicial scrutiny, and it might be assessed as null and void by the ICC Appeals Chamber if the latter will find that the Rome Statute's letter was not respected by the declaring State. All in all, *this potential controversy could have been avoided if States Parties to the Rome Statute had universally ratified the 2015 amendment deleting Article 124 from the Statute itself*, as unanimously decided by the Assembly of States Parties exercising its legislative functions. Yet, *the entry into force for such*

is a necessary component of a successful ratification process, which, in most national legal systems, requires concurrence, authorization, or approval by the legislative branch before the executive branch can deposit an instrument of ratification of a treaty or its amendments. This means that treaty ratification, including amendments' ratification, must compete with national legislative priorities in almost all national parliaments, hence posing an obstacle to the timely and universal participation of States in treaty regimes. Therefore, this limited capacity of national legislatures to focus on joining international agreements represents an additional argument in support of pragmatic and principled interpretations of the category of "other inhumane acts" to ensure alignment of the (apparently static) definition of Article 7 of the Rome Statute with the new definition that may result from the treaty-making process on a new U.N. Convention for the Prevention and Punishment of Crimes against Humanity.

V. USE OF OTHER INHUMANE ACTS TO ENSURE CONSISTENCY AND COHERENCE BETWEEN A NEW UN CONVENTION ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST HUMANITY AND THE ROME STATUTE OF THE ICC

The final question is whether the use of "other inhumane acts" would fulfill the requirements of coherence and consistency of Article 7 of the Rome Statute vis-à-vis the progressive developments of international law reflected in an *expanded* definition of crimes against humanity that may be included in a new U.N. Convention for the Prevention and Punishment of Crimes against Humanity, should this instrument be adopted in 2029. The Rome Statute provides the interpreters with a general norm that keeps the gates of international criminal law open to progressive development. It is contained in Article 10, the only norm of the Statute without a title or rubric, which reads: "*[n]othing in this Part [II of the Rome Statute] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.*" Conceived as a non-prejudice clause, the rationale of Article 10 is to reassure the international law-makers—i.e., States—that the

an amendment requires the ratification of 7/8 of States Parties, in accordance with *Article 121, paragraph 4***,** and only twenty-four States out of 125 ratified this amendment as of mid-January 2025. This reality constitutes additional evidence of the existing challenge to the entry into force of amendments to the Rome Statute. Rome Statute, *supra* note 6, arts. 121, 124.

definitions of crimes contained in the Rome Statute represent a minimum standard, and States are free to agree on rules that would encompass wider criminalization and increase protections for victims under international law in new instruments.[37] Combined with the principle of legality defined in Part III of the Statute on general principles of law in Article 22, *Nullum crimen sine lege*, which includes in its second paragraph the prohibition of interpretation by analogy and the principle of strict interpretation[38], the *corpus juris* of the Statute may not be generally used for an exercise of progressive development and expanded interpretation of the applicable law of the ICC. This is undoubtedly true for genocide, war crimes, and the crime of aggression, all of which contain an enumerated and exhaustive list of incriminated acts or omissions. For crimes against humanity there is instead an explicit category of "other inhumane acts" that was conceived and agreed upon by States to serve the purpose of an open clause or a residual category, founded upon the consideration that

37 Article 10 refers equally to existing and new norms: for example, an existing norm that was not reflected in Article 7 of the Rome Statute regards the criminalization of persecution as a crime against humanity that could be prosecuted as such, independently of its connection to other international crimes. Rome Statute, *supra* note 6, art. 10. Instead, Article 7(1)(h) makes persecution punishable before the ICC only if connected with any other crime falling under the Court's jurisdiction (i.e., other crimes against humanity or any war crime, genocide, or the crime of aggression). Regretfully, in respect of the crime against humanity of persecution, the Rome Statute is not consistent and coherent with the definition of this crime under customary international law. *See supra* note 10 and accompanying text.

38 Due to its importance, Article 22 is hereby reproduced:

> Nullum crimen sine lege
>
> 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
>
> 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
>
> 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Rome Statute, *supra* note 6, art. 22. The third paragraph essentially reiterates the non-prejudice clause of Article 10: The Rome Statute cannot be used as a tool to invoke the progressive development of international criminal law. Such a policy, if carried out by a State Party, would be in contradiction with the letter of the treaty itself.

there cannot be a limit to inhumane acts that may shock the consciousness of humankind and harm victims in a similar way to the shock and harm caused by the other categories of crimes against humanity. This means that the very notion of "other inhumane acts" is to ensure that the definition of crimes against humanity should never become outdated or surpassed, as it should capture—by way of its strict interpretation—any new form of "heinous conduct" that the international community deems as fulfilling the criteria of crimes against humanity.[39] In other terms, any new category of crimes against humanity agreed upon by U.N. Member States, which represents the international community almost in its entirety, should be applied in the ICC jurisprudence as "other inhumane acts," hence ensuring consistency and coherence between the Court's interpretation of the Rome Statute and the interpreters' understanding of the definition of crimes against humanity contained in the new U.N. Convention.

Yet, the use of "other inhumane acts" as a residual clause that can automatically mirror the practice of the ICC with the progressive developments of the definition of crimes against humanity that may be agreed upon by States will be significant *not only* after that such legislative improvements would be adopted in a new treaty on crimes against humanity (*ex post*), *but also* before that such innovations would have entered into force or even proposed, negotiated and adopted (*ex ante*). Therefore, while the ICC jurisprudence on other inhumane acts can on one hand reaffirm as crimes against humanity all the inhumane conduct that is not explicitly enumerated in Article 7 of the Rome Statute and that will be included in the crimes against humanity treaty's definition, on the other hand it can also continue to serve as a useful *precursor* to the inclusion in a new treaty's definition

39 To explain how Article 7 of the Rome Statute meets the requirement of strict interpretation under the principle of legality, this author wrote the following observation right after the Rome Statute's adoption:

> Pursuant to Article 7(k), only acts or omissions representing an aggression against the *values* protected by the incriminating norms constituting crimes against humanity (*i.e.*, the physical and/or mental integrity of the human being, such as in the case of biological experimentation upon individuals) are qualified as "inhuman acts". The strict *mens rea* requirement of intent for such residual offenses has the effect of leaving open the door to future unimaginable types of atrocities.

Cattin, *supra* note 10, at 88.

of new types of crimes against humanity, such as forced marriage or gender apartheid.[40]

VI. A TRIBUTE TO THE ONGOING LEGACY OF BENJAMIN FERENCZ: THE WAY FORWARD

Benjamin Ferencz, the last living Nuremberg Prosecutor until his death in 2023 at the age of 103, wrote the following on other inhumane acts and the crime of aggression:

> The Nuremberg principles sought to substitute a rule of enforceable humanitarian law to replace the horrors of armed conflict. Those who stubbornly refused to be bound by new international rules failed to recognize that, in today's interdependent and increasingly democratic world, sovereignty belongs not to a monarch who is above the law but to the people. The notion of absolute sovereignty is absolutely obsolete.[41]

Given the recent launch of the treaty-making process towards a Convention for the Prevention and Punishment of Crimes against Humanity, the responsible exercise of sovereignty by States, on behalf of their peoples and their fundamental human rights under international law, is more important and necessary than ever. As a young scholar and activist who had the privilege to sit on the left of Benjamin Ferencz in the Red Room of the FAO Building when the ICC Statute was adopted by the Committee of the Whole of the Rome Diplomatic Conference on July 17, 1998,[42] I was a witness to a historic

40 The same reasoning may apply to the forgotten crime against humanity of the slave trade, even if it would be more correct from a legislative and conceptual perspective to add the slave trade to the crime against humanity of enslavement, which also entails slavery under Article 7, in line with the previously mentioned proposal for amendments to the Rome Statute by Sierra Leone. Conversely, since Article 8 on war crimes is characterized by *an exhaustive list* of offenses, the amendment proposal of Sierra Leone, *supra* note 31, is absolutely necessary to fill the lacuna on enslavement/slavery and the slave trade in the context of war crimes. Rome Statute, *supra* note 6, arts. 7-8.

41 *The Illegal Use of Armed Force*, *supra* note 2.

42 Benjamin Ferencz and this author were accredited to the Rome Diplomatic Conference as NGO observers. We had access to all the open meetings of the Plenary, the Committee of the Whole and the Working Groups of this UN Conference, which took place from June 15 to July 17, 1998 at FAO Headquarters in Rome, Italy. The text of the Draft Statute adopted by the Committee of the Whole

treaty-making process in which *States responsibly exercised their sovereign powers* when they reaffirmed the Nuremberg Principles within the framework of a jurisdiction based on the foundational element for every modern and legitimate (i.e., people-centered) legal system: namely, *the principle of equality of all before the law*.

The creation of a permanent International Criminal Court had been the most important objective pursued by Benjamin Ferencz throughout his entire career as a practitioner, activist, scholar, educator, and leader who believed that the same principles of law that the Allied Powers applied to the international crimes of the Axis Powers should have become applicable to all, regardless of nationality, geostrategic alliance, rank, or status. And all the principles of law enshrined in the Nuremberg jurisprudence and charter, recognized by the first U.N. General Assembly as part of customary international law in 1946[43] and reaffirmed by the UN International Law Commission in 1950, were effectively incorporated in the 1998 Rome Statute, but with one exception, which is noteworthy to cite here: "*Principle II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law*."[44] This principle of irrelevance of domestic criminalization for crimes under international law had a direct impact on the second paragraph of the definition of the principle of legality contained in the International Covenant on Civil and Political Rights[45]

on July 17 was transmitted on the same date to the plenary. Both adoption processes required a vote, as the creation of a permanent jurisdiction on international crimes that would have applied the law equally to all individuals, within the framework of the preconditions that established the ICC jurisdiction, found the opposition of seven States in the plenary's unrecorded vote. *See* Rome Statute, *supra* note 6, arts. 12, 13(b); *see also supra* Section II.

43 *See* G.A. Res. 95(I), Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal (Dec. 11, 1946), https://legal.un.org/avl/pdf/ha/ga_95-i/ga_95-i_ph_e.pdf [https://perma.cc/FP3M-LGK3].

44 *Report of the International Law Commission to the General Assembly*, at 11, U.N. Doc. A/1316 (1950), *reprinted in* [1950] 2 Y.B. Int'l L. Comm'n 374, U.N. Doc. A/CN.4/SER.A/1950/Add.1. This report contains the article "Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal."

45 Article 15 of the International Covenant on Civil and Political Rights reads as follows:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was

and other relevant regional human rights treaties, which permits the retrospective punishment of international crimes by domestic courts as long as the crime in question was proscribed under international law. Without this principle, the normative and institutional edifice of international criminal law *stricto sensu* would have collapsed right after World War II. But, in 1998, the principle of irrelevance of domestic criminalization of international crimes was considered fully absorbed and accepted by the international community as a whole, and all the participants in the law-making process on the Rome Statute did not even consider it for inclusion in the Statute as its goal had been instrumental to justifying the legality (and legitimacy) of the Nuremberg and post-Nuremberg trials. Yet, Nuremberg Principle II should still be considered relevant to the practice of international

> committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
>
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

International Covenant on Civil and Political Rights art. 15, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171. This norm, including its paragraph 2, reflects general (customary) international law as accepted by all States, given that it was reflected in the practice of international and hybrid criminal jurisdictions, and the Rome Statute had to explicitly include a prohibition of retroactivity to ensure a *lex specialis* before the ICC itself. In fact, the principle of non-retroactivity *ratione personae* is formulated in Article 24 ("*No person shall be criminally responsible under this Statute for* ***conduct*** *prior to the entry into force of the Statute*") (emphasis added) as an apparent repetition vis-à-vis the letter of Article 124 on entry into force and Article 12(3), the combined reading of which states that, *ratione materiae*, the Rome Statute can only apply to crimes committed after the entry into force of the Statute itself (July 1, 2002) or at a later date, depending on the modality that creates the Court's jurisdiction either under Articles 12(2) on States' ratification or accession, 12(3) on ad hoc consent to jurisdiction by States Non Parties, or 13(b) on a U.N. Security Council referral of a situation. Rome Statute, *supra* note 6, arts. 12(3), 24, 124. Yet, Article 24 is not entirely repetitive and redundant vis-à-vis other norms on the non-retroactive application of the Rome Statute because when it uses the term "conduct," it aims at ensuring that the principle of non-retroactivity extends to "permanent crimes" that are characterized by conduct that took place before July 1, 2002, while their continued effects or consequences may be still ongoing (e.g., the enforced disappearances of persons, which may have commenced in the 1970s in certain Latin American countries and are continuing until the truth about the fate and whereabouts of the disappeared will be revealed by relevant State authorities).

criminal law, especially in relation to "other inhuman acts of similar character" as the residual category of crimes against humanity that can allow the international jurisprudence to cover acts or omissions that constitute permissible conduct under the domestic legal systems of certain repressive regimes, dictatorships, and totalitarian States, but are "intentionally causing great suffering, or serious injury to body or to mental or physical health"[46] when committed within the framework of a widespread or systematic attack against any civilian population. These otherwise lawful behaviors under national law deserve to be qualified as other inhumane acts of similar character under crimes against humanity regardless of their non-enumeration in the international definition, and also regardless of their domestic criminalization as affirmed by Nuremberg Principle II.

Benjamin Ferencz had such a profound appreciation of the potential scope of application of "other inhumane acts" that he proposed to use this category of crimes against humanity to ensure punishment for the crime of aggression, at least in all instances in which an illegal use of armed force would have resulted in the death or suffering of civilians in a widespread or systematic manner.[47] Whereby this position of Benjamin Ferencz remained a minority one, albeit recently revived in the face of Russia's aggressive war in and against Ukraine,[48] his assessment of this category of crimes as an open-ended framework that can be used to fight impunity for mass atrocities that had not explicitly conceived, anticipated, and codified by States (which responsibly exercised sovereignty on behalf of their peoples when they agreed to Article 7 of the Rome Statute) was right.

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46 *Compare* Rome Statute, *supra* note 6, art. 7, ¶ 1(k), *with* Int'l L. Comm., *supra* note 22, art. 2, ¶ 1(k),

47 *The Illegal Use of Armed Force*, *supra* note 2, at 187-98.

48 *See* Gregory S. Gordon, *Charging Aggression as a Crime against Humanity? Revisiting the Proposal after Russia's Invasion of Ukraine*, 57 ISR. L. REV. 213 (2024). Prof. Gordon's article cites all the main writings that critically reviewed Ferencz's proposal. In the humble view of this author, the main reason why Prof. Ferencz's opinion remained minoritarian stems from the fact that the crime of aggression, or crimes against the peace, had a legislative origin and development that was distinct and separate from the notion of crimes against humanity. In other terms, since the London Agreement to which the Nuremberg Tribunal Charter is annexed, crimes against the peace – replaced now by the crime of aggression – were conceived as one of the core crimes under International Law as such. In light of this legislative history, it would be very difficult for the interpreter to subsume conduct that may be qualified as the crime of aggression (e.g., as defined in Article 8 bis of the Rome Statute, adopted without a vote by the Kampala Review Conference of 2010) under the definitional elements of another international crime. *See* Rome Statute, *supra* note 6; *see also supra* note 36.

Now, States and stakeholders who are supportive of the progressive development and codification of the law on crimes against humanity have the opportunity to make the best possible use of this residual clause and ensure that its dynamic application in concrete cases may serve as *a precursor* (until 2029) and *a confirmatory derivative* (after 2029) of the new types of crimes against humanity that may integrate, enrich, and modernize the definition of crimes against humanity in a new U.N. Convention.