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2023 Klatsky Endowed Lecture in Human Rights: The Forgotten Crime: Forging a Convention for Crimes Against Humanity

Leila Nadya Sadat

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2023 KLATSKY ENDOWED LECTURE IN HUMAN RIGHTS: THE FORGOTTEN CRIME: FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY

Leila Nadya Sadat †

OCTOBER 25, 2023

Thank you, Dean Scharf, for your generous introduction. Being honored with the Klatsky Humanitarian Award is humbling given the distinguished individuals who have received it in prior years. It is also special to be here today with you, as we have collaborated on many projects in the past, including during the very early stages of the *Crimes Against Humanity Initiative*,¹ the subject of today's lecture. I would also like to thank Mr. Bruce Klatsky² for his kind words, service on the Board of Human Rights Watch, and generous support of this award and associated endowed lecture series.

I. INTRODUCTION

The theme of this lecture, *The Forgotten Crime*, explores what crimes against humanity are, why the crimes themselves and their victims have been forgotten, and why it is important not only that they be remembered, but that a new specialized convention dedicated to their prevention and punishment be adopted. Even today, victims and survivors around the world are suffering and waiting for justice that the world has been too slow to provide.

As an initial matter, let me explain why crimes against humanity are “the forgotten crime.” First and foremost, I am referring to the victims and survivors whose lives have been devastated and who have been forgotten. The late Elie Wiesel, incarcerated at Buchenwald

† James Carr Professor of International Criminal Law, Washington University in St. Louis; Visiting (nonresident) Fellow, Orville Schell Center for Human Rights, Yale Law School; Special Adviser on Crimes Against Humanity to the ICC Prosecutor (2012–2023). This Article is written solely in my personal capacity and does not represent the views of any organ or personnel of the International Criminal Court. Thank you to all the Washington University and Yale students who have provided exceptional assistance over the many years of this project, and especially Jeni Christensen and Kristian Sturm, who worked on this article.

1. *Crimes Against Humanity Initiative*, WASH. U. ST. LOUIS, <https://sites.wustl.edu/crimesagainsthumanity/about/> [perma.cc/6KRW-RWDZ].
2. *Bruce J. Klatsky*, HUM. RTS. WATCH, <https://www.hrw.org/about/people/bruce-j-klatsky> [https://perma.cc/NU6P-NKYY].

during the Holocaust, wrote of indifference as one of the worst aspects of his suffering—the feeling that no one knew or cared what had happened to the Jewish people—that they—and he—had been forgotten.³ Indifference, he wrote, “makes the human being inhuman.”⁴ The lives of the forgotten are stripped of meaning by severing their connection with their communities and the world. They are too often “disappeared,” shut away by governments and tortured without access to family and friends. In prison, they may experience feelings of hopelessness and despair as their captors convince them that they have been forgotten. When killed, they are often buried in mass graves, their time on this earth wiped away by their tormentors. Victims of sexual and gender-based violence may find themselves shunned and ostracized by their communities, separated from society, and forgotten even by their families. These individuals are the victims of “unimaginable atrocities”⁵ occurring on every continent, in far off places that are often inaccessible, as my film *Never Again: Forging a Convention for Crimes Against Humanity* evokes.⁶

Second, there is an absence of justice for the forgotten. Attacked by their own States or by non-State actors like ISIS, these individuals have been the victims of arbitrary arrest and detention, enforced disappearance, murder, torture, ethnic cleansing, rape and other forms of sexual or reproductive violence, and other inhumane acts, and rarely have the perpetrators been punished or held to account, leaving a real impunity gap. In North Korea, for example, the State maintains detention camps in which an estimated hundreds of thousand prisoners are wrongfully detained and terribly maltreated.⁷ No prosecutions have ensued. In Myanmar, military “clearance operations” in 2017 forced more than seven hundred and fifty thousand Rohingya into refugee camps in Bangladesh. Although a United Nations Mechanism is collecting evidence,⁸ the ICC has jurisdiction, and a case is pending

3. Elie Wisel, *The Perils of Indifference* (Apr. 12, 1999), <https://americanrhetoric.com/speeches/ewieselperilsofindifference.html> [<https://perma.cc/7RGM-382G>].

4. *Id.*

5. Rome Statute of the International Criminal Court preamble, U.N. Doc. A/Conf. 183/9, July 17, 1998 [hereinafter Rome Statute].

6. *Never Again: Forging a Convention for Crimes Against Humanity*, WASH. U. ST. LOUIS, <https://sites.wustl.edu/crimesagainsthumanity/> [<https://perma.cc/LS26-Z5ZJ>] (depicting many examples of crimes against humanity).

7. *See, e.g.*, Hum. Rts. Council. Rep. of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, U.N. Doc. A/HRC/25/CRP.1, Feb. 7, 2014, <https://documents.un.org/doc/undoc/gen/g14/108/71/pdf/g1410871.pdf>.

8. *See, e.g.*, *Independent Investigative Mechanism for Myanmar*, U.N., <https://iimm.un.org/> [<https://perma.cc/CXU4-PXFQ>].

before the International Court of Justice, no one has yet been arrested or brought to justice for these crimes. Likewise, in the Democratic Republic of the Congo, an estimated nineteen different militias are operating on the territory, many of which are committing war crimes and crimes against humanity against thousands of victims, as the ICC found in several judgments including the *Lubanga*,⁹ *Katanga*,¹⁰ and *Ntaganda*¹¹ decisions. Jose Avala Lasso, former U.N. High Commissioner for Human Rights noted in 1996 that “we must rid this planet of the obscenity that a person stands a better chance of being tried and judged for killing one human being than for killing 100,000.”¹² Nearly three decades later, this has not yet been achieved.

Third, crimes against humanity have been forgotten in political and academic discourse. Because there are treaties on the laws and customs of war, the media often debates whether or not a particular action constitutes a war crime. Journalists and politicians also invoke the word genocide, even though it is extraordinarily difficult to show that genocide has been committed as a matter of law. But rarely do politicians, journalists, or survivors allege the commission of crimes against humanity. Part of the reason is one of terminology: what was prosecuted as *crimes against humanity* at Nuremberg (the widespread and systematic persecution and destruction of European Jewry) was partially codified in 1948 as the crime of *genocide*, leaving modern crimes against humanity law to address other widespread or systematic human rights abuses that, unlike genocide, do not have as their sole objective the destruction of a racial, religious, national, or ethnic group, including other forms of mass murder.¹³ As a practical matter, the promise of “never again” notwithstanding, impunity for the commission of these crimes remains an unfortunate and recurring feature of international affairs.

9. See generally Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment (Mar. 14, 2012).

10. See generally Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment (Mar. 24, 2017).

11. See generally Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Judgment (Jul. 8, 2019).

12. U.N. Secretary-General, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. Doc. A/51/292 ¶5 (Aug. 16, 1996) (quoting then U.N. High Commissioner for Human Rights Jose Ayala Lasso); José Ayala Lasso, U.N. HUM. RTS., <https://www.ohchr.org/en/about-us/high-commissioner/past/jose-ayala> [https://perma.cc/HH36-2GJW].

13. Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT'L L. 334, 374 (2013).

II. WHAT ARE CRIMES AGAINST HUMANITY?

Crimes against humanity are one of four offences included in the Rome Statute of the International Criminal Court. They materialized as positive law in the Nuremberg and Tokyo tribunals established after World War II, as Article 6(c) of the Charter of the International Military Tribunal at Nuremberg, and Article 5(c) of the International Military Tribunal at Tokyo.¹⁴ It was Hersch Lauterpacht and Justice Robert Jackson who, together, brought the concept to life at Nuremberg, as beautifully chronicled in Philippe Sands' extraordinary book, *East West Street*,¹⁵ but the concept had a long history. American and European jurists used it during the first half of the nineteenth Century to describe slavery and the slave trade, and later to describe King Leopold's atrocities in the Congo,¹⁶ in European trials conducted at the end of the nineteenth Century; and in official declarations regarding the massacre of the Armenians in the early twentieth Century.¹⁷

The concept was also given voice in the Martens clauses, inserted in the preambles of the 1899 and 1907 Hague Treaties:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations . . . the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages

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14. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 280 [hereinafter Nuremberg Tribunal]; International Military Tribunal for the Far East, art. 5(c), Jan. 19, 1946, 20 T.I.A.S. 1589 [hereinafter Tokyo Tribunal].
 15. See, e.g., PHILIPPE SANDS, *EAST WEST STREET: ON THE ORIGINS OF GENOCIDE AND CRIMES AGAINST HUMANITY* 111–117 (2016).
 16. See, e.g., Beth Van Schaack, *Crimes Against Humanity in the “Western European & Other” Group of States: A Continuing Tradition*, 6 AFRICAN J. INT’L CRIM. JUST. 136, 137 (2020); see also Christopher Gevers, *African and International Criminal Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW 154, 158 (Kevin Heller, et al., eds. Oxford 2019); see also Alhagi B.M. Marong, *The ILC Draft Articles on Crimes Against Humanity, an African Perspective*, 6 AFRICAN J. INT’L CRIM. JUST. 93, 100–02 (2020).
 17. Roger S. Clark, *History of Efforts to Codify Crimes Against Humanity*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 1, 8–9 (Leila Nadya Sadat, ed., 1st ed. 2011).

established among civilized peoples, *from the laws of humanity, and the dictates of the public conscience . . .*¹⁸

The International Military Tribunal at Nuremberg interpreted Article 6(c) of the Charter (on crimes against humanity) relatively narrowly.¹⁹ Nonetheless, some key ideas emerged from the text of the Charter and the Judgment of the Tribunal, and from the subsequent case law of the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) in the 1990s. *First*, crimes against humanity protect all civilians—including a State’s own nationals—from widespread or systematic attacks on their human rights. *Second*, although the crime of persecution addresses attacks undertaken on a discriminatory basis, persecution or discrimination is not a necessary element of a crime against humanity, although it is often present. *Third*, the perpetrators of crimes against humanity may be State or non-State actors, including, but not limited to, organized armed groups. *Fourth*, crimes against humanity may be committed during armed conflict or in peacetime.²⁰

By their nature, crimes against humanity are mass crimes that may take many forms: a State policy of torture or disappearance; a campaign of rape or other forms of sexual or reproductive violence; arbitrary arrest and detention (typically accompanied by inhumane conditions); mass expulsions or deportations (often referred to as ethnic cleansing); or mass murder of individuals by a government or non-state actors in war or peace. They are “characterized either by their seriousness and their savagery . . . or by their magnitude, or by the fact that they were part of a system designed to spread terror, or that they were a link in a deliberately-pursued policy against certain groups . . .”²¹ Yet from 1945 until the establishment of the ICTY and the ICTR fifty years later, and later the Special Court of Sierra Leone²² and the

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18. Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land Preamble, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539.
 19. U.N. Secretary-General, *The Charter and Judgment of the Nürnberg Tribunal—History and Analysis*, at 67–68, U.N. Doc. A/CN.4/5 (1949).
 20. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 248–55 (July 15, 1999).
 21. Antonio Cassese, *Crimes Against Humanity*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 353, 357 (Antonio Cassese, et al., eds. 2002).
 22. Statute of the Special Court for Sierra Leone, S.C. Res. 1315, art. 2 (2002); Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res 827, art. 5 (1993) [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, S.C. 955, art. 3 (1994) [hereinafter ICTR Statute].

Extraordinary Chambers in the Courts of Cambodia,²³ they were punished only by national courts.

One of the most radical elements of the Nuremberg and Tokyo definitions of crimes against humanity was the provision that crimes against humanity could be prosecuted “whether or not in violation of the domestic law of the country where perpetrated.”²⁴ This language was necessary because the Nazis were killing citizens in their own country, not just in countries they had attacked and/or occupied. One of their chief defenses was that everything they had done—from the attacks on Jews in their country to their deportation and extermination—was perfectly legal in Germany. Thus, they argued that State sovereignty was an absolute bar to their prosecution.²⁵ This required the invention of a new international crime that could pierce the existing immunity of States and state officials. When asked to opine as to whether these newly established offenses formed part of international law and could fairly be applied to individuals, the Nuremberg Tribunal found that

The [Nuremberg] Charter is not an arbitrary exercise of power on the part of the victorious nations, but . . . is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.²⁶

The flip side of having duties under international law, is that one can acquire rights under international law. Thus, the Nuremberg trial gave rise not only to the notion of individual criminal responsibility, but to all of the human rights that we now enjoy under international law and that Human Rights Watch and other organizations enforce and protect.

When the ICC Statute was negotiated, Professor M. Cherif Bassiouni, an expert on crimes against humanity,²⁷ became the Chair of the Drafting Committee for the Rome Diplomatic Conference. Under his guidance, and based upon earlier iterations of the crime in the *ad*

23. Law on the Establishment of the Extraordinary Chambers, art. 5 NS/RKM/1004/006 (2004) [hereinafter ECCC Statute].

24. Nuremberg Tribunal, *supra* note 14, art. 6(c). It was also in the Charter of the Tokyo Tribunal, *supra* note 14, art. 5(c); *see, e.g.*, Viviane E. Dittrich & Jolana Makraiova, *Towards a Fuller Appreciation of the Tokyo Tribunal*, in *THE TOKYO TRIBUNAL: PERSPECTIVES ON LAW, HISTORY, & MEMORY* 3 (Viviane E. Dittrich, et. al eds., 2020).

25. International Military Tribunal [IMT] in Session at Nuremberg, Germany, Judgment, at 55 (Oct. 1, 1946).

26. *Id.* at 52.

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

hoc international criminal tribunals, a modern definition of crimes against humanity was elaborated which is now found in Article 7 of the Rome Statute.²⁸ The objective was to stay within the bounds of customary international law²⁹ but add additional threshold (or context) elements given its nature as an international crime being tried before an international court.

The Rome Statute definition is longer than the Nuremberg definition. It includes additional crimes, including expanded provisions on crimes of sexual violence (but adds the idea that they must be of “comparable gravity” to the other crimes involving sexual violence set forth in Article 7(1)(g)); expands considerably the ambit of Article 7(1)(h) beyond the narrow grounds of ethnic, racial, religious, political and national persecution found in the ICTR and the ECCC Statutes;³⁰ and includes enforced disappearance of persons and the crime of apartheid as new specific acts constituting crimes against humanity.³¹

The Rome Diplomatic Conference rejected appeals from some governments to add economic and environmental offenses, preferring the list to track crimes already found in other international instruments or clearly understood to be predicate acts of crimes against humanity under customary international law.³² They may have been cautious due to the potentially broad ambit of Article 7, which, although containing difficult-to-prove context elements, nonetheless was relatively broad. Thus, the negotiators added a fifth element to crimes against humanity

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28. Rome Statute, *supra* note 5, art. 7.
 29. *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), Case No. ICC-02/05-01/20, *Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II’s Decision on the Defence exception d’incompétence*, ¶ 89 (Nov. 1, 2021).
 30. Ken Roberts, *The Law of Persecution Before the International Criminal Tribunal for the Former Yugoslavia* 15 LEIDEN J. INT’L. L. 623 (2002); Leila Nadya Sadat, *Crimes Against Humanity: Limits, Leverage, and Future Concerns*, in THE FIRST GLOBAL PROSECUTOR 45, 47–48 (Martha Minow et al., eds. 2015); Rome Statute, *supra* note 5, art. 7(1)(g–h).
 31. Rome Statute, *supra* note 5, art. 7(1)(j); Sadat, *Crimes Against Humanity: Limits, Leverage, and Future Concerns*, *supra* note 30, at 48.
 32. Sadat, *Crimes Against Humanity: Limits, Leverage, and Future Concerns*, *supra* note 30, at 48; Doudou Thiam (Special Rapporteur), *Second Report on the Draft Code of Offences Against the Peace and Security of Mankind*, [1984] II Y.B. Intl L. Comm’n, U.N. Doc. A/CN.4/377; *but see* Rome Statute, *supra* note 5, art. 7. Twenty-five years after the amendment of the Rome Statute there is now a push to open up the definition by including additional offenses. One is “grand corruption.” *See, e.g.*, Naomi Roht-Arriaza & Santiago Martínez, *Grand Corruption and the International Criminal Court in the “Venezuela Situation”* 17 J. INT’L CRIM. JUST. 1057, 1057 (2019). Another is environmental harm. A third is a new proposal to include the slave trade in article 7(1)(c) in addition to “enslavement.” And finally, there have been extensive proposals to add gender apartheid and forced marriage to the statute.

in addition to those found in the statutes of earlier tribunals: Article 7(2)(a) specifies that the State or organization committing the attack against the civilian population involving ICC crimes must be doing so pursuant to a policy, although that policy need not be formal or in writing. Whether or not this policy element is required by customary international law remains controversial.³³

III. WHY IS THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST HUMANITY SO IMPORTANT?

The expansive ambit of crimes against humanity makes it a powerful tool to address what I call an “atrocities cascade,” in which human rights abuses deteriorate to the point of becoming criminal, and if not staunched, descend further into war, and even into genocide.³⁴ A visual depiction of this idea is shown in Figure 1, below.



Figure 1: *The Atrocities Cascade*

Prosecutions (or other forms of legal advocacy, including the actions of international human rights bodies) based on crimes against humanity may occur before the onset of war or the commission of genocide, rendering crimes against humanity charges a potential tool for mass atrocity prevention. Human rights violations occur in every country in the world. Most national systems have mechanisms to address them, however, and fortunately they are typically sporadic, so addressing them falls within the scope of a country’s own jurisdiction. There are a series of treaties and institutional mechanisms that address human rights issues at the international level, as well. However, sometimes both the national and international checks on human rights abuses fail, and they grow and eventually metastasize, overcoming the ability of national systems to address them, and leaving the international system to condemn but without concrete enforcement measures, outside the possibility of human rights courts operating in some parts of the world. If they metastasize too far, they may become crimes against humanity. Indeed, in his seminal essay on the subject, David Luban refers to crimes against humanity as “politics gone

33. See, e.g., Guénaél Mettraux, *Crimes Against Humanity and the Question of a “Policy” Element*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 142, 173–76 (Leila Nadya Sadat, ed., 2d ed. 2013).

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

cancerous.”³⁵ There is thus a frontier between human rights violations and criminality in peacetime, which is where combating impunity for the commission of crimes against humanity becomes so important, and why a new international treaty is so critical as well. Syria is a notable example.³⁶

The regime of Syrian President Bashar al-Assad had been criticized by the international community for extensive human rights violations. As they became progressively worse and could arguably have been characterized as constituting crimes against humanity, in Spring 2011, citizens began protesting their mistreatment. Rather than address their concerns, the Syrian government attacked the protesters, who then took up arms. The result has been a full-scale civil war that has resulted in the death of more than 500,000 civilians and the commission of war crimes and crimes against humanity, including the use of chemical weapons, attacks on hospitals and other civilian objects, torture, arbitrary arrest and detention, and sexual and gender-based violence.³⁷ The deterioration of the situation in Syria evidences why it is so important to address crimes against humanity prior to the onset of armed conflict.

This “peacetime” importance of crimes against humanity is particularly evident in the work of the International Criminal Court. The ICC is the world’s first permanent international criminal court and operates in real time. Crimes against humanity have been alleged in all the situations referred to the Court and most of the cases. In situations involving armed conflict, crimes against humanity charges often track war crimes charges or are added to target persecution or sexual violence. In some situations, the crimes against humanity charges constitute the only basis upon which the ICC can exercise its jurisdiction, given the absence of an armed conflict sufficient to trigger the Court’s war crimes jurisdiction (at least at the outset of the referral) and the implausibility of alleging genocide.³⁸ This suggests that crimes against humanity may serve as an important tool of genocide prevention, applicable before atrocity levels spin completely out of control to rein in a situation that is degrading into conflict or overwhelming levels of atrocity crimes. Sadly, where the ICC has no jurisdiction, as in Syria, and the Security Council referral process is blocked, neither prevention nor deterrence are present, as shown by the terrible toll of the Syrian Civil War.³⁹

35. David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 90–91 (2004).

36. See Amnesty Int’l, *The State of the World’s Human Rights*, AI Index POL 10/5670/2023, at 351–255 (2023).

37. BETH VAN SCHAACK, *IMAGINING JUSTICE FOR SYRIA* (OXFORD 2021).

38. See Rome Statute, *supra* note 5, art. 8; see also Sadat, *Crimes Against Humanity in the Modern Age*, *supra* note 13, at 339–44, 355.

39. VAN SCHAACK, *supra* note 37, at 9–10, 55.

In a study I published in 2013, of the eight situations before the ICC (Central African Republic, Côte d'Ivoire, Darfur, Democratic Republic of the Congo, Kenya, Libya, Mali, and Uganda) only crimes against humanity were charged by the ICC Prosecutor in three of those situations, and the number of accused represented more than one-third of the Court's cases.⁴⁰ Although charges have yet to be filed in some of the more recent situations such as Bangladesh/Myanmar, Burundi, the Philippines, and Venezuela, those will also likely be "crimes against humanity only" cases. In contrast, at the ICTY and ICTR, only two accused (at each tribunal) were charged solely with crimes against humanity, representing 1.2 and 2.2 percent, respectively, of all accused.⁴¹ This difference between the practice at the *ad hoc* international criminal tribunals and at the ICC is striking, suggesting that the ICC is indeed, a "crimes against humanity court."⁴²

IV. FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY: WHY A NEW TREATY?

Last year the ICC celebrated its twenty-fifth anniversary, and a definition of crimes against humanity has been enshrined in a treaty with 124 States Parties. The question that might be on your minds then, is, why does the world need a new treaty on crimes against humanity? This question has arisen repeatedly for the past fifteen years, and the case *for* a new treaty has only gotten stronger during that time period, as follows.

First, our experience with the ICC demonstrates that it takes very few cases. This was a prediction in 2008; today it is a clear reality. According to the Court, thirty-one cases have been filed, some having more than one suspect, and forty-two arrest warrants have been issued.⁴³ No warrants have been issued in the Afghanistan, Bangladesh/Myanmar, Palestine, Philippines, Palestine, and Venezuela situations as of this writing. Hopefully the slow pace of indictments will improve, but even if it does, an impunity gap will remain. By design, the ICC is a court of last resort, with the principal responsibility for the prosecution of international crimes falling to national courts.

Second, there is no duty in the ICC Statute for States to criminalize the offenses in the Statute (although they are encouraged to do so), and there is no duty to prevent crimes against humanity. The preamble of the Rome Statute notes the "duty of every State to exercise its criminal

40. Sadat, *Crimes Against Humanity in the Modern Age*, *supra* note 13, at 356–57.

41. *Id.* at 356.

42. *Id.* at 377.

43. *About the Court*, ICC, <https://www.icc-cpi.int/about/the-court> [<https://perma.cc/9CYM-DG46>].

jurisdiction over those responsible for international crimes.”⁴⁴ However, there is no obligation to adopt national legislation, and many States have never adopted legislation penalizing crimes against humanity.⁴⁵

Third, as the saying goes, an ounce of prevention is worth a pound of cure. This requires building up State capacity and imposing an enforceable duty of preventing crimes against humanity upon States, parallel to the obligation in Article I of the Genocide Convention. The duty to prevent was the subject of an important judgment of the International Court of Justice in *Bosnia v. Serbia*,⁴⁶ but is not explicitly present for crimes against humanity because there is no global treaty on crimes against humanity.⁴⁷

Fourth, in order to effectively investigate, prosecute, and deter crimes against humanity, States need to be able to cooperate with each other and offer each other mutual legal assistance. The ICC offers a vertical mechanism for the prosecution of crimes against humanity. In contrast, the proposed crimes against humanity treaty will be an interstate convention, offering a horizontal mechanism for prevention and punishment. This will close a significant gap. For example, in the United States, we are unable to prosecute individuals for crimes against humanity because there is no federal statute addressing them. In contrast, we have laws prohibiting the commission of genocide and war crimes. If a perpetrator from Myanmar or Syria, for example, is somehow found in the United States—even right here in Cleveland—they could not be charged or arrested for committing crimes against humanity. We also could not request the extradition of individuals accused of those crimes or cooperate with third States and render them legal assistance. Thus, the absence of a specialized international treaty on crimes against humanity leads to an impunity gap, a State

44. Rome Statute, *supra* note 5, Preamble.

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

46. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgment, ¶¶ 428–42, 2007 I.C.J. Rep. 43 (Feb. 26, 2007).

47. See Payam Akhavan, *The Universal Repression of Crimes Against Humanity before National Jurisdictions: The Need for a Treaty-Based Obligation to Prosecute*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 28, 30 (Leila N. Sadat, ed., 2d ed., 2013); M. Cherif Bassiouni, *Crimes Against Humanity: The Case for a Specialized Convention*, 9 WASH. UNIV. GLOBAL STUD. L. REV. 575, 582–83 (2010); Leila Nadya Sadat, *Heads of State and Other Government Officials before the International Criminal Court: The Uneasy Revolution Continues*, in THE ELGAR COMPANION TO THE INTERNATIONAL CRIMINAL COURT 95, 120–21 (Margaret DeGuzman & Valerie Oosterveld, eds., 2021).

responsibility gap, a lack of State cooperation, and definitional uncertainty.⁴⁸

V. THE CRIMES AGAINST HUMANITY INITIATIVE AT WASHINGTON UNIVERSITY

For these and other reasons, in 2007, I started the project that became the *Crimes Against Humanity Initiative*, directed by an international steering committee of luminaries that helped shape and direct the project, including the late Professor M. Cherif Bassiouni, Ambassador Hans Corell, Justice Richard Goldstone, Professor Juan Mendez, Professor William Schabas, and Judge Christine Van Den Wyngaert. Through an iterative process, convening meetings in St. Louis, the Hague, and Washington D.C., we brought together more than 250 experts to draft the world's first international treaty for the prevention and punishment of crimes against humanity. That treaty, and the academic work that shaped its adoption, is published in *Forging a Convention for Crimes Against Humanity*,⁴⁹ as well as on the Harris Institute website. We based on our work on the many international criminal law treaties already in existence, such as the genocide, torture, apartheid, and enforced disappearances treaties, and took, as the definitional centerpiece for the model treaty, Article 7 of the Rome Statute of the International Criminal Court. Our draft *Proposed Convention* is available in multiple languages.⁵⁰

The project rested upon four key pillars. First, that all human beings have a right to be free from the commission of crimes against humanity. A survivor of sexual violence in the Democratic Republic of the Congo told me that she never realized that she had a legal *right* to be free from the commission of atrocities. It was a deeply powerful moment that reinforced the need to enshrine this obligation in positive law.

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

48. Leila Nadya Sadat, *A Contextual and Historical Analysis of the International Law Commission's 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity*, 16 J. INT'L CRIM. JUST. 683, 685–86 (2017).

49. FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (Leila N. Sadat, ed., 2d ed., 2013).

50. *See generally* CRIMES AGAINST HUMANITY INITIATIVE, PROPOSED INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST HUMANITY (2010) WASH. UNI. SCH. OF L., <https://sites.wustl.edu/crimesagainsthumanity/convention-text/> [<https://perma.cc/D2TM-XFKU>].

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

Finally, in order to cooperate with the prevention and punishment of crimes against humanity, robust interstate cooperation mechanisms are required. Our proposal was to enhance the *de minimus* provisions of earlier treaties on genocide and war crimes, for example, and establish a set of robust provisions on extradition, cooperation, and mutual legal assistance akin to those found in modern treaties on transnational crime. These appeared as annexes to our *Proposed Convention* and were eventually incorporated into a different project known as the Mutual Legal Assistance Treaty, which was adopted in Ljubljana in May 2023, and opened for signature in February 2024,⁵¹ as well as in the International Law Commission's 2019 Draft Articles on Crimes Against Humanity (Draft Articles),⁵² to which I now turn.

VI. THE INTERNATIONAL LAW COMMISSION'S 2019 DRAFT ARTICLES

After fifteen years, the draft crimes against humanity treaty is currently awaiting action at the United Nations. How did it get from our expert project to an official U.N. proposal? That is a fascinating story. In 2010, the *Crimes Against Humanity Initiative* held its capstone conference at the Brookings Institution in Washington, D.C. We invited professors of international law in the D.C. area to attend, including Sean Murphy of George Washington University School of Law. Professor Murphy indicated his interest in our work and was subsequently nominated by the United States to be a candidate for the U.N. International Law Commission (ILC). During his election campaign, he indicated his interest in a possible treaty on crimes against humanity. When elected to the ILC in 2012, he proposed this

51. *MLA (Mutual Legal Assistance and Extradition) Initiative*, REP. OF SLOVENIA (Dec. 27, 2023), <https://gov.si/en/registries/projects/mla-initiative/> [<https://perma.cc/PE6J-WZJ7>]; see also Priya Pillai, *Introducing a Symposium on Ljubljana—the Hague Convention on Mutual Legal Assistance: Critical Reflections*, OPINIO JURIS (July 24, 2023), <https://opiniojuris.org/2023/07/24/introducing-a-symposium-on-ljubljana-the-hague-convention-on-mutual-legal-assistance-critical-reflections> [<https://perma.cc/KP7X-NU96>]; see also MLA Diplomatic Conference, *Final Document* (May 15–25, 2023), <https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/Final-Documents-English.pdf>.

52. International Law Commission, Draft articles on Prevention and Punishment of Crimes Against Humanity, adopted at its seventy-first session, A/74/10 (2019) [hereinafter ILC Draft Articles].

topic to the Commission which adopted it, and subsequently moved the topic to its active programme of work. Thereafter, Professor Murphy served as the ILC’s Special Rapporteur for crimes against humanity from 2014–2019.

The International Law Commission meets in Geneva every summer, and from 2013 onwards I traveled to Geneva to observe its work. For several years, Professor Murphy would write a report and submit it to the Commission and produce draft articles for consideration by the members. The ILC’s members would then debate the report and accompanying draft articles, which were then sent to a drafting committee. At the end of the summer, when the Commission finished its work, its report, including its work on crimes against humanity, was submitted to the Sixth (Legal) Committee of the General Assembly for consideration. This iterative process took place over a four-year period, until in 2017, the Commission had produced a first complete set of draft articles,⁵³ that States then had a year to comment upon. The response of States and other entities to the Commission’s work from 2013–2017 is shown in Figure 2, below.⁵⁴

| | 68th Session (2013) | 69th Session (2014) | 70th Session (2015) | 71st Session (2016) | 72nd Session (2017) | TOTAL | % | % |
|------------------------|---------------------------|---------------------------|---------------------------|---------------------------|---------------------------|-------|-----|-----|
| Strong Positive | 0 | 3 | 4 | 5 | 10 | 22 | 12% | 65% |
| Positive | 10 | 11 | 22 | 21 | 33 | 97 | 53% | |
| Neutral | 9 | 10 | 8 | 8 | 8 | 43 | 24% | 24% |
| Negative | 3 | 2 | 2 | 4 | 2 | 13 | 7% | 11% |
| Strong Negative | 2 | 1 | 2 | 0 | 2 | 7 | 4% | |
| TOTAL | 24 | 27 | 38 | 38 | 55 | 182 | | |

Figure 2: *The Response by States & Entities at the U.N. Sixth Committee (2013–2017)*

53. This process is chronicled in Sadat, *A Contextual and Historical Analysis*, *supra* note 48, at 689–93.

54. This data has been collected by me, along with Harris Institute Senior Fellow Madaline George and her predecessors, as well as Washington University Law School student fellows, since 2013. The project is also now currently supported by the Lowenstein Project at Yale Law School. This particular chart is found in Leila N. Sadat & Madaline George, *An Analysis of State Reactions of the ILC’s Work on Crimes Against Humanity: A Pattern of Growing Support*, 6 *AFRICAN J. INT’L. CRIM. J.* 162, 166 (2020) [hereinafter Sadat & George, *Pattern of Support*].

In early 2019, after taking into account the government and expert comments in 2018 submitted on the “first reading” of the Commission’s draft text, Special Rapporteur Murphy produced a fourth report, and, after debate and referral to the Commission’s drafting committee, adopted, on second reading, a complete set of Draft Articles on Prevention and Punishment of Crimes Against Humanity, as part of the Commission’s report covering the work of its seventy-first session.⁵⁵ These Draft Articles are the current basis for the ongoing discussions at the United Nations.

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

When the ILC’s text was introduced to the Sixth Committee in 2019, it was not the first time the idea of a new treaty had been floated at the General Assembly. The ILC had assiduously canvassed State reactions⁵⁶ since beginning work on the topic in 2013, and the 2017 and 2019 drafts took into account those comments.⁵⁷ Thus, it was unsurprising that a significant majority of States in 2019 were willing to proceed quickly to a diplomatic conference to negotiate the treaty, which Austria offered to host. A handful of States demurred, however, asking for more time to study the draft, and an even smaller number opposed the treaty entirely. Because of the consensus tradition in the Sixth Committee, which allows even a small number of States to block action on a particular proposal,⁵⁸ the result was a disappointing resolution “taking note” of the draft articles and promising to revisit them the following year. Austria, joined by forty-two other States, expressed disappointment.⁵⁹

In 2020, the COVID-19 pandemic made advancing work on the Draft Articles even more challenging. Strict limitations on working methods were imposed, causing the Sixth Committee to adopt a technical rollover resolution again simply “taking note” of the Draft

55. See ILC Draft Articles, *supra* note 52.

56. Leila Nadya Sadat, *Little Progress in the Sixth Committee on Crimes Against Humanity*, 54 CASE W. RES. J. INT’L L. 89, 90 (2022) [hereinafter Sadat, *Little Progress*].

57. See generally Sadat & George, *Pattern of Support*, *supra* note 54.

58. CRIMES AGAINST HUMANITY INITIATIVE & GLOBAL JUSTICE CENTER, OPTIONS TO ADVANCE THE ILC DRAFT ARTICLES ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST HUMANITY ¶ 34 (2022).

59. Letter from the Permanent Mission of Austria to the United Nations in New York to the Chair of the 74th Session of the General Assembly (Oct. 28, 2019), <https://statements.unmeetings.org/media2/23557769/-e-austria-statement-item-79-eop.pdf>.

Articles. Civil society was completely excluded from participation. Mexico, joined by thirteen other States, voiced concerns that this ran the “risk . . . of getting caught in a cycle of consideration and postponement of the articles without concrete action, which could undermine the relationship between the General Assembly and the ILC.”⁶⁰ The results from the 2019 and 2020 sessions of the U.N. Sixth Committee are tabulated below as Figure 3.⁶¹

| | 2019 | | 2020 (pandemic year) | |
|--|-------|-------------|----------------------|-------------|
| | Total | Percent | Total | Percent |
| Explicitly favors a process to develop a convention | 62 | 72 % | 36 | 65 % |
| Takes no explicit view on a process (positive and/or constructive comments on the text) | 8 | 9 % | 6 | 11 % |
| Takes no explicit view on a process (neutral comments) | 2 | 2 % | 0 | 0 % |
| Opposes a process to develop a convention at this time | 11 | 13 % | 12 | 22 % |
| Opposes a convention | 3 | 3 % | 1 | 2 % |
| Total (States commenting & joining statements) | 86 | | 55 | |

Figure 3: *The Response of States & Entities at the U.N. Sixth Committee (2019 & 2020)*

In 2021, with the waning of the pandemic, expectations ran high in New York as State interventions in the Sixth Committee were overwhelmingly positive. A handful of States again opposed any action on the Draft Articles, in stark contrast to their views that on other agenda items, such as the protection of persons in the event of disasters,

60. Letter from the Permanent Mission of Mexico to the United States in New York, Explanation of Position—Crimes Against Humanity (Nov.19, 2020), https://www.un.org/en/ga/sixth/75/pdfs/statements/cah/19mtg_mexico.pdf.

61. CRIMES AGAINST HUMANITY INITIATIVE, COMPILATION OF GOVERNMENT RESPONSES TO THE UN INTERNATIONAL LAW COMMISSION’S WORK ON CRIMES AGAINST HUMANITY 2019–2021 (2021), <https://bpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/b/2004/files/2022/06/cahi-compilation-of-6th-committee-response-2019-2021-w.-cover-updated-summary-table.pdf>.

a working group could be convened to consider the Commission's recommendation and report back to the Sixth Committee. Those States supporting the Draft Articles were unwilling to put the matter to a vote, however, due to the Sixth Committee's tradition of taking decisions by consensus, and the result was another technical rollover to 2022.⁶²

Many States expressed frustration at this disappointing outcome, including Mexico, which dissociated from the draft resolution—in effect breaking consensus.⁶³ Other States objected in their “explanation of position” including the United States,⁶⁴ the United Kingdom, Israel, and the European Union (joined by twenty-two additional States for a total of fifty). The EU statement noted that the consensus tradition of the Sixth Committee was being used to prevent the opening of a formal, structured, inclusive dialogue on the ILC's draft, failed to “captur[e] the view of the majority” and was inconsistent with the Sixth Committee's responsibility under the U.N. Charter.⁶⁵ As I have noted elsewhere, this “infelicitous cycle” not only prevented any action with respect to the crimes against humanity Draft Articles but imperiled the legitimacy of the International Law Commission and the Sixth Committee itself. Again, it was also notable that civil society had been excluded from the meetings. The results are shown in Figure 4, below.⁶⁶

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62. Leila Nadya Sadat & Akila Radhakrishnan, *Crimes Against Humanity: Little Progress on Treaty as UN Legal Committee Concludes its Work*, JUST SEC. (Dec. 7, 2021), <https://www.justsecurity.org/79415/crimes-against-humanity-little-progress-on-treaty-as-un-legal-committee-concludes-its-work/> [https://perma.cc/7JCR-3S6J].
 63. Letter from the Permanent Mission of Mexico to the United Nations in New York, Adoption of the Draft Resolution Entitled “Crimes Against Humanity” (Nov. 18, 2021), https://www.un.org/en/ga/sixth/76/pdfs/statements/cah/29mtg_mexico.pdf.
 64. Letter from the Permanent Mission of the United States to the United Nations in New York, Agenda Item 83: Crimes Against Humanity (Nov. 18, 2021), https://www.un.org/en/ga/sixth/76/pdfs/statements/cah/29mtg_us.pdf.
 65. Letter from the Permanent Mission of the European Union to the United Nations in New York, Adoption of the Draft Resolution Entitled “Crimes Against Humanity”, https://www.un.org/en/ga/sixth/76/pdfs/statements/cah/29mtg_eu.pdf.
 66. Sadat, *Little Progress*, *supra* note 56, at 101.

| | Total | Percent |
|--|-----------|------------------------|
| States & Entities Commenting and/or Joining a Statement | 90 | |
| Explicitly favors a process to develop a convention | 76 | 84 % |
| Takes no explicit view on a process (positive and/or constructive comments on the text) | 0 | 0% |
| Takes no explicit view on a process (neutral) | 4 | 4 (approx. 5) % |
| Opposes a process to develop a convention at this time | 5 | 5 (approx. 6) % |
| Opposes a convention | 5 | 5 (approx. 6) % |
| 76 positive, 4 neutral, 10 negative | | |

Figure 4: Results from the 2021 U.N. Sixth Committee

Finally, in 2022, the fourth year after the draft was submitted to the General Assembly’s Sixth Committee, a breakthrough was achieved. On November 18, 2022, after several weeks of negotiations, a Resolution was adopted on the 2019 Draft Articles, creating a two-year process for their debate and discussion within the Sixth Committee of the U.N. General Assembly.⁶⁷ Some States hesitated to circumvent the consensus tradition in the Sixth Committee either by moving the Draft Articles out of the United Nations entirely or by voting on them. At the same time, for an increasing number of States, it was simply intolerable to fail again to advance discussions of the Draft Articles, especially in a world increasingly wracked by violence and war. In a thoughtful compromise, combined with an astute procedural innovation, a cross-regional group of eight States—Colombia, Costa Rica, Gambia, Mexico, Republic of Korea, United Kingdom, and the United States—deposited a “zero-draft” resolution with the Bureau on October 5, shortly after the start of the Sixth Committee’s session, and prior to consideration of the agenda item on crimes against humanity scheduled for October 10, 2022. Led by Mexico and the Gambia, which acted as co-facilitators, these States encouraged others to join them in finding a way forward within the Sixth Committee.⁶⁸

67. G.A. Res. 77/249 (Dec. 30, 2022).

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

During the initial plenary debate, the zero-draft received considerable support with seventy-six States out of ninety-five speaking in favor either of the draft resolution or the immediate elaboration of a new treaty, four taking a neutral position to the resolution, and fifteen either opposing the draft resolution, the proposed new treaty, or both. After weeks of difficult negotiations, during which the co-facilitators and most opponents showed flexibility, a modified draft was adopted. The resolution, which was later adopted as U.N. General Assembly Resolution 77/249, provided for an inclusive, structured, and transparent process for discussion of the Draft Articles, key benchmarks for the proponents. At the same time, the proponents conceded several elements. The time period for discussion was extended from one to two years; the venue would no longer be an “Ad Hoc Committee” but the Sixth Committee itself meeting in an “interactive format;” and perhaps of greatest concern, rather than reporting out to the General Assembly, in which voting is standard operating procedure, the two year process will remain within the Sixth Committee itself, which will “take a decision” in 2024 regarding the Draft Articles,⁶⁹ meaning that the question of voting (or not) may simply have been pushed off for two years.

The breakdown of State support for Resolution 77/249 is shown in Figure 5 as follows:

| | Total | Percent |
|---|-------|---------|
| Favors Zero Draft | 63 | 53% |
| Favors CAH Treaty (Silent on Zero Draft) | 14 | 12% |
| Zero Draft Co-Sponsors (In Addition to Plenary) | 23 | 19% |
| Neutral to Zero Draft | 4 | 3% |
| Seems to Oppose Zero Draft | 8 | 7% |
| Strongly Opposes Zero Draft | 5 | 4% |
| Opposes CAH Treaty | 2 | 2% |
| Total Positive: 100 States; Neutral 4; Negative 15 | | |

Figure 5: 2022 Summary Table of Support

Achieving consensus on this resolution was extraordinary. Certainly, the Russian invasion of Ukraine cost the Russian Federation in terms of political clout. According to inside accounts, while opposed

69. Resolution 77/249, *supra* note 67.

to the crimes against humanity treaty as a general matter, China was nonetheless willing to work with other States on the consensus resolution given the large number of States trying to move forward, rather than being seen as a spoiler. It should also be noted that civil society was allowed to observe in person for the first time since 2019. Resolution 77/249 was adopted in November 2022, with eighty-six co-sponsors, and a total of 100 States supporting the draft text in some measure, as shown above in Figure 5.⁷⁰

Resolution 77/249 allowed, for the first time, a process permitting States to address their substantive concerns. They did so in an intersessional briefing held by Germany and France in March 2023;⁷¹ and during the resumed session of the Sixth Committee held from April 10–14, 2023. During the resumed session, the Sixth Committee’s Bureau organized the meetings into five substantive clusters: (1) introductory provisions; (2) definition and general obligations; (3) national measures; (4) international measures; and (5) safeguards. The program eliminated any general debate and imported from the ILC its practice of “mini debates”⁷² as a way to encourage state-to-state interaction on the points raised and positions taken.⁷³ Unsurprisingly, most interventions were positive, given the strong showing of support for Resolution 77/249. That said, not all interventions were positive either regarding the Draft Articles or even the organization of the resumed session, particularly at the outset. As the week progressed, however, and several lively mini debates occurred, occasionally veering into humor as well as legal text and philosophy, the tension in Conference Room 4 at U.N. Headquarters in New York was greatly reduced. The meeting concluded on a positive note, with the Gambia’s Legal Adviser concluding that he had found “renewed hope” in the process, and that the “differences are getting narrower and narrower.”⁷⁴

70. CRIMES AGAINST HUMANITY INITIATIVE, COMPILATION OF GOVERNMENT RESPONSES TO THE UN INTERNATIONAL LAW COMMISSION’S WORK ON CRIMES AGAINST HUMANITY 2022 (2023), <https://bpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/b/2004/files/2023/02/6CCA>.

71. Rep. of the G.A., U.N. Doc. A/C.6/77/INF/3 (2023).

72. *About the Commission*, INT’L L. COMM’N, <https://legal.un.org/ilc/structure.shtml> [<https://perma.cc/P8LH-ALSR>] (June 21, 2023).

73. The three co-facilitators, Anna Pála Sverrisdóttir (Iceland), Sarah Zahirah Ruhama (Malaysia), and Edgar Daniel Leal Matta (Guatemala) presided and summarized the meeting at its close. Sixth Comm., Oral Rep. on Crimes Against Humanity of its 77th Session (2023), https://www.un.org/en/ga/sixth/77/pdfs/english/cah_oral_report.pdf

74. Leila Nadya Sadat & Akila Radhakrishnan, *Differences ‘Getting Narrower’ on Proposed Crimes Against Humanity Treaty*, JUST SEC. (May 15, 2023), <https://www.justsecurity.org/86582/differences-getting-narrower-on-proposed-crimes-against-humanity-treaty/> [<https://perma.cc/4WR5-VVUD>].

The question of crimes against humanity returned to the U.N. Sixth Committee in October 2023. Although no resolution was on the table, many States intervened in the debate, as shown in Figure 6 below:

| Levels of Support | Total | Percent |
|---|-------|---------|
| Very Supportive of a CAH Convention | 92 | 76.8% |
| Supportive of a CAH Convention, but Offered Some Critical Comments | 16 | 11.2% |
| Neutral (Positive, but Not Supportive) | 9 | 5.6% |
| Negative, but with a Constructive Tone | 3 | 1.6% |
| Opposes a CAH Convention | 6 | 4.8% |
| Total Positive: 108 States; Neutral 9; Negative 9 | | |

Figure 6: 2023 Summary Table of Support

During the 2023 Sixth Committee discussions, 126 States intervened either individually or on behalf of regional or cross-regional groups, with 86 percent supporting the 2019 Draft Articles and the elaboration of a Convention.⁷⁵

In April 2024, during the second resumed session, States will have another opportunity to express their views on the draft and raise issues, amendments, and concerns. Thus far, we have seen that the Africa group is interested in adding “the slave trade,” to the provision on enslavement. Others have advocated for enhancing the gender competency of the new treaty. Disability and indigenous rights and environmental harm have been raised by some participants as potential areas of expansion, in terms of opening up the definition of the crime, and a possible new crime of gender apartheid has been proposed. Of course, there are conservative and regressive proposals that have been floated as well, in addition to concerns about double standards raised by the Global South, the relationship of the new treaty to the ICC Statute, and other cautionary notes. Finally, still looming is the possibility of failure in October 2024. The consensus tradition of the Sixth Committee could be used to bury the proposed treaty even if only a handful of States oppose it; or a way could be found to overcome opposition either through negotiations or calling for a vote in order to

75. CRIMES AGAINST HUMANITY INITIATIVE, COMPILATION OF GOVERNMENT RESPONSES TO THE UN INTERNATIONAL LAW COMMISSION’S WORK ON CRIMES AGAINST HUMANITY, UN SIXTH COMMITTEE SESSIONS 11–12 OCTOBER 2023 (2023), https://bpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/b/2004/files/2024/01/FinalCompilationofUNSixthCommitteeFall2023_22Jan2024-3c1f498e91511ea1.pdf.

send the draft to a Diplomatic Conference for negotiation.⁷⁶ Thus far, we have seen a steady increase in support for the draft treaty with the passage of time, as shown in Figure 7, below, with States opposing the draft remaining few (but constant). This bodes well for October 2024, but more work needs to be done before then to achieve a positive result.

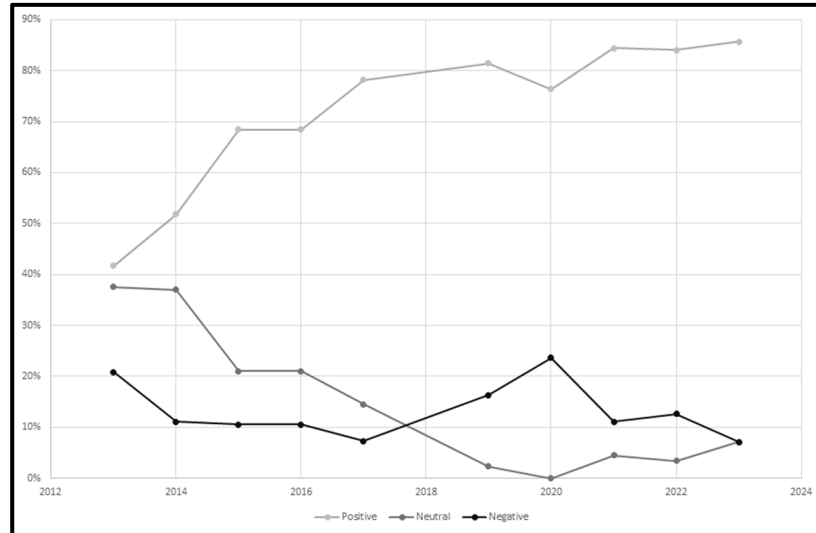


Figure 7: Aggregated State Support as a Percentage of Annually Participating States

VII. CONCLUSION: THE WAY FORWARD

The 2019 Draft Articles on Crimes Against Humanity were adopted by the International Law Commission at its 3,499th meeting, seventy-three years after the International Military Tribunal's judgment at Nuremberg. If the more than 120 States now supporting the treaty succeed in motivating others and overcoming the consensus tradition of the Sixth Committee in October 2024, States can begin the hard work of negotiating a new treaty on crimes against humanity at a diplomatic conference or in the General Assembly itself. This is an urgent mission. The world is on fire, with conflicts and atrocities occurring on every continent and in every region. To combat this challenge, international law must be reinforced and reinvigorated. This proposed new treaty presents an opportunity to do just that.

In closing, thank you for the opportunity to be here today and present this ongoing work. And above all, thank you for your support and encouragement.

76. Leila Nadya Sadat & Akila Radhakrishnan, *Continued Positive Momentum on Crimes Against Humanity Treaty*, JUST SEC. (Nov. 9, 2023), <https://justsecurity.org/90024/continued-positive-momentum-on-crimes-against-humanity-treaty/> [<https://perma.cc/89L7-77LC>].