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International Justice Day and Days to Come: The Rome Statute of the ICC and a future Convention on Crimes against Humanity – Complementarity, not Competition

On International Justice Day, Amnesty International reiterates its call that the system of international justice, based on cooperation and complementarity of relevant actors, must continue to be strengthened if accountability is to be pursued more comprehensively and effectively. In this regard, the organization believes strongly that states and all stakeholders must commit to progressing and ultimately adopting a Convention on Crimes against Humanity (CAH Convention).

In Amnesty International's view, the CAH Convention is a vital step for the international community, which would complement the Rome Statute, and not – as some have argued – compete with or replace it. Like the [Ljubljana-The Hague Convention](#) on international cooperation in the investigation and prosecution of international crimes, adopted in 2023, a CAH Convention would reinforce the [international justice framework](#), including the International Criminal Court (ICC).

Newer initiatives which seek to strengthen the international justice system, alongside existing mechanisms, are necessary to comprehensively and effectively pursue accountability and to narrow the impunity gap, as well as – crucially – to deliver justice, truth and reparation for victims and survivors of crimes under international law.

The International Law Commission (ILC) drew heavily on the Rome Statute of the ICC when it was developed and eventually adopted in 2019 its [Draft Articles on Prevention and Punishment of Crimes Against Humanity](#). In fact, with only some changes, the present Draft Articles imported the list and definitions of crimes against humanity as laid out in Article 7 of the Rome Statute. This choice was part of the ILC's approach to make the Draft Articles more likely to be accepted by states. The Draft Articles are now the basis of discussions in the Sixth Committee (Legal) of the UN General Assembly (UNGA), which in late 2024 will decide whether they should be progressed to formal negotiations for the elaboration of a convention, as recommended by the ILC.

However, the close relationship between the Rome Statute and what could become a future Convention on Crimes against Humanity has raised some questions and complaints. For some states, the relationship is too close. They claim a separate convention would be redundant, given that the ICC already has jurisdiction over such crimes, or introduce ICC membership "through the backdoor". For other states, the relationship is not close enough, and they fear a risk of "fragmentation" of international law if close alignment is not assured. This group worries about consistency and coherence between the two regimes and legal certainty in their domestic application.

AMNESTY INTERNATIONAL PUBLIC STATEMENT

The arguments of the second group overall appear more genuine and made with a constructive mindset, whereas those of the first group seem at least partially cynical, simply aimed at slowing down and spoiling the treaty-making process. From states that are not parties to the Rome Statute and have therefore not committed to domestically implement the Statute's provisions, including on crimes against humanity, the argument of a specialized convention not being necessary rings hollow.

Nevertheless, questions about the relationship come up frequently, including in the recent [resumed session](#) of the UNGA Sixth Committee as well as in comments raised by [civil society actors](#). [Without claiming to break new ground](#) but in the spirit of moving discussions forward, the following – focused on the issues of scope, crimes and institutional questions – therefore aims to clarify the 'relationship' issue and demonstrate that concerns are unwarranted (assuming they are genuine).

Scope

Beyond the given core of covering crimes against humanity, there is indeed some overlap between the Rome Statute and a future CAH Convention as presently laid out by the Draft Articles. Yet, more importantly, fundamental differences exist in the treaties' respective scope and functions.

The Rome Statute is aimed at trying persons for their individual criminal responsibility. So would the CAH Convention, but in addition it would set out obligations and **responsibilities of states**. Among these are the duties, both not to engage in crimes against humanity and to **prevent** them through appropriate domestic measure and international **cooperation**. In this regard the CAH Convention borrows from another specialized treaty, the 1948 [Genocide Convention](#), which also co-exists with the Rome Statute and, [as recent events have shown](#), has by no means become obsolete since the ICC's foundation.

The CAH Convention would be **specific** with regard to one particular crime under international law, just as the Genocide Convention, the Torture Convention, the Enforced Disappearances Convention, and the Apartheid Convention are for their specific titular crimes, and as the Geneva Conventions and their Additional Protocols set the international framework for war crimes. All of these conventions co-exist with the Rome Statute.

The Rome Statute was adopted to establish the **International Criminal Court** in The Hague. This court only has jurisdiction to investigate and prosecute crimes when a state has consented to the Court exercising territorial jurisdiction or jurisdiction over that state's nationals, usually by becoming a **member state** to the Statute, and only if that state is unable or unwilling genuinely to prosecute relevant cases itself. Another base of jurisdiction is when the UN Security Council refers a situation to the ICC Prosecutor, as it did with Darfur (in Sudan) and Libya.

While the CAH Convention would also be aimed, in principle, at 'universal' membership, a foundational element of this new convention would be that it is primarily directed at **enabling states**, not setting up a new international court. Overall, the CAH Convention is intended, to a large extent, to enable states to fulfil functions not covered by the ICC, such as prevention and duties to inter-state cooperation, and take actions which might complement the ICC's mandate (but not replicate it).

Crimes

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Some states [argued in April](#) this year that the substantive catalogue of crimes against humanity was too diverse to agree on one consolidated list for purposes of the CAH Convention, citing in support statutes of various international and hybrid courts over the past decades. But what they failed to recognize, in some cases one must assume on purpose, is that the scope and understanding of what constitutes crimes against humanity has evolved over the past eight decades, through jurisprudence at international tribunals starting with those at Nuremberg and Tokyo, later those for the Former Yugoslavia and Rwanda, and more recently the hybrid courts for Sierra Leone and Cambodia among others, and at the International Criminal Court itself. This catalogue of crimes was never meant to be static but to develop alongside international law and the recognition by states that certain conduct needs to be criminalized.

Without a doubt, the agreement on Article 7 of the Rome Statute in 1998 was a landmark moment in the recognition and codification of crimes against humanity. The Rome Statute today has received broad ratification by 124 states on all continents. In addition, Ukraine has accepted the Court's jurisdiction. And beyond that, even if a state is not yet a party to the Rome Statute, most have accepted the general notions of international criminal law, including the principal rules on crimes against humanity. Those states opposed to becoming ICC member states usually shun its institutional framework and jurisdiction, not its list of internationally criminalized conduct. States not party to the Rome Statute, like the Philippines and Indonesia have even [legislated domestically](#) to criminalize crimes against humanity. Therefore, the ILC was basically right to take the definition of crimes against humanity in Article 7 of the Rome Statute as the basis for Article 2 of the CAH Convention.

However, Amnesty International believes that more than 26 years after the adoption of the Rome Statute, the international community should not be satisfied at that common denominator. Amnesty International argues for a careful opening of the Rome catalogue of crimes for purposes of the CAH Convention, which while remaining true to this fundamental core of international criminal law would enable the recognition of newer developments in international law – an approach of “Rome-plus” so to speak.

The crimes as listed in the Rome Statute were always only meant as a common baseline, not as an inviolable final word. Indeed, 26 years after the Statute's adoption, many countries that have domesticated the Rome Statute have chosen to add crimes or otherwise diverged from the Rome Statute approach. States are allowed to do this as long as they do not fall below standards of international law and the level of protection required by the Rome Statute. Once again, the Statute was intended [“as a floor, not a ceiling”](#). The Draft Articles recognize this by including a “without prejudice” clause. Furthermore, the ever-growing list of hybrid tribunals is adding to this mosaic with crimes responding to the specific situation they are created for.

This means that the international law on crimes against humanity is *already* expressed in variations, around the core of Article 7 of the Rome Statute. A future CAH Convention would be for implementation by states on the national level. But if states have already deviated from or expanded on the ICC ‘model’ when implementing the Rome Statute on the national level, there is no reason a similar approach could not be taken for the CAH Convention, or to fear that some national variations would be leading to fragmentation. The goal is to harmonize criminal law across countries, not to make it identical. In fact, the CAH Convention provides an opportunity to remedy some of the compromises made in Rome in 1998, and to reflect the progression of international law since. Caution and a desire for consensus may have then been an appropriate approach for drafting the legal framework of a novel international entity, which seemingly included restricting the ICC's jurisdiction on some crimes. But such

AMNESTY INTERNATIONAL PUBLIC STATEMENT

approaches are presently unnecessary or unsuitable for a convention that is to be applied *only* by its states parties in their own national legal systems.

Sexual and Gender-based crimes, gender apartheid, enforced disappearance and persecution

Approaching international crimes from today's viewpoint is especially needed when it comes to sexual and gender-based crimes. Amnesty International welcomes the ILC decision not to include the **definition of gender** contained in Article 7(3) of the Rome Statute in the Draft Articles. Further, removing the unnecessary reference to national laws from the existing definition of [forced pregnancy](#) would in fact follow ICC developments post-2019, such as in the [Ongwen](#) case. Just as the ad hoc tribunals for the Former Yugoslavia and Rwanda recognized forced transfer, enforced prostitution and sexual violence as “other inhumane acts” constituting crimes against humanity, which have then been incorporated in the Rome Statute, to codify ICC jurisprudence in the CAH Convention would in fact confirm the Rome Statute system and continue the gradual evolvement of international criminal law.

Keeping in mind that the victims of crimes against humanity are often marginalized groups who traditionally have lacked effective shields and recognition of their plight under international law, other potential new crimes against humanity such as **forced abortion** and other [reproductive violence](#), as well as [gender apartheid](#), would not undermine the Rome Statute system but rather expand the protection of international criminal law.

Such inclusions in the text would be an accurate and over-time acknowledgement of massive human rights abuses that have been going on for decades. None of the interests which would be protected by these additional crimes run in any way contrary to those of the Rome Statute system. In contrast, to add such crimes as part of a limited opening of the Rome Statute catalogue would ensure that a future CAH Convention is fit for purpose and reflects the highest standards of international criminal law.

This approach would also allow for the correction of unfounded restrictions of certain crimes in the Rome Statute. Amnesty International has long [argued](#) that jurisdictional thresholds as contained in Article 7 of the Rome Statute for the crimes against humanity of enforced disappearance and persecution should be removed in the CAH Convention, since they are neither necessary nor required by customary international law. The double qualification in the Rome Statute that an **enforced disappearance** is only given if committed “with the intention of removing them [the disappeared persons] from the protection of the law [and] for a prolonged period of time” is absent in the definition of the crime contained in the 1992 Declaration on the Protection of all Persons from Enforced Disappearance and the 2006 Enforced Disappearances Convention.

Likewise, the organization strongly believes that the crime against humanity of **persecution** should be a self-standing crime, independent of any other crime against humanity, and not subject to a “connection with any act referred to in this paragraph or any crime within the jurisdiction of the [ICC]”, as laid out in Article 7 of the Rome Statute. While the ILC in its Draft Articles removed the alternative of “or any crime within the jurisdiction of the [ICC]” – since the CAH Convention does not cover any other category of crimes – it retained the requirement of a “connection with any act referred to in this paragraph”. This means persecution under the Draft Articles is still only criminalized if committed in connection with another crime against humanity.

Institution

AMNESTY INTERNATIONAL PUBLIC STATEMENT

Finally, negotiating and hopefully adopting a CAH Convention in no way means that any non-party states would become ICC states parties “through the backdoor” (and presumably the governments making that somewhat disingenuous argument know that). The Rome Statute and a future CAH Convention would be **distinct treaties** under international law, which any state in the world can choose to accede to or ratify, in line with their domestic law and preferences, or not. There is no automatic or legal interdependency.

In fact, the core impetus of a CAH Convention is that it does **not create a new international court** but is primarily directed at states. States that already are members of the Rome Statute, but for some reason have not yet implemented its rules on crimes against humanity in national law, would be given a more comprehensive and up-to-date model to follow. States that are not Rome Statute party states would be given a template to criminalize crimes against humanity independently from the ICC’s legal framework. Each group would see a benefit.

Avowed ICC opponents regularly point to how submission to an international court would impinge their sovereignty, [subject their own nationals to an international jurisdiction](#), or that ICC prosecutions are subject to [double standards](#) and a Western bias. For this, the CAH Convention would pose a solution: it would provide a “toolbox” **enabling state authorities** to do their own national investigations and prosecutions, whether of crimes committed in their own or other countries, with common core definitions and principles, and the cooperative support of other countries.

Therefore, unlike the Rome Statute, which contemplates the cooperation of states with the ICC, the Draft Articles concern **horizontal, inter-state cooperation** for purposes of prosecutions at the national level. This can take the form of mutual legal assistance, the obligation to prosecute or extradite, and facilitating the rights of victims. But the relationship would still primarily remain state-to-state. Even if a dispute about the application of any future CAH convention would go to the International Court of Justice for resolution, as presently foreseen, it would still be a dispute between equal states.

The ICC Office of the Prosecutor can be rightly criticized for having applied its **prosecutorial discretion** in a way that has – until recently – [focused almost exclusively on Africa](#) since the ICC began operating in 2002. The recent applications for arrest warrants against [senior Russian officials](#), including Russian President [Vladimir Putin](#), and even more those against Israeli Prime Minister [Benjamin Netanyahu](#) and others in the context of the conflict in Gaza, are still the significant minority in the overall picture of those indicted. Unforgettable are the [decisions](#) in 2020 not to investigate war crimes by the United Kingdom’s forces in Iraq (despite the prosecutor’s own finding that such crimes had in fact been committed), and in 2021 to “deprioritise” an investigation into war crimes allegedly committed by US forces in Afghanistan, ostensibly for “viability and budgetary” reasons. But under the CAH Convention, such decisions would be made by **domestic prosecutors**. Given the current approach of states to international justice on the national level, it is unfortunately the case that domestic proceedings may still be selective and neglect certain parts of the overall spectrum of crimes under international law and other gross human rights violations, but states cannot reasonably complain that under the CAH Convention they would have no say in who is prosecuted and how.

Overall, the Rome Statute of the ICC and the planned Convention on Crimes against Humanity are not competing with or duplicating each other, but are mutually reinforcing. A CAH Convention is needed to complement and further strengthen the existing system aimed at preventing and responding to the most serious crimes under international law. It is clear,

AMNESTY INTERNATIONAL PUBLIC STATEMENT

and always was intended, that the ICC alone cannot deal with all situations around the world. The Crimes against Humanity Convention would be a crucial tool to enable domestic courts to provide help.