

International Law Commission - Draft Articles on the Prevention and Punishment of Crimes Against  
Humanity (2019)

Canadian Written Comments

Canada reiterates its appreciation to the International Law Commission (ILC), and rapporteur Sean Murphy, for their work on the Draft Articles on the Prevention and Punishment of Crimes against Humanity (CAH) and contribution to the work of the Sixth Committee (6C). We were pleased to participate in the discussions that took place during the April 2023 resumed session of the 6C, where delegations actively exchanged substantive views on all aspects of the Draft Articles. We further welcome the opportunity to submit written comments and observations on these Draft Articles, which build on the elements we raised during the April 2023 resumed session. Canada hopes that these will help to advance discussions during the second resumed session of the 6C in April 2024. Canada reserves the right to continue to develop its position on the Draft Articles and to make further comments at a later date.

**General Comment – Filling a gap in the international law framework**

The need to hold perpetrators of CAH accountable is indisputable, yet it remains the only atrocity crime without a dedicated convention. Canada believes that elaborating a convention addressing the prevention and punishment of CAH would fill a gap in the international treaty law framework and would provide an additional tool to counter impunity for such crimes. Indeed, like the Genocide Convention and the Geneva Conventions of 1949 and their Additional Protocols, Canada considers that a Convention on CAH would be complementary to the Rome Statute of the International Criminal Court (ICC), as the latter concerns horizontal judicial cooperation. A convention on CAH would create direct obligations for States Parties and would help them in their adoption of national CAH laws, thereby contributing to the harmonization of laws at the national level, in addition to strengthening the principle of complementarity for those states that are States Parties to the Rome Statute.

**General Comment – Not altering International Humanitarian Law**

Canada recognizes that CAH may be committed during armed conflict or in times of peace. However, the Draft Articles must clarify that they would not modify international humanitarian law (IHL), which constitutes *lex specialis* in armed conflict. Canada shares the view previously expressed by other States that such clarification is necessary to avoid undermining established IHL or criminalizing conduct undertaken in accordance with IHL.

**Preamble**

**PP1:** Recognizing that the language in this draft paragraph is drawn from the Rome Statute, Canada nevertheless considers that it is warranted to replace the use of “Mindful” with a term that better reflects the persistent commission of such crimes, and emphasizes the gravity in terms of number of victims. Using the present tense, in addition to highlighting that these crimes continue to occur to this day, would also better reflect the increased concern with the continued perpetration of such crimes.

This paragraph could also be worded in a more inclusive manner, such as by referring to “people” more generally.

**PP3:** Canada reiterates its position expressed during the April 2023 resumed session of the 6C of keeping a general reference to the principles of international law embodied in the Charter of the United Nations, rather than highlighting any specific principles.

**PP4:** Canada emphasizes the importance of recognizing that the prohibition of CAH is a peremptory norm of general international law (*jus cogens*).

**PP7:** As a State Party to the Rome Statute of the ICC, Canada appreciates the specific reference to this instrument with respect to the definition of CAH. This allows for a certain degree of consistency and avoids fragmentation of international law. Canada equally recognizes that the Rome Statute only applies to those States that are Parties to it, unlike customary international law to which all States are bound. Canada is therefore comfortable with simply “noting” the Rome Statute in reference to the definition of CAH. As the primary source and definition for CAH, a reference to customary international law should also be included in this preambular paragraph, which will also allow States Parties to refer to the evolving nature of the definition.

**PP8:** Canada considers that while this draft paragraph indicates that it is the duty of states to exercise criminal jurisdiction with respect to CAH, States may also exercise other forms of jurisdiction over CAH.

**PP9:** In addition to the recognition of the rights of victims, witnesses and others, Canada is of the view that also referring to “survivors” would enhance respect for self-identification of those who have been subjected to CAH.

**PP10:** Canada recommends including a reference to the investigation component as included in draft article 8, which would better reflect the full extent of the obligation of States Parties, should a Convention on CAH be adopted, in relation to the punishment of CAH. Canada is also of the view that the *aut dedere aut judicare* principle found in draft article 10 could be better reflected in this draft preambular paragraph.

In addition to the above comments, Canada recognizes that CAH may be committed during armed conflict or in time of peace. Bearing this in mind, and as was raised during the April 2023 resumed session of the 6C as well as in our general comments above, Canada would propose including in the preamble a reference to IHL as *lex specialis* in armed conflict. Additional clarifications would also be necessary in draft article 3 and/or draft article 11 that a Convention on CAH, if adopted, would not modify IHL.

### **Article 1. Scope**

Canada is of the view that this draft article should clearly state the object and purpose of a potential Convention, rather than stating that it “apply to” the prevention and punishment of CAH.

### **Article 2. Definition of Crime Against Humanity**

Canada recognizes the value in terms of jurisprudence and common understanding that derives from the use of the definition of CAH as provided for in the Rome Statute, as well as the harmonization it may

create in relation to these Draft Articles, if eventually adopted in a Convention. However, we also acknowledge the benefit of further reflecting on the definition of CAH pursuant to customary international law. Once again, we reiterate our support for the ILC's choice not to include the definition of the term "gender", as the concept continues to evolve, and its understanding may vary from state to state.

In relation to the acts that may constitute CAH if committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, Canada reiterates its belief that considering these Draft Articles provides an opportunity to crystallize "forced marriage" as a standalone prohibited act, rather than including it under the label of "other inhumane act". Furthermore, we are of the view that the protection provided by draft subparagraph (g) could be expanded to include acts that violate the sexual integrity of a person and not only acts of a sexual nature, to which the ICC Elements of Crimes refer when mention is made of "any other form of sexual violence" as included in the corresponding article in the Rome Statute. Consideration could also be given to including "reproductive violence", which would encompass other comparable serious violations that would not otherwise be included in the scope of this definition. Finally, with regard to the act of persecution as contained in draft subparagraph 1(h), Canada suggests that, as with the other acts listed in this draft paragraph, only the *act* of persecution be mentioned here, i.e. solely the term "persecution", without including parts of its definition, which should be added to the definition contained in draft subparagraph (2)(g).

Regarding the definitions included in draft paragraph 2, Canada sees value in continuing discussions on bringing these into closer alignment with the definitions under customary international law.

Particularly, Canada is of the opinion that a person's gender does not necessarily indicate whether that person has the capacity to become pregnant, and would therefore suggest replacing the term "woman" by a more gender-neutral one to broaden the protection provided by this draft subparagraph on forced pregnancy to all potential victims. Furthermore, we recommend removing the last part of the draft subparagraph referring to impacts on national laws; this is not relevant in the context of a horizontal treaty, contrary to the compromise sought during the elaboration of the Rome Statute. The ICC Appeals Chamber in the [Ongwen](#) case also particularly recognized that this reference to national laws did not impose an additional element to the Rome Statute's definition of forced pregnancy. In accordance with our above suggestion to solely retain the term "persecution" as an act in draft subparagraph 1(h), we recommend adding the elements relating to the grounds on which persecution could be perpetrated in draft subparagraph 2(g), and suggest adding "sexual orientation" to that enumeration. Consistent with our above suggestion to consider including "forced marriage" as a standalone offence, Canada also suggests adding a definition for this crime, which could be modelled on the concise and gender neutral definition provided in the jurisprudence of the ICC in the Ongwen case.

Finally, Canada reiterates its call made during the April 2023 resumed session of the 6C supporting the inclusion of draft paragraph (3) as a "without prejudice clause", which clarifies that, should the Convention be adopted, States Parties would retain the flexibility to include broader elements within their national jurisdiction, in addition to binding treaty obligations, without imposing any additional obligations on other States Parties.

### **Article 3. General obligations**

With regard to the general obligations to prevent and punish CAH, Canada notes that this draft paragraph draws on and largely reproduces Article 1 of the Genocide Convention. However, we believe that the language used could be better aligned with the format in the Genocide Convention and could further indicate that these obligations must be taken in accordance with the provisions set out in any eventual Convention.

Canada also suggests, in addition to including a reference to IHL in the preamble of these Draft Articles, adding a clarification that this Convention, should it be adopted, would not operate to modify IHL, which constitutes *lex specialis* applicable in armed conflict. Such clarification could also be added in draft article 11, for which Canada has made a suggestion.

### **Article 4. Obligation of prevention**

It is Canada's perception that this draft article is inspired by and mostly replicates Article 2 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment (CAT). We suggest that consideration be given to bringing its wording into better alignment with the CAT. It is Canada's view that cooperation with international courts and tribunals could also be included, despite having noted the contrary suggestion to that effect by the ILC. By adding such reference after the mention of "as appropriate," it would act as an encouragement, and would apply to any States Parties, should the draft Convention be adopted, including those who are not party to treaties mandating cooperation with any particular court or tribunal.

### **Article 5. Non-refoulement**

Canada is of the view that the title of draft article 5 could lead to a misunderstanding that the provisions are being limited to refugees and asylum seekers only. Therefore, we suggest that consideration be given to broadening its scope by including "expulsion" and "extradition" in the title in accordance with the terms used in draft paragraph (1). In that regard, we note that this draft article is limited to inter-State cooperation. Canada wishes to emphasize that Article 102 of the Rome Statute distinguishes between "surrender" and "extradition", the former referring to the delivery of a person to the Court, while the latter is to a State.

Furthermore, while recognizing that this draft article draws on existing language of the CAT, Canada notes that the definition of CAH contains a "chapeau element" which requires the existence of a "widespread or systematic attack directed against any civilian population" in addition to constituent acts listed in the Draft Articles. The need to take into account the broader situation within a country is thus already included in the obligation contained in draft paragraph (1). We also note that there are differences between the constituent elements of torture versus the broader definition of the CAH and that the analysis of the "danger" by competent authorities will necessarily be more extensive and potentially more difficult to ascertain. We are also actively considering whether this draft article, as opposed to that in the CAT, should provide for exceptions given the broader nature of the CAH definition.

### **Article 6. Criminalization under national law**

Regarding the measures to be taken to ensure that CAH constitute offences under a State's domestic law, Canada is of the view that States have the flexibility to address the forms of participation in the

perpetration of CAH in additional ways. Therefore, we reiterate our proposal made during the April 2023 resumed session of the 6C that similar language to the “without prejudice clause” of draft article 2(3) should be added to this draft paragraph to ensure that it does not unduly restrict a State’s ability to include additional acts which may constitute offences under their national laws, or to define the crimes in accordance with specific elements of criminal responsibility under their domestic laws.

With respect to draft paragraph (5), Canada would like to reiterate its view shared during the April 2023 resumed session of the 6C that “criminal responsibility” for persons holding an official position is distinct from the application of procedural immunity in foreign jurisdictions, and that this draft article is sufficiently clear in that it does not affect the application of conventional or customary international law with respect to the application of procedural immunity.

Additionally, Canada positively notes the inclusion of the concept of the liability of legal persons pursuant to the current draft paragraph (8). However, we would recommend separating this draft paragraph into its own article, as the concept of liability extends beyond that of criminalization to which this draft article refers. Alternatively, we would suggest modifying its title to broaden its scope to cover liability, and not only criminalization. Canada is also of the view that some reformulation could be made to the draft paragraph to better reflect the hierarchy of norms between international and national law.

#### **Article 7. Establishment of national jurisdiction**

Canada recommends closer alignment with the language used in the CAT, particularly with regard to the use of the term “habitually resident” in comparison to the formulation “usually resides” used in the CAT.

#### **Article 9. Preliminary measures when an alleged offender is present**

Canada suggests that consideration be given to bringing the wording used in draft paragraph (1) into closer alignment with that of the CAT, and to reflect that the obligations in the Draft Articles are for States, and that therefore it is necessary to refer to the acts of individuals.

As we have raised during the April 2023 resumed session of the 6C, Canada wishes to reiterate that the current language of draft paragraph (2) appears more appropriate for an inquisitorial system of criminal justice than what it is typically in place in common law systems. If appropriate changes cannot be reflected here, we would suggest adding a preambular clause referring to the diversity of legal systems, including in the area of criminal justice. Additionally, and although we note that draft articles 9 and 11 should be read in conjunction, a general reference to internationally recognized standards of due process could further clarify the alleged offender’s rights at this stage of the proceedings.

With regard to draft paragraph (3), Canada has taken note of the concern raised during the April 2023 resumed session of the 6C regarding the fact that the exercise of jurisdiction here is tied to the “intention” of a State, and suggests States should clarify how this draft paragraph interacts with draft article 13(12).

#### **Article 10. *Aut dedere aut judicare***

As referred to in the ILC commentary related to this draft article, Canada sees the obligation to “submit” to the competent authority and the “possibility” of prosecution as aligned with Canada’s interpretation of the draft article and of the fundamental principle of prosecutorial independence. We also do not consider this draft article to be limited to criminal proceedings, but as implicitly including administrative or civil remedies, following the exercise of a prosecutor’s discretion about whether to proceed with a case.

### **Article 11. Fair treatment of the alleged offender**

Recognizing the significance this draft article places on the legitimacy of the law by enshrining the rights of the accused, it is Canada's view that further details could be added to reflect the rights of accused persons and detainees. Additionally, and although noting the qualifier "applicable" in draft paragraph 1, if there is no broader clarification included earlier in these Draft Articles that it does not modify existing IHL (*lex specialis* in armed conflict), Canada recommends including such clarification here. A query can also be raised as to whether the guarantee of "full protection" of the rights of an alleged perpetrator differs from that of "protection" of his or her rights.

With regard to draft paragraph (2), Article 36 of the Vienna Convention on Consular Relations (VCCR) provides that it is the right of States to visit their nationals, and not the right of individuals per se. Bearing this in mind, Canada suggests adding a new draft paragraph (3), drawn from the VCCR, to replace the current subparagraph (b). Separately, Canada is also of the opinion that "stateless person" would be captured by the use of the term "any such person", and that therefore the last part of draft subparagraph (a) could be removed, as already incorporated. Alternatively, some reformulation could be made for clarification purposes.

Notwithstanding our previous comment on the need to modify language to reflect that it is States that have the right to visit their nationals, Canada generally agrees with the content of the current third draft paragraph. However, it is unclear what issues the text of the third draft paragraph is intended to address.

### **Article 12. Victims, witnesses and others**

With regard to draft subparagraph 1(a), Canada believes it is important to specify that the scope of the measures a State will have to take are those in relation to CAH that have been or are being committed within its jurisdiction only. Greater flexibility could also be integrated in this draft subparagraph to allow for a better recognition that States may have various procedures regarding the protection of victims, survivors and witnesses, which may require a case-by-case analysis. Furthermore, we note the mention of extradition in draft subparagraph 1(b), although victims, survivors and witnesses are generally not involved in such proceedings. In the rare circumstances where they might be, "other procedures" can be read as already including extradition proceedings. Finally, Canada sees this draft subparagraph as an opportunity to incorporate language related to sexual and gender based violence and violence against children to protect the well-being, integrity, and dignity of victims, survivors and witnesses and help prevent their re-traumatization.

Canada recognizes that draft paragraph (2) strikes a balance between the rights of the victims and those of the alleged perpetrators. However, Canada is of the view that in doing so, States can proceed in various ways and that such flexibility should be reflected.

Finally, as the right to restitution may also vary from state to state, Canada suggests a more general reference to the "right to reparation" in draft paragraph (3).

### **Article 13. Extradition**

Canada recommends clarifying that the extradition provisions included in any Convention that may be adopted, apply only to its States Parties, including when referring to any extradition treaty, existing or future, between States.

Specifically on draft paragraph (5), and for consistency with the language used in Article 16(5) of the United Nations Convention against Transnational Organized Crime, from which we believe it is inspired, Canada recommends adding a reference that a State should inform the Secretary-General of the United Nations as to whether it will use the present Draft Articles as the legal basis for cooperation on extradition at the time of the deposit of its instrument of ratification, acceptance, approval of - or accession to - this Convention.

On draft paragraph (9), Canada notes the related ILC commentary indicating that this draft paragraph intends to circumvent an event for which a “State, under its national law, may only extradite a person to a State where the crime occurred,” to include the territory of the States that have established jurisdiction in accordance with draft article 7(1) “to facilitate extradition to a broader range of States”. However, we are of the view that the language used in this draft article is vague and that clarification on its application in practice would be helpful. It remains unclear to us under “what” circumstances a State would treat offences as if they had been committed in territory of States that have established jurisdiction. The “necessity” to do so could also be clarified.

With regard to draft paragraph (11), Canada suggests including “sexual orientation” as a specific term to the enumeration contained therein, in accordance with our suggestion to that effect in draft article 2.

Finally, on draft paragraph (13), Canada is of the opinion that further clarification could be integrated in this draft paragraph to better indicate that it serves to give the requesting State reasonable opportunity to adapt its request to comply with the requirements for extradition under the law and procedures of the requested State. Furthermore, we note that, as currently drafted, this paragraph does not reflect that there may be circumstances in which consultation will not be engaged, with the refusal being based on other grounds.

#### **Article 14. Mutual legal assistance**

As it was raised during the April 2023 resumed session of the 6C that the questioning of witnesses and victims by videoconference merited further consideration, Canada is of the view that greater flexibility should be included in draft subparagraph 3(a). We also suggest not limiting the effective service of documents to “judicial documents” alone in draft subparagraph 3(c), the term being more appropriate for civil law systems of criminal justice rather than common law systems, which require broader language. Canada is also of the view that greater clarity should be provided in draft subparagraph 3(h) with regard to the reference to “other purposes”. We question whether it is referring to confiscation, which should be specified if so. Greater clarity is also needed at draft paragraph (6) as to the type of request formulated, i.e. for assistance.

#### **Article 15. Settlement of disputes**

Canada would suggest that consideration be given for this draft article to be more closely modelled on Article 30(1) of the CAT as it provides timelines on the consideration of terms of arbitration and recourse to the ICJ.

Canada also favors wording that the settlement of disputes cannot be subject to a reservation, even if it could lead to fewer ratifications. Indeed, the application of other conventions has proven that if there is no ability to bring a dispute before a court or tribunal, there is no means to hold other States to account for violations of their obligations. The obligation not to commit CAH already exists under customary

international law; States can therefore hold other states to account under the principle of state responsibility outside of an international legal proceeding. Canada therefore suggests removing this draft paragraph. In accordance with our preference for removing draft paragraph (3), Canada would also suggest removing draft paragraph (4).

## **Annex**

### **General comment**

We note also that some States have expressed their interest during the April 2023 resumed session of the 6C in retaining the Annex to serve as a “model law”, including in relation to implementation in national legislation, and could therefore serve as an additional tool for certain States in terms of cooperation. With this in mind, Canada suggests that consideration be given to referencing extradition in the annex as well. This would be appropriate as it is also necessary with regard to, for example, the designation of a central authority and the procedures for submitting an application.

### **Procedures for making a request**

Canada is of the view that additional details regarding the request for mutual legal assistance in draft paragraph 4 are needed, such as the title and contact information of the authority making the request, and factual context regarding the service of documents, to ensure that the documents to be served relate to a matter that is within the scope of the Draft Articles. As well, and as noted previously, documents to be served should not be limited to judicial documents only, i.e. prosecuting authorities may issue notifications to accused persons or witnesses. Canada also suggests referring to “alleged facts” rather than “relevant facts”, the latter suggesting that a judicial finding of guilt has been made. Canada finds the reference to “any person concerned” vague and would recommend specifically referring to subjects, witnesses or experts. Canada would also suggest additional requirements to add to a request for mutual legal assistance, namely that there is a basis to believe that the requested evidence is located in the requested State, and that, if applicable, the nexus between the criminal investigation or prosecution in question in the foreign case and the evidence or assistance sought.

### **Response to the request by the requested State**

Canada is of the view that the expression “reasonable requests” included in draft paragraph 7 is vague and that clarifying what constitutes a “reasonable” or “unreasonable” request in practice would be helpful.

Canada is also of the view that greater clarification could be provided in draft paragraph 10 to specify that the interference is in relation to an ongoing investigation, prosecution, judicial or other proceeding of the domestic state, i.e. the requested State.

### **Use of information by the requesting State**

For greater clarity, Canada recommends detailing further in draft paragraph 14 what would happen in the event that a State would not be able to comply with the requirement of confidentiality, for which the requesting State should be informed before executing the request to give this State the opportunity to determine whether the request should nevertheless be executed.



**Transfer for testimony of person detained in the requested State**

Canada suggests clarifying in draft paragraph 17 that the person being detained or serving a sentence should freely give their informed and written consent to be transferred.

With regard to draft paragraph 18, Canada views the detention abroad as an uninterrupted detention of the person serving the sentence, and would therefore suggest reviewing the wording used in this draft article in relation to the “credit” for the time served.

**Costs**

Canada believes that additional details regarding associated costs are warranted in draft paragraph 20.

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