

**Comments from the United States on the International Law Commission’s Draft Articles
on the Prevention and Punishment of Crimes against Humanity
December 2023**

The United States welcomes the opportunity to provide written comments and observations on the International Law Commission’s (the Commission) Draft Articles on the Prevention and Punishment of Crimes against Humanity (the Draft Articles) and the recommendation of the Commission for the elaboration of a convention by the United Nations General Assembly or by an international conference of plenipotentiaries on the basis of the Draft Articles.

The United States has a long and proud history of supporting accountability for those responsible for crimes against humanity, dating back to the instrumental role the United States played in the first prosecution of such crimes before the International Military Tribunal at Nuremberg. We note, however, that more than 75 years after the Nuremberg trials, other international crimes have been codified in dedicated treaties, but there is no general multilateral convention on the prevention and punishment of crimes against humanity. Meanwhile, crimes against humanity continue to be committed around the world—all too often with impunity.

The United States views the Draft Articles as an important step and expresses its deep appreciation to the Commission and Special Rapporteur Sean Murphy for their valuable contributions to this project. The United States was proud to join more than eighty other co-sponsors of UN General Assembly resolution 77/249, which established a process for States to further examine and exchange substantive views on the Draft Articles through two resumed sessions of the Sixth Committee and the submission of written comments and observations. The United States was pleased to participate in the first resumed session in April 2023, which provided States the opportunity to engage in a thoughtful, robust exchange of views, and looks forward to next year’s resumed session, during which we hope the rich conversation will continue.

In that spirit, the United States is pleased to submit the following written comments and observations on the final Draft Articles. Recognizing that the process established by resolution 77/249 is not intended to be a negotiation or to prejudice the decision the Sixth Committee will make regarding the Commission’s recommendation—and that the United States previously submitted written comments on the Draft Articles as adopted by the Commission on their first reading—the United States has not sought to express its views on every provision of the Draft Articles here.¹ Rather, the United States generally has focused its comments and observations on what it views as the most significant issues for States to consider in connection with further examining the Draft Articles. To that end, the United States notes that it has organized its comments and observations on the Draft Articles by “cluster,” consistent with the structure of the Sixth Committee’s program of work for the two resumed sessions.

¹ We note that the written comments the United States submitted in 2019 on the Draft Articles, as adopted by the Commission in 2017 on their first reading, are available on the Commission’s website. *See Analytical Guide to the Work of the International Law Commission: Crimes Against Humanity, Comments by Governments*, available at https://legal.un.org/ilc/guide/7_7.shtml.

Cluster 1: Introductory Provisions (Preamble and Draft Article 1)

The first cluster encompasses the Preamble and Draft Article 1, which introduce and set out the scope of the Draft Articles.

The United States recognizes the important role that the introductory provisions play in the overall structure of the Draft Articles. The United States also appreciates that the Preamble draws inspiration from, among other things, language used in the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) in setting out the general context and the main purpose of the Draft Articles. We view the Genocide Convention, in many respects, as a useful model and starting point for any future convention on the prevention and punishment of crimes against humanity.

Nonetheless, the United States believes the introductory provisions of the Draft Articles could be clarified in certain respects. For instance, nothing in the Draft Articles should be construed as authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations. The Draft Articles should guard against the possibility that the duty to prevent and punish crimes against humanity could be used as a pretext for unlawful uses of force. To be sure, in our view, no provision of the Draft Articles, properly interpreted in good faith, would explicitly or implicitly authorize a State, acting on the pretext of preventing or punishing crimes against humanity, to commit aggression. However, we believe States should be mindful of this issue in connection with any discussions of a future convention on crimes against humanity. We note that potential models for such language could be found in other international instruments, including the preamble to the 1977 Additional Protocol I to the 1949 Geneva Conventions.

Moreover, the United States believes the introductory provisions should make clear that the Draft Articles would not modify international humanitarian law, which is the *lex specialis* applicable to armed conflicts. In the United States' view, it is important that the Draft Articles not be interpreted in ways that may purport to alter international humanitarian law or criminalize conduct undertaken in accordance with international humanitarian law. As discussed in our comments and observations on Cluster 2 below, some of the terms used in the definition of crimes against humanity reflected in Draft Article 2, in our view, lack clarity and could be misinterpreted to criminalize conduct by State actors that is permissible under international law, including international humanitarian law.

Cluster 2: Definition and General Obligations (Draft Arts. 2, 3, and 4)

The second cluster encompasses Draft Article 2, which defines crimes against humanity; Draft Article 3, which sets forth the general obligations of States regarding the prevention and punishment of crimes against humanity; and Draft Article 4, which addresses in more detail how States should undertake to prevent crimes against humanity.

The United States recognizes that Draft Article 2 is, in many respects, the most important provision of the Draft Articles, as the definition of crimes against humanity has implications for all of the obligations and rights set forth in the other provisions of the Draft Articles. As a

preliminary matter, we emphasize the critical role that the chapeau element plays in the definition of crimes against humanity—certain acts are crimes against humanity only when they are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. The chapeau element is fundamentally consistent with international humanitarian law, under which making the civilian population the object of attack is prohibited and punishable as a war crime. It also distinguishes crimes against humanity from other international crimes, such as genocide.

The United States recognizes that Draft Article 2 is drawn nearly verbatim from the definition of crimes against humanity in Article 7 of the Rome Statute of the International Criminal Court (ICC). We appreciate that State Parties to the Rome Statute may have an interest in ensuring that the definition of crimes against humanity in the Draft Articles is consistent with the definition of crimes against humanity in the Rome Statute. While the United States is not a party to the Rome Statute, the United States believes the definition of crimes against humanity in the Rome Statute largely should be understood to reflect customary international law. The United States also recognizes that Article 7 of the Rome Statute provides the most comprehensive list of constituent acts of crimes against humanity in any multilateral instrument, including with respect to rape and other forms of sexual violence, which are far too often overlooked in efforts to hold accountable those responsible for atrocities. Closing the impunity gap for crimes involving sexual violence should be, in the United States' view, a goal for any future convention on crimes against humanity.

Nonetheless, we continue to believe that there is value in States giving further consideration to the definition of crimes against humanity reflected in the Draft Articles. As the United States has previously noted, some of the terms used in Draft Article 2 lack clarity, which could create certain challenges for States seeking to implement obligations under any future convention based on this definition, including with respect to prosecuting individuals responsible for crimes against humanity. We note, in this regard, the important role that the ICC Elements of Crimes have played in clarifying the definition of crimes against humanity in the Rome Statute. Further consideration should be given to whether aspects of the ICC Elements of Crimes could be drawn upon, where appropriate, to help clarify the definition in Draft Article 2 and, in turn, the scope of the obligations and rights set forth in the other provisions of the Draft Articles.

We also note that Draft Article 2 already differs in certain respects from Article 7 of the Rome Statute. Among other things, Draft Article 2 does not include the definition of “gender” found in Article 7 of the Rome Statute, which the United States views as a positive change that should be retained. Recognizing that the definition of “gender” was highly controversial at the time the Rome Statute was negotiated, any future convention on crimes against humanity should leave this concept undefined to avoid defining “gender” in a strictly binary manner, as is done in the Rome Statute, which fails to reflect an intersectional and gender inclusive approach. In this regard, we also acknowledge efforts by civil society to encourage States to consider gender within the framework of the “crime of apartheid” in any future convention on crimes against humanity.

With regard to Draft Article 3, the United States welcomes the fact that it draws inspiration from Article I of the Genocide Convention in providing that States undertake to prevent and punish crimes against humanity and clarifying that crimes against humanity are crimes under international law, whether or not committed in time of armed conflict. However, as a point of clarification, Article 3(2) might be expanded slightly to confirm that crimes against humanity can be committed by both state and non-state actors, especially given that Article 3(1) might imply that crimes against humanity can only be committed by State actors. In addition, it would be useful to consider whether the provision would be clearer if the phrase “in time of armed conflict” were changed to “in the context of armed conflict.” Likewise, the United States appreciates the clear statement, inspired by Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), that no exceptional circumstances may be invoked as a justification for crimes against humanity. These principles are, in our view, of critical importance to States’ efforts to prevent and punish crimes against humanity. Moreover, as a general matter, the United States believes that it would be important for any future convention on crimes against humanity to draw on, to the extent possible, similar provisions in widely ratified instruments such as these.

With respect to Draft Article 4, the United States welcomes the confirmation that efforts to prevent crimes against humanity must be undertaken in conformity with applicable international law. We would welcome similar language elsewhere in the Draft Articles confirming that efforts to punish crimes against humanity must also be undertaken in conformity with applicable international law. However, we also believe further consideration should be given to whether Draft Article 4 could be clarified in certain respects.

As a general matter, the United States notes that it could be helpful to elucidate the relationship between Draft Articles 3 and 4. With respect to Draft Article 4, sub-paragraph (a), we note that, in addition to taking effective legislative, administrative, and judicial measures to prevent crimes against humanity in territories under their jurisdiction, it is critical to clarify that States also should take such measures to prevent crimes against humanity committed by their personnel outside their territory. With respect to sub-paragraph (b), the United States appreciates that it draws attention to the significant role that international cooperation plays in efforts to prevent crimes against humanity. However, as noted in our earlier comments, the United States continues to have questions and concerns about this provision, including with respect to the proposed obligation to cooperate with other States, relevant intergovernmental organizations, and other organizations.

Cluster 3: National Measures (Arts. 6, 7, 8, 9, and 10)

The third cluster encompasses a broad range of provisions. These include Draft Article 6, which generally requires States to criminalize crimes against humanity in their domestic laws and punish offenders appropriately, including when the crimes are committed through various direct or indirect modes of liability or committed by government officials, and to take measures, where appropriate, to establish liability for “legal persons”; Draft Article 7, which sets forth the bases

of jurisdiction that States must establish; Draft Article 8, which establishes obligations with respect to when and how States investigate allegations of crimes against humanity; Draft Article 9, which addresses the preliminary measures States should take with regard to offenders; and Draft Article 10, which generally requires States, if they do not extradite or surrender an offender found in territory under their jurisdiction, to submit the case to their competent authorities for the purpose of prosecution.

With respect to Draft Article 6, the United States notes that the obligation contemplated by paragraph 1—to take necessary measures to ensure crimes against humanity constitute offenses under each State’s criminal law—is key to efforts to more effectively prevent and punish crimes against humanity and combat impunity through national efforts. We note that, although crimes against humanity are not criminalized as such under U.S. law, many existing U.S. laws could be used to punish conduct that, depending on the circumstance, may constitute a crime against humanity, including federal criminal laws addressing murder, sexual violence, human trafficking, torture, and war crimes. The Biden Administration also supports draft legislation in the United States Congress to make crimes against humanity a separate offense under U.S. criminal law and, to that end, is engaging with members of Congress on this issue.

Moving to the other paragraphs of Draft Article 6, we note that they reflect, in many respects, important principles recognized by the International Military Tribunal at Nuremberg that would be critical to the effectiveness of any future crimes against humanity convention. These include the principle that any person who commits, orders, or otherwise is complicit in crimes against humanity is liable to punishment and the principle that acting pursuant to an order of a government or superior does not categorically relieve a perpetrator of responsibility for crimes against humanity.

With respect to the modes of liability encompassed by Draft Article 6, paragraph 2(c), we believe that it would be vital for any future convention on crimes against humanity to address both direct and indirect modes of liability. We also note that paragraph 2(c) could, for example, be expanded to conclude with a clause such as “, including acting in concert with a group pursuant to a shared common purpose.” However, we recognize that States’ domestic criminal systems vary, and States may utilize different approaches to questions of complicity, including accomplice liability, conspiracy, participation in a joint criminal enterprise, common purpose, or other modes of responsibility. Accordingly, it is important that any future convention allow flexibility in how States implement their obligations in that regard.

With respect to Draft Article 6, paragraph 3, we recognize the importance of the doctrine of command responsibility to holding accountable those superiors who are responsible for serious international crimes. Since World War II, this doctrine has played an integral role in holding military commanders and other superiors accountable for offenses committed by their subordinates when they have the requisite culpability. However, we also recognize that States may approach the concept of command responsibility—including its precise elements and its applicability to both military commanders and other superiors—in different ways, just as there are different approaches to other indirect modes of liability. To that end, it is important that any future convention allow flexibility in how States implement their obligations with regard to

indirect modes of liability and we continue to be interested in hearing the views of other States on this issue.

With respect to Draft Article 6, paragraph 8, which addresses the liability of “legal persons,” we note that there is no universally recognized concept of criminal responsibility for legal persons in international criminal law. We appreciate that paragraph 8 acknowledges as much by expressly providing that national laws and “appropriateness” may dictate whether and how States establish liability for “legal persons.” Nonetheless, we think there is value in States further considering this concept, including with respect to the scope of liability and the elements to establish such liability. To that end, the United States also would welcome the opportunity to hear from States that recognize liability for “legal persons” for international crimes about their experiences in this area.

Turning to Draft Article 7, which addresses the establishment of national jurisdiction, the United States recognizes how this provision can support efforts to improve international cooperation to hold accountable individuals responsible for crimes against humanity consistent with international law. In that regard, we support national authorities taking steps to establish jurisdiction over such crimes, as appropriate. We recognize that States take a number of different approaches to the question of jurisdiction, and it would be important to provide flexibility for domestic implementation in any future convention. Furthermore, the establishment of jurisdiction should not be used to facilitate inappropriate prosecutions. While we continue to examine this provision, we generally believe Draft Article 7, including paragraph 2’s contemplation of a form of present-in jurisdiction, may be appropriately crafted, provided that appropriate safeguards can also be established, as discussed below.

Nevertheless, we recognize that Draft Article 7 generated a robust discussion in April’s resumed session and note the concerns expressed by several delegations that Draft Article 7 does not address the possibility of overlapping or competing claims of jurisdiction by States. Accordingly, we believe it is important for States to consider whether the Draft Article should expressly acknowledge the priority of the State whose official or national allegedly committed the crime or in whose territory the crime allegedly occurred if there are overlapping or competing exercises of jurisdiction. The United States has previously expressed its concerns regarding unwarranted assertions of jurisdiction in this context, which could lead to increased tensions between States as States seek to exercise jurisdiction over the same matter in conflicting ways. We also would encourage States to consider whether a reference to States’ obligations under international law regarding fair trial guarantees and other applicable legal protections should be added to Draft Article 7, sub-paragraph (3), recognizing that a State’s exercise of criminal jurisdiction under its domestic law must still be in accordance with its obligations under international law, as Draft Article 11 also acknowledges. In this regard, we also note that sub-paragraph (3) as currently drafted is overbroad because the Draft Articles should seek to exclude exercises of criminal jurisdiction that are not in conformity with applicable international law. Sub-paragraph (3) of Draft Article 7 could be refined to clarify this.

With regards to Draft Article 8, the United States supports a provision requiring States to conduct investigations of crimes against humanity. Undertaking such investigations is critical if

crimes against humanity are to be effectively prevented and punished. However, we note that certain aspects of Draft Article 8 may warrant further discussion and consideration by States. For example, Draft Article 8 does not currently contemplate an obligation for States to investigate allegations that their officials have committed crimes against humanity abroad, which would be important if States are to more effectively prevent and punish crimes against humanity. Accordingly, the text of the Draft Article could be easily amended to incorporate such an obligation. Similarly, the relationship between the investigation contemplated in Draft Article 8 and the preliminary inquiry in Draft Article 9 should be considered further and clarified.

Turning to Draft Article 9, the United States believes it addresses important, practical issues in securing custody of alleged offenders. However, in the United States' view, the Draft Article warrants further consideration by States. For example, a State may have relevant obligations under a status of forces agreement with regard to an alleged offender in its territory.

With respect to Draft Article 10, the United States welcomes the inclusion of a provision in the Draft Articles that would require States, if they do not extradite or surrender an offender in territory under their jurisdiction, to submit the case to competent authorities for the purpose of examining whether prosecution would be appropriate. Similar provisions in other instruments have played an important role in helping States prevent and punish other acts prohibited under international law, such as torture. For any future convention on crimes against humanity to be effective, such a provision, in our view, would be critical.

Finally, with respect to Draft Articles 8, 9, and 10 more generally, the United States believes it would be useful to consider and develop safeguards to avoid any future convention on crimes against humanity providing a pretext for prosecutions inappropriately targeting officials of foreign States. For example, it would be useful to clarify the situation of alleged offenders who already have been the subject of genuine investigation or other proceedings by their State of nationality. We note that it could be a source of international tension if persons who already were genuinely investigated or prosecuted for allegations of crimes against humanity by their State were the subject of duplicative or conflicting proceedings in another State. Recognizing that several delegations raised similar concerns during the April 2023 resumed session, the United States believes this issue, including as it concerns double jeopardy or *ne bis in idem*, would benefit from further consideration and discussion by States.

Cluster 4: International Measures (Arts. 13, 14, and 15 and Annex)

The fourth cluster encompasses Draft Article 13, which addresses extradition; Draft Article 14 and the related Annex, which address mutual legal assistance; and Draft Article 15, which addresses dispute settlement.

With respect to Draft Articles 13 and 14, the United States notes that cooperation between States for the purpose of extradition and mutual legal assistance in cases involving crimes against humanity is critical to international efforts to prevent and punish such crimes. As history has shown, crimes against humanity rarely respect international borders. Draft Articles 13 and 14,

accordingly, play an important role in the overall structure of the Draft Articles and the critical twin goals of effective prevention and punishment.

We also note that there are widely ratified instruments, such as the United Nations Convention against Corruption (UNCAC) and the United Nations Convention against Transnational Organized Crime (UNTOC), that address extradition and mutual legal assistance with respect to specific crimes. In general, the United States believes that it would be beneficial for any future convention on crimes against humanity to closely follow those provisions, recognizing many States are familiar with them. With respect to Draft Article 15, and particularly paragraph 2, we recognize the important role that the International Court of Justice could play in settling disputes concerning the interpretation or application of any future convention on the prevention and punishment of crimes against humanity. At the same time, we welcome the inclusion in paragraph 3 of a process by which States could declare that they do not consider themselves bound by paragraph 2. In this regard, we note that conventions under which States may make reservations to or otherwise opt out of the Court's jurisdiction, such as the Genocide Convention and the CAT, are more likely to be widely ratified by States.

The United States also noted the suggestion from some delegations during the April 2023 resumed session that a treaty body could be established to monitor implementation of States' obligations under any future convention on crimes against humanity. We recognize the important role that treaty bodies have played in monitoring the implementation of State Parties' obligations under various human rights treaties, including, for instance, the International Covenant on Civil and Political Rights (ICCPR) and the CAT.

With respect to the Annex, we continue to believe that paragraph 2 could benefit from streamlining. This could include deleting the second, fourth, and sixth sentences, which are drawn from UNCAC and UNTOC but are seemingly extraneous in this context. It could also include deleting the seventh sentence, recognizing that one of the purposes of the Draft Articles would be to bypass the *ad hoc* diplomatic process for requesting legal assistance, which can be cumbersome and time consuming, and note that the reference to INTERPOL is unnecessary if the purpose of the Draft Articles is to encourage working through central authorities in each State.

Cluster 5: Safeguards (Arts. 5, 11, and 12)

The fifth cluster encompasses Draft Article 5, which contemplates an absolute prohibition on refoulement; Draft Article 11, which addresses fair treatment of offenders; and Draft Article 12, which sets forth rights and obligations regarding victims and witnesses, including with respect to reparations.

With regards to Draft Article 5, the United States recognizes the important role that the principle of non-refoulement plays in protecting individuals from certain acts prohibited under international law. The non-refoulement provisions of the 1951 Convention Relating to the Status of Refugees (the Refugee Convention), its 1967 Protocol, and the CAT, for example, are critical

to ensuring that individuals around the world are protected from return to countries where they face persecution or torture. We note that many of these individuals would receive complementary protection under Draft Article 5.

At the same time, we are cognizant of the fact that some States have faced challenges in implementing their non-refoulement obligations under other treaties and recognize that several delegations raised questions and concerns about Draft Article 5 during the April 2023 resumed session. We also note that widely ratified conventions have framed non-refoulement obligations in different ways. The Refugee Convention and its Protocol, for instance, generally exclude from protection individuals who have committed particularly serious crimes, including crimes against humanity, and individuals who pose a danger to the security of the country they are in. The CAT, by contrast, recognizes no exceptions to the obligation of non-refoulement. Accordingly, we think the non-refoulement obligation contemplated by Draft Article 5, and its potential scope, would be important issues for States to further consider in connection with any future convention on crimes against humanity.

Turning to Draft Article 11, the United States notes that it reflects an important principle recognized by the International Military Tribunal at Nuremberg: that any person charged with a crime under international law must be treated fairly during all stages of the proceedings. This principle is reflected in other instruments, such as the ICCPR, the CAT, and the 1949 Geneva Conventions. In our view, references to fair trial guarantees would be an important element of any future convention on crimes against humanity.

Nevertheless, we note that Draft Article 11 could be clearer in several respects. For instance, Draft Article 11, paragraph 1, would require States to guarantee the “full protection” of the offender’s “rights under applicable national and international law, including human rights law and international humanitarian law,” but it does not specify which rights under international human rights law and international humanitarian law are contemplated. We note that this issue generated a robust discussion during the April 2023 resumed session. Given that, the United States believes there would be value in States further considering whether Draft Article 11 could be more effective if it specified which rights under applicable national or international law it encompasses.

We also share the concerns expressed by several other delegations in the April 2023 resumed session that Draft Article 11(2), which addresses communication between a detainee and representatives of their State of nationality, does not precisely follow the language used in Article 36 of the Vienna Convention on Consular Relations, and instead alters the formulation in ways that deviate from Article 36. Moreover, we reiterate that the “rights” of consular notification and access described in Article 36 of the Vienna Convention on Consular Relations belong to States, not individuals, and, as such, they are not enforceable by private individuals. We also believe the novel language on stateless persons in Draft Article 11(2)(a) would benefit from further consideration and discussion by States. Moreover, Draft Article 11(2)’s application in circumstances of armed conflict should also be considered, because such visits to persons covered by the Third or Fourth Geneva Conventions typically would be performed by the

Protecting Power or the International Committee of the Red Cross, rather than representatives of the opposing belligerent State.

With respect to Draft Article 12, the United States welcomes its focus on the rights of victims, their relatives and representatives, and witnesses, who play a key role in proceedings relating to crimes against humanity. Ensuring that they are heard, not subjected to retaliation, and able to obtain redress, as appropriate, is critical to holding those responsible for crimes against humanity accountable and providing victims and their families with some measure of justice. Draft Article 12 is an important step in that regard.

Nonetheless, we believe that Draft Article 12 lacks clarity in certain respects, including with respect to the scope of the “right to complain” contemplated by Draft Article 12(1) and the “right to obtain reparation” contemplated by Draft Article 12(3). Recognizing that States may address these and other issues relating to remedies in their domestic legal systems in a range of different ways—and that provisions of widely ratified treaties, such as the CAT, could serve as useful models in that regard—the United States believes that Draft Article 12 warrants further consideration and discussion by States.

The ILC’s Recommendation

The United States believes that a convention on crimes against humanity could play an important role in strengthening international efforts to prevent and punish such crimes and views the Draft Articles as an important step in that regard. Recognizing the importance of the process established by resolution 77/249, the United States remains focused on sharing its views on the content of the Draft Articles and hearing the views of other Member States. To that end, the United States was pleased to participate in the first resumed session in April 2023 and looks forward to reviewing the written comments and observations on the Draft Articles by other Member States. We also look forward to next year’s resumed session, during which we hope the robust exchange of views between States will continue. As the United States has previously noted, we do not believe this process should prejudice the decision the Sixth Committee will make next fall on the Commission’s recommendation.

The United States welcomes the opportunity to provide these written comments and observations on the Draft Articles and the recommendation of the Commission for the elaboration of a convention by the UN General Assembly or an international conference of plenipotentiaries on the basis of the Draft Articles.