



# **BRIEFING PAPER**

# **ASIAN STATES' POSITION ON THE DRAFT CRIMES AGAINST HUMANITY CONVENTION**

**October 2023**

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# INTRODUCTION

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The International Law Commission (“ILC/Commission”) is a subsidiary body established by the UN in 1947 to assist the UN General Assembly (“UNGA”) in undertaking studies and making recommendations for the progressive development of international law and its codification (Article 13(1)(a), UN Charter). In 2013, the ILC added crimes against humanity (“CAH”) to its long-term program of work with the aim of preparing a set of draft articles to form the basis of an international convention. In 2014, the official work on CAH began with the appointment of Prof. Sean D. Murphy as Special Rapporteur.

Following the production of three reports by the Special Rapporteur (2015, 2016, 2017), the Commission adopted the Draft Articles on Prevention and Punishment of Crimes Against Humanity (“Draft Articles”) in 2019. In furtherance of its mandate under its Statute (Articles 16(j) and 22), the ILC submitted the final set of Draft Articles along with their commentary to the UN General Assembly recommending the elaboration of a convention either at the UNGA or an international conference of plenipotentiaries (paragraph 42).

# WHAT HAS HAPPENED SO FAR?

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Pursuant to the recommendations of the ILC, the Draft Articles were taken up by the Sixth Committee of the UNGA (“Committee”), which is the primary forum for the consideration of legal questions in the General Assembly. The Committee plays a significant role in either accepting or rejecting recommendations made by the ILC and whether to propose it for the consideration of the UNGA. In other words, the General Assembly decides whether to accept recommendations of the ILC based on the Sixth Committee’s decision. The UNGA also takes a call on the process for elaboration of an international convention.

At the Sixth Committee, there has not been much movement on the Draft Articles. Since 2019, the Committee only ‘took note’ of the Draft Articles in their resolutions and passed it to General Assembly with a view to consider the treaty the subsequent year. The Committee also did not hold substantive discussions on the content of the Draft Articles. The lack of any concrete action on the Draft Articles is because of the failure of States to reach any consensus, especially since the Committee works based the tradition of action by consensus.

In November 2022, a cross-regional (Colombia, Costa Rica, The Gambia, Mexico, the Republic of Korea, the United Kingdom, and the United States) resolution co-sponsored by 86 States was adopted to break the procedural impasse.

The resolution established a two-year time frame and provided for two resumed sessions for a thorough and substantial discussion on the ILC Draft Articles in an ‘interactive format’. This format allowed ‘mini debates’ (state-to-state interaction on a point of law) as well as participation of civil society as observers at the Sixth Committee. The resolution was adopted by UNGA in December (Res. 77/249).

The first resumed session of the Sixth Committee took place from 10 to 14 April 2023. States exchanged substantive views on all aspects of the Draft Articles thematically divided across five clusters. The session also witnessed a briefing by the ILC secretariat on the Commission’s recommendations.

# WHAT ARE THE NEXT STEPS?

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The Draft Articles will be taken up by the UNGA in its regular session on **11 and 12 October 2023**.

The second resumed session of the Sixth Committee will take place from **1- 5 and 11 April 2024** where the Draft Articles will be considered once again by the States. Consequently, a written summary of the deliberations will be prepared by the Committee.

States are invited to submit their position on the Draft Articles by **1 December 2023**. The inputs received from States shall be shared in a compilation with the Sixth Committee by the UN Secretary-General before the 2024 Sixth Committee session.

Based on the discussions at the two resumed sessions and the inputs received from States, the members will decide on the next steps in the 79th session of the Sixth Committee in October/November 2024. The decision of the Committee on the recommendation of the Commission will be without prejudice to the question of their future adoption or other appropriate action.

# WHY DO WE NEED A NEW SPECIALISED CONVENTION?

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Crimes against humanity are not new – international criminal responsibility for these crimes was first established under the Nuremberg trials and have been incorporated in the statutes of contemporary international tribunals, including the Rome Statute for the International Criminal Court (ICC). However, unlike other crimes under international law, crimes against humanity have not been the subject of a specialized Convention setting out the full obligations of States. For example, the four Geneva Conventions of 1949 and Additional Protocol I of 1977 set out a regime of grave breaches constituting war crimes. The 1948 Genocide Convention was established to criminalise and prevent the crime of genocide.

Underlying acts that constitute crimes against humanity include, but are not limited to, the crimes against humanity of murder, deportation or forcible transfer of a population, torture, enforced disappearance, and other inhumane acts. CAH, unlike war crimes, can be committed during peacetime as well as armed conflict. But any act would only be considered a crimes against humanity if it is directed towards a civilian population and is committed with the knowledge of such an attack (Draft Article 2; Article 7 of the Rome Statute). To know more about crimes against humanity, check Asia Justice Coalition's [primer here](#).

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Building on well-accepted existing multilateral treaties (Convention Against Torture, Convention Against Corruption, Convention Against Transnational Organised Crime), the ILC Draft Articles reflect the codification and progressive development of international law.

While a few of the individual acts of crimes against humanity are criminalised under different international treaties like torture, apartheid etc, there is no comprehensive global treaty that binds States, including non-Rome Statute States to punish crimes under domestic law. Having said that, many States – both Rome Statute States (like, Canada, France, Republic of Korea) and non-Rome Statute States (The Philippines, Indonesia) have domesticated and criminalized crimes against humanity.

The Draft Articles however bridge the mentioned impunity gap by addressing state responsibility for crimes against humanity. In comparison, the ICC provides for individual criminal responsibility for crimes against humanity. The Draft Articles facilitate inter-state cooperation; this horizontal cooperation, including extradition and mutual legal assistance is absent within the Rome Statute framework. In other words, the Rome Statute facilitates a ‘vertical relationship’ between the ICC and Member States, whereas the proposed CAH Convention allows for a ‘horizontal relationship’ amongst States.

Much like the Genocide Convention, the Draft Articles explicitly call upon States to not just punish crimes against humanity but also prevent the commission of the crime in the first place. Check Asia Justice Coalition’s [primer on genocide here](#).



In particular, the Draft Articles strengthens inter-State cooperation by enabling states to develop national capacity to investigate and prosecute crimes against humanity before their national courts, and consequently could bolster national capacity. In doing so, the Draft Articles respect the principle of sovereignty by recognising the primary responsibility of States to criminalise and punish crimes against humanity, as well as provide national ownership over the criminal proceedings.

# WHAT IS THE POSITION OF ASIAN STATES?

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More recently, States, including those from Asia, have engaged, deliberated, and debated on the substance of the Draft Articles. In the recently concluded resumed session (April 2023), States exchanged views on the content of the Draft Articles, most of which were largely positive.

Afghanistan, Bangladesh, South Korea, Moldova, and Mauritius (all Rome Statute members, too) are the core supporters of the Draft Articles and co-sponsors of the November 2022 resolution calling for the resumed sessions.

The Philippines, Singapore, Japan, and Indonesia see the value of a future CAH Convention and welcome the movement on the Draft Articles. Sri Lanka and Japan appreciated the work of the ILC and called for more discussion. China and India engaged in the discussions in good faith to better the content of the Draft Articles but expressed their opposition to the passage of a Convention.

**Bangladesh** is one of the strongest supporters of the Draft Articles from the region. Recalling its history, experience and lessons from the 1971 war, it reiterated the importance of an obligation to prevent and punish to secure justice and accountability and called for strengthened international cooperation to ensure that the perpetrators of such crimes don't go scot-free.

**The Republic of Korea** welcomed the Draft Articles to prevent and punish crimes against humanity and expressed its support for a Convention providing an opportunity to forge stronger inter-State cooperation in matters of extradition and mutual legal assistance. Korea defended the transfer of the Rome Statute definition in the Draft Articles to prevent fragmentation of international law. Korea also backed the provisions on extradition and mutual legal assistance; it called for a detailed sub-clause concerning the grounds for refusal of extradition.

**The Philippines** expressed its support for the definition as well as the dual obligation of prevention and punishment of crimes against humanity (Draft Articles 2, 3 and 4). The Philippines also reiterated the obligation of each State, as enshrined in the Draft Articles, to exercise its national jurisdiction to hold perpetrators of most serious crimes to account. The Philippines supported the criminalisation of CAH and the exercise of jurisdiction under domestic law thereof (Draft Articles 6 and 7). In doing so, the Philippines called for a deeper examination of the Draft Articles to mitigate any risk of politicisation of human rights and state sovereignty.

**Indonesia**, much like the Philippines, supported the inclusion of the definition of crimes against humanity from the Rome Statute and the ‘without prejudice clause’ (Draft Article 2(3)) that allows each State to adopt the definition as per their own national legal systems. Indonesia further appreciated the addition of the obligation to prevent within the Draft Articles (Draft Article 4) but called for more clarity in the language of the provision (‘or appropriate measures’) to avoid conflict concerning state responsibility under international law. It also highlighted the divergence of views in relation to the Draft Articles and called for building consensus.

**Singapore** welcomed the Draft Articles and its commentaries. In absolute terms, Singapore called for the freedom of States to award punishments according to one’s national law which might include the death penalty. Along with the Philippines and China, Singapore demanded legal certainty on the question of immunities under international law for those in official positions. Similarly, Singapore and China objected to the inclusion of ‘moral damages’ as reparations to victims of crimes against humanity under Draft Article 12(3).

**Sri Lanka** expressed its concern about the improper and extensive use of international jurisdiction to combat crimes against humanity. It called for the inclusion of aggression as a crime against humanity, and to balance the flexibility accorded to the State under Draft Article 2 to amend the national definition to ensure non-arbitrary application of law.

**India** categorically opposed the Draft Articles and questioned the ‘rushed movement’ to adopt a new Convention. According to India, there exist multiple international instruments governing crimes against humanity, including the Rome Statute, and therefore, no utility in considering yet another one.

Much like China, India, being a non-State Party, raised alarm at drawing references from the Rome Statute. Further, India, China, and Singapore highlighted the possibility of conflict of jurisdiction under Draft Article 7 and called for the primacy of the territorial state (where the offence is committed) to exercise of jurisdiction. India considers the obligation of non-refoulement under Draft Article 5 would violate bilateral treaties concerning extradition and mutual legal assistance. Lastly, India also repeated its long-standing demand to include nuclear weapons and terrorism as distinct crimes under the definition of crimes against humanity.

**China** called for an explicit reference to non-interference and state sovereignty as the guiding principles in the Preambular paragraph 3. It questioned the transplantation of the definition of CAH under Draft Article 2 from the Rome Statute. According to China, the Rome Statute definition doesn't form part of customary international law and there exists divergence in the definition even with the domestic laws of Rome Statute members. Similarly, China doesn't see any value in including apartheid, torture, and enforced disappearances as distinct crimes when separate specialised conventions exist under international law. For China, criminalisation of underlying acts that constitute CAH under domestic law suffice; the title and punishment of such crimes are irrelevant to fighting impunity.

In the absence of a corresponding provision in the Genocide or Torture Convention, China calls for an explicit reference that States do not commit crimes against humanity. Additionally, China called for careful consideration of the *aut dedere aut judicare* obligation (Draft Article 10) to ensure no exercise of universal jurisdiction. It also demanded the removal of grounds to refuse extradition, namely culture, membership to a particular social group, and other grounds' under Draft Article 13(11).

Based on the substantive discussion held during the First Resumed Session, it is welcoming to see Asian States supporting movement on the ILC Draft Articles. Barring China and India, States in the region see merit in adopting a Convention on Crimes Against Humanity. It is so because States understand that the commission of atrocity crimes not only violates international law but also exacerbates international and regional instability.

# RECOMMENDATIONS

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States should recommend that the General Assembly elaborate a convention under the aegis of the UN based on the ILC Draft Articles. The commitment to rule of law is weakened if impunity remains unabated. In fact, such an elaboration would align with the objectives and goals of the UN Charter – maintenance of peace and security.

It is therefore important that all States support the movement of Draft Articles in the Sixth Committee in 2024. If States have further proposals and amendments to make the Draft Articles better, they should recommend holding a diplomatic conference to negotiate a widely accepted CAH Convention. Meanwhile, States should submit their comments on the Draft Articles by December 2023 and contribute to the development of international law.

# TIMELINE

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DATE	ACTIVITY
<b>30 December 2022</b>	Adoption of the resolution 77/249 entitled “Crimes against humanity” ( <u>A/C.6/77/L.4</u> )
<b>10 – 14 April 2023</b>	First Resumed Session, Sixth Committee, UNGA
<b>11 and 12 October 2023</b>	Sixth Committee debate on CAH during the 78th session ( <u>provisional work programme</u> )
<b>1 December 2023</b>	Deadline for States to <u>submit written comments and observations</u> on ILC Draft Articles and the recommendations of the ILC.
<b>1 – 5 and 11 April 2024</b>	Second Resumed Session, Sixth Committee, UNGA
<b>October/November 2024</b>	Sixth Committee debate on CAH during the 79th session and a resolution on the next steps.



# RELEVANT RESOURCES

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- Statute of the International Law Commission (1947), [available here](#).
- ILC's Draft Articles on Crimes against Humanity and commentaries, [available here](#).
- Comments and observations by Governments, international organisations, and others (2019) – [available here](#), [here](#), and [here](#).
- UN General Assembly Resolution 77/249 on Crimes Against Humanity, 30 December 2022, [available here](#).
- Briefing on the recommendation adopted by the International Law Commission on the occasion of the adoption of the draft articles on prevention and punishment of crimes against humanity, [available here](#).
- Summaries of meetings of the Sixth Committee during the First Resumed Session (10 – 14 April 2023), [available here](#).
- Statements made in Sixth Committee in the 77th UNGA, [available here](#).
- Statements made in Sixth Committee in the 76th UNGA, [available here](#).
- Statements made in Sixth Committee in the 75th UNGA, [available here](#).
- Statements made in Sixth Committee in the 74th UNGA, [available here](#).
- Asia Justice Coalition and International Commission of Jurists' webinar on 'Crimes Against Humanity Convention at the UNGA Sixth Committee: The Potential and Relevance for Asia', [available here](#).

# ABOUT THE ASIA JUSTICE COALITION

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Founded in 2018, the Asia Justice Coalition's purpose is to improve the legal landscape in Asia to ensure justice and accountability for gross violations of international human rights law and serious violations of international humanitarian law. The Coalition operates through collaboration, resource-sharing, and coordinating efforts between local and international civil society organizations working in the region. Its work is accomplished by undertaking joint activities relating to justice and accountability and engaging in collective advocacy.

## **DISCLAIMER**

**This paper shall be attributed to the Asia Justice Coalition secretariat; its contents may not necessarily reflect the position of a specific Member and/or all Members of this Coalition.**



**[www.asiajusticecoalition.org](http://www.asiajusticecoalition.org)**