

# An Analysis of State Reactions to the ILC's Work on Crimes Against Humanity

## A Pattern of Growing Support

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### Abstract

*The international community has been engaged with the topic of crimes against humanity since the International Law Commission (ILC) began work on it in 2013, with a view to draft articles for a future convention. Between 2013 and 2019, 86 States as well as several entities and subregional groups made comments on the ILC's work at the United Nations Sixth Committee or through written comments to the ILC. This article is the culmination of the Whitney R. Harris World Law Institute's work cataloguing and analysing States' comments by assigning each statement to one of five categories – strong positive, positive, neutral, negative, and strong negative – examining both specific words and the general tenor of the comments. This article analyses the development of States' reactions to the ILC's work over time, as well as specific issues that frequently arose, observing that there is a pattern of growing support from States to use the ILC's Draft Articles on Prevention and Punishment of Crimes Against Humanity as the basis for a new convention.*

**Keywords:** crimes against humanity, Sixth Committee, International Law Commission, Draft Articles, International Criminal Court.

### 1 Introduction

Ever since the Crimes Against Humanity Initiative published its proposed draft treaty in 2010,<sup>1</sup> there has been an increasingly robust discussion within the

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1 The work of the *Crimes Against Humanity Initiative* is described in L.N. Sadat (Ed.), *Forging a Convention for Crimes Against Humanity*, 2nd ed., Cambridge, Cambridge University Press, 2013. The Initiative published a *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity* in English and French in August 2010, available at <http://sites.law.wustl.edu/WashULaw/crimesagainsthumanity/convention-text/>. *The Proposed Convention* is now available in Arabic, Chinese, German, Portuguese, Spanish and Russian. *Id.*

United Nations (UN) about the possibility of a new global convention on crimes against humanity. The UN Sixth (Legal) Committee began to formally engage with the topic after the International Law Commission (ILC) added “crimes against humanity” to its long-term programme of work in 2013.<sup>2</sup> While many States were initially cautious or even sceptical of the need for a new treaty, as this article shows, support for the idea grew with each successive report of the ILC introducing new draft articles and commentaries.<sup>3</sup> By 2017, when the First Reading of a complete set of Draft Articles was submitted to the Sixth Committee, only four out of fifty-five States – China, India, Iran, and Sudan – offered negative views.

This trend continued as the ILC received comments on the first set of Draft Articles, revised them, and finalized its work. In December 2018, the ILC received a record number of comments (approximately 750), including from thirty-nine States, on the first Draft,<sup>4</sup> which were largely positive. These are summarized in Table 2 and discussed in Part 3. The ILC revised the Draft Articles in 2019, taking into account the comments received, and on 5 August 2019, transmitted a final set of Draft Articles on Prevention and Punishment of Crimes Against Humanity to the UN General Assembly. The 2019 Report “recommended the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles”.<sup>5</sup> During the Sixth Committee debate that took place in October and November 2019, more than eighty States and entities<sup>6</sup> commented or joined a statement on the revised text. A significant majority advocated for moving forward with a treaty. Only three States – China, India, and Vietnam – demurred. This generally positive trend suggests that more than 75 years after crimes against humanity were defined in the London Charter and prosecuted at Nuremberg, a new treaty on their prevention and punishment might be within reach.<sup>7</sup>

2 L.N. Sadat, ‘A Contextual and Historical Analysis of the International Law Commission’s 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity’, *Journal of International Criminal Law*, Vol. 16, No. 4, 2018, pp. 683-704.

3 Whitney R. Harris World Law Institute, *Compilation of Government Reactions to the UN International Law Commission’s Project on Crimes Against Humanity During UN Sixth Committee Meetings: 68th Session (2013) – 74th Session (2019)*, available at: <https://law.wustl.edu/wp-content/uploads/2020/08/Compilation-of-6th-Committee-Responses-to-CAH-2013-2019.pdf>.

4 In comparison, the ILC received 20 submissions from 24 States on the Draft Code of Crimes Against the Peace and Security of Mankind in 1993 (Denmark, Finland, Iceland, Norway, and Sweden jointly submit observations). *Yearbook of the International Law Commission*, Vol. II (Part One) (1993), at 59. In 1994, the Working Group on a draft statute for an international criminal court received 27 submissions from 31 States. *Yearbook of the International Law Commission*, Vol. II (Part One) (1994), at 21.

5 Int’l Law Comm’n, *Report on the Work of Its Seventy-First Session*, U.N. Doc. A/74/10 (2019), at p. 10, Para. 42.

6 This Article defines entity as any non-Member State, entity, or organization which has received a standing invitation to participate as observers in the sessions and work of the General Assembly as listed in U.N. Doc. A/INF/74/3. This includes the Council of Europe, the European Union, and the Holy See.

7 M.C. Bassiouni, ‘Crimes Against Humanity: The Need for a Specialized Convention’, *Columbia Journal of Transnational Law*, Vol. 31, 1994, pp. 457-494.

This article summarizes the work of the Whitney R. Harris World Law Institute over the past few years cataloguing and analysing State responses to the ILC's work on crimes against humanity at the UN Sixth Committee meetings from the 68th Session in 2013 to the 74th Session in 2019. In addition to attending ILC and Sixth Committee meetings in person, we have read each government statement submitted, as well as comments submitted by experts, NGOs, international organizations, and UN Non-Member State observers. For the period 2013-2017, we assigned each Sixth Committee statement to one of five categories – strong positive, positive, neutral, negative, and strong negative<sup>8</sup> – examining both specific words and the general tenor of the comments. Responses from 2013-2017 are summarized in Table 1. We separately coded written statements sent directly to the ILC on the Draft Articles in 2018, as shown in Table 2 and as explored in Section 3. We also tracked specific issues that frequently arose, including the relationship of the ILC's work to the Rome Statute, the need (or not) for a new convention, and the relationship of the ILC's work on crimes against humanity to the Mutual Legal Assistance (MLA) Initiative.

Following the revision of the Draft Articles and the submission of its final Report and Second Reading to the Sixth Committee in 2019, we evaluated States' reactions to the ILC's final draft. These findings are set forth in Table 3. Because States at this time had a new 'choice' before them – to support (or not) the text becoming a new treaty – their reactions are categorized slightly differently than in the early years of the project. Several conclusions emerge from our study.

First, concerns that the proposed new treaty was either superfluous or could interfere with the Rome Statute declined significantly over time. Second, States generally became more supportive of the ILC's work and the goal of establishing a new convention as the work progressed, regardless of whether they began as positive, neutral, or negative towards the project at its inception. Indeed, most States expressing doubts about the project at the outset later became strong supporters of a new treaty. Whether that is because States became more familiar with the project over time or because they felt the ILC was addressing their concerns or some combination of these and other reasons, it is clear that the consensus moved in a positive direction.

Second, the few States that remained opposed to a new treaty on the prevention and punishment of crimes against humanity are not Parties to the Rome

8 Statements were coded according to the following guidelines: Strong Positive: emphatic yes – keywords include “strong support”; “strong consideration”; “vital/critical importance”. Positive: qualified yes, may offer some suggestions for improvement – keywords include “welcomes”; “supports”; “commends”; “committed to”. Neutral: does not take a position, may support another project – keywords include “offers congratulations”; “noting”; “noting with interest”; “stress need for study”. Negative: querying the project as a whole or in part – keywords include “queries”; “takes issue with”; “doubts”; “concerned”. Strong Negative: emphatic rejection – keywords include “no need”; “doesn't meet criteria”; “bad idea”; “rejects”. In close cases or those where a State's comments seem to fall into multiple categories, we tended to code the comment as neutral, unless there were compelling reasons to assign it a different code.

Statute and have opted out of several other human rights treaty regimes,<sup>9</sup> including the International Criminal Court (ICC) Statute. This suggests a possible correlation between a State's ratification of the Rome Statute – and acceptance of crimes against humanity as an international crime – and support for the ILC's work on crimes against humanity. It may also presage the constellation of States likely to quickly ratify a new convention on crimes against humanity as those States that are Parties to the Rome Statute, with States sitting 'on the fence' likely to take more time to come on board.

Finally, we note in the conclusion that many States have not yet opined regarding the Draft Articles on Prevention and Punishment of Crimes against Humanity, and that the existence of a parallel project on Mutual Legal Assistance may create some confusion on the part of States that could slow acceptance of the ILC's work. Nonetheless, reading the statements of governments over the past seven years makes clear that the ILC's assiduous and transparent efforts, combined with support from civil society, encouraged States to view the Draft Articles positively, a perspective that grew with time.

## 2 State Responses at the Sixth Committee (2013-2017)

A total of 182 comments on the ILC's work on crimes against humanity were delivered by sixty-four States and entities at the Sixth Committee between 2013 and 2017. This includes statements delivered on behalf of the Caribbean Community and Common Market (CARICOM), the Community of Latin American and Caribbean States (CELAC), and the Nordic countries.<sup>10</sup> The overwhelming majority of statements – 65% – were positive, 24% were neutral, and only 11% were negative.

9 For example, neither China, India, nor Vietnam are Party to the Rome Statute, the Convention for the Protection of All Persons from Enforced Disappearance, or the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Moreover, India is not a Party to the Torture Convention and China is not a Party to the International Covenant on Civil and Political Rights.

10 Although this article indicates when statements are made by an individual country on behalf of a larger group, we count each statement only once, even if it was delivered 'on behalf of' a regional group. Counting each country within these groups individually would skew the data, particularly with the larger regional groups like CELAC (thirty-two countries) or the Africa Group (54 countries). Whereas the Nordic countries (5 countries) rotated which State spoke each year and had a consistent viewpoint throughout, only one statement was delivered on behalf of the Africa Group and CARICOM, and CELAC States often delivered individual statements with a different view than that presented in the regional statement, making it difficult to impute the stance in that statement to each individual country. The only exception to this manner of counting is Austria's 2019 statement on behalf of 42 other States, because participation in that joint statement was a clear indication of that country's position, and not by default of being a part of a regional grouping.

**Table 1** Summary of State and Entity Responses (2013-2017)<sup>11</sup>

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

### 2.1 Reactions at the 68th Session of the UN Sixth Committee (2013)

The ILC added the elaboration of a treaty on “crimes against humanity” to its long-term work programme in 2013. It emphasized how a new treaty would complement the Rome Statute and identified four key elements of a new convention: a definition tracking Article 7 of the ICC Statute; a State obligation to criminalize crimes against humanity in their domestic legal systems; robust interstate cooperation procedures; and a clear obligation to prosecute or extradite offenders.<sup>12</sup>

At the 68th Session of the UN Sixth Committee later that year, twenty-four States commented on the ILC’s decision. Ten States – Austria, Chile, Czech Republic, Italy, Japan, Norway (on behalf of the Nordic Countries), Peru, Poland, Thailand, and the United States – representing 42% of the comments made, responded favourably and welcomed the ILC’s decision. For example, Slovenia stated that “all efforts should be directed at filling this gap”<sup>13</sup> in international law. Norway (on behalf of the Nordic countries) stated that the topic “addresses a pressing concern of the international community as a whole”.<sup>14</sup> Austria observed that despite the Rome Statute, many States still lack domestic legislation to prosecute crimes against humanity, which “engenders a lack of cooperation among states in this area”.<sup>15</sup> The United States, noting the global prevalence of crimes against humanity, stated that “careful consideration and discussion of draft articles for a convention” could “be valuable”.<sup>16</sup>

Nine States – China, Cuba (representing CELAC), India, Malaysia, Mongolia, Romania, Slovenia, Spain and the United Kingdom – representing approximately 38% of those commenting, were neutral, expressing neither a positive nor negative view of the project. Mongolia, for example, supported inclusion of the project

11 Whitney R. Harris World Law Institute, *supra* note 3.

12 Int’l Law Comm’n, *Report on the Work of Its Sixty-Fifth Session*, U.N. Doc. A/68/10 (2013), Ann. B.

13 Statement by B. Mahnič, 68th Session of the General Assembly, Sixth Committee, under agenda item 81, at 8 (30 October 2013).

14 Statement by R.E. Fife, 68th Session of the General Assembly, Sixth Committee, under agenda item 81, at 4 (28 October 2013).

15 Statement by G. Schusterschitz, 68th Session of the General Assembly, Sixth Committee, under agenda item 81, at 5 (28 October 2013).

16 Statement by M. McLeod, 68th Session of the General Assembly, Sixth Committee, under agenda item 81, at 4 (28 October 2013).

in the long-term programme of work, and Cuba took note of the decision.<sup>17</sup> China suggested that “taking into consideration the complexity and sensitivity of [the] topic”, it should be dealt with in a “prudent manner”.<sup>18</sup> India and the United Kingdom stressed the need for “in-depth study and further discussion”.<sup>19</sup> Romania did not comment on the possible need for a treaty or not, but stated that “more consideration is needed on the proposed outcome” of the project “in view of other initiatives related to this matter”.<sup>20</sup>

Five, or slightly more than 20% of States commenting – France, Iran, the Netherlands, Russia, and South Africa – questioned the need for a new treaty, arguing in large part that a sufficient framework for the prevention and punishment of crimes against humanity was already provided for by the Rome Statute and other international instruments. France, for example, stated that “it seems preferable to encourage universalisation of the Rome Statute and the effectiveness of existing norms”,<sup>21</sup> whereas Iran stated that it “does not seem that [...] there is a legal loophole to be filled through the adoption of a new international instrument”.<sup>22</sup> To that end, the Netherlands argued that “it is not the definition of the crime that is missing, but the operational tools to ensure prosecution” and therefore supported “an international instrument on mutual legal cooperation covering all the major international crimes” rather than a treaty specific to crimes against humanity.<sup>23</sup>

- 17 Statement by Amb. O. Od, 68th Session of the General Assembly, Sixth Committee, under agenda item 81, at 3 (30 October 2013) (Mongolia); Statement by T.D. Lao, 68th Session of the General Assembly, Sixth Committee, under agenda item 81, at 3 (28 October 2013) (Cuba, on behalf of CELAC).
- 18 Statement by H. Huikang, 68th Session of the General Assembly, Sixth Committee, under agenda item 81, at 5 (30 October 2013) (China) (noting “the complexity and sensitivity of this topic”).
- 19 Statement by N. Chadha, 68th Session of the General Assembly, Sixth Committee, under agenda item 81, at 3 (29 October 2013) (India); Statement by J. Clarke, 68th Session of the General Assembly, Sixth Committee, under agenda item 81, at 4 (29 October 2013) (United Kingdom).
- 20 Statement by A. Orosan, 68th Session of the General Assembly, Sixth Committee, under agenda item 81, at 5 (29 October 2013).
- 21 Statement by E. Belliard, 68th Session of the General Assembly, Sixth Committee, under agenda item 81, at 2 (28 October 2013) (France).
- 22 Statement by D. Momtaz, 68th Session of the General Assembly, Sixth Committee, under agenda item 81, at 7 (5 November 2013) (Iran). *See also* Statement by M. Zabolotskaya, 68th Session of the General Assembly, Sixth Committee, under agenda item 81, at 6 (30 October 2013) (Russia) (stating that “customary international law gives sufficiently clear understanding of what is the crime against humanity” and as such “we should ask ourselves questions what the goal of elaborating a new document on crime against humanity is and how this document would be related to the existing norms of customary and treaty law”); Statement by T. Joyini, 68th Session of the General Assembly, Sixth Committee, under agenda item 81, at 5-7 (28 October 2013) (South Africa) (“that the gaps identified in the syllabus are not prevalent for all States, and in particular those States that are party to the Rome Statute”).
- 23 Statement by L. Lijnzaad, 68th Session of the General Assembly, Sixth Committee, under agenda item 81, at 9 (29 October 2013) (The Netherlands).

## 2.2 Reactions at the 69th Session of the UN Sixth Committee (2014)

Having received this cautious “green light” from governments and, subsequently, experts and civil society,<sup>24</sup> the ILC moved the topic of crimes against humanity to its active agenda in July 2014. Professor Sean Murphy was appointed as Special Rapporteur and charged with preparing a First Report to begin the process of proposing draft articles.

States responded to the ILC’s decision during the 69th Session of the Sixth Committee in October of that year, with twenty-seven comments delivered, including on behalf of the Nordic countries and CELAC. Support for the project increased about 10% over the prior year, with fourteen interventions (52%) welcoming the decision – Austria, Chile, Croatia, Czech Republic, Finland (on behalf of the Nordic countries), Israel, Italy, Japan, New Zealand, Poland, Republic of Korea, Spain, Trinidad and Tobago, and the United States. Croatia stated that it “fully supports endeavours aimed at developing a global international instrument for the prevention, prosecution and punishment of crimes against humanity, as well as cooperation between States in that regard”.<sup>25</sup> Japan stated that

the “fight against impunity” is one of the major goals to be pursued in the modern international society, and expects that this topic will greatly contribute to the development of the international criminal law.<sup>26</sup>

The Republic of Korea stated that “[t]he international community needs to send a clear message that perpetrators of crimes against humanity will be punished unequivocally”.<sup>27</sup> Israel stated that the “codification of crimes against humanity in a new treaty would be an important achievement for the international community”.<sup>28</sup> Trinidad and Tobago noted the importance of this work, and

24 L.N. Sadat & D.J. Pivnichny, ‘Fulfilling the Dictates of Public Conscience: Moving Forward with a Convention on Crimes Against Humanity’, Whitney R. Harris World Law Institute, 17 July 2014, available at: <http://sites.law.wustl.edu/docs/harris/Final-CAHGenevaReport-071714.pdf>.

25 Statement by S. Rogac, 69th Session of the General Assembly, Sixth Committee, under agenda item 78, at 1 (28 October 2014) (Croatia).

26 Statement by T. Hanami, 69th Session of the General Assembly, Sixth Committee, under agenda item 78, at 2 (28 October 2014) (Japan).

27 Statement by S. Han, 69th Session of the General Assembly, Sixth Committee, under agenda item 78, at 3 (29 October 2014) (Republic of Korea).

28 Statement by S. Weiss Ma’udi, 69th Session of the General Assembly, Sixth Committee, under agenda item 78, at 2 (28 October 2014) (Israel).

emphasized that “the project should not detract from but rather complement what is provided under the Rome Statute of the International Criminal Court”.<sup>29</sup>

As in the prior year, other States remained cautious. Ten were neutral – Australia, Costa Rica (representing CELAC), El Salvador, Ireland, Jamaica, Mongolia, Peru, Romania, South Africa, and the United Kingdom – representing 36% of comments made. South Africa, which the previous year had “reservations” (and was therefore coded as negative), again suggested that “there remains sufficient legal basis for the criminalisation of crimes against humanity in national law”, but also acknowledged that “there could be important advances made on this topic”.<sup>30</sup> Mongolia stressed the importance that the ILC's work be consistent with the Rome Statute, including the Article 7 definition.<sup>31</sup> Three statements were negative, including, again, France and the Netherlands, which both raised concerns related to the Rome Statute.<sup>32</sup> Malaysia argued that “in lieu of drafting a new Convention to address the inadequacy of resources for the prosecution of all perpetrators of crimes against humanity”, the ICC should be supported with additional resources.<sup>33</sup>

### 2.3 Reactions at the 70th Session of the UN Sixth Committee (2015)

The ILC began its substantive drafting work on new articles for a crimes against humanity treaty during its 67th Session in 2015.<sup>34</sup> The ILC provisionally adopted four Draft Articles and related commentaries, including the scope of the Draft Articles, the general obligation of States, the specific obligation of States to pre-

- 29 Statement by Amb. E. Charles, 69th Session of the General Assembly, Sixth Committee, under agenda item 78, at 2 (3 November 2014) (Trinidad and Tobago). *See also* Statement by A. Tiritico, 69th Session of the General Assembly, Sixth Committee, under agenda item 78, at 8 (29 October 2014) (Italy) (stressing that Art. 7 of the Rome Statute was “in no way under discussion” and that the ILC's focus “should be on mechanisms to fill any jurisdictional gaps and on the implementation at the national level of international norms relating to this category of crimes”); Statement by A. Reinisch, 69th Session of the General Assembly, Sixth Committee, under agenda item 78, at 1 (27 October 2014) (Austria) (“[T]he Commission and Special Rapporteur Sean Murphy should put emphasis on the need of cooperation and adequate domestic legislation rather than on the elaboration of new definitions of such crimes. New definitions [...] could only create problems for the pursuit of the goal of combating impunity.”).
- 30 Statement by A. Stemmet, 69th Session of the General Assembly, Sixth Committee, under agenda item 78, at 8 (27 October 2014) (South Africa).
- 31 Statement by O. Od, 69th Session of the General Assembly, Sixth Committee, under agenda item 78, at 1-2 (31 October 2014) (Mongolia).
- 32 Statement by F. Alabrune, 69th Session of the General Assembly, Sixth Committee, under agenda item 78, at 8 (28 October 2014) (France) (reiterating its doubts on the need for a new instrument and expressing concern that any new Convention would contradict the Rome Statute); Statement by L. Lijnzaad, 69th Session of the General Assembly, Sixth Committee, under agenda item 78, at 8 (27 October 2014) (The Netherlands) (arguing that “this issue is to a large extent already addressed in the Rome Statute”).
- 33 Statement by W.M.A. Wan Jantan, 69th Session of the General Assembly, Sixth Committee, under agenda item 78, at 7 (5 November 2014).
- 34 S. Murphy (Special Rapporteur on Crimes Against Humanity), *First Report on Crimes Against Humanity*, U.N. Doc. A/CN.4/680, 17 February 2015.



vent crimes against humanity, and the definition of the crime,<sup>35</sup> which essentially reproduced Article 7 of the Rome Statute, with the addition of a without prejudice clause.

During the 70th Session of the Sixth Committee, thirty-eight statements addressed the ILC's work on crimes against humanity. Perhaps because States could actually review a draft text, as opposed to a concept, more States commented than in the previous two years, and more of those commenting were favourable. Twenty-six States (69%) commented positively,<sup>36</sup> including many States weighing in for the first time, such as Germany, Mexico, Slovakia, Switzerland, and Indonesia. Spain stated that the "quality of the texts adopted up until now foretells a good final result".<sup>37</sup> Israel stated that it "would be honoured to contribute to the drafting process of the new proposed treaty".<sup>38</sup> Indonesia and Japan noted that this work would "create "horizontal relationships" among States and "regulate interstate cooperation", thereby strengthening the ability of the international community to prevent and punish these crimes.<sup>39</sup> States also noted the gravity and severity of crimes against humanity and the importance of holding perpetrators accountable for their commission. Hungary, for example, noted that "crimes against humanity are among the most serious crimes that threaten the international community as a whole".<sup>40</sup> Chile stated that the creation of a new treaty was "essential so that we do not again have to bemoan the fact that innocent people fall victim to the most abhorrent behaviour known to humanity".<sup>41</sup> China, which expressed uncertainty in 2013, stated that

[t]he punishment of crimes against humanity and other serious international crimes is a common goal of the international community and is our common interest. The discussion and codification of the topic by the Commission is therefore of great significance.

- 35 Int'l Law Comm'n, *Report on the Work of Its Sixty-Seventh Session*, U.N. Doc. A/70/10 (2015), at pp. 49-83.
- 36 Austria, Chile, China, Croatia, Czech Republic, El Salvador, Germany, Hungary, Indonesia, Israel, Italy, Japan, Malaysia, Mexico, New Zealand, Peru, Poland, Republic of Korea, the Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sweden (on behalf of the Nordic countries), Switzerland, and the United Kingdom.
- 37 Statement by J. Martín y Pérez de Nanclares, 70th Session of the General Assembly, Sixth Committee, under agenda item 83, at 4 (9 November 2015) (Spain).
- 38 Statement by S. Weiss Ma'udi, 70th Session of the General Assembly, Sixth Committee, under agenda item 83, at 3 (5 November 2015) (Israel).
- 39 Statement of T. Hanami, 70th Session of the General Assembly, Sixth Committee, under agenda item 83, at 3 (6 November 2015) (Japan); Statement by Amb. F. Adamhar, 70th Session of the General Assembly, Sixth Committee, under agenda item 83, at 5 (9 November 2015) (Indonesia).
- 40 Statement by R. Silek, 70th Session of the General Assembly, Sixth Committee, under agenda item 83, at 2 (6 November 2015) (Hungary).
- 41 Statement by C. Troncoso, 70th Session of the General Assembly, Sixth Committee, under agenda item 83, at 3 (6 November 2015) (Chile).

However, it also stressed that the Draft Articles should be based upon State practice, rather than that of international bodies.<sup>42</sup>

Eight comments were neutral – Ecuador (on behalf of CELAC), France, India, the Netherlands, Portugal, Romania, Turkey, and the United States. Many statements took note of the work, sought clarifications, or provided feedback. France, for example, which in the previous two years had doubted the need for a new instrument (and was therefore coded as strongly negative), thanked the Special Rapporteur and offered constructive recommendations on the content of the Draft Articles. India highlighted the need for “in depth study and thorough discussion” and stressed that the “proposed obligations should not conflict with the existing treaty obligations and it should not duplicate the existing regimes”.<sup>43</sup> Four States were negative, or strongly negative – Belarus, Greece, Iran, and Singapore. Although Singapore's tone was more neutral than that of the others, it recommended against “any pre-determined results” as “there may be other outcomes that are ultimately more appropriate” than a new convention.<sup>44</sup> Greece cautioned that “the risk of reopening [...] the consensus reached on the definition of the crimes against humanity, as contained in Article 7 of the Rome Statute, cannot be excluded” and that “such a convention may hamper efforts to achieve the universality of the Rome Statute”.<sup>45</sup> Iran considered that “there is sufficient legal basis as to the prevention and punishment of crimes against humanity” and that a new convention could lead to fragmentation.<sup>46</sup> Belarus suggested that the premature adoption of a new treaty might have “an opposite effect in terms of augmentation of the legal regime of the fight against the aforesaid serious crimes and their diverse manifestations covered by existent international treaties”.<sup>47</sup>

At a thematic level, States emphasized that the ILC's work should not interfere with that of the ICC and stressed the importance of consistency with the Rome Statute. At least seventeen States, including El Salvador, Germany, Republic of Korea, Mexico, Poland, Romania, Slovakia, and the United Kingdom, noted that the Special Rapporteur and his Draft Articles appear to agree with this

42 Statement by X. Hong, 70th Session of the General Assembly, Sixth Committee, under agenda item 83, at 2 (6 November 2015) (China).

43 Statement by R. Pathak, 70th Session of the General Assembly, Sixth Committee, under agenda item 83, at 2 (6 November 2015) (India).

44 Statement by P.K. Chau, 70th Session of the General Assembly, Sixth Committee, under agenda item 83, at 3-4 (4 November 2015) (Singapore).

45 Statement by M. Telalian, 70th Session of the General Assembly, Sixth Committee, under agenda item 83, at 2 (4 November 2015) (Greece).

46 Statement by R. Deghani, 70th Session of the General Assembly, Sixth Committee, under agenda item 83, at 3 (6 November 2015) (Iran).

47 Statement by A. Popkov, 70th Session of the General Assembly, Sixth Committee, under agenda item 83, at 4 (6 November 2015) (Belarus) (unofficial translation).

view.<sup>48</sup> Peru stated “it is important to note that these draft articles do not seek to replace this legal framework, but rather to complement it”.<sup>49</sup> Some States mentioned that they already had enacted, or were in the process of enacting, domestic legislation on crimes against humanity. Additionally, the Netherlands noted that “[i]t is of key importance [...] to ensure the connection between the relevant national judicial systems, so as to promote inter-State cooperation with respect to prosecution”.<sup>50</sup>

#### 2.4 Reactions at the 71st Session of the UN Sixth Committee (2016)

The ILC refined the first four Draft Articles during its 68th Session in 2016, taking into account the views expressed by States, and adopted an additional six articles. These addressed criminalization under national law, including the liability of legal persons; command and superior responsibility; the establishment of national jurisdiction; investigation; preliminary measures; the obligation *aut dedere aut iudicare*; and fair treatment of alleged offenders. The ILC’s 2016 Report thus contained ten Draft Articles with commentaries.

During the 71st Session of the Sixth Committee, thirty-eight States commented on the Draft Articles. As in the year before, twenty-six, or 69%, were positive or strongly positive.<sup>51</sup> The twenty-six positive comments included a statement on behalf of the Nordic countries, as well as statements from three governments that had not previously commented: Brazil, Egypt, and Vietnam.<sup>52</sup> Both Belarus and Greece welcomed the ILC’s progress, despite their concerns the year before, with Belarus stating that the ILC’s draft could “make a valuable contribution to

48 See, e.g., Statement by the Delegation of Switzerland, 70th Session of the General Assembly, Sixth Committee, under agenda item 83, at 3-4 (6 November 2015) (expressing hope that a future convention would enable national prosecutions and therefore “strengthen complementarity with the Rome Statute system”). See also comments by the Czech Republic, El Salvador, Germany, Hungary, Mexico, Poland, Republic of Korea, Romania, Slovakia, Slovenia, South Africa, Sweden (on behalf of the Nordic countries), and the United Kingdom. Whitney R. Harris World Law Institute, *supra* note 3.

49 Statement by the Delegation of Peru, 70th Session of the General Assembly, Sixth Committee, under agenda item 83, at 2 (6 November 2015) (unofficial translation).

50 Statement by L. Lijnzaad, 70th Session of the General Assembly, Sixth Committee, under agenda item 83, at 7-8 (4 November 2015) (The Netherlands).

51 Australia, Austria, Belarus, Brazil, Chile, Croatia, Cuba, Czech Republic, Egypt, El Salvador, France, Germany, Greece, Hungary, Iceland (on behalf of the Nordic countries), Israel, Mexico, Peru, Poland, Portugal, Romania, Slovakia, Slovenia, Switzerland, the United Kingdom, and Vietnam.

52 Statement by the Delegation of Brazil, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 1 (28 October 2016); Statement by Egypt, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 2 (26 October 2016); Statement by P.B. Viet, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 1 (29 October 2016) (Vietnam). Although Cuba had commented on behalf of CELAC in 2013 but not in its national capacity, in 2016, it commented directly. Statement by the Delegation of Cuba, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 1 (27 October 2016).

filling the legal gaps in this sphere".<sup>53</sup> Australia stated that the ILC's work would "contribute to our efforts to prevent and punish these crimes".<sup>54</sup> Brazil considered that the ILC's Draft Articles would facilitate "much-needed judicial cooperation",<sup>55</sup> and Germany stated that a future convention would "foster interstate cooperation regarding the investigation, prosecution and punishment of such criminal acts" and "provide further impetus to our mutual aspirations to end impunity for atrocity crimes".<sup>56</sup> Israel commented that the "effective codification of the customary crimes against humanity would benefit the entire international community and therefore welcomes the process in this regard".<sup>57</sup> Croatia stated that it "staunchly supports all efforts aimed at developing" a new global treaty on the prevention and punishment of crimes against humanity.<sup>58</sup> Slovakia repeated its assertion that

the decision to handle the topic with a vision to elaborate a convention on prevention and punishment of crimes against humanity from the very outset of the consideration of the topic, was the right and wise decision.<sup>59</sup>

As shown in Table 1, eight States – Argentina, Indonesia, Ireland, the Netherlands, Russia, Singapore, Spain, and the United States – representing 21% of the total, were neutral in 2016. Many statements we coded as 'neutral' recognized the complexity of the topic and the need for careful consideration. Spain, for example, "consider[ed] the new draft articles appropriate and balanced" but felt that "certain issues of enormous significance still need more in-depth analysis", including amnesty, military tribunals, and extradition issues.<sup>60</sup> The United States noted that "this topic's importance is matched by the complicated legal issues that it implicates" and stated that it was continuing to study the Draft Articles and develop its views.<sup>61</sup> Singapore, which expressed concerns the year before, was

53 Statement by M. Telalian, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 1 (28 October 2016) (Greece); Statement by Belarus, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 1 (26 October 2016).

54 Statement by M. Bliss, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 2 (28 October 2016) (Australia).

55 Statement by Brazil, 2016, *supra* note 52, at 1.

56 Statement by H.E. Amb. M. Koch, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 1 (25 October 2016) (Germany).

57 Statement by S. Reshef Mor, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 1 (27 October 2016) (Israel).

58 Statement by Amb. A. Metelko-Zgombić, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 1 (28 October 2016) (Croatia).

59 Statement by M. Špaček, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 2 (28 October 2016) (Slovakia).

60 Statement by J. Martín y Pérez de Nanclares, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 2 (28 October 2016) (Spain).

61 Statement by the United States of America, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 1 (28 October 2016).

decidedly neutral in its comments, stating that it was following the ILC's work on this topic "with great interest".<sup>62</sup>

Four interventions were negative: China, India, Malaysia, and Sudan. India and Malaysia suggested that existing international mechanisms and treaties, such as the Rome Statute, raised serious questions as to the need for a new multilateral treaty on crimes against humanity.<sup>63</sup> Departing from its earlier neutrality, China argued that States had not yet reached a consensus on the need for a new treaty and suggested that "the advisability of [the ILC's] working method is open to question".<sup>64</sup> Sudan criticized the legal precedents used in the ILC report – namely, the Nuremberg and Tokyo Tribunals and the ICC – as political and partisan.<sup>65</sup>

In terms of substantive comments, many States expressed appreciation that the ILC addressed their concerns regarding the project's relationship to the ICC and noted that the Draft Articles drew inspiration from, and were compatible with, the Rome Statute. Iceland (on behalf of the Nordic countries), for example, "endorse[d] the consideration of this topic as complementary to the Rome Statute".<sup>66</sup> El Salvador stated that

[a]lthough we know that the Rome Statute [...] made a decisive contribution to determining the characteristics of this type of crime, we believe that an instrument of general scope on crimes against humanity had been due for many years.<sup>67</sup>

62 Statement by N.Y. Morris-Sharma, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 1 (28 October 2016) (Singapore).

63 Statement by V.D. Sharma, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 1 (28 October 2016) (India); Statement by H. Ramly, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 2-3 (26 October 2016) (Malaysia) ("Bearing in mind that there are already various multilateral treaties which addresses crimes against humanity, for example, the Rome Statute, Malaysia wishes to reiterate its concern that it is premature to conclude that the time is ripe for the adoption of new international instrument on the issue of crimes against humanity."). It is worth noting that as of this writing, India has not joined the Rome Statute and Malaysia withdrew in 2019.

64 Statement by X. Hong, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 1 (28 October 2016) (China).

65 Statement by Amb. O.D.F. Mohamed, 71st Session of the General Assembly, Sixth Committee, under agenda item 78 at 2 (25 October 2016) (Sudan). President Al-Bashir of Sudan was under indictment at the ICC at the time of this statement, which may explain the harsh rhetoric employed.

66 Statement by Ambassador H. Hauksdóttir, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 1 (27 October 2016) (Iceland on behalf of the Nordic countries). *See also, e.g.*, Statement by Mexico, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 2 (28 October 2016) (unofficial translation) ("We agree with the importance that this project does not duplicate, but complement, the obligations contained in existing treaties on international criminal law and human rights."); Statement by the Swiss Delegation, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 3 (27 October 2016) ("[W]e welcome the rapporteur's recommendation that the Commission seek ways to avoid any conflicts with the terms of other agreements such as the Rome Statute, a matter that we consider indeed to be essential").

67 Statement by the Delegation of El Salvador, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 1 (28 October 2016) (unofficial translation).

Egypt noted that the ILC's work could "result in a bill of treaty which criminalizes those acts nationally, enhances global cooperation to combat them, and strengthens measures to hold perpetrators accountable", while noting that "certain controversial matters, such as immunities and the liability of legal persons" needed further debate.<sup>68</sup> Several other States also commented upon the ILC's decision to include the possibility of liability for legal persons,<sup>69</sup> and a small number brought up the MLA Initiative by several States to establish a new treaty outside of the UN framework.<sup>70</sup> Ireland expressed its desire that work on one project should not detract from work on the other.<sup>71</sup> Chile and the Netherlands (one of the initiators of the MLA Initiative) encouraged dialogue between the ILC and the MLA Initiative to ensure compatibility.<sup>72</sup>

### 2.5 Reactions at the 72nd Session of the UN Sixth Committee (2017)

During its 2017 session, the ILC provisionally adopted five additional Draft Articles, as well as a corresponding Annex and a Draft Preamble, completing its First Reading.<sup>73</sup> The new Draft Articles covered a wide range of elements, including cooperation between States in extradition and mutual legal assistance; the resolution of disputes regarding the interpretation and application of the draft treaty; and the rights of victims and witnesses.

The 2017 Report was the first time that the Sixth Committee was presented with a complete text and commentary. Statements in the 72nd Session were overwhelmingly supportive of the ILC's work and noted the progress it had made. Of the fifty-five comments made, forty-three (78%) were positive or strongly posi-

68 Statement by Egypt, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 2 (26 October 2016) (unofficial translation).

69 Statement by B. Mahnič, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 2 (28 October 2016) (Slovenia) (supporting the inclusion of liability of legal persons "which is progressive in nature, but allows States considerable flexibility concerning its implementation"); Statement by Vietnam, 2016, *supra* note 52, at 1-2 ("sanction against acts of legal persons should be dealt with by national laws of States and should be excluded from the draft articles"); Statement by Mexico, 2016, *supra* note 66, at 4 ("the decision to include an article on the liability of legal persons for the commission of crimes against humanity should be treated with caution and merits further reflection") (unofficial translation).

70 Republic of Slovenia, MLA Initiative, available at: [www.gov.si/en/registries/projects/mla-initiative/](http://www.gov.si/en/registries/projects/mla-initiative/) (last visited 29 July 2020). See M. George, 'Some Reflections on the Proposal for a New Mutual Legal Assistance Treaty for International Crimes', *OpinioJuris*, 1 November 2019, available at: <http://opiniojuris.org/2019/01/11/some-reflections-on-the-proposal-for-a-new-mutual-legal-assistance-treaty-for-international-crimes/>.

71 Statement by A. O'Sullivan, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 1 (1 November 2016) (Ireland).

72 Statement by Amb. C. Troncoso, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 3 (27 October 2016) (Chile); Statement by L. Lijnzaad, 71st Session of the General Assembly, Sixth Committee, under agenda item 78, at 4 (28 October 2016) (The Netherlands).

73 Int'l Law Comm'n, *Report on the Work of Its Sixty-Ninth Session*, U.N. Doc. A/72/10 (2017), p. 10, Para. 45. See L.N. Sadat & K. Falconer, 'The UN International Law Commission Progresses Towards a New Global Treaty on Crimes Against Humanity', *ASIL Insights*, 25 January 2017, available at: [www.asil.org/insights/volume/21/issue/2/un-international-law-commission-progresses-towards-new-global-treaty](http://www.asil.org/insights/volume/21/issue/2/un-international-law-commission-progresses-towards-new-global-treaty).

tive, including those on behalf of CARICOM and the Nordic Countries.<sup>74</sup> Several States and entities commented on the ILC's work (positively) for the first time, including Bulgaria, the Council of Europe, Estonia, Jordan, Mozambique, Paraguay, Timor-Leste, and Ukraine, and it was also the first time a statement was made on this topic on behalf of CARICOM. The 72nd Session also marks the first time positive comments were delivered by Argentina and Ireland (both previously neutral), and the Netherlands (previously negative and then neutral).

Eight comments in 2017 were neutral – Algeria, Malawi, the Russian Federation, Singapore, Turkey, the United States, and Vietnam, as well as a statement on behalf of CELAC (delivered by El Salvador) – accounting for 15% of statements delivered. This was the first time Algeria and Malawi had commented. Algeria recognized crimes against humanity as “one of the most serious violations of international law”, and recommended that “this topic should be carefully addressed bearing in mind the existence of legal framework”.<sup>75</sup> Vietnam, which was positive the previous year, stated that because of

various challenges that are facing the International Criminal Court [...] more consideration needs to be given to the necessity and effectiveness of an international treaty dealing with crimes against humanity.<sup>76</sup>

Four States – China, India, Iran, and Sudan – expressed negative views. Each had previously delivered negative comments on this project. China contended that “many provisions of the draft articles lack empirical analysis” and argued that “[t]his issue is better left to the autonomous decision of States”.<sup>77</sup> India reiterated its belief that existing international mechanisms rendered the necessity of the ILC's work on this topic “unclear”.<sup>78</sup>

As for the provisions of the text itself, many governments noted the significance of developing a global treaty on crimes against humanity,<sup>79</sup> which Poland

74 Argentina, Australia, Austria, Belarus, Brazil, Bulgaria, Chile, Council of Europe, Croatia, Cuba, Czech Republic, El Salvador, Estonia, France, Greece, Hungary, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Mexico, Mozambique, the Netherlands, New Zealand, Paraguay, Peru, Poland, Portugal, Republic of Korea, Romania, Slovakia, Slovenia, South Africa, Spain, Sweden (on behalf of the Nordic countries), Switzerland, Thailand, Timor-Leste, Trinidad and Tobago (on behalf of CARICOM), Ukraine, and the United Kingdom.

75 Statement by Algeria, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 2 (25 October 2017).

76 Statement by the Delegation of Viet Nam, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 1-2 (25 October 2017).

77 Statement by X. Hong, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 2, 4 (23 October 2017) (China).

78 Statement by V.D. Sharma, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 1 (24 October 2017) (India).

79 *See, e.g.*, Statement by the Delegation of Cuba, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 2 (25 October 2017) (unofficial translation) (noting the importance of “a specific instrument, of a binding nature, for the prevention, punishment, and international cooperation for the acts that typify the crime against humanity”).

called of “vital importance”.<sup>80</sup> Brazil stated that “[s]uch an instrument would be beneficial not only for promoting the harmonization of national legislation, but also for facilitating much-needed judicial cooperation in this realm”.<sup>81</sup> Mozambique stated that it would “contribute to a better world of peace and security”.<sup>82</sup> Ukraine noted the prevalence of crimes against humanity, and stated that “[e]stablishing [a] universal legal framework for crimes against humanity has critical importance”.<sup>83</sup> New Zealand added that the “Commission’s work in this area presents an opportunity to address a gap in the international legal framework”.<sup>84</sup> The Netherlands stated that a new convention would “help to strengthen the legal framework in order to provide accountability and fight impunity”.<sup>85</sup>

States frequently praised the ILC’s engagement with States and the quality of its work. Indonesia, for example, highlighted the ILC’s “cautiousness and efforts to accommodate the view of member states”.<sup>86</sup> Several States commented that the ILC adequately responded to the expressed need for harmony with the Rome Statute. For example, Paraguay, stated that the “draft articles are compatible with the Rome Statute” and “will contribute to the application of the principle of complementarity established in said instrument”.<sup>87</sup> Peru added that a future convention would complement not only the Rome Statute, but also the Genocide and Geneva Conventions.<sup>88</sup> Australia, Romania, and Thailand also supported the ILC’s decision not to depart from the Rome Statute, particularly in defining crimes against humanity.<sup>89</sup> Turkey, on the other hand, noting the lack of a treaty stated that “this legal vacuum should properly be addressed” but cautioned that “disre-

80 Statement by A. Misztal, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 1 (24 October 2017) (Poland).

81 Statement by G.R. Bandeira Galindo, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 1 (25 October 2017) (Brazil).

82 Statement by Amb. A. Gumende, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 2 (25 October 2017) (Mozambique) (adding that it was “determined to cooperate and to lend its full support” to the project).

83 Statement by Ukraine, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 1 (25 October 2017).

84 Statement by V. Hallum, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 1 (23 October 2017) (New Zealand).

85 Statement by R. Lefeber, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 1 (25 October 2017) (The Netherlands).

86 Statement by the Delegation of the Republic of Indonesia, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 1 (25 October 2017).

87 Statement by Paraguay, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 3 (25 October 2017) (unofficial translation). *See also* Statement by New Zealand, 2017, *supra* note 84, at 1 (“[T]he focus of these draft articles is on addressing inter-state cooperation in national laws on the prevention of crimes against humanity. This would complement the Rome Statute, which makes provision for that cooperation but does not regulate it.”).

88 Statement by Amb. G.M. Velasquez, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 1 (24 October 2017) (Peru).

89 Statement by M. Bliss, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 1 (23 October 2017) (Australia); Statement by A. Orosan, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 2 (24 October 2017) (Romania); Statement by V. Mangklatanakul, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 1 (24 October 2017) (Thailand).



garding non-state parties' concerns" may result in a situation where "only state parties to the Rome Statute embrace those rules, but others opt out of it".<sup>90</sup>

States seemed less concerned about the relationship between the ILC's work on crimes against humanity and the MLA Initiative. The Netherlands and Slovenia, both initiators of the MLA Initiative, expressed the view that the two projects were complementary and should develop side by side, and the Czech Republic stated that "both undertakings are highly relevant and compatible".<sup>91</sup> To that end, States continued to encourage collaboration and dialogue between the two projects.<sup>92</sup>

### 3 Reactions to the ILC's First Reading of Draft Articles in 2018

Although the ILC's work on crimes against humanity was not on the agenda of the 73rd Session of the Sixth Committee, the Holy See nonetheless dedicated an entire statement to it, noting that a convention on crimes against humanity would "provide a mechanism to help fulfil the international community's obligation to protect populations from crimes against humanity through collective and diplomatic actions".<sup>93</sup> Several other States (including Belarus, Czech Republic, India, Iran, Israel, Peru, and Sierra Leone) mentioned the work of the ILC on crimes against humanity within the context of their remarks on other topics, mostly to note that the work of the ILC was proceeding. Because there was no formal consideration of the ILC Draft Articles in 2018, the coding of the eight states commenting in the Sixth Committee is not shown in Table 1.

Instead of consideration of the ILC's work on crimes against humanity during the Sixth Committee, States and other entities were invited to submit written comments on the Draft Articles to the ILC by November 2018. The ILC received what is thought to be a record number of comments, receiving thirty-five submissions on behalf of thirty-nine States, as well as comments from seven international organizations and approximately 700 NGOs or individuals.<sup>94</sup> Perhaps significantly, nine States that had not commented on this topic at the Sixth Com-

90 Statement by Turkey, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 1-2 (25 October 2017).

91 Statement by M. Smolek, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 1 (25 October 2017) (Czech Republic). *See also* The Netherlands, 2017, *supra* note 85, Para. 9 (considering that "both initiatives are complementary, and that they can co-exist and be developed side by side"); Statement by B. Mahnič, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81 (24 October 2017) (Slovenia).

92 *See, e.g.*, Statement by A. O'Sullivan, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 1 (25 October 2017) (Ireland) ("[I]t is important that the Commission continues to communicate with the Convening States of this initiative as they progress work on this proposed new instrument, to guard against any potential fragmentation in this area of law.").

93 Statement by Archbishop B. Auza, 73rd Session of the General Assembly, Sixth Committee, under agenda item 82, at 2 (30 October 2018) (the Holy See).

94 Int'l Law Comm'n, Crimes Against Humanity: Comments and Observations Received from Governments, International Organizations and Others, U.N. Doc. A/CN.4/726/Add. 1+Add. 2 (2019). Civil society statements are summarized in the Fourth Report.

**Table 2** Summary of States' Written Comments on the First Reading

|                                  | Total     | Percent    |
|----------------------------------|-----------|------------|
| <b>Strong Positive</b>           | 3         | <b>9%</b>  |
| <b>Positive</b>                  | 27        | <b>77%</b> |
| <b>Neutral</b>                   | 3         | <b>9%</b>  |
| <b>Negative</b>                  | 2         | <b>6%</b>  |
| <b>Strong Negative</b>           | 0         | <b>0%</b>  |
| <b>Total State Submissions =</b> | <b>35</b> |            |

mittee yet (Bosnia and Herzegovina, Canada, Costa Rica, Liechtenstein, Malta, Morocco, Panama, Sierra Leone, and Uruguay) submitted comments. A breakdown of these written comments is shown in Table 2

Comments were generally positive, with governments and others noting the significance of this new treaty and expressing pleasure that it would not conflict with the Rome Statute of the ICC but would complement it. Japan, for example, noted that the Rome Statute “regulates ‘vertical relationships’ between the Court and its States Parties”, whereas the ILC’s Draft Articles create “‘horizontal relationships’ among states” and as such “will lead to a strengthening of the effort of the international community for preventing those crimes and punishing their perpetrators”.<sup>95</sup> Sierra Leone noted that the ILC’s work on this topic is poised to “join the pantheon of remarkable International Law Commission contributions to the progressive development of international law and its codification”.<sup>96</sup>

Three States were neutral – Malta, Singapore, and Ukraine – however their comments tended to be technical in nature. Malta’s comment was limited to a request that the definition of gender be modified so as to be more inclusive,<sup>97</sup> whereas Ukraine requested that the “in connection with” language found in Draft Article 3 on persecution be adjusted to reflect the Rome Statute, which includes the crime of aggression.<sup>98</sup> Singapore agreed with most of the Draft Articles in

95 Japan, *Comments and Observations of Japan on the Draft Articles of Crimes Against Humanity of the International Law Commission*, at 1 (2019), available at: [http://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah\\_japan.pdf&lang=E](http://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah_japan.pdf&lang=E). Likewise, Germany stated that a convention based on the Draft Articles would “not only complement treaty law on core crimes, but would foster inter-state cooperation with regard to their investigation, prosecution and punishment” and “contribute to the implementation of the complementarity provisions of the Rome Statute.” Germany, *Written Contribution on the Draft Articles on Crimes Against Humanity Adopted by the International Law Commission*, at 1 (2019), available at: [http://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah\\_germany.pdf&lang=E](http://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah_germany.pdf&lang=E).

96 Sierra Leone, *Comments and Observations on the International Law Commission’s Draft Articles on Crimes Against Humanity as Adopted by the Commission in 2017 on First Reading*, at 41 (2019), available at: [http://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah\\_sierra\\_leone.pdf&lang=E](http://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah_sierra_leone.pdf&lang=E).

97 Malta, *Comments on the ILC’s Draft Articles on Crimes Against Humanity* (2019), available at: [https://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah\\_malta.pdf&lang=E](https://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah_malta.pdf&lang=E).

98 Ukraine, *Comments of Ukraine on the Draft Articles on Crimes Against Humanity of the International Law Commission* (2019), available at: [https://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah\\_ukraine.pdf&lang=E](https://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah_ukraine.pdf&lang=E).

principle, and provided observations and recommendations for clarity on several points, including the obligation to prevent, criminalization under national law, and investigation.<sup>99</sup>

Two States were negative. Greece reiterated its concerns “about the desirability and the necessity of a convention addressing exclusively that category of crimes”.<sup>100</sup> The United States, citing “very serious concerns that have arisen with respect to the ICC”, warned that the Draft Articles

need safeguards to avoid providing a pretext for prosecutions inappropriately targeting officials of foreign States. Absent such safeguards, any convention could give rise to tensions between States and thereby undermine rather than strengthen the legitimacy of efforts to promote justice.<sup>101</sup>

#### 4 74th Session of the UN Sixth Committee of the General Assembly (2019) and Response

The ILC completed a second and final reading of Draft Articles on Prevention and Punishment of Crimes Against Humanity with revised commentary in August 2019, after a vigorous discussion and taking into account the comments it had received from States, international organizations, and civil society, as well as the Special Rapporteur’s Fourth Report.<sup>102</sup>

As shown in Table 3, the response at the 74th Session of the Sixth Committee was overwhelmingly supportive. A total of sixty-six statements were delivered on behalf of seventy-seven States,<sup>103</sup> as well as by the Council of Europe, the European Union, the Holy See, and the Africa Group. Comments acknowledged the ILC’s speed and thoroughness, as well as its responsiveness to State concerns, and conveyed satisfaction in the changes made to the ILC Articles. Estonia, for

99 Singapore, *Response of the Republic of Singapore to the International Law Commission’s Request for Comments and Observations on the Draft Articles on Crimes Against Humanity* (2019), available at: [https://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah\\_singapore.pdf&lang=E](https://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah_singapore.pdf&lang=E).

100 Greece, *Comments on the Draft Articles on Crimes Against Humanity Adopted on First Reading by the International Law Commission*, at 1-2 (2019), available at: [http://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah\\_greece.pdf&lang=E](http://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah_greece.pdf&lang=E).

101 United States of America, *Comments on the International Law Commission’s Draft Articles on “Crimes Against Humanity” as Adopted by the Commission in 2017 on First Reading* (2019), available at: [https://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah\\_usa.pdf&lang=E](https://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah_usa.pdf&lang=E). The ICC Prosecutor submitted a request in 2017 to open an investigation into alleged crimes against humanity committed in Afghanistan, including those by U.S. forces, leading to an increasingly adversarial position of the U.S. government towards the Court.

102 Int’l Law Comm’n, *supra* note 5; S. Murphy (Special Rapporteur on Crimes Against Humanity), *Fourth Report on Crimes Against Humanity*, U.N. Doc. A/CN.4/725, 18 February 2019. For additional commentary on the ILC’s Second Reading, see M. George, ‘Prospects for a Convention on the Prevention and Punishment of Crimes Against Humanity’, *OpinioJuris*, 8 October 2019, available at: <http://opiniojuris.org/2019/10/08/prospects-for-a-convention-on-the-prevention-and-punishment-of-crimes-against-humanity/>.

103 This number takes into account Austria’s statement delivered after the Committee’s Draft Resolution on Crimes Against Humanity (discussed *infra*), because States joined that statement in their individual capacities, and not by default of membership in a regional group.

**Table 3** *The Response of States & Entities at the UN Sixth Committee (2019)*

| <b>Position</b>  | <b>Total</b> | <b>Percent</b> |
|--|--------------|----------------|
| Expressed explicit support for a convention                                  | 57           | <b>70%</b>     |
| Requested more time (for study and/or revision)                              | 11           | <b>14%</b>     |
| Did not take a stance on further action; still considering official position | 10           | <b>12%</b>     |
| Doubted the need for a new convention  | 3            | <b>4%</b>      |
| <b>Total:</b>  | <b>80</b>    |                |

example, expressed its gratitude that the ILC process had been “a transparent and inclusive one and that all interested states, organizations, as well as civil society had the possibility to contribute”.<sup>104</sup> Singapore “greatly appreciate[d] the Commission’s clear efforts to engage with Member States”.<sup>105</sup> Germany, Sierra Leone, Slovenia, and South Africa were pleased that previous concerns and suggestions had been addressed by the ILC.<sup>106</sup>

Of the eighty-one States and entities that delivered statements or endorsed Austria’s statement in support of a convention (discussed *infra*), fifty-seven,<sup>107</sup> or 70%, supported the elaboration of a convention on crimes against humanity on the basis of the ILC Articles.<sup>108</sup> France, which had initially been sceptical,<sup>109</sup>

104 Statement by the Republic of Estonia, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 2 (31 October 2019).

105 Statement by D. Hong, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 2 (29 October 2019) (Singapore).

106 Statement by the Federal Republic of Germany, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 1 (30 October 2019) (noting that the Commission “took on board [member States’] suggestions and concerns”); Statement by M.I. Kanu, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 3 (31 October 2019) (Sierra Leone) (“We are equally grateful to the Commission for its efforts to address the extensive number of comments received on the first reading draft text, including those from Sierra Leone.”); Statement by B. Mahnič, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 1 (30 October 2019) (Slovenia) (noting that “a number of changes have been introduced into the draft articles, in order to reflect the views expressed on the topic”); Statement by T. Molefe, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 3 (31 October 2019) (South Africa) (“pleased to note that some of its previous concerns have been clarified in the Report”).

107 Argentina, Armenia, Austria, Belarus, Belgium, Brazil, Bulgaria, Chile, Colombia, Costa Rica, the Council of Europe, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, El Salvador, Estonia, the European Union, Finland, France, Germany, Greece, the Holy See, Honduras, Hungary, Iceland, Ireland, Italy, Republic of Korea, Liechtenstein, Lithuania, Luxembourg, Malaysia, Malta, Mexico, the Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Senegal, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, The Gambia, the United Kingdom, Ukraine, and Uruguay.

108 Five additional States (Bosnia and Herzegovina, Jordan, Mozambique, Timor-Leste, and Trinidad and Tobago (on behalf of CARICOM)) delivered positive statements or written comments in 2017 or 2018 but did not comment in 2019.

109 See Statement by France, 2013, *supra* note 21; Statement by France, 2014, *supra* note 32.

stated that the ILC Articles “should logically be adopted in the form of an international convention of as wide a scope as possible”.<sup>110</sup> Sierra Leone, in its first Sixth Committee comment on the ILC’s work, stated that the ILC Articles “provide a robust and transparent foundation for a future global convention”.<sup>111</sup> Slovakia stated that the ILC’s work was “genuinely suitable for immediate codification”.<sup>112</sup> Chile found “no reason not to conclude a convention on this subject”.<sup>113</sup> Portugal declared that “this is the right moment to convene an international convention on ‘crimes against humanity’”.<sup>114</sup>

States acknowledged the compatibility of the Draft Articles on Prevention and Punishment of Crimes Against Humanity with other international legal instruments. Honduras noted that “[t]his draft Convention complements international human rights law, international criminal law and international humanitarian law”.<sup>115</sup> The Czech Republic stated that a crimes against humanity convention “would complement other conventions on prosecution of crimes under international law and adequately fill a long-standing lacuna iuris in this area”.<sup>116</sup> Many States, including Austria and the United Kingdom, expressed satisfaction that a convention based on the ILC Articles would complement, rather than compete with, the Rome Statute and, in particular, would enhance the principle of complementarity.<sup>117</sup> Ecuador, for example, noted that a future convention would “promote international cooperation at the horizontal level between States”.<sup>118</sup>

110 Statement by F. Alabrune, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 4 (29 October 2019) (France) (unofficial translation).

111 Statement by Sierra Leone, 2019, *supra* note 106, at 6-7.

112 Statement by M. Špaček, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 1 (28 October 2019) (Slovakia).

113 Statement by Amb. M. Durney, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 9 (31 October 2019) (Chile).

114 Statement by S. Vaz Patta, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 8 (30 October 2019) (Portugal) (adding “we sincerely hope that the General Assembly rises to its responsibilities under the Charter of the United Nations to codify and progressively develop international law and thus decides on the necessary steps to bring these Articles to life”).

115 Statement by Honduras, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 1 (31 October 2019) (unofficial translation).

116 Statement by P. Valek, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 1 (28 October 2019) (Czech Republic).

117 Statement by Amb. H. Tichy, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 2 (28 October 2019) (Austria) (a crimes against humanity convention “would constitute an important supplement to the Rome Statute of the International Criminal Court”); Statement I. MacLeod, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 6 (28 October 2019) (United Kingdom) (“[A] future convention on this subject would complement, rather than compete with, the Rome Statute. A new convention could also facilitate national prosecutions, thereby strengthening the complementarity provisions of the Rome Statute”). *See also* Statement by G.R. Bandeira Galindo, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 1 (29 October 2019) (Brazil) (“Mr. Murphy’s work builds upon the Rome Statute of the International Criminal Court”).

118 Statement by Ecuador, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 2 (31 October 2019).

Nearly all States addressing the relationship between the ILC's Draft Articles on Prevention and Punishment of Crimes against Humanity and the MLA Initiative saw them as complementary, including all five of the MLA Initiative's core sponsors that commented: Argentina, Belgium, the Netherlands, Senegal, and Slovenia.<sup>119</sup> Senegal called the two projects "mutually reinforcing and complementary to our common objective of combating the impunity", which "requires the promotion of coordinated approaches".<sup>120</sup> Bulgaria stated that "their relevant differences could bring added value to the international legal framework".<sup>121</sup> Cyprus and Greece recognized that the two projects could complement each other, but encouraged further clarification to avoid duplication or confusion.<sup>122</sup> Sounding a more cautionary note, Russia expressed concern that "the simultaneous realization of two projects on a similar topic may be complicating, and in the end neither of them may be crowned with success".<sup>123</sup> Portugal and Slovakia urged other States not to use the MLA Initiative as an excuse to not support the elaboration of a new convention on crimes against humanity.<sup>124</sup>

Of the fifty-seven States and entities proposing the adoption of a new treaty, sixteen<sup>125</sup> expressed a preference for a diplomatic conference, which Austria offered to host, in lieu of adoption through the General Assembly. Argentina and Brazil preferred adoption by the General Assembly. The remaining thirty-nine did not express a preference for method, or, like South Africa, suggested that

119 Statement by Argentina, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 4 (29 October 2019); Statement by Belgium, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 2 (31 October 2019); Statement by R. Lefeber, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 2-3 (29 October 2019) (The Netherlands); Statement by Senegal, 74th Session of the General Assembly, Sixth Committee, under agenda item 7, at 3 (31 October 2019); Statement by Slovenia, 2019, *supra* note 106, at 2-3. Other States that made this point include Bulgaria, Cyprus, Portugal, and Slovakia.

120 Statement by Senegal, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 3 (31 October 2019).

121 Statement by D. Dramova, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 2 (31 October 2019) (Bulgaria).

122 Statement by the Republic of Cyprus, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 1 (31 October 2019); Statement by M. Telalian, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 2-3 (29 October 2019) (Greece) ("[T]he two projects can indeed become mutually complementary only if their respective scope and objectives become clearly distinct:"). *See also* Statement by K. You, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 2 (31 October 2019) (Republic of Korea) ("[C]areful consideration should be given to the relationship between the draft articles on crimes against humanity and other relevant international instruments, including [the MLA Initiative].").

123 Statement by Russia, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 3 (30 October 2019) (unofficial translation). *See also* Statement by Greece, 2019, *supra* note 122, at 2 ("We also agree with the Rapporteur's assessment that the simultaneous pursuit by States of both initiatives might be inefficient and confusing and risks the possibility that neither initiative succeeds.").

124 Statement by Portugal, 2019, *supra* note 114; Statement by Slovakia, 2019, *supra* note 112.

125 Armenia, Austria, Belarus, Chile, Croatia, the Czech Republic, Estonia, the European Union, France, Germany, Ireland, the Netherlands, Poland, Portugal, Romania, and Slovakia.

the manner selected should be the one that will not be unduly delayed and that will allow for the largest number of ratifications in order for cooperation to be successful.<sup>126</sup>

Three of these fifty-seven supported the elaboration of a treaty in principle but cautioned that the process should not be rushed. For example, Armenia, in its first statement on the topic, favoured a diplomatic conference “at a suitable time, such as three to five years from now”, to allow further opportunity for study.<sup>127</sup> Belarus, which it is worth recalling expressed concern about the “premature adoption” of a convention back in 2015, stated that it “supports the elaboration of a treaty on the basis of the draft articles”, but that “this endeavour should be approached in a cautious manner, since the draft articles deal with complex and fundamental issues of international criminal law”, and as such, the diplomatic conference should be organized “after the text has been finalized at the expert level”.<sup>128</sup> The Republic of Korea stated that “further efforts for the elaboration of a convention” should be made; yet, “further discussions among States about consultation methods and procedures are needed”.<sup>129</sup>

Eleven States<sup>130</sup> (14%) felt more time was needed before deciding on the path forward. Israel, a consistently strong supporter in past years, suggested that moving slowly would

ensure a firm legal foundation is established, wide legitimacy is achieved and as inclusive a process as possible is undertaken, so that the ultimate legal product adopted is one that is effective and will stand the test of time.<sup>131</sup>

Egypt, whose only prior comment was positive in 2016, stated that “achieving the Draft Articles for the desired purposes requires that the Assembly not be rushed” and suggested that a decision “be taken in a future session”, as did the United States.<sup>132</sup> Sudan (which had experienced a coup d’état six months earlier and was in a transitional period) stated that “a proposal for an agreement on this important issue is an idea worthy of finding momentum”, and as such, “States are in urgent need to appropriate time for in-depth consideration of the draft arti-

126 Statement by South Africa, 2019, *supra* note 106.

127 Statement by Armenia, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (31 October 2019).

128 Statement by the Delegation of Belarus, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (29 October 2019). Belarus also stated that the Draft Articles were “a good starting point for intergovernmental negotiations, which would lead to a treaty”.

129 Statement by Republic of Korea, 2019, *supra* note 122.

130 Cameroon, Cuba, Egypt, Iran, Israel, Morocco, the Philippines, the Russian Federation Sudan, Turkey, and the United States of America.

131 Statement by S. Weiss Ma’udi, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (29 October 2019) (Israel).

132 Statement by A. Abdelaziz, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (31 October 2019) (Egypt) (unofficial translation); Statement by M.A. String, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (29 October 2019) (United States).

cles".<sup>133</sup> Cameroon, Morocco, and the Philippines (each of which had not previously commented on this work at the Sixth Committee, although Morocco did submit a positive written statement in 2018), as well as the Russian Federation, noted the importance of the ILC's work, but suggested that further time was needed.<sup>134</sup> Iran, which had consistently been negative towards the ILC's work since 2013, stated that more work was needed for States to "make an informed decision", but also noted that

such an important instrument should be the product of an inclusive intergovernmental and member states driven process and the work of the ILC could be considered as a valuable source in a well-defined process that could be shaped under the auspices of the Sixth Committee.<sup>135</sup>

Nine States and the African Group (in a second statement delivered by Sierra Leone) did not comment on their preferred outcome.<sup>136</sup> Several, such as Japan, noted the possible benefits of a crimes against humanity convention, but did not take a stance on future action.<sup>137</sup> Uzbekistan stated that the "codification of norms on prevention and punishment can promote governments to adopt and harmonize national legislation, thereby opening a path to a more effective international cooperation".<sup>138</sup> Other States, including Australia, Thailand, and Togo, stated that they were still undergoing internal governmental consideration or study regarding the ILC's recommendation to elaborate a treaty based on the

133 Statement by E.A. Sayed Ahmed, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (29 October 2019) (unofficial translation) (Sudan). Turkey also argued that more time was needed to carefully review the ILC Articles, which had been released roughly three months earlier. Statement by the Republic of Turkey, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (31 October 2019).

134 Statement by Z.S.R. Nyamid, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (31 October 2019) (Cameroon) (attaching "great importance to the prevention and punishment of crimes against humanity" but requesting "certain concepts relating to it to be elucidated, clarified and better framed, in order to avoid the creation of permanent offenses which can be used according to mood and interest"); Statement by Morocco, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (5 November 2019); Statement by M.A.A. Ponce, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (31 October 2019) (The Philippines) (calling the ILC Articles an "important contribution to the international community's collective efforts to deter and curtail atrocity crimes" but stating that the process "cannot proceed in haste".) Statement by Russia, 2019, *supra* note 123 ("[T]he perspective of the development of a convention [...] demands a thorough assessment. This will need time.").

135 See Statement by Amb. A. Bagherpour Ardekani, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (31 October 2019) (Iran).

136 Australia, Canada, Cote d'Ivoire, Indonesia, Japan, the African Group (in a second statement delivered by Sierra Leone), Singapore, Thailand, Togo, and Uzbekistan.

137 Statement by Y. Hamamoto, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (31 October 2019) (Japan). See also Statement by Indonesia, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (31 October 2019).

138 Statement by M. Azimov, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (31 October 2019) (Uzbekistan) (unofficial translation).



Draft Articles on Prevention and Punishment of Crimes Against Humanity.<sup>139</sup> Four of these States (Australia, Indonesia, Japan, and Thailand) were positive in their 2017 Sixth Committee statements, while another four (Canada, Côte d'Ivoire, Togo, and Uzbekistan) had not previously commented on the ILC's work during the Sixth Committee, although Canada did submit a positive written comment in 2018.

Only three States – China, India, and Vietnam – opposed a convention and could be considered negative. China argued that “States are far from reaching a consensus on the need” for a convention,<sup>140</sup> and India again suggested that the Rome Statute rendered a new convention unnecessary.<sup>141</sup> Vietnam again raised questions about the ILC's use of ICC practice in its analysis, concluding that the “necessity of a new convention on crimes against humanity as well as its formation [...] should be carefully examined”.<sup>142</sup>

Given the high level of State support for the ILC's work, and Austria's offer to host a diplomatic conference in Vienna to negotiate the treaty, it is perhaps surprising that the Commission's recommendations were not followed in the Sixth Committee's draft resolution. The Sixth Committee essentially punted, crafting a draft resolution that postponed a decision on the outcome of the text by taking note of the ILC Draft Articles on Prevention and Punishment of Crimes Against Humanity and the Commission's recommendation, “[e]mphasizing the continuing importance of the codification and progressive development of international law” and “[r]ecognizing the need to prevent and punish crimes against humanity”, deciding to include the topic in the provision agenda of the 75th Session, and continuing “to examine the recommendation of the Commission”.<sup>143</sup>

139 Statement J. Aitken, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (29 October 2019) (Australia) (“As we consider the substance of the draft articles, we are mindful of the Commission's recommendation that States elaborate a Convention on the basis of the draft articles and the potential benefit such a convention may bring.”); Statement V. Mangklatanakul, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (29 October 2019) (Thailand) (“My delegation is positively considering the recommendation by the Commission for an elaboration of a convention.”); Statement D.F. Lamega, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (31 October 2019) (Togo) (unofficial translation) (“Pending the appropriate decision by the Togolese Government as to the desirability of elaborating, as the Commission recommends to the General Assembly, a Convention [...] my delegation wishes to make the following preliminary comments.”). *See also* Statement by the Canadian Delegation 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (31 October 2019) (“[T]he Convention raises a number of other issues that would require more detailed consideration from the Government of Canada should the decision be taken to move forward with the negotiation of a Convention on Crimes Against Humanity.”).

140 Statement by J. Guide, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (28 October 2019) (China) (continuing that “the time is not yet ripe for the elaboration of a convention”).

141 Statement by U. Sekhar, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (31 October 2019) (India).

142 Statement by the Delegation of Vietnam, 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (31 October 2019).

143 Report of the Sixth Committee, UN Doc. A/74/25, 21 November 2019, Draft Resolution II, at 9.

In response, Austria delivered a statement on behalf of forty-two other States expressing disappointment that the Sixth Committee was unable to agree on an “ambitious and structured approach” for future deliberations on the ILC recommendation.<sup>144</sup> Eight of these States had never before made a statement at the Sixth Committee on this topic – Colombia, The Gambia, Liechtenstein, Lithuania, Luxembourg, Malta, Panama, and Uruguay (although Liechtenstein, Malta, Panama, and Uruguay did submit written comments in 2018).<sup>145</sup> These States expressed hope that there would be opportunities for further discussion in preparation of the next session so that the Sixth Committee could reach a consensus on the way forward in October 2020. In December 2019, the General Assembly adopted Resolution 187, which took note of the ILC Articles, and decided to include “Crimes against humanity” in the provisional agenda of its 75th Session (2020) with the view to continuing to examine the ILC recommendation.<sup>146</sup>

## 5 Conclusion: A Pattern of Growing Support and a Caveat

As this survey of State reactions shows, support for using the ILC Draft Articles on the Prevention and Punishment of Crimes against Humanity as the basis for a new convention grew over time. Nearly every State that commented at least twice on the topic became more positive. This trend of growing support holds true for countries that started off positive, as well as states that were neutral or negative. Indeed, the enthusiasm of States such as Chile, the Czech Republic, Italy, Poland, and the Nordic countries rose from positive to strongly positive as the project progressed.

Most initially neutral States also became more positive with time, including Argentina, Australia, Ireland, Malaysia, Malta, Portugal, Romania, Slovenia, Spain, and the United Kingdom.<sup>147</sup> Only two States that were neutral towards the project when it began – Turkey and Mongolia – remained neutral. Mongolia, however, only delivered two statements – one acknowledging the topic in 2013, and its second in 2014, when it cautioned that any new definition would “create problems for the determination of the crime and [...] in turn may result in impunity of those responsible”.<sup>148</sup> However, Mongolia did not comment on subsequent Draft Articles.

Likewise, initially sceptical States grew more positive over time. Between 2013 and 2018, negative comments at the Sixth Committee came from just twelve States: Belarus, China, France, Greece, India, Iran, Malaysia, the Netherlands, the Russian Federation, Singapore, South Africa, and Sudan. Only China and India were firmly against a new convention when given the choice in 2019.

144 Statement by Austria (on behalf of 42 other countries), 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (20 November 2019).

145 Costa Rica made a statement in 2014 on behalf of CELAC, but not in its national capacity.

146 GA Res. 74/187, 18 December 2019.

147 This analysis excludes States that commented only once.

148 Statement O. Od, 69th Session of the General Assembly, Sixth Committee, under agenda item 78 (31 October 2014) (Mongolia).

Six of these States – Belarus, France, Greece, Malaysia, the Netherlands, and South Africa – supported the adoption of a new convention in 2019, with most of their negative comments coming early in the project.<sup>149</sup> For example, France questioned “whether the States really need to draw up a convention on the subject”<sup>150</sup> in 2013, but in 2019 stated that “the draft articles, which were very successful, should logically be adopted in the form of an international convention of as wide a scope as possible”.<sup>151</sup> Singapore, which was negative in 2015, stated in 2019 that “[i]t is imperative that the international community works together to end impunity for perpetrators and provide justice for victims”, but that “there remain some divergences in views” on the ILC Articles that might require further clarification.<sup>152</sup> Three previously negative States – Iran, Russia, and Sudan – recognized the importance of the ILC’s work in 2019 but suggested that more time or study was needed before taking further action. Russia, for example, delivered its only negative comment in 2013 and its comments over the years seem to take issue more with the substance of the articles than with the objective of developing a new convention. Sudan, on the other hand, was negative towards the project while former President Al-Bashir was in power, but stated in 2019, under a transitional government, that the ILC’s “proposal for an agreement on this important issue is an idea worthy of finding momentum”.<sup>153</sup>

Only five States seemed to develop more negative views of the ILC’s work over time: Egypt, China, India, the United States, and Vietnam. The United States welcomed the ILC’s work in 2013 and 2014, but was neutral every year following, noting that “this topic’s importance is matched by the difficulty of some of the legal issues that it implicates”.<sup>154</sup> Some of this may reflect the views of the Trump administration, which was elected in 2016, and like the other demurring States, the United States is not a Party to the Rome Statute. Vietnam supported the drafting of a new convention in 2015 “to fill in the gap that currently exists in the framework of international criminal, humanitarian, and human rights laws, and thereby address the issue of impunity”.<sup>155</sup> However, in 2017 and 2019 it raised doubts about the ILC’s use of ICC practice in its methodology (Vietnam is also not a Party to the Rome Statute), and suggested that although it “supports the punishment of crimes against humanity on the basis of respect for national sovereignty and non-intervention in domestic matters of other States”, more research was needed regarding the necessity of a new convention.<sup>156</sup>

149 Compare Statement by Belarus, 2015, *supra* note 47 (stating it was “not confident that the outcome of discussing this topic must be the elaboration of an international treaty”) with Statement by Belarus, 2019, *supra* note 128 (supporting “the elaboration of a treaty on the basis of the draft article”).

150 Statement by France, 2013, *supra* note 21. See also Statement by France 2014, *supra* note 32 (reiterating “its doubts regarding the need for relevant agreement”).

151 Statement by France, 2019, *supra* note 110.

152 Statement by Singapore, 2015, *supra* note 44; Statement by Singapore, 2019, *supra* note 105.

153 Statement by Sudan, 2019, *supra* note 133.

154 Statement by T. Buchwald, 70th Session of the General Assembly, Sixth Committee, under agenda item 83 (6 November 2015) (United States).

155 Statement by Viet Nam, 2016, *supra* note 52.

156 Statement by Viet Nam, 2017, *supra* note 76; Statement by Viet Nam, 2019, *supra* note 142.

China and India refrained from taking a stance on the project in 2013, but became negative in 2016, and by 2019 opposed it. China expressed concern that the underlying law was not yet settled,<sup>157</sup> as well as suggested that State sovereignty and national law should govern the question. India argued that “considering the international mechanisms that are already dealing with the matter, including the International Criminal Court”, the necessity of a crimes against humanity convention “need[s] to be examined”.<sup>158</sup> The remaining State – Egypt – gave only two statements, making it hard to determine if the change is reflective of a sustained shift in position. In 2016, Egypt expressed hope that the ILC's work would result in a treaty, but in 2019 was hesitant, stating that while the ILC's work “may represent an important addition to the international legal architecture”, it nonetheless “believes that achieving the Draft Articles for the desired purposes requires that the Assembly not be rushed”.<sup>159</sup>

This brief analysis demonstrates that confidence in, and support for, the ILC's work and the idea of a new treaty grew over time. The thoroughness of the Special Rapporteur's reports and the high quality of the ILC's work (which were often referenced by States) clearly contributed to the increase in their respect for, and positive views of, its draft text. States also commented favourably on the ILC's commitment to consistently addressing States' comments and taking their recommendations and concerns on board.

It is also likely that the ILC's decision to base its work to a large degree on existing treaty regimes and to borrow concepts that were already widely accepted by States encouraged States' acceptance of its work. Likewise, the ILC kept the text relatively modest, and rather than produce an extensive draft, left many decisions in the hands of States, to be negotiated later at a diplomatic conference. The United Kingdom noted this in 2017, stating that “a future convention should be ratified widely, and to that end the United Kingdom welcomes the fact that the Commission has kept the draft relatively simple”.<sup>160</sup> Similarly, Switzerland stated in 2015 that it was “in favour of a concise convention that is as long as necessary and as short as possible”, and in 2017 welcomed the fact that “the draft convention is concise and limited to the essential aspects”.<sup>161</sup> Finally, the ILC engaged with civil society, formally and informally, which helped to spread the idea of a new treaty in conferences and meetings and thereby build civil society and State support.

The ILC is thus to be commended for the speed, quality, thoroughness, and engagement of its work with States and civil society. This effort clearly led to a

157 Statement by China, 2019 *supra* note 140.

158 Statement by India, 2019, *supra* note 141.

159 Statement by Egypt, 2019, *supra* note 132 (“make available time for all countries to undertake the necessary study of the draft articles and to align them with their domestic constitution and legislations”).

160 Statement by S.H. Smith, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 4 (24 October 2017) (United Kingdom).

161 Statement by Switzerland, 2015, *supra* note 48, at 3; Statement by the Swiss Confederation, 72nd Session of the General Assembly, Sixth Committee, under agenda item 81, at 3 (23 October 2017).

positive reception for the ILC Draft Articles on the part of many. Yet we offer several caveats to this positive picture.

First, because the Sixth Committee operates by consensus, the opposition of a few States managed to derail or at least to postpone the convening of a diplomatic conference or the adoption of a resolution in the General Assembly in 2019. To overcome this difficulty will require a clear political strategy on the part of States wishing to proceed. Looking at the statements thus far, a significant number of States in the General Assembly have not yet weighed in, although if one aggregates the statements on behalf of CARICOM, CELAC, the Council of Europe, and the Africa Group, 155 States have arguably been represented in the discussions. Thus perhaps of greater concern is that most of the States vocally supporting the ILC's work, and particularly those States signing onto Austria's 2019 statement, are from the Western European and Other States Group (WEOG) or Group of Latin America and Caribbean Countries (GRULAC) regions. This suggests that more effort must be made to engage with the views of UN Member States from Africa, the Middle East, and Asia.

Second, three of the five permanent members of the Security Council – China, Russia, and the United States – are either neutral or hostile to the idea of a new global treaty on crimes against humanity. None of the three are ICC State Parties, but all three are Parties to the Geneva Conventions and the Genocide Convention. Perhaps this suggests that with the passage of time, while they might not immediately support the new treaty, they might join it eventually, and allow other States to move forward in the interim.

Finally, the MLA Initiative may still siphon off support from the ILC project, if only because of confusion on the part of States about the goals and impact of the two projects. The MLA treaty was to have been negotiated at a treaty conference in Slovenia in June, which was postponed due to the COVID-19 pandemic. So long as that project is pending, it may be difficult for at least some States to move forward on the crimes against humanity treaty.

These caveats notwithstanding, the ILC's assiduous and transparent efforts, combined with support from civil society, undoubtedly encouraged States to view the ILC Draft Articles on Prevention and Punishment of Crimes Against Humanity positively. That perspective increased with time, and a large majority of States that have commented now support the adoption of a new treaty based upon the ILC Articles. Although many States are now in crisis due to the COVID-19 pandemic, it is to be hoped that they will nonetheless find the resources and the resolve to see the crimes against humanity convention move forward as it makes its way back to the General Assembly for deliberations this year.