

## **Comments from the United States on the International Law Commission’s Draft Articles on “Crimes Against Humanity” as Adopted by the Commission in 2017 on First Reading**

The United States appreciates the opportunity to provide written comments on the International Law Commission’s (Commission) Draft Articles on Crimes Against Humanity (CAH) (Draft Articles), and associated Commentary, which were adopted at its 69th session on July 31, 2017. The United States also recognizes and appreciates the extensive efforts of Special Rapporteur Sean Murphy on this topic. Special Rapporteur Sean Murphy brings tremendous value to bear in the Commission’s work on this topic, and we particularly appreciate his efforts to take into account States’ views on this topic. Robust interaction and a productive relationship between States and the ILC is vitally important to the relevance and continuing vitality of the Commission’s work. The United States reiterates that it is critical that the Commission account for the views of States in this and other topics on the Commission’s program of work because international law is built on the foundation of State consent. International law has binding force as a result of the consent States give to international law and the process of making international law. The Commission is, of course, not a legislative body that establishes rules of international law. Rather, its contributions focus on documenting areas in which States have established international law or on proposing areas in which States might wish to consider establishing international law. In the view of the United States, developing these Draft Articles is not primarily an exercise in codifying customary international law, but instead is primarily an effort to provide the Commission’s recommendations on progressive legal development.<sup>1</sup>

The United States acknowledges that the concept of CAH has been part of international law and the domestic laws of various foreign States for a number of years. The United States has a long history of supporting justice for victims of CAH and other international crimes. The adoption and widespread ratification of certain multilateral treaties regarding serious international crimes – such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide<sup>2</sup> – have been a valuable contribution to international law, and the United States shares a strong interest in supporting justice for victims of atrocities.

With due appreciation of the importance and gravity of the subject, the United States submits that the significant concerns that it has identified with the current Draft Articles, described in part below, are sufficient to call into question whether, absent substantial further work to address such concerns, a treaty based on the Draft Articles could attract wide acceptance by States, including the United States. The United States offers the edits and comments below in a spirit of constructive engagement, but notes that these edits and comments do not represent acceptance of the draft in whole or in part or that the United States is indicating its approval of future work on

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<sup>1</sup> Of course, it would be useful for the Commission to take account of the range of views that States have on how the law should develop and what areas should be addressed by the Draft Articles. It would also be useful for the Commission to provide States with different language options for achieving different policy outcomes, even if the Commission members recommend a specific option in the Draft Articles. Such options could be provided with bracketed text or with drafting alternatives identified in the Commission’s report. Similarly, where the Commission’s text is drawn from a provision of an existing treaty instrument, which is subject to different interpretations, the Commission could usefully identify for States such ambiguity and provide States with options for clarification.

<sup>2</sup> Convention on the Prevention and Punishment of the Crime of Genocide, *adopted by resolution Dec. 9, 1948, [hereinafter Genocide Convention]*.

the articles or any possible resulting convention. The edits and comments below should not be taken as representing the United States' agreement with any conclusion as to the content of customary international law in this area.

The United States believes the work of the ILC in this area should be guided by three objectives.

First, clarity should be an important objective for the ILC's work on CAH, and is a *sine quo non* of both a well-crafted treaty that would support justice for victims of CAH and any U.S. acceptance of a possible resulting treaty. The United States is concerned that the Draft Articles lack clarity with respect to a number of key issues – as addressed in further detail below – and believes these issues must be clarified in order to reach consensus among States and to ensure that a future convention would be effective in practice. In particular, not all States, including the United States, have made the definition of CAH and how they should be addressed the subject of codification, and there is no universally accepted definition of CAH.<sup>3</sup> Moreover, clarity is especially important in the criminal context, where the application of vague or indeterminate legal standards with respect to individuals could raise concerns regarding fair trial guarantees, among other issues. As we explain below, the United States' concerns in this regard extend beyond the criminal context.

Second, any convention should be drafted with a view toward recommending to States an instrument that could be universally (or at least very widely) ratified by States, as the Geneva Conventions of 1949 have been.<sup>4</sup> To this end, the Draft Articles need to be flexible in implementation, accounting for a diversity of national systems (*e.g.*, common law and civil law systems), parties to the Rome Statute of the International Criminal Court<sup>5</sup> (the Rome Statute) and States that are not parties to the Rome Statute, as well as diversity within national systems (*e.g.*, federal and local law enforcement authorities or civilian and military authorities may apply different criminal law and procedures).

Third, in order to be useful to States in strengthening accountability, the draft provisions of the proposed convention should be mindful of the challenges that have arisen in the area of international criminal justice, including by reflecting lessons learned and reforms enacted<sup>6</sup> after

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<sup>3</sup> In addition, the Commentary notes that, in advance of a decision by States as to whether to use the Draft Articles as the basis for negotiating a convention, the Commission has not included technical language characteristic of treaties, including references to "States Parties." This drafting decision to refer in the Draft Articles to "States" rather than to "States Parties" should not be misunderstood as suggesting that the Draft Articles themselves impose obligations upon States to act in accordance with their terms. Rather, any binding force of the Draft Articles as such would arise only as a result of States consenting to be bound by them in the form of a convention or other international agreement. Language should be added to the Commentary to make this point clear.

<sup>4</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 [hereinafter, collectively, Geneva Conventions].

<sup>5</sup> The Rome Statute of the International Criminal Court, *adopted* July 17, 1998 [Hereinafter the Rome Statute].

<sup>6</sup> See, *e.g.*, Organic Act No. 1/2009 of 3 November (Official Gazette No. 266 of 4 November) (Spain) (limiting universal jurisdiction), Organic Act No. 1/2014 of 13 March (Official Gazette No. 63 of 14 March 2014) (Spain) (amending Spain's universal jurisdiction further to contain specific requirements for different crimes including CAH).

overbroad assertions of jurisdiction by national and international courts. In this context, the United States recalls and reiterates its continuing, longstanding, and principled objection to any assertion of jurisdiction by the International Criminal Court (ICC) over nationals of States that are not parties to the Rome Statute, including the United States, absent a UN Security Council referral or the consent of such a State. The United States remains a leader in the fight to end impunity and continues to support justice for victims of international crimes. We respect the decision of those nations that have chosen to join the ICC, and in turn we expect that our decision not to join and not to place our citizens under the ICC's jurisdiction will also be respected. Were other nations to conclude a CAH treaty that the United States did not join, the United States would not be bound by it and would reject any claim of authority to impose its terms on the United States absent its consent.

The Draft Articles, of course, differ in significant ways from the Rome Statute, including that they are focused on facilitating justice for victims of CAH in domestic legal systems rather than intended to establish an international court. However, experience and lessons learned with respect to the ICC nonetheless need to inform the Draft Articles in order to avoid the very serious concerns that have arisen with respect to the ICC. In particular, 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.

To that point, throughout the Draft Articles one issue that merits further consideration is the scope of specific draft articles, including limitations on a State Party's obligation based on territory, jurisdiction, or both. The United States has serious concerns regarding unwarranted assertions of jurisdiction in this context and believes that portions of the current draft have no basis in customary international law and could lead to increased tensions between States as States seek to exercise jurisdiction over the same matter in conflicting ways. Accordingly, the United States believes that further work needs to be done to clarify and justify the scope of potential State obligation under each of the Draft Articles, including whether territory, jurisdiction, or other limitations should provide the appropriate scope of such obligation. The United States believes it is vital that the ILC undertake such clarification and analysis in order for any proposed convention to be successful in winning State support and in strengthening justice for victims of CAH. Indeed, for its part, absent such clarification, the United States would not ratify a proposed convention based on the draft articles. This work should also include consideration of the appropriate limits on the exercise of jurisdiction for prosecution and investigation under any convention that might result, such as a nexus to the location of the offense, the offender or material evidence, or the nationality of the offender or the victims. Without such limitations, the United States is concerned that abuses that have been demonstrated in the context of the ICC and certain domestic proceedings will be repeated in this context, and such abuses will undermine genuine efforts to promote justice and inhibit ratification of an eventual draft convention by concerned States. Indeed, without clear provisions that define the scope of each State's obligations on CAH or other safeguards, States would have to consider how a possible CAH convention would affect the legal risks and potential inappropriate exposure of their governments and their officials in domestic, foreign, and international courts. As the country with the world's largest overseas presence, significant portions of which are engaged in combatting CAH by terrorist groups and in addressing the conditions in which CAH have

historically occurred, the United States will continue to consider these issues carefully and seek to have them addressed appropriately in this draft and any possible proposed convention.

A related issue meriting further consideration concerns the differences between States that have ratified other relevant conventions and States that have decided not to ratify such conventions. In particular, the Draft Articles should not simply be developed for Rome Statute parties, but rather should be acceptable both to States Parties to the Rome Statute and to States that have decided not to become party or remain party to the Rome Statute. This includes, for example, ensuring that the Draft Articles and Commentary do not profess to affect whether a given State has any obligations with respect to an international court or tribunal. Addressing these concerns will also help further the goal of promoting universal acceptance of the instrument, as noted above.

The United States notes that the below comments, which include both general views and specific suggestions for changes to the current draft, reflect an effort by the United States to engage in constructive dialogue with the ILC on the Draft Articles. The below comments should be understood in this specific context and not as representing approval by the United States of future work on the Draft Articles and its Commentary or on any possible resulting convention or with regard to international criminal law issues outside the context of the Draft Articles. The absence of comment by the United States on a particular provision of the Draft Articles or Commentary should not be understood to indicate the absence of concerns with respect to that provision.

## Preamble

The preamble should be adjusted in line with the objectives outlined above. We recommend adding a preambular paragraph modelled after language in the preamble to the 1977 Additional Protocol I to the 1949 Geneva Conventions<sup>7</sup> clarifying that nothing in the Draft Articles may be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations.<sup>8</sup> Such language is noticeably absent from the Draft Articles and could help assuage concerns that any convention would be used as a pretext to otherwise unlawful uses of force. Similarly, the Draft Articles, and any convention that follows, should not seek to infringe upon the sovereign rights of any State. Therefore, we propose adding preambular paragraphs that recognize the sovereign equality of States and that States should seek to resolve disputes concerning how to address CAH through peaceful means and in accordance with relevant and applicable domestic and international law.<sup>9</sup>

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<sup>7</sup> Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977.

<sup>8</sup> Similar language is present in Article 3 of the Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Adopted June 8, 1977, and in the preamble to the Rome Statute of the International Criminal Court, which reaffirms the prohibition on the use of force in the Charter of the United Nations and emphasizes “in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State.” Rome Statute, *supra* n.5.

<sup>9</sup> A number of multilateral treaties include provisions that clarify that they do not authorize violations of the territorial sovereignty of other States. Article 4 of the United Nations Convention against Transnational Organized Crime may be a helpful model for language in the preamble of other Draft Articles. United Nations Convention

## **Article 1**

### **Scope**

Draft Article 1 notes that the Draft Articles apply to the prevention and punishment of CAH. The United States believes it is necessary, in Draft Article 1 or elsewhere, to clarify that these provisions of the proposed convention would not modify international humanitarian law, which is the *lex specialis* applicable to armed conflict. Such clarification is necessary in order to avert the possibility of the convention being misinterpreted in ways that may undermine or purport to alter established international humanitarian law or criminalize conduct undertaken in accordance with the law of armed conflict. For example, such clarification could be provided in a preambular clause or in an addition to Article 1. We note that this approach would be consistent with Article 21(1)(b) of the Rome Statute of the International Criminal Court (“the Rome Statute”). That provision refers to “established principles of the international law of armed conflict” as one of the bodies of law to be applied by the International Criminal Court,<sup>10</sup> confirming that that instrument does not create new rules or modify existing rules applicable to armed conflict. Such a provision would also be consistent with paragraph 6 of the General Introduction to the ICC Elements of Crimes, which notes that the “[t]he requirement of ‘unlawfulness’ found in the Statute or in other parts of international law, in particular international humanitarian law, is generally not specified in the elements of crimes.”<sup>11</sup>

Finally, the United States underscores the necessity of clarifying, in Draft Article 1 or elsewhere, that the text as proposed for the convention will not and is not intended to modify any rules of international law that may be applicable to the exercise of jurisdiction by one State in relation to the sovereign acts of another State.

## **Article 2**

### **General Obligation**

Draft Article 2 states that CAH, “whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.” The United States suggests clarifying that all efforts to prevent and punish must be done in accordance with international law. In addition, please see our comments below on Draft Article 4 for our views on the scope of the obligation to prevent.

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against Transnational Organized Crime art. 4, *adopted by resolution* Nov. 15, 2000 (stating, “nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.”). Similar language also appears in the 1988 UN Convention against illicit traffic in Narcotic drugs and psychotropic substances (article 2) and the UNCAC (art 4). United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 2, *adopted by the Conference* Dec. 19, 1988 (stating, “a Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law); United Nations Convention against Corruption art. 4, Dec. 9, 2003 (stating, “nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.”).

<sup>10</sup> Rome Statute, *supra* n.5, art. 21(1)(b).

<sup>11</sup> International Criminal Court: Elements of Crimes General Introduction para. 6, *adopted* September 10, 2002.

## **Article 3**

### **Definition of crimes against humanity**

Draft Article 3 lays out a definition of CAH. We recognize that the first three paragraphs of Draft Article 3 are drawn almost verbatim from the Rome Statute<sup>12</sup> and that Rome Statute parties may have an interest in ensuring that the definition of CAH in the Draft Articles would be consistent with the Rome Statute. The United States, along with many other States, is not party to the Rome Statute and has not accepted the definition of CAH in that instrument. Some of the specifically enumerated offenses and definitions in Draft Article 3, paragraph 3, as in the Rome Statute, are problematic because of the inclusion of references to unidentified and amorphous principles of “fundamental rules of international law,” “universally recognized” concepts of international law, and “fundamental rights” of international law. It is unclear whether these references encompass, for example, all the rights enshrined in the Universal Declaration of Human Rights<sup>13</sup> or all rights enshrined in the International Covenant on Civil and Political Rights.<sup>14</sup>

In addition, the ILC should explain in more detail the meaning and scope of Draft Article 3, paragraph 1, section (d) that would criminalize “deportation or forcible transfer of population.” Although the Draft Article 3, paragraph 2, section (d) defines “deportation or forcible transfer of population” as “forced displacement of persons … from the area in which they are lawfully present, without grounds permitted under international law,” the Commentary should explicitly state that the offense does not include a State enforcing its own immigration laws against individuals not lawfully present in the State, consistent with its obligations under international law. International law has long recognized the prerogative of all States to control their own borders and, subject to certain exceptions, to remove individuals not lawfully present.

The ILC should also explain in more detail the meaning and scope of Draft Article 3 paragraph 1, section (k) that would criminalize “inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” This Draft Article is so broadly and vaguely worded that it could cover any number of government acts lawful under domestic law. For example, to the extent the definition continues to be drawn from the Rome Statute, the definition should be further clarified by explicitly incorporating, with small technical modifications to address the context, the relevant text of the ICC Elements of Crimes relating to CAH,<sup>15</sup> and another draft article or draft annex reflecting these understandings, *mutatis mutandis*, could provide the basis for additional useful clarification if the Rome Statute definition continues to be used in the Draft Articles

In addition, the United States concurs with the conclusion in the Commentary that the definition set forth in Draft Article 3 does not provide that the perpetrator would in all circumstances be a State official or agent. Indeed, non-State groups such as the Islamic State in Iraq and Syria

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<sup>12</sup> Rome Statute, *supra* n. 5.

<sup>13</sup> Universal Declaration of Human Right, *adopted by consensus* Dec. 10, 1948.

<sup>14</sup> International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966.

<sup>15</sup> International Criminal Court: Elements of Crimes, *supra* n. 11.

(ISIS) have been responsible for crimes against humanity.<sup>16</sup> However, the inclusion of the Commission’s 1991 comment that “de facto leaders and criminal gangs”<sup>17</sup> may be non-State groups that can formulate a “policy” for purposes of the Draft Articles merits further clarification. The United States notes that, in general, criminal gangs would not be considered to commit CAH. Moreover, an overly broad definition of CAH in which ordinary criminal activity by gangs and other organized criminals would qualify as CAH could make non-refoulement obligations very difficult to administer. Accordingly, the Draft Articles and the Commentary should be clarified to ensure that the Draft Articles do not suggest that organized criminal activity would ordinarily constitute CAH.

## **Article 4**

### **Obligation of Prevention**

Draft Article 4 further defines the obligation to prevent CAH. Subparagraph 1(a) requires a State to undertake to prevent CAH via effective legislative, administrative, judicial, or other preventive measures in any territory under its jurisdiction. First, we note that the Draft Article itself expressly limits a State’s obligation to take measures to those measures in “any territory under its jurisdiction.” This language differs from the language in conventions in which the territorial limitation on the obligation to prevent is explicitly applied to the crimes to be prevented.<sup>18</sup> We recommend adhering to the more established approach as the formulation in the Draft Article might be interpreted to suggest an obligation to prevent CAH that occur abroad. The Commentary suggests, based on a similar provision of the Genocide Convention, that the obligation to prevent in the Draft Articles requires that States follow a “due diligence standard”, whereby “the State party is expected to use its best efforts...when it has a ‘capacity to influence effectively the action of persons likely to commit, or already committing’” CAH.<sup>19</sup> It is the United States’ strong belief that an obligation to undertake to prevent would be a general undertaking by its clear terms and, in accordance with common practice, would express the general purpose and intent of States parties rather than creating an independent obligation to take

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<sup>16</sup> See, e.g., Remarks by Secretary Tillerson on Religious Freedom, reprinted in the Digest of U.S. Practice in International Law 2017, p. 238 (“Application of the law to the facts at hand leads to the conclusion ISIS is clearly responsible for genocide against Yezidis, Christians, and Shia Muslims in areas it controls or has controlled. ISIS is also responsible for crimes against humanity and ethnic cleansing directed at these same groups and in some cases also against Sunni Muslims, Kurds, and other minorities.”).

<sup>17</sup> See (31) of the Commentary: “As a consequence of the “policy” potentially emanating from a non-State organization, the definition set forth in paragraphs 1 to 3 of Draft Article 3 does not require that the offender be a State official or agent. This approach is consistent with the development of CAH under international law. The Commission, commenting in 1991 on the draft provision on CAH for what would become the 1996 draft Code of Crimes against the Peace and Security of Mankind, stated “that the Draft Article does not confine possible perpetrators of the crimes to public officials or representatives alone” and that it “does not rule out the possibility that private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the draft Code”.”

<sup>18</sup> Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Article 2(1) (“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”).

<sup>19</sup> See (12) of Commentary. The United States generally understands the language in Article I of the Genocide Convention as confirming the intention of the Contracting Parties to undertake actions intended to prevent genocide in the exercise of their existing authorities under domestic and international law, rather than creating additional rights or obligations to take actions not authorized under existing international law.

specific actions. To suggest that a very general obligation in the Draft Articles would create an unclear array of specific requirements that are not reflected in the remainder of the Draft Articles, which does articulate specific requirements, would pose an undue burden on States in implementing the convention and could discourage States from ratifying it. Moreover, there are existing procedures, including action under Chapter VII of the UN Charter,<sup>20</sup> that are available where States assess that risks of CAH merit collective action, or, as appropriate, the need for a dispute resolution mechanism provided in Draft Article 15.<sup>21</sup> We suggest clarifying as such in the Commentary.

Subparagraph 1(b) of Draft Article 4 indicates that a Party's obligation to prevent CAH includes "cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations." The Commentary notes in passing that whether an international organization is "relevant" will depend, *inter alia*, on "the relationship of the State to that organization," but this still leaves little guidance on when there would be an obligation to cooperate and may result in misinterpretations. For example, consistent with the fact that international organizations derive their mandate and authority from State consent, the text of the Draft Articles should clearly avoid any implication that a State would be obligated pursuant to this convention to cooperate with an international organization or other entities in circumstances where the State is not otherwise bound by such an obligation. Accordingly, we suggest that moving "as appropriate" to the end of Draft Article 4, Paragraph 1, subparagraph (b), such that "as appropriate" modifies the entire clause.

## **Article 5**

### **Non-Refoulement**

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<sup>20</sup> U.N. Charter art. 39-51.

<sup>21</sup> Indeed, the 2005 World Summit Outcome document reflects the latest consensus on the responsibility to protect populations from CAH. The Responsibility to Protect is a political commitment that was adopted by consensus by all members of the United Nations General Assembly at the 2005 World Summit. The key points are articulated in paragraphs 138–139 of the 2005 World Summit Outcome Document.

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability. G.A. Res. 60/1, 2005 World Summit Outcome ¶ 138 (Sept. 16, 2005).

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out. *Id.* at ¶ 139.

Draft Article 5 details the obligation that States would have regarding non-refoulement where there are substantial grounds for believing that he or she would be in danger of being subjected to a CAH. The United States is not convinced of the value or practicality of this Draft Article; it creates a new non-refoulement obligation specific to CAH, and the Commentary does not address why a new non-refoulement obligation is necessary. The 1951 Convention relating to the Status of Refugees (the Refugee Convention) and its 1967 Protocol,<sup>22</sup> as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),<sup>23</sup> have been widely ratified and provide protection from return to countries where individuals fear many of the types of conduct included under the definition of CAH. These existing obligations do not require individuals seeking protection to meet any purported predicate requirements of CAH, however defined, that the actions are part of a “widespread or systematic attack directed against a civilian population, with knowledge of the attack.” In this sense, Draft Article 5 would, in many circumstances, offer narrower protection than would be provided by existing international instruments.

In addition, given that the Draft Article 3 provides more protected bases for “persecution” than the Refugee Convention, and a more expansive definition of “torture” than that contained in the CAT, Draft Article 5 could result in an expansion of mandatory non-refoulement protections in other circumstances. In particular, on its face, the “torture” definition in the Draft Articles omits any requirement for State action, as is required in the CAT, and therefore requires non-refoulement regardless of the fact that the “torture” would have been conducted by private criminals with no knowledge or acquiescence by any public official. We suggest that further consideration of this issue is warranted, taking into account the Refugee Convention and the CAT.

Moreover, the extent the treaty would provide protection from refoulement to those who have engaged in conduct that raises security and other concerns (e.g., human rights abusers, those who have made terrorist threats) is unclear and deserves further consideration. Existing international law has long stipulated certain security-related exceptions in the refugee context,<sup>24</sup> and those exceptions are integral to the United States’ administration of asylum and statutory withholding of removal.<sup>25</sup> Although the CAT’s non-refoulement obligations do not provide any such exceptions, the Commission should consider exclusions similar to those in the Refugee Convention.

In addition, Draft Article 5 differs in material respects from well-established non-refoulement obligations in other treaties. The Commentary does not explain the reasoning behind these differences, and such changes could conflict with current State practice. For example, the Commentary states that the Draft Article is modeled on the Convention on Enforced

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<sup>22</sup> Convention relating to the Status of Refugees, *entered into force* April 22, 1954; Protocol relating to the Status of Refugees, *entered into force* Oct. 4, 1967.

<sup>23</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *entered into force* June 26, 1987.

<sup>24</sup> See Refugee Convention, art. 1(f); art. 33(2).

<sup>25</sup> See 8 U.S.C. §§ 1158, 1231(b)(3), 1182(a)(3); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 179–180 (1993).

Disappearances (CED),<sup>26</sup> which has only been ratified by 59 States.<sup>27</sup> Further, although the CED addresses returning individuals to “another State,” Draft Article 5 refers to “territory under the jurisdiction of another State,” and no explanation is provided for this change.

Moreover, although Draft Article 5 utilizes the same standard as Article 3 of the CAT for determining whether a person would be in danger of being subjected to a crime against humanity—“where there are substantial grounds for believing” that the ill treatment would occur—the U.S. Senate’s advice and consent was subject to the understanding that the United States would interpret this phrase to mean “more likely than not.” The United States likely would take a similar approach to this provision. But the Commentary seems to go against this interpretation, by citing the European Court of Human Rights’ interpretation of Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms: “While a ‘mere possibility’ of ill-treatment is not sufficient, it is not necessary to show that subjection to ill-treatment is ‘more likely than not.’”

Paragraph 2 of Draft Article 5 refers to competent authorities making a determination of a consistent pattern of violations in the territory of another State. It would be useful to revise this paragraph to include the concept of “credible information supporting” the existence of such a pattern.

Finally, as noted above, throughout the Draft Articles, the scope of the Draft Articles, particularly whether a specific Draft Article’s scope should be limited based on territory, jurisdiction, or both, bears further consideration. To the extent the Draft Articles continue to include a non-refoulement obligation, we suggest making clear in Draft Article 5 that a State Party would only have such obligation with respect to persons within its territory and subject to its jurisdiction.

## **Article 6**

### **Criminalization under national law**

Draft Article 6 addresses requirements for the criminalization of CAH under domestic law, including modes of liability. As noted above, we underscore the importance that the Draft Articles be drafted with a flexible approach allowing for implementation by a variety of legal systems. Given the egregious nature of CAH, the conduct constituting CAH should already constitute a domestic crime in most circumstances. Moreover, as noted above, we do not think that the Rome Statute definition is sufficiently clear, and adopting a novel and unclear definition of CAH that broadens the definition of CAH would be unhelpful.

Since a convention would seek to enhance international cooperation, the United States acknowledges that the benefit of a common definition for offenses is dual criminality, which will allow for a similar concept of the crime in both the requesting and requested jurisdiction in extradition cases. Although we emphasize that dual criminality does not require laws that are mirror images of each other, we recognize that having common definitions as the starting place

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<sup>26</sup> Int’l Convention for the Protection of All Persons from Enforced Disappearance, *entered into force* Dec. 23, 2010.

<sup>27</sup> United Nations Office of the High Commissioner for Human Rights, Committee on Enforced Disappearances (available at <https://www.ohchr.org/EN/HRBodies/CED/Pages/CEDIndex.aspx>).

would greatly facilitate reaching end results that satisfy dual criminality requirements. If the Commission is not able to draft a common definition that would be acceptable to a wide range of States, it may wish to give consideration to further describing the prohibited conduct in cases involving requests for extradition based on allegations of CAH, rather than suggesting that States should enact new domestic offense provisions.

As to the doctrine of command responsibility, conceptions and applications have varied widely among and even within States. For example, some see it as a form of vicarious liability for the offense of a subordinate, while others view it as a standalone offense, such as dereliction of duty. As noted above, the standards articulated in the Draft Articles must allow flexibility for appropriate and diverse domestic implementation. The Commission should give further consideration to tailoring its provision on command responsibility to the context of CAH or to acknowledging that States that have not accepted the Rome Statute standard in their domestic law, such as the United States, might not find the Draft Articles acceptable.

Paragraphs 1 to 7 of Draft Article 6 are directed at criminal liability of offenders who are natural persons, although the term “natural” is not used, which is consistent with the approach taken in treaties setting out crimes. Paragraph 8, in contrast, addresses the liability of “legal persons” for the offences referred to in Draft Article 6. As acknowledged in the Commentary, there is no universal, international concept of criminal responsibility for legal persons in this area (or in others). The United States believes international law establishes substantive standards of conduct but generally leaves each State with substantial discretion as to the means of enforcement within its own jurisdiction, which could include the precise category of potential perpetrators and type of relief. Draft Article 6 acknowledges such a principle by explicitly providing that national laws and “appropriateness” may dictate whether and how States establish liability for “legal persons,” a class broader than natural persons. The United States emphasizes that at a minimum, the flexibility provided for in the Draft Article should be maintained – both as to how such liability would operate under criminal laws, but also its appropriateness in a national system.

Finally, as a general note, we suggest replacing “national law” with “domestic law” throughout this and other Draft Articles, to track more closely the terminology in other law enforcement cooperation treaties.<sup>28</sup> The reasons for departing from this language by using the language in the draft CAH articles are unclear, and using “national law” could raise federalism concerns for States with federal systems.

## **Article 7**

### **Establishment of national jurisdiction**

Draft Article 7 sets out the circumstances where the establishment of jurisdiction for CAH would be proper under the draft convention. The Draft Articles should clarify that jurisdiction be established when a State party does not extradite in accordance with the Draft Articles and “other

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<sup>28</sup> See generally United Nations Convention against Corruption art. 4, Dec. 9, 2003; United Nations Convention against Transnational Organized Crime art. 4, adopted by resolution Nov. 15, 2000; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 2, adopted by the Conference Dec. 19, 1988.

applicable international law,” because extradition or surrender could be subject to a variety of international obligations depending on the circumstances, including bilateral treaties, multilateral human rights treaties, or international humanitarian law treaties.

In addition, the Draft Articles should be interpreted to exclude the exercise of criminal jurisdiction inconsistent with or contrary to the Draft Articles and applicable international law, such as prosecution for CAH that did not comport with international human rights law, including fair trial guarantees. Accordingly, we suggest modifying subparagraph (3) of Draft Article 7 to make explicit that the Draft Articles do not authorize deviations from existing requirements and that the Draft Articles must be applied consistent with international law. Additionally, based on recent history, we are mindful that mechanisms for cooperation set forth in the Draft Articles could be open to abuse, particularly in those domestic legal systems where prosecutors are given broad discretion to open investigations or file charges. If the Draft Articles provide for obligations to establish jurisdiction over CAH more broadly, then such obligations are likely to increase the number of situations in which States will have concurrent jurisdiction. The Draft Articles and Commentary should clarify how such conflicts should be addressed, including by consideration of factors commonly recognized in criminal law, such as the location of the offense, the offender, or material evidence; the nationality of the offender or the victims; or a State’s essential interest in ensuring accountability for its personnel. We further express concern that although subparagraphs (1) and (2) and the Commentary speak about the “establishment” of jurisdiction, subparagraph (3) speaks of the “exercise” of jurisdiction. It is unclear whether this shift in terminology is intentional, and if so, what implications it may have. The United States also recommends the Commission consider language similar to subparagraph (b) of paragraph (2) of Article 16 of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict to address concerns related to unwarranted prosecutions.<sup>29</sup>

Finally, we note that the Commentary construes jurisdiction over ships and aircraft registered in a State as encompassed within that State’s “territorial” jurisdiction. The United States does not agree with this interpretation and believes the Draft Articles should not construe such jurisdiction over ships and aircraft as necessarily ‘territorial’ in nature; for example, although a flag State generally enjoys exclusive jurisdiction over its ships on the high seas, the ship is not the territory of the State as such.

## **Article 8**

### **Investigation**

As drafted, Draft Article 8 creates an obligation to investigate whenever there are reasonable grounds to believe that acts constituting CAH have been or are being committed in any territory under its jurisdiction. The United States notes that a State should investigate allegations that its

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<sup>29</sup> Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, art. 16(2)(b), The Hague, March 26, 1999, 2253, A-3511 UNTS 172, 219 (2005) (“except in so far as a State which is not Party to this Protocol may accept and apply its provisions . . . , members of the armed forces and nationals of a State which is not Party to this Protocol, except for those nationals serving in the armed forces of a State which is a Party to this Protocol, do not incur individual criminal responsibility by virtue of this Protocol, nor does this Protocol impose an obligation to establish jurisdiction over such persons or to extradite them.”).

officials have committed CAH abroad. Moreover, in contrast to Draft Article 7(1)(a), Draft Article 8 and other Draft Articles address only “territory under its jurisdiction,” not ships and aircraft registered in that State. This distinction generally makes sense, given that in certain circumstances another State may be better positioned than the State of registry to take relevant action (*e.g.*, to conduct an investigation). We would suggest that to avoid any confusion, the Commentary highlight and clarify this distinction expressly, consistent with the ordinary meaning of “territory” and with the unique phrasing of Draft Articles 7 and 8.<sup>30</sup> The United States also suggests considering more generally whether an additional provision is needed in the Draft Articles to clarify the scope of their provisions with respect to ships and aircraft.

Finally, it would be useful to clarify that the competent authorities must possess the information in order to trigger the obligation to investigate.

## **Article 9**

### **Preliminary measures when an alleged offender is present**

Draft Article 9 provides what measures a State must take when an alleged offender is present in territory under its jurisdiction. The United States is concerned that the Draft Articles fail to acknowledge that States may have conflicting obligations with respect to taking foreign officials into custody, including depending on the status of those officials. Therefore, we recommend that the Commentary address and acknowledge the different obligations faced by States with respect to this issue.

Regarding subparagraph (2) of Draft Article 9, we note that what constitutes a “preliminary inquiry” is unclear. We believe that, depending on how it is defined, at least a preliminary inquiry into the facts should be part of an examination of information for the purposes of detaining a person. The United States suggests the Draft Articles reiterate that a person should not be taken into custody for allegations without even a preliminary inquiry into the facts.

Finally, in subparagraph (3) of Draft Article 9, we have concerns regarding the blanket requirement that the circumstances that warrant detention be shared with States of which the individual is a national. Such a requirement ignores privacy concerns and legal restrictions under domestic and international law, and also could expose law enforcement and intelligence sources and methods. We strongly believe that such an obligation for sharing should be limited to only that information and situations that the State deems appropriate.

## **Article 10**

### ***Aut dedere aut judicare***

Draft Article 10 sets out the obligation to prosecute an alleged offender for CAH where no other State has requested extradition. As an initial note, the United States suggests reconsidering the use of the phrase *aut dedere aut judicare* in the title of the Draft Article. Including this phrase

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<sup>30</sup> We understand the term “territory under its jurisdiction” is used in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to include registered ships and aircraft. In general, however, the ordinary meaning of “territory” does not include ships and aircraft as such, and so for clarity and precedential reasons the *sui generis* terminology of that convention should not be replicated here.

inserts a degree of uncertainty, since it may be translated as a principle. This potentially undermines, or at minimum, obfuscates, the fact that the obligation is to consider the matter for prosecution, not to prosecute, and as drafted, the use of the phrase in the title does not accurately describe the obligations in the Draft Article. Similarly, the United States suggests Draft Article 10 more closely track the provisions in the United Nations Convention against Transnational Organized Crime (UNTOC), the United Nations Convention against Corruption (UNCAC), and other law enforcement treaties.<sup>31</sup> In addition, the Draft Article should clarify that a State need not prosecute a case automatically. Rather, a State could decide to dispose of allegations in other appropriate ways, for example, if the allegations have already been investigated and found to be without basis, or through immigration removal proceedings.

In addition, although the United States supports the Draft Articles' aim to help facilitate domestic accountability processes and extraditions and strengthen the ability of immigration authorities to ensure that such persons are not able to find safe haven in the United States, the United States does not support the creation of new obligations under Draft Article 10 that vary in meaningful ways from current extradition practice. For example, Draft Article 10 is modeled on the text of Article 44 the United Nations Convention Against Corruption (UNCAC)<sup>32</sup>; under Article 44(6)(a) of the UNCAC, if a State declines to extradite the alleged offender solely on the ground that he or she is one of its nationals, the State shall pursue prosecution if the State seeking extradition so requests. In contrast, Draft Article 10 requires that, if a State does not act to extradite an offender, it *must* use the Draft Articles as a basis for domestic prosecution. Such a shift is problematic, and the United States does not support its inclusion, as it would no longer allow for the requesting State to exercise discretion as to whether their cases are submitted for prosecution. To be consistent with UNCAC Article 44, we suggest revising the draft article to allow requesting States to choose whether their cases are submitted for prosecution in requested States.

Finally, we would note the Commentary specifically states that the Draft Article would encompass cooperation with hybrid tribunals. A strict argument could be made that hybrid tribunals are neither “competent international criminal tribunals” nor “State tribunals”; accordingly, broadening the Draft Article to include “competent tribunals” would allow hybrid courts to address such cases as necessary under the framework of the convention.

## **Article 11**

### **Fair treatment of the alleged offender**

Draft Article 11 sets out rights of individuals who are accused of CAH. We strongly recommend explicitly including a reference to international humanitarian law, as applicable, in paragraph (1)

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<sup>31</sup>See, e.g., United Nations Convention against Transnational Organized Crime art. 16(10), adopted by resolution Nov. 15, 2000 (“A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.”).

<sup>32</sup> United Nations Convention against Corruption art. 46(6)(a), Dec. 9, 2003.

given that different protections and procedures to implement those protections can apply in that context. More generally, portions of paragraph 1 of Draft Article 11 are vague and overbroad – in particular the phrases “measures are being taken in connection with an offence” and “full protection of his or her rights under . . . international law” – even if further expounded in the Commentary.<sup>33</sup> Comparatively, Article 7(3) of the CAT refers only to “fair treatment at all stages of the proceedings.”<sup>34</sup> The United States suggests that revising paragraph 1 of Draft Article 11 to be more general, along the lines of the CAT language could ensure acceptance and implementation by a diversity of criminal systems. In addition, with regard to paragraph (2) of Draft Article 11, the provision should be clarified to make clear that the obligation should not be applicable to situations in which a non-State actor unlawfully detains a person.

The United States believes that the incorporation of the individual “right” to consular access in paragraph (2) of Draft Article 11 is misplaced. The “rights” of consular notification and access described in Article 36 of the Vienna Convention on Consular Relations<sup>35</sup> belong to States and not individuals. As such, they are not enforceable by private individuals. Draft Article 11 suggests otherwise and should likewise be clarified.

Finally, in paragraph (3), as above, it would be useful to make explicit the principle that the law of armed conflict is *lex specialis* in relation to armed conflict by providing for the application of the Geneva Conventions of 1949 rather than the provisions of the Draft Articles when the Geneva Conventions of 1949 are applicable.

## **Article 12**

### **Victims, witnesses and others**

Draft Article 12 requires that States take necessary measures to ensure an individual right to complain to competent authorities regarding CAH. As a general matter, the United States supports a broad range of options for individuals to bring attention generally to CAH being committed anywhere. However, for purposes of the Draft Article, it is necessary to articulate explicitly temporal, geographical, or jurisdictional limits. In the same vein, the individual “right” of complaint in Draft Article 12 should be reframed as a duty of competent authorities to allow and consider complaints rather than an individual right. Such a framing avoids a focus on the individual making the complaint, which could invite abusive complaints or invite limitations on such a right. Instead, we think the more important aspect to emphasize is that the competent authorities be open to receiving complaints and assessing them.

We further suggest adding “or other unlawful sanctions” to subparagraph (b) of paragraph (1) of Draft Article 12. Such an addition clarifies that ill-treatment or intimidation refers to actions prohibited by law, and also clarifies that it may be appropriate to subject someone to lawful sanctions for giving false testimony or other offense against the administration of justice.

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<sup>33</sup> Additionally, the United States notes that the Commentary on Draft Article 11 references, *inter alia*, Article 14 of the ICCPR to which the United States has lodged several understandings.

<sup>34</sup> “Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.” Convention Against Torture, art. 7(3).

<sup>35</sup> Vienna Convention on Consular Relations art. 36, *entered into force* March 19, 1967.

Draft Article 12 also discusses legal measures to ensure victims of CAH can obtain reparation for material and moral damages on an individual or collective basis from a constituted government. The United States believes that further work should be done to examine whether an individually enforceable damages remedy is appropriate in this context. The United States opposes an individually enforceable damages remedy against government officials. To the extent such a concept remains, given the variance in States' legal systems, the Draft Articles should clarify who would be responsible for such reparations, including when non-state actors commit CAH. It may also be valuable to engage further on whether and when any temporal, geographical, or jurisdictional limits should apply to such remedies

## **Article 13**

### **Extradition**

Draft Article 13 sets out the parameters States must follow when extraditing alleged offenders for CAH. In general, the United States asserts that negotiating new extradition treaties just to cover one offense or a narrow range of offenses would be ill advised. The United States does not understand that the Draft Articles nor the Commentary require such actions, but the Commentary should further clarify this point.

In addition, the United States suggests that the Draft Article should more closely track the language in other law enforcement conventions, in particular the UNTOC and the UNCAC,<sup>36</sup> including to clarify further how extradition treaties currently in force will interplay with the Draft Articles. In particular, such conventions generally include the concept that if the requested State has already convicted or acquitted the fugitive for the same offense for which extradition is requested, then extradition must be denied. Such clarification would be helpful here and important for ensuring that the extradition process created under these Draft Articles does not conflict with current practice. Additional consideration also should be given to tailoring this provision to the context of CAH and situations that could arise frequently, depending on the eventual scope of obligations under the convention to investigate or prosecute allegations of CAH

Finally, the United States notes the helpful caveat in Draft Article 13 paragraph 8 with regard to extradition to serve a sentence, noting that a requested State should only pursue service of a sentence if a national cannot be extradited and "upon application of the requesting State." That same caveat is not articulated with regard to extradition to face charges.

## **Article 14**

### **Mutual legal assistance**

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<sup>36</sup> United Nations Convention against Corruption art. 44 □ 4, Dec. 9, 2003 (stating, "Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence."); United Nations Convention against Transnational Organized Crime art. 16, *adopted by resolution* Nov. 15, 2000 (stating, "Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.").

Draft Article 14 provides obligations with regards to mutual legal assistance for prosecutions of CAH. However, the article should more closely track the model for mutual legal assistance in the UNTOC and UNCAC, with adaptions to the specific context of CAH.<sup>37</sup> Both of these conventions include far more complete provisions governing mutual legal assistance than the Draft Articles. In particular, they more clearly define the relationship between the multilateral obligation to provide mutual legal assistance and bilateral treaties and, when no such bilateral treaty exists, they define the grounds on which mutual legal assistance may be denied. One illustration of why this is important is that in certain cases, the United States has received requests to provide mutual legal assistance in relation to proceedings that the United States believes to be objectionable, such as efforts to prosecute U.S. service members for alleged war crimes in foreign courts. Although existing bilateral treaties have provisions that allow the United States to reject these and similar requests, as do the UNTOC and UNCAC,<sup>38</sup> the Draft Articles could benefit from a tailoring to the context and level of international tensions that are likely to arise in the context of requests from mutual legal assistance in relation to efforts against current or former government personnel for CAH.

Paragraphs 2 and 4 of Draft Article 14 draws directly from the UNCAC and make reference to “legal persons” and to “bank secrecy”. The United States recommends that the Commission consider whether these references are relevant in a CAH context. Similarly, in paragraph 3 of Draft Article 14, the United States notes that the language “including obtaining forensic evidence” is an odd formulation because it does not specify who is collecting the forensic evidence. States may have domestic laws that only allow law enforcement activity by the requested State, not by foreign law enforcement. Accordingly, we recommend deleting this language.

Finally, paragraph 7 of Draft Article 14 notes that its provisions shall not affect the obligations under existing applicable agreements “except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance.” This is new language not found in prior drafts, nor is it found in the UNCAC or the UNTOC. It is unclear whether the two concepts practically work together or whether there would be difficulties in applying different agreements on an *ad hoc* basis. We recommend further consideration of the language.

## Annex

Although the second, fourth, and sixth sentences of paragraph 2 of the annex come from the UNCAC and UNTOC, they are extraneous for this text. We therefore recommend deleting them. With regard to the seventh sentence, the purpose of creating mutual legal assistance treaties, or miniature ones in multilateral conventions, is to bypass the *ad hoc* diplomatic process for requesting assistance, which is cumbersome and more time consuming than the process used in mutual legal assistance treaties. As such, use of diplomatic procedures would be regressive, so the United States recommends deleting the reference. Finally, the United States posits that the

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<sup>37</sup> United Nations Convention against Corruption art. 46, Dec. 9, 2003; United Nations Convention against Transnational Organized Crime art. 18, *adopted by resolution* Nov. 15, 2000.

<sup>38</sup> United Nations Convention against Corruption art. 46 □□ 9-29, Dec. 9, 2003; United Nations Convention against Transnational Organized Crime art. 18 □ 21, *adopted by resolution* Nov. 15, 2000.

reference to INTERPOL is unnecessary if the purpose of the paragraphs is to encourage working through central authorities in each State.

The United States again thanks the ILC for the opportunity to comment on the Draft Articles. Regardless of the outcome, the United States will continue to engage in promoting the capacity of foreign countries to provide justice and accountability for serious crimes in their national jurisdictions, including acts that would constitute CAH.