



# Options to Advance the ILC Draft Articles on the Prevention and Punishment of Crimes Against Humanity

*June 29, 2022*

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## EXECUTIVE SUMMARY

1. This Memorandum identifies three potential avenues to advance the International Law Commission's Draft Articles on Crimes Against Humanity to the next procedural step. It is intended as a practical, not a technical, guide.
2. The Draft Articles on Crimes Against Humanity have widespread support from States, yet opposition from a few States has caused them to stagnate in the United Nations General Assembly Sixth Committee due to the Committee's tradition of acting by consensus.
3. Option 1 is for the Sixth Committee to act, by breaking consensus, if necessary. It could establish an Ad Hoc Committee to examine the Draft Articles on Crimes Against Humanity. Alternatively, there is precedent for moving directly to a Codification Conference or working directly on the Draft Articles as a Committee of the Whole.
4. Option 2 is for the General Committee to shift the Draft Articles on Crimes Against Humanity to the Third Committee or the Plenary of the General Assembly.
5. Option 3 is to pursue the development of a treaty on crimes against humanity either outside of, or adjacent to, the United Nations.
6. Option 1 is preferred. If consensus is impossible to achieve, U.N. practice shows that voting is employed by all U.N. bodies, including the Main Committees. Moreover, the Sixth Committee *can and does vote* after efforts to reach consensus have been exhausted.
7. The Third Committee has considered other related treaties, including the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Suppression and Punishment of the Crimes of Apartheid.
8. However, it is the Sixth Committee's mandate to examine legal and drafting questions, including the Annual Report of the International Law Commission and its recommendations. Failure to do so on the Draft Articles on Crimes Against Humanity by voting or consensus appears to substitute a political for a legal task. Conversely, forward action by the Sixth Committee respects and enhances the key role of the Commission and the General Assembly to develop and codify international law under Article 13, paragraph 1(a) of the U.N. Charter.
9. The Draft Articles could be seen as a "special case," warranting voting given their connection to human rights, humanitarian law, peace, and security. The other Main Committees addressing those areas (the Third and First Committees) vote on a regular basis. In the area of international criminal law, unlike other areas of international law in which "soft law" instruments may be effective and authoritative, experience has demonstrated, and the principle of legality requires, that prevention and punishment of specific crimes require clear definitions and modalities of enforcement.
10. Although some States have argued that the Sixth Committee is different because it establishes legal norms, that argument would not seem to be relevant regarding the *process* to be used to take a matter forward. The argument that the Sixth Committee should operate by consensus so that the General Assembly can speak with one voice in establishing the content of customary international law is not relevant as to the question of whether a potential treaty should be discussed in the first place. Additionally, as for matters of substance, treaties must be considered by States not only at the international level but also in their own parliamentary systems, as they impose specific obligations upon them. Thus, the argument that the Sixth Committee should only work by consensus because it "creates law," is without real foundation.
11. The General Assembly has noted the desirability of adopting decisions and resolutions by consensus "when doing so. . . contributes to the effective and lasting settlement of differences, thus strengthening the authority of the United Nations." If consensus, however, weakens or undermines the authority of the United Nations, voting is preferred.

## INTRODUCTION

12. This Memorandum is intended as a practical guide to exploring avenues to advance the International Law Commission's (ILC) Draft Articles on Prevention and Punishment of Crimes Against Humanity (Draft Articles) in the Sixth Committee based on its prior practice and examples of other successful treaty drafting processes. It also briefly explores options outside the Sixth Committee, should the current impasse prove intractable. It is not intended as a technical explanation of Sixth Committee or United Nations procedure.
13. The Draft Articles are currently stalled in the Sixth Committee of the United Nations General Assembly (UNGA).<sup>1</sup> Yet elaborating an international convention based on the Draft Articles has significant support among States. Indeed, 76 of the 90 States and entities that made or aligned with statements during the Sixth Committee's discussion on the Draft Articles during its 76th Session in 2021 expressed explicit support for moving the process forward, and 4 others were neutral.<sup>2</sup>
14. Despite this overwhelming support, the practice of the Sixth Committee — and more specifically the Committee's tradition of taking decisions on the basis of consensus — has precluded meaningful progress<sup>3</sup> due to objections from a small number of States.<sup>4</sup>
15. Because securing consensus on a resolution to further the Draft Articles has been impossible for the past three years, States in favor of adopting a crimes against humanity treaty — or even *debating* the adoption of a crimes against humanity treaty (which this Memorandum will refer as “Treaty-Proponent States”) — have been reduced to advancing resolutions *taking note* of the Draft Articles and placing them on the agenda for the following year's session.<sup>5</sup> In this way,

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<sup>1</sup> Int'l Law Comm'n, Rep. on the Work of Its Seventy-First Session, ¶ 44, U.N. Doc. A/74/10 (2019). See Leila Sadat, *Towards a New Treaty on Crimes Against Humanity: Next Steps*, JUST SEC. (Sept. 13, 2021), <https://www.justsecurity.org/78063/towards-a-new-treaty-on-crimes-against-humanity-next-steps/> (explaining in further detail how the ILC Draft Articles address gaps in the current international legal framework).

<sup>2</sup> See Leila Sadat & Akila Radhakrishnan, *Crimes Against Humanity: Little Progress on Treaty as UN Legal Committee Concludes Its Work*, JUST SEC. (Dec. 7, 2021), <https://www.justsecurity.org/79415/crimes-against-humanity-little-progress-on-treaty-as-un-legal-committee-concludes-its-work/>; Leila Nadya Sadat, *Little Progress in the Sixth Committee on Crimes Against Humanity*, 54 CASE WESTERN J. INT'L L. 89 (2022); See also *Sixth Committee (Legal) – 76th session: Crimes against humanity (Agenda item 83)*, U.N., <https://www.un.org/en/ga/sixth/76/cah.shtml>; *Crimes Against Humanity Initiative*, WASH. UNIV. IN ST. LOUIS, <https://sites.wustl.edu/crimesagainsthumanity/>.

<sup>3</sup> Sadat, *supra* note 1.

<sup>4</sup> See Sixth Comm., *Sixth Committee, 8th meeting - General Assembly, 76th session*, U.N. Web TV (Oct. 13, 2021), at 1:08:48 (Iran), 1:13:15 (Egypt), 1:16:56 (Philippines), 1:27:47 (China), 2:34:41 (Pakistan), and 2:41:31 (India), <https://media.un.org/en/asset/k1b/k1b7vxyyps>; Sixth Comm., *Sixth Committee, 9th meeting - General Assembly, 76th session*, U.N. Web TV (Oct. 15, 2021), at 4:45 (Cameroon), 38:29 (Saudi Arabia), and 2:17:18 (Russian Federation), <https://media.un.org/en/asset/k18/k18kdjyppi>.

<sup>5</sup> Rep. of the Sixth Comm., *Crimes Against Humanity*, U.N. Doc. A/75/427, (Nov. 20, 2020) [hereinafter *2020 Sixth Committee Report*]; Rep. of the Sixth Comm., *Crimes Against Humanity*, U.N. Doc. A/76/474 (Nov. 18, 2021) [hereinafter *2021 Sixth Committee Report*].

the Sixth Committee’s consensus tradition has had “the practical effect of importing the veto prerogative from the Security Council into the General Assembly.”<sup>6</sup>

16. This Memorandum identifies some of the procedural barriers to moving the draft Crimes Against Humanity Treaty forward and suggests three potential avenues for Treaty-Proponent States to overcome the present stagnation: (1) using procedures of the Sixth Committee itself; (2) moving the Draft Articles to the agenda of the Third Committee or the UNGA Plenary; and (3) pursuing ‘U.N.-adjacent’ options to adopt the treaty.

## I. History and Background

17. Following the efforts of the *Crimes Against Humanity Initiative*,<sup>7</sup> which published a model treaty on the prevention and punishment of crimes against humanity in 2010, the ILC added the topic of “Crimes Against Humanity” to its long-term programme of work in 2013.<sup>8</sup> The ILC subsequently moved the topic to its active agenda, and continued work on it across four sessions and reports, and included input from a large number of States, U.N. experts, and civil society organizations (CSOs).<sup>9</sup>
18. In 2019, the ILC adopted a full set of Draft Articles on the Prevention and Punishment of Crimes Against Humanity on second reading,<sup>10</sup> and, in accordance with Article 23 of its Statute, recommended that the UNGA elaborate a treaty either within the General Assembly or through an international conference of plenipotentiaries.<sup>11</sup>
19. That same year (2019), during the Sixth Committee’s debate, most States welcomed the Draft Articles and endorsed the ILC’s recommendations. Austria offered to host a diplomatic conference in Vienna to negotiate the treaty. Of the more than 80 States and entities commenting, only 3 opposed moving forward.<sup>12</sup> Given the complexity of the project, several States suggested the need for further study (or were opposed to a new treaty). As a result, the draft resolution adopted by the Sixth Committee, and subsequently by the General Assembly,

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<sup>6</sup> Sadat & Radhakrishnan, *supra* note 2.

<sup>7</sup> Launched in 2008 by Leila Nadya Sadat, Director of the Whitney R. Harris World Law Institute, and presided over by a Steering Committee of renowned international legal scholars and practitioners, the *Crimes Against Humanity Initiative* convened meetings over a three-year period involving more than 250 experts worldwide that resulted in the publication of a *Proposed Convention on the Prevention and Punishment of Crimes Against Humanity*. FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (Leila Nadya Sadat ed., 2d ed. 2013). See *Crimes Against Humanity Initiative*, *supra* note 2.

<sup>8</sup> Int’l Law Comm’n, *Report on the Work of Its Sixty-Fifth Session*, U.N. Doc. A/68/10, at ¶ 170 (2013).

<sup>9</sup> The Commission’s work was led by Special Rapporteur Sean D. Murphy. *Analytical Guide to the Work of the International Law Commission: Crimes Against Humanity*, INT’L L. COMM’N (Apr. 6, 2021), [https://legal.un.org/ilc/guide/7\\_7.shtml](https://legal.un.org/ilc/guide/7_7.shtml).

<sup>10</sup> Int’l Law Comm’n, 2019 Session, *supra* note 1.

<sup>11</sup> *Id.* at ¶¶ 39-42.

<sup>12</sup> Leila N. Sadat & Madaline George, *An Analysis of State Reactions to the ILC’s Work on Crimes Against Humanity: A Pattern of Growing Support*, 6 AFRICAN J. INT’L CRIM. L. 189 (2020).

therefore simply “took note” of the Draft Articles and decided to include the topic in the provisional agenda of the 75<sup>th</sup> (2020) Session with a view to continuing to examine the ILC’s recommendation.<sup>13</sup> Austria delivered a statement on behalf of 42 other States expressing disappointment that the Sixth Committee was unable to agree on an “ambitious and structured approach” for future deliberations on the ILC’s recommendation.<sup>14</sup>

20. The Sixth Committee again considered the topic in October 2020. In large part due to the COVID-19 pandemic’s limitations on working methods at the United Nations, it opted for a technical rollover, adopting a consensus resolution on November 12, 2020 “taking note” of the Draft Articles.
21. Disappointed by the outcome, Mexico delivered a statement on behalf of itself and 13 additional States warning that this resolution “run[s] the risk – as it has been the case with other ILC products in the past – of getting caught in a cycle of consideration and postponement of the articles without concrete action, which in our view may undermine the relationship between the general assembly and the ILC.” The statement expressed hope that discussions in 2021 would “break the inertia.”<sup>15</sup> Once again, the General Assembly simply “took note” of the Draft Articles and decided to include the topic in the provisional agenda of the 76th (2021) Session with a view to continuing to examine the ILC’s recommendation.<sup>16</sup>
22. During the 76th Session in 2021, to avoid a repeat of the prior two years,<sup>17</sup> a large number of States sought to establish an Ad Hoc Committee or some similar entity (such as a Working Group) that would have a clear mandate and a well-defined timeline to discuss the Draft Articles in inter-sessional meetings over the next year.<sup>18</sup> As shown in Table 1, below, an overwhelming majority of States who spoke or aligned with statements during the Sixth Committee’s debate during the 76th Session, as well as those expressing their positions upon adoption of the resolution on November 18, 2021 (76 of 90), supported this initiative.<sup>19</sup>

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<sup>13</sup> G.A. Res. 74/187, ¶¶ 2-3, U.N. Doc. A/RES/74/187 (Dec. 30, 2019).

<sup>14</sup> Statement by Austria (on behalf of 42 other countries), 74<sup>th</sup> Session of the General Assembly, Sixth Committee, under agenda item 79 (Nov. 20, 2019), [https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/austria\\_eop.pdf](https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/austria_eop.pdf).

<sup>15</sup> *Mexico, Explanation of Position – Crimes Against Humanity (Final 19 November 2020)*, [https://www.un.org/en/ga/sixth/75/pdfs/statements/cah/19mtg\\_mexico.pdf](https://www.un.org/en/ga/sixth/75/pdfs/statements/cah/19mtg_mexico.pdf).

<sup>16</sup> G.A. Res. 75/136, ¶ 2, U.N. Doc. A/RES/75/136 (Dec. 22, 2020).

<sup>17</sup> *2020 Sixth Committee Report*, *supra* note 5; *2021 Sixth Committee Report*, *supra* note 5.

<sup>18</sup> The data compiled on this question was a joint project of Yale Law School and the Crimes Against Humanity Initiative at Washington University School of Law, and is publicly available at: <https://sites.wustl.edu/crimesagainsthumanity/disappointing-outcome-but-glimmers-of-hope-at-the-u-n-sixth-committee-in-2021/>. See also Sadat & Radhakrishnan, *supra* note 2; Sadat, *supra* note 2.

<sup>19</sup> *Id.* See also Sadat, *Little Progress*, *supra* note 2.

SUMMARY TABLE 2021 U.N. SIXTH COMMITTEE	
States & Entities Commenting and/or Joining a Statement	90
Explicitly favors a process to develop a convention	76 (≈84%)
Takes no explicit view on a process (positive and/or constructive comments on the text)	0
Takes no explicit view on a process (neutral)	4 (≈5%)
Opposes a process to develop a convention at this time	5 (≈6%)
Opposes a convention	5 (≈6%)

23. Dozens of prominent international lawyers and practitioners, including International Criminal Court Prosecutor Karim A. A. Khan, his predecessor Fatou Bensouda, and Silvia Fernandez de Gurmendi, President of the ICC Assembly of States Parties, also publicly urged the Sixth Committee to make concrete progress.<sup>20</sup> Despite this internal and external support, a few opposing States again successfully prevented any concrete action due to the Sixth Committee’s consensus tradition.
24. The Sixth Committee will resume consideration of the Draft Articles during its 77th Session. Unless action is taken between now and Fall 2022, when the Sixth Committee begins its consideration, 2022 is likely to be a repeat of 2021, 2020, and 2019.

## II. The Way Forward

### A. Option 1: Action in the Sixth Committee

25. The U.N. Sixth Committee is the “platform for the political and legal synergy that is needed to achieve the goals”<sup>21</sup> of the General Assembly’s mandate under Article 13(1) of the Charter to promote international cooperation in the political field and encourage the progressive development of international law and its codification. The relationship between the work of the International Law Commission and the Sixth Committee is an important one, and the traditional venue for discussion and implementation of the Commission’s recommendations.
26. There are several options for taking the Draft Articles forward in the Sixth Committee. This Memorandum highlights three of them.

<sup>20</sup> See The Global Justice Center & the Crimes Against Humanity Initiative at Washington University School of Law, Statement Urging Sixth Committee Action on The International Law Commission’s Draft Articles on Prevention and Punishment of Crimes Against Humanity (Nov. 9, 2021), [https://law.wustl.edu/wp-content/uploads/2021/11/CrimesAgainstHumanityTreaty\\_JointLetter\\_Updated2.pdf](https://law.wustl.edu/wp-content/uploads/2021/11/CrimesAgainstHumanityTreaty_JointLetter_Updated2.pdf).

<sup>21</sup> Michael Imran Kanu, *70 Years of the International Law Commission, it’s Future Role in the Changing Landscape of International Law and the Small-Developing States Nexus*, 13 FLA. INT’L. UNIV. L. REV. 1043, 1050 (2019).

## I. Three Possibilities in the Sixth Committee

### ***(a) The Sixth Committee could take up the Draft Articles as a Committee of the Whole during the General Assembly Session in 2023***

27. This was the method employed for the U.N. Convention on the Law of the Non-Navigational Uses of International Watercourses, a topic that was developed by the ILC from 1970 to 1994. It was taken up, pursuant to UNGA Resolution 49/52, by the Sixth Committee, which convened as a Working Group of the Whole to complete work on the draft and prepare it for adoption as a convention.<sup>22</sup> The Working Group met in October 1996 and again in March and April of 1997 before submitting its final report containing the draft treaty text directly to the General Assembly.<sup>23</sup> Both specific articles and the completed text were voted upon during the Sixth Committee's elaboration of the text and were adopted by a vote of 42 in favor, 3 against with 19 abstentions.<sup>24</sup> When the draft moved to the General Assembly, it was adopted as Resolution 51/229 of May 21, 1997, in a recorded vote of 103 to 3, with 27 abstentions.<sup>25</sup>
28. During the discussion before the vote and explanations following the vote, some delegations complained of the "haste" surrounding the elaboration of the text,<sup>26</sup> others challenged aspects of the treaty's substance, and one State, India, regretted that the General Assembly was "bypassing the importance of consensus."<sup>27</sup> The treaty entered into force in August 2014 and now has 37 parties.<sup>28</sup>

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<sup>22</sup> See U.N. General Assembly, Official Records, 99<sup>th</sup> Plenary Meeting, Wednesday, May 21, 1997, U.N. Doc. A/51/PV.99, at 1 (May 21, 1997).

<sup>23</sup> *Id.* The final report is contained in Doc. A/51/869. U.N. Sixth Comm., Rep. of the Sixth Committee Convening as the Working Group of the Whole, U.N. Doc. A/51/869 (Apr. 11, 1997).

<sup>24</sup> U.N. Doc. A/C.6/51/SR.62/Add.1. See also Virginia Morris & M. Christiane Bourloyannis-Vrailas, *The Work of the Sixth Committee at the Fifty-First Session of the UN General Assembly*, 91 AM. J. INT'L L. 542, 547 n.24. (1997). U.N. GAOR, 51st Sess., 62nd C.6 mtg., U.N. Doc. A/C.6/51/SR.62 (Apr. 4, 1997).

<sup>25</sup> Records of the General Assembly, *supra* note 22, at pp. 7-8.

<sup>26</sup> This was the position of France, which complained it was obliged to abstain because the text was "carelessly drafted and imbued with a spirit of partisanship." *Id.* at p. 8.

<sup>27</sup> India abstained in the vote and critiqued the substance of the text, as well. *Id.* at p. 9.

<sup>28</sup> *Status, Convention on the Law of the Non-Navigational Uses of International Watercourses*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-12&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-12&chapter=27&clang=_en).

***(b) The Sixth Committee could establish a Special or Ad Hoc Committee that would meet between sessions and take up the Draft Articles under a mandate elaborated by the Sixth Committee in Fall 2022***

29. A prominent example of an ILC product that took this route<sup>29</sup> is the Ad Hoc Committee for the Establishment of an International Criminal Court, which considered substantive issues arising from the ILC's early draft statute before reporting to the General Assembly on a final draft, with alternatives, and recommending the creation of a Preparatory Committee to consolidate a draft text for negotiation at the Rome diplomatic conference.<sup>30</sup>
30. Another example is the U.N. Convention on Jurisdictional Immunities of States and Their Property, which had a long genesis in the ILC and the Sixth Committee. The ILC began its work in 1977 and reported a first set of draft articles to the Sixth Committee in 1991,<sup>31</sup> which was then taken up by an open-ended working group that met in 1992 and 1993,<sup>32</sup> and reported back to the Sixth Committee.<sup>33</sup> The General Assembly returned the subject to the ILC in 1999, and in 2000, the General Assembly established an Ad Hoc Committee pursuant to Resolution 55/150 which met for three sessions and submitted a final text on March 5, 2004, which was transmitted to the General Assembly and adopted without a vote.<sup>34</sup> As of this writing the treaty has not yet entered into force.

***(c) The Sixth Committee could send the Draft Articles directly to a Codification Conference to elaborate a convention based on the Draft Articles***

31. For example, in 1984, the General Assembly decided to convene a conference of plenipotentiaries in Vienna to negotiate the final text of the Convention on the Law of Treaties Between States and International Organizations or Between Two or More International

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<sup>29</sup> See Manuel Rama Montaldo, *The Role of Special and Ad Hoc Committees of the General Assembly in the Codification and Progressive Development of International Law*, U.N. AUDIOVISUAL LIBR. OF INT'L L. (Feb. 27, 2014), [https://legal.un.org/avl/ls/Montaldo\\_UN.html](https://legal.un.org/avl/ls/Montaldo_UN.html).

<sup>30</sup> G.A. Res. 50/46, U.N. Doc. A/RES/50/46 (Dec. 18, 1995).

<sup>31</sup> Rep. of the Int'l L. Comm'n on the Work of Its Forty-Third Session, ¶¶ 23, 28, U.N. Doc. A/46/10 (1991), reprinted in [1991] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/1991/Add.1; *Jurisdictional Immunities of States and Their Property, Summaries of the Work of the International Law Commission*, INT'L L. COMM'N, [https://legal.un.org/ilc/summaries/4\\_1.shtml#a7](https://legal.un.org/ilc/summaries/4_1.shtml#a7); *Jurisdictional Immunities of States and Their Property, Analytical Guide to the Work of the International Law Commission*, INT'L L. COMM'N, [https://legal.un.org/ilc/guide/4\\_1.shtml](https://legal.un.org/ilc/guide/4_1.shtml).

<sup>32</sup> G.A. Dec. 47/414, U.N. Doc. A/RES/47/414 (Nov. 25, 1992).

<sup>33</sup> U.N. Sixth Comm., Report of the Working Group, U.N. Doc. A/C.6/48/L.4 (Nov. 11, 1993).

<sup>34</sup> G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 2, 2004); See also David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L L. 194 (2005).



Organizations.<sup>35</sup> The draft text upon which the conference was convened emanated from the International Law Commission which recommended a conference “to conclude a convention.”<sup>36</sup>

32. Although there were areas of contention between States, the General Assembly transmitted to the Conference a consensus list of articles in an Annex attached to the resolution for which substantive consideration was deemed necessary, while all other articles were to be reviewed for “consequential” drafting adaptations.<sup>37</sup> All substantive articles were ultimately adopted without a vote by the Conference. The dispute resolution clause, final clauses, and the convention as a whole were ultimately voted on.<sup>38</sup>

33. The Austrian government has already offered to convene an international conference of plenipotentiaries to negotiate a new global treaty on crimes against humanity, using the ILC Draft Articles as a basis for the drafting and conclusion of the treaty. The Sixth Committee could decide upon this avenue for moving the project forward, by voting, if necessary, consistent with prior codification practice and the recommendation of the International Law Commission.

## 2. Consensus vs. Voting

34. Any of the three options set out above could be accomplished either through a consensus resolution or by taking a vote. As noted above, during the 76th Session of the Sixth Committee, 76 States and entities of 90 intervening clearly favored the establishment of an Ad Hoc Committee or other entity (such as a Working Group), with a clear mandate and a well-defined timeline, to further consider the ILC’s Draft Articles. Four others were neutral.<sup>39</sup> Thus far, all possibilities have been stymied by the consensus tradition.

35. As discussed below, however, not only is voting the default rule in the General Assembly, but the Sixth Committee has also voted in the past. This suggests a path for Treaty-Proponent States if they wish to move the ILC Draft Articles forward.

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<sup>35</sup> Neri Sybesma-Knol, *The New Law of Treaties: The Codification of the Law of Treaties Concluded Between States and International Organizations or Between Two or More International Organizations*, 15 GA. J. INT’L & COMP. L. 425, 448-52 (1985); see G.A. Res. 38/139, U.N. Doc. A/RES/38/139 (Dec. 19, 1983).

<sup>36</sup> Rep. of the Int’l L. Comm’n on the Work of Its Thirty-Fourth Session, ¶ 57, 2 Y.B. INT’L L. COMM’N 1, U.N. Doc. A/CN.4/SER.A/1982/Add.1 (Part 2).

<sup>37</sup> G.A. Res. 40/76, U.N. Doc. A/RES/40/76 (Dec. 11, 1985); See also Karl Zemanek, *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*, U.N. AUDIOVISUAL LIBR. OF INT’L L., [https://legal.un.org/avl/ha/vcltsio/vcltsio.html#:~:text=On%2020%20March%201986%2C%20the,the%20Conference%20\(A%2FCONF](https://legal.un.org/avl/ha/vcltsio/vcltsio.html#:~:text=On%2020%20March%201986%2C%20the,the%20Conference%20(A%2FCONF).

<sup>38</sup> *Official Records of the United Nations Conference on the Law of Treaties Between States and International Organizations or Between International Organizations, Vienna, 18 February – 21 March 1986*, U.N. Doc. A/CONF.129/16, Sales No. 94.V.5.

<sup>39</sup> See *supra* note 18 and accompanying text.

***(a) Voting is the Primary Default Rule in the U.N. General Assembly***

36. The Sixth Committee's practice of consensus resolutions is better described as a *tradition* than a rule. The General Assembly has considered, and rejected, incorporating consensus-based decision-making into its rules of procedure.<sup>40</sup> Voting takes place regularly in other Main Committees of the General Assembly,<sup>41</sup> in the Plenary of the General Assembly, and with respect to the adoption of major treaties including the U.N. Convention on Watercourses, the Rome Statute of the International Criminal Court, and the U.N. Convention on the Law of the Sea.
37. The Fifth Committee is the only Main Committee with a mandate from the General Assembly to endeavor to reach decisions by consensus. Resolution 41/213 outlines that it is "desirable" for the Fifth Committee "to make all possible efforts with a view to establishing the broadest possible agreement."<sup>42</sup> Yet voting may be required if "every effort [has been] made to reach consensus"<sup>43</sup> to advance the Committee's work. Indeed, in 2020, the Fifth Committee voted 151 to 2 to adopt the U.N.'s budget (the vote was called for by the United States, which was then outvoted). Likewise, during the same session, the Russian Federation opposed the inclusion of the International, Impartial and Independent Mechanism for Syria in the 2021 regular budget and proposed an amendment to the Legal Affairs budget deleting all references to potential crimes committed in Syria. Switzerland called for a vote on the Russian Federation's proposal, which was then defeated by a recorded vote of 92 against to 21 in favor, with 45 abstentions.<sup>44</sup>

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<sup>40</sup> The only reference to consensus-based decision making is in an annex to the rules that contains the conclusions of the Special Committee on the Rationalization of the Procedures and Organization of the General Assembly. The Special Committee highlighted the desirability of the adoption of decisions and resolutions by consensus "when it contributes to the effective and lasting settlement of differences, thus strengthening the authority of the United Nations." Rules of Procedure of the General Assembly, U.N. Doc. A/520/Rev.19, Annex IV, ¶ 104 (2021); *see also* Robbie Sabel, *Consensus, in* PROCEDURE AT INTERNATIONAL CONFERENCES: A STUDY OF THE RULES OF PROCEDURE AT THE UN AND AT INTER-GOVERNMENTAL CONFERENCES 343-345 (2d ed. 2006) (noting the emergence of resistance to the proposed inclusion of consensus-based decision making in the rules of procedure by developing States concerned that it was "an attempt 'to create a *de facto* veto'").

<sup>41</sup> U.N. Secretariat, *Note by the Secretariat, Historical and Analytical Note on the Practices and Working Methods of the Main Committees, fifty-eighth session, Agenda Item 5, Revitalization of the work of the General Assembly*, U.N. Doc. A/58/CRP.5 (Mar. 10, 2004) [hereinafter *Secretariat Note on Practices and Working Methods*].

<sup>42</sup> Consensus arose in the Fifth Committee following recommendation by the 'Group of High-level Intergovernmental Experts to Review the Efficiency of the Administrative and Financial Functioning of the United Nations,' a group established in response to criticism of the methodology of the U.N.'s budgeting and accounting in the mid-1980s. While the Group failed to reach consensus on streamlining the budget process, the Group put forth proposals for the UNGA, and the UNGA adopted these proposals through Res. 41/213. *See* Vikram Sura, *The Process of Informals*, U.N. Chronicle 59 (Mar. 2002) ("A key part of this resolution states that the Fifth Committee must achieve the 'broadest possible agreement' in passing the budget."). G.A. Res. 41/213, U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/RES/41/213 (Dec. 19, 1986).

<sup>43</sup> *See Administrative and Budgetary Committee (Fifth Committee): Frequently Asked Questions*, U.N., <https://www.un.org/en/ga/fifth/faq.shtml>.

<sup>44</sup> *By 151 Votes in Favour to 2 Against, with 1 Abstention, Fifth Committee Approves \$3.21 Billion Budget for 2021, Concluding Main Part of Seventy-Fifth Session*, Dec. 30, 2020, <https://www.un.org/press/en/2020/gaab4362.doc.htm>.

38. The General Assembly has not given a “consensus is desirable” mandate to any of the other Main Committees, including the Sixth Committee.
39. Although endeavoring to take decisions by “general agreement,” “consensus,” or “without a vote” reflects a long-standing practice of the General Assembly and its Main Committees to build global agreement,<sup>45</sup> voting is employed as a standard practice if consensus fails.
40. In the First Committee, “some proposals are adopted by consensus and others are traditionally adopted by a vote.”<sup>46</sup> In 2021, votes were taken on a host of issues including the “Declaration of the Indian Ocean as a Zone of Peace,”<sup>47</sup> to “Assistance to States for curbing the illicit traffic in small arms and light weapons and collecting them,”<sup>48</sup> to “No first placement of weapons in outer space.”<sup>49</sup> Indeed, the First Committee Resolutions and Decisions Database, which lists the various agenda items, First Committee Reports, Main Sponsors, and Actions taken by the First Committee and the General Assembly,<sup>50</sup> suggests that voting is the customary practice in the First Committee, and in the General Assembly on resolutions originating from the First Committee.
41. Similarly, and by way of example, the records of the Third Committee (Social, Humanitarian & Cultural Issues) during the 73<sup>rd</sup> Session<sup>51</sup> note that everything from the Adjournment of Debate<sup>52</sup> to the Promotion of Peace as a vital requirement for the full enjoyment of all human rights<sup>53</sup> was voted upon.

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<sup>45</sup> Arnold Pronto, *Consideration at the United Nations of an International Prohibition on the Cloning of Human Beings*, 20 LEIDEN J. INT’L L. 239, 250 (2007). Indeed, although U.N. Declarations are often adopted based on consensus, they are also voted on. *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration on Human Rights (Dec. 10, 1948) (adopted 48 to 0, with 8 abstentions); G.A. Res. 1803 (XVII) (Dec. 14, 1962) (adopted 87 to 2); G.A. Res. 3171 (XVIII) (Dec. 17, 1973) (adopted 108 to 1, with 16 abstentions, and with a separate vote adopting paragraph 3 by 86 to 11, with 28 abstentions). G.A. Res. 41/213, U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/RES/41/213 (Dec. 19, 1986).

<sup>46</sup> *Secretariat Note on Practices and Working Methods*, *supra* note 41, ¶ 17.

<sup>47</sup> *Voting records of the First Committee, 17<sup>th</sup> Plenary meeting*, UNGA 76<sup>th</sup> Sess., <https://reachingcriticalwill.org/images/documents/Disarmament-for-a/1com/1com21/votes/L22.pdf> (135 yes, 3 no, 46 abstain).

<sup>48</sup> *First Committee List of Draft Proposals for the 76<sup>th</sup> Session (as of 4 Nov 2021)*, U.N., [https://www.un.org/en/ga/first/76/pdf/FC\\_List\\_draft\\_proposals\\_76\\_Voting\\_Results.pdf](https://www.un.org/en/ga/first/76/pdf/FC_List_draft_proposals_76_Voting_Results.pdf) (last visited May 20, 2022) (voting 150 yes, 0 no, 19 abstain).

<sup>49</sup> *Id.* (voting 124 yes, 35 no, 22 abstain).

<sup>50</sup> UN Office for Disarmament Affairs, *First Committee Resolutions and Decisions Database*, <https://www.un.org/disarmament/meetings-2/first-committee-resolutions-and-decisions-database/>.

<sup>51</sup> *Voting records of the Third Committee (Social, Humanitarian & Cultural Issues)*, UNGA 73<sup>rd</sup> Sess., <https://www.un.org/en/ga/third/73/votingsheets.shtml>.

<sup>52</sup> *Id.* (voting 67 yes, 56 no, 11 abstain).

<sup>53</sup> *Id.* (voting 134 yes, 53 no, 2 abstain).

42. The practice of the Third Committee is relevant as it took up both the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) and the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention),<sup>54</sup> as discussed below, and would likely be the best option for Crimes Against Humanity if action in the Sixth Committee proves impossible. The Torture Convention was adopted without a vote; the Apartheid Convention was adopted by a vote (in the General Assembly) of 91 to 4, with 26 abstentions.<sup>55</sup>
43. As recently as March 17, 2022, the 5<sup>th</sup> UN Conference on the Least Developed Countries adopted without objection the following rule entitled “Consensus” but which also provides for voting:
1. The Conference shall make every effort to ensure that its substantive decisions are taken by consensus.
  2. Notwithstanding paragraph 1, a proposal before the Conference shall be voted on if a representative of any State participating in the Conference so requests.<sup>56</sup>

***(b) The Sixth Committee Has Voted in the Past***

44. Despite the stated preference for consensus, the Sixth Committee has voted on resolutions when efforts to achieve consensus have failed. According to a study by the Secretariat published in 2004, the Sixth Committee will adopt draft resolutions and decisions by a vote in “exceptional and rare circumstances,” “after exploring other possible alternatives for compromise.”<sup>57</sup>
45. In addition to the examples already cited, another more recent case relates to the adoption of the 2005 U.N. Declaration on Human Cloning.<sup>58</sup>
46. Unlike the proposed treaty on crimes against humanity, which originated in the ILC, the U.N. Declaration on Human Cloning originated with a proposal by France and Germany in the Sixth

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<sup>54</sup> *Procedural History, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. AUDIOVISUAL LIBR. INT’L L., <https://legal.un.org/avl/ha/catcidtp/catcidtp.html#:~:text=The%20Convention%20against%20Torture%20and,bee n%20ratified%20by%2020%20States>; *Procedural History, Convention on the Suppression and Punishment of the Crime of Apartheid*, U.N. AUDIOVISUAL LIBR. INT’L L., <https://legal.un.org/avl/ha/cspca/cspca.html#:~:text=The%20Apartheid%20Convention%20was%20adopted,been %20ratified%20by%20107%20States>.

<sup>55</sup> *Procedural History, Convention on the Suppression and Punishment of the Crime of Apartheid*, U.N. AUDIOVISUAL LIBR. INT’L L.; G.A. Res. 3068 (XXVIII) (Nov. 30, 1973).

<sup>56</sup> Fifth United Nations Conference on the Least Developed Countries, New York, U.S., March 17, 2022; Doha, Qatar, Mar. 5-9, 2023, *Provisional Rules of Procedure*, ¶ 33, U.N. Doc. A/CONF.219/2022/2 (Mar. 3, 2022).

<sup>57</sup> *Secretariat Note on Practices and Working Methods*, *supra* note 41, ¶ 75.

<sup>58</sup> Rep. of the Sixth Comm., 59th Sess., U.N. Doc. A/59/516/Add.1 (Feb. 24, 2005).

Committee for a treaty on the subject.<sup>59</sup> It initially attracted significant support,<sup>60</sup> and an Ad Hoc Committee was created to carry the proposal forward. Differences of view emerged almost immediately within the Ad Hoc Committee,<sup>61</sup> which manifested in two competing draft resolutions that were pending before the Sixth Committee in 2003. Ultimately both were stymied by a “no-action motion,” proposed by Iran, to adjourn the debate until the 60<sup>th</sup> session of the General Assembly in 2005. The “no-action” motion carried by a vote of 80 to 19, with 15 abstentions.

47. With the passage of time, proponents of the treaty approach initially proposed by France and Germany actually became less committed to the treaty idea,<sup>62</sup> and the Italian delegation submitted a new proposal for a *declaration* against cloning, rather than a treaty, on the last day of negotiations at the 59<sup>th</sup> session of the General Assembly in 2004.<sup>63</sup> This proposal was taken up in a working group in which a series of votes were taken on various issues of substance, and ultimately a revised version of a Draft Declaration was adopted by the Sixth Committee “by a recorded vote of 71 to 35, with 43 abstentions.”<sup>64</sup> On March 8, 2005, the General Assembly took up the Sixth Committee’s resolution and recommendation and adopted the U.N. Declaration on Human Cloning by a recorded vote of 84 to 34, with 37 abstentions.<sup>65</sup>
48. This example shows that voting *can and does* take place in the Sixth Committee. It also suggests the utility of establishing committees and working groups to hammer out details relating to difficult or technical negotiations between regular meetings.

***(c) Is it Time to Move Past Consensus for the Draft Articles on Crimes Against Humanity?***

49. During the 76<sup>th</sup> session of the General Assembly, a significant number of States expressed frustration that consensus was being used to prevent continued dialogue and meaningful consideration of a crimes against humanity treaty.<sup>66</sup> The United States noted the “long tradition

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<sup>59</sup> See Pronto, *supra* note 45, at 240.

<sup>60</sup> 48 states joined the Franco-German proposal. Rep. of the Sixth Comm., 56th Sess., U.N. Doc. A/56/599 (2001)

<sup>61</sup> Pronto, *supra* note 45, at 242. See generally Mahnouch H. Arsanjani, *Negotiating the UN Declaration on Human Cloning*, 100 AM. J. INT’L L. 164, 165 (2006).

<sup>62</sup> Pronto, *supra* note 45, at 246 (“[F]or some a non-result in the Sixth Committee was increasingly preferable to negotiating a comprehensive treaty whose outcome was unpredictable.”)

<sup>63</sup> *Id.* at 175.

<sup>64</sup> Rep. of the Sixth Comm., 59th Sess., ¶¶ 14, 17, U.N. Doc. A/59/516/Add.1 (Feb. 24, 2005).

<sup>65</sup> See G.A. Res. 59/280, U.N. Doc. A/RES/59/280 (Mar. 23, 2005).

<sup>66</sup> Slovenia made a statement on behalf of the European Union and its member States, as well as Albania, Argentina, Canada, Chile, Costa Rica, Ecuador, Georgia, Guatemala, Honduras, Iceland, Jordan, Lebanon, Liechtenstein, Montenegro, New Zealand, Norway, Paraguay, Peru, the Republic of Korea, the Republic of Moldova, Switzerland, and Ukraine. See, e.g., UN Web TV, *Sixth Committee, 29th meeting - General Assembly, 76th session*, at 46:35 (Nov. 18, 2021), <https://media.un.org/en/asset/k1e/k1ern5xeuj>. (Slovenia’s statement on behalf of

of consensus-based decision-making,” but emphasized that for it to work as it is intended, there needs to be a willingness to negotiate in good faith, not with “absolutism.”<sup>67</sup>

50. Mexico was strongest in its condemnation of the consensus practice, which it noted “is neither defined nor enshrined in the Rules of Procedure,” asserting that the “General Assembly cannot and must not be held hostage by its own practices or use them as a pretext for inaction.”<sup>68</sup>
51. Although some States have argued that the Sixth Committee is different because it establishes legal norms, that argument would not seem to be relevant regarding the *process* to be used to take a matter forward.<sup>69</sup> The argument that the Sixth Committee should operate by consensus so that the General Assembly can speak with one voice in establishing the content of customary international law is not relevant as to the question of whether a potential treaty should be discussed in the first place. Additionally, as for matters of substance, treaties must be considered by States not only at the international level but also in their own parliamentary systems, as they impose specific obligations. Thus, the argument that the Sixth Committee should only work by consensus because it “creates law,” is without real foundation.
52. Moreover, as the Secretariat noted in its 2004 Note on Working Practices, consensus may be worthwhile and indeed necessary on some matters. However, “in other cases it is often time-consuming and results in decisions that provide little added value.”<sup>70</sup>
53. Additionally, consensus in the Sixth Committee is no guarantee of a treaty’s ultimate success. The U.N. Treaty on Jurisdictional Immunities, discussed above, which was adopted by consensus in the Sixth Committee and without a vote in the General Assembly, has still not entered into force.
54. Another core principle of the United Nations is the sovereign equality of States. Article 18 of the U.N. Charter provides that “Each member ...shall have one vote.” While States have the sovereign right to decide not to support a particular agenda item, preventing other States from expressing their support for an item, particularly following several years of extensive negotiations which have failed to produce any results, may impair the sovereignty of those States wishing to act.
55. Finally, the General Assembly has emphasized the need for the progressive development and codification of international law “to make it a more effective means of implementing the purposes and principles” of the U.N. Charter and to give “increasing importance” to

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<sup>67</sup> Explanation of the United States’ Position on Item 83: “Crimes against Humanity.” Sixth Committee of the 76th UN General Assembly, Permanent Mission of United States to the United Nations (Nov. 18, 2021), <https://usun.usmission.gov/statement-at-the-76th-general-assembly-sixth-committee-agenda-item-83-crimes-against-humanity/>.

<sup>68</sup> Explanation of Mexico’s Position on Item 83: “Crimes against Humanity.” Sixth Committee of the 76th UN General Assembly, Permanent Mission of Mexico to the United Nations (Nov. 18, 2021), (courtesy translation), <http://statements.unmeetings.org/media2/7654926/mexico.pdf>.

<sup>69</sup> No Security Council veto exists for procedural matters. See, e.g. U.N. Charter art. 27(2)-(3).

<sup>70</sup> *Secretariat Note on Practices and Working Methods*, *supra* note 41, ¶ 97.

international law.<sup>71</sup> It also emphasized the need for the Sixth Committee to take up “legal and drafting questions”<sup>72</sup> to further the development of international law and the purposes of the United Nations. For the Sixth Committee to allow political concerns to block even the consideration of the ILC Draft Articles on Crimes Against Humanity and avoid all consideration of the legal questions presented by the draft text undermines the mandate, indeed, the *raison d’être*, of the Committee.

## **B. Option 2: Adding the Draft Articles to the agenda of the Third Committee or the UNGA plenary**

56. Each year, the General Committee of the UNGA allocates each agenda item to a Main Committee or to the Plenary.<sup>73</sup> The General Assembly has taken the position that substantive items should normally be discussed initially in a Main Committee unless there are “compelling circumstances” requiring consideration by the Plenary or by a special committee.<sup>74</sup> There is no rule, however, against shifting agenda items from one Main Committee to another or from a Main Committee to the Plenary, and the case for doing so may be stronger after repeated consideration of an agenda item in a Main Committee. The Convention on the Rights of Persons with Disabilities is such an example, as it was adopted directly by the Plenary upon a text elaborated by an Ad Hoc Committee.<sup>75</sup>
57. The General Committee operates by consensus, if possible, but if that is not possible, by voting. Thus, a successful effort to reallocate an agenda item requires only a simple majority in favor.

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<sup>71</sup> G.A. Res. 37/111, *Report of the International Law Commission*, preamble, cl. 1, U.N. Doc. A/RES/37/11 (Dec. 16, 1982).

<sup>72</sup> *Id.* preamble, cl. 3.

<sup>73</sup> See, e.g., PERMANENT MISSION OF SWITZERLAND TO THE UNITED NATIONS, *THE GA HANDBOOK: A PRACTICAL GUIDE TO THE UNITED NATIONS GENERAL ASSEMBLY* 38 (2d ed. 2017), [https://www.eda.admin.ch/dam/mission-new-york/en/documents/UN\\_GA\\_\\_Final.pdf](https://www.eda.admin.ch/dam/mission-new-york/en/documents/UN_GA__Final.pdf).

<sup>74</sup> *Id.*

<sup>75</sup> The *Final Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* was submitted to the General Assembly which adopted the convention on December 13, 2006. U.N. Secretary-General, *The Final Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, U.N. Doc. A/61/611 (Dec. 6, 2006); *Convention on the Rights of Persons with Disabilities*, G.A. Res. 61/106, U.N. Doc. A/Res/61/106, (Jan. 24, 2007), [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_61\\_106.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_61_106.pdf).

There are examples of items being split between Main Committees,<sup>76</sup> moving between Main Committees,<sup>77</sup> or to a specific committee upon the General Committee's recommendation.<sup>78</sup>

58. The General Assembly decided in December 2021 that the provisional agenda of the 77<sup>th</sup> session will have an agenda item entitled "Crimes Against Humanity." The Secretary-General in his "Bureau" paper proposals to the General Committee will thus propose that this item a) be included in the adopted agenda of the General Assembly for the 77<sup>th</sup> Session and b) that it be allocated to the Sixth Committee. A Treaty-Proponent State in the General Committee can propose that the General Committee should instead recommend it be taken up by the Plenary — or in a different Committee, such as the Third Committee — for compelling reasons that could be developed over the course of the next few months. This route would only be successful if there are sufficient Treaty-Proponent States that are also members of the General Committee, and which agree that the agenda item on Crimes Against Humanity should be moved to the Plenary or the Third Committee. The positive views of the incoming Chairs of the Third and Sixth Committees would probably be critical for this to succeed.

### C. Option 3: U.N.-Adjacent Options to Advance the Crimes Against Humanity Treaty

59. A third avenue to advance the crimes against humanity treaty is for civil society and States to work outside of or adjacent to the General Assembly. Examples of both are found in recent practice.

#### 1. The "Stand-alone" Model

60. The "stand-alone" option has been employed by the proponents of a new draft treaty on interstate mutual legal assistance for all international core crimes. Known as the "MLA Initiative," this project, which began in 2011,<sup>79</sup> has resulted in a series of consultations and a draft text of a new proposed treaty on mutual legal assistance. After early efforts to work inside the U.N. system in Vienna were unsuccessful, the MLA Initiative re-emerged as a standalone process, outside of the United Nations, in 2017.<sup>80</sup> The leadership expanded to a "core six" — Argentina, Belgium, Mongolia, the Netherlands, Senegal, and Slovenia. Participation in the negotiations is limited to States supporting the initiative.<sup>81</sup>

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<sup>76</sup> The General Assembly allocated the agenda item to both the Fifth and Sixth Committees. See *Summary of Work, Administration of Justice at the United Nations (Agenda Item 152), Sixth Committee (Legal) – 75<sup>th</sup> Session*, U.N., [https://www.un.org/en/ga/sixth/75/admin\\_of\\_justice.shtml](https://www.un.org/en/ga/sixth/75/admin_of_justice.shtml).

<sup>77</sup> An agenda item transferred from the Fourth to the Sixth Committee. See *Summary of Work, Criminal Accountability of United Nations Officials and Experts on Mission (Agenda Item 76), Sixth Committee (Legal) – 74<sup>th</sup> Session*, U.N., [https://www.un.org/en/ga/sixth/74/criminal\\_accountability.shtml](https://www.un.org/en/ga/sixth/74/criminal_accountability.shtml).

<sup>78</sup> An agenda item was allocated to the Sixth Committee. *Summary of Work, The Rule of Law at the National and International Levels (Agenda Item 82), Sixth Committee (Legal) – 69<sup>th</sup> Session*, U.N., [https://www.un.org/en/ga/sixth/69/rule\\_of\\_law.shtml](https://www.un.org/en/ga/sixth/69/rule_of_law.shtml).

<sup>79</sup> Argentina, Belgium, Mongolia, the Netherlands, Senegal, and Slovenia proposed the MLA Initiative. *MLA Initiative*, REPUBLIC OF SLOVENIA (June 8, 2021), <https://www.gov.si/en/registries/projects/mla-initiative/>. *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *MLA Initiative*, CENTRUM VOOR INTERNATIONAAL RECHT, <https://www.centruminternationaalrecht.nl/mla-initiative>.



61. As of June 2021, 76 States support the MLA Initiative; States can join by signing an official *note verbale* and sending it to any of the core group members.<sup>82</sup> The process has been slow as different models of the new treaty have emerged,<sup>83</sup> and the pandemic delayed a possible treaty conference until, it seems, at least 2023. The latest round of consultations took place on June 1 and 2, 2022 and focused on the appropriate scope of the draft text.<sup>84</sup>
62. Unlike other major multilateral treaties, which typically require 20 or more States Parties to enter into force, the MLA treaty will enter into force with only two ratifications under Article 67(1) of the current (2021) draft.
63. The experience thus far with the MLA Initiative does not immediately suggest that a purely “stand-alone” treaty drafting exercise outside the United Nations system is desirable to adopt a new global treaty on crimes against humanity. As envisaged by the work of the International Law Commission, and the engagement of States thus far, the crimes against humanity treaty is intended to have a universal ambit and will enter into force after a significant number of ratifications have been achieved.

## **2. U.N.-Adjacent Models Brought Within the U.N. System**

64. If working towards progress on a parallel track outside the United Nations system is desired due to obstacles within the Sixth Committee, there are examples of “outside/inside” treaty negotiations that have been successful. This Memorandum briefly evokes two: The 1984 Torture Convention and the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (the Ottawa Landmines Convention).

### ***(a) The U.N. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment***

65. The impetus for the Torture Convention came from two States, Sweden and the Netherlands, which had played a leading role in the drafting of the U.N. Declaration on the Protection of all Persons from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly in 1975.<sup>85</sup> The two States continued to press the issue over the next several years. Sweden tabled a proposal and ultimately a draft text of a convention to be considered by the Commission on Human Rights in Geneva.<sup>86</sup>

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<sup>82</sup> *Id.*

<sup>83</sup> Switzerland introduced a different draft text during the negotiations, for example.

<sup>84</sup> *Virtual Informal Consultation – MLA Initiative*, MINISTRY OF JUST. & SEC., <https://mlainitiative.minjenv-events.nl/>.

<sup>85</sup> G.A. Res. 3452 (XXX), U.N. Doc. A/RES/3452(XXX) (Dec. 9, 1975); Peter R. Baehr, *The General Assembly: Negotiation the Convention on Torture*, in *THE UNITED NATIONS IN THE WORLD POLITICAL ECONOMY: ESSAYS IN HONOR OF LEON GORDENKER* 36, 37 (David P. Forsythe ed., 1989).

<sup>86</sup> Although the Netherlands was not favorable to the Swedish draft treaty text initially, the Dutch government was ultimately persuaded to champion the treaty. Baehr, *supra* note 85, at 41-42.

66. The text elaborated in Geneva was then sent to the Third Committee.<sup>87</sup> Differences of views between delegations on many provisions were resolved via intensive consultations and informal negotiations led by the Netherlands. These resulted in a number of changes and allowed the Third Committee to adopt the text without a vote. The General Assembly followed suit, adopting the treaty on December 10, 1984, also without a vote,<sup>88</sup> and the treaty entered into force upon the 20th ratification in 1987.<sup>89</sup>

***(b) The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction***

67. The Ottawa Landmines Convention, as a disarmament treaty, is not a perfect analogy for a treaty on crimes against humanity but illustrates the potential of a strategy utilizing an extra-U.N. process to break through log jams at the United Nations. It began with unsuccessful attempts by States to amend the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects to include a ban on anti-personnel landmines.<sup>90</sup> This led champion States, supported by an extensive CSO campaign, to begin to negotiate a treaty “outside” the United Nations.<sup>91</sup>

68. In October 1996, Canada hosted an international strategy conference “Towards a Global Ban on Anti-Personnel Mines,” at which 50 participating States agreed to conclude a legally binding international agreement to ban anti-personnel mines as soon as possible.<sup>92</sup> Following subsequent negotiating conferences in Brussels and Oslo (and preparatory meetings for these conferences in Austria and Germany), champion States concluded the final text of the proposed Convention in Oslo. Canada then introduced the draft text at the General Assembly on behalf of 106 Member States, and it was subsequently adopted by the First Committee (Disarmament

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<sup>87</sup> *Id.* at 39.

<sup>88</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984), [undocs.org/en/a/res/39/46](https://undocs.org/en/a/res/39/46).

<sup>89</sup> Baehr, *supra* note 85, at 49 n. 15.

<sup>90</sup> See Stuart Casey-Maslen, *The context of the adoption of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, U.N. AUDIOVISUAL LIBR. INT’L L., (Sept. 18, 1997), <https://legal.un.org/avl/ha/cpusptam/cpusptam.html>.

<sup>91</sup> Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997, U.N. AUDIOVISUAL LIBR. INT’L L. 1 (2008), [https://legal.un.org/avl/pdf/ha/cpusptam/cpusptam\\_ph\\_e.pdf](https://legal.un.org/avl/pdf/ha/cpusptam/cpusptam_ph_e.pdf) [hereinafter *Procedural History*]; see also Review Conference on the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Final Report of the Conference, U.N. Doc. CCW/CONF.I/16 (Part I) (1996); See also Review Conference on the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Documents and Summary Records of the Conference, U.N. Doc. CCW/CONF.I/16 (Part II) (1996).

<sup>92</sup> *Procedural History*, *supra* note 91.

& International Security).<sup>93</sup> On the recommendation of the First Committee, the General Assembly adopted the convention text by a vote of 142 votes to none, with 18 abstentions.<sup>94</sup>

### 3. Conclusion

69. The MLA Initiative has stayed *outside* the United Nations system, whereas the Torture Convention and the Ottawa Landmines Convention remained *within* the United Nations via a parallel effort in the Main Committees charged with the respective treaties. The MLA process is still ongoing, so it is difficult to draw many conclusions from that experience. Both the Torture Convention and the Ottawa Landmines Convention have been widely ratified by States.

## CONCLUSION

70. The ILC Draft Articles on Crimes Against Humanity have received much positive support from States in all regions of the world. Yet progress on the ILC's recommendation — that they be used as the basis to elaborate a new treaty on crimes against humanity — has been blocked by a small number of States using the Sixth Committee's tradition of taking decisions by consensus.

71. The scourge of crimes against humanity, however, is ongoing. These crimes afflict every region, and their prevention and punishment have been hampered by the absence of a treaty thereon. This is an urgent crisis, as atrocities multiply and the term “genocide” is invoked by policymakers and the press in part because of the absence of a treaty on crimes against humanity.

72. As the U.N. Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Adviser to the Secretary-General on the Prevention of Genocide noted in a recent report, “[u]nlike genocide and war crimes, which are recognized and prohibited under international criminal law, there is no convention on crimes against humanity . . . Finalizing and adopting the draft convention [of the ILC on crimes against humanity] would demonstrate the commitment of the United Nations to atrocity prevention.”<sup>95</sup>

73. This Memorandum has set forth three options for taking the Draft Articles forward in the Sixth Committee. Each could be accomplished on the basis of consensus.

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<sup>93</sup> Rep. of the First Comm., General and Complete Disarmament, U.N. Doc. A/52/600 (Nov. 21, 1997); *Procedural History*, *supra* note 91. See also Press Release, United Nations, Text Urging Ratification of Anti-Personnel Mine Convention Introduced in First Committee, U.N. Press Release GA/DIS/3093 (Nov. 6, 1997).

<sup>94</sup> *Procedural History*, *supra* note 91, at 2, U.N. GAOR, 52<sup>nd</sup> Sess., 67<sup>th</sup> Plenary Meeting at 10, U.N. Doc. A/52/PV.67 (Dec. 9, 1997) (abstaining were Azerbaijan, China, Cuba, Egypt, India, Iran (Islamic Republic of), Israel, Kazakhstan, Mongolia, Morocco, Myanmar, Pakistan, Republic of Korea, Russian Federation, Syrian Arab Republic, Tajikistan, Turkey, United States of America).

<sup>95</sup> *Joint Study on the Contribution of Transitional Justice to the Prevention of Gross Violations and Abuses of Human Rights and Serious Violations of International Humanitarian Law, Including Genocide, War Crimes, Ethnic Cleansing and Crimes Against Humanity and Their Recurrence*, Hum. Rts. Council, ¶ 7, U.N. Doc. A/HRC/37/65 (June 6, 2018). [https://www.un.org/en/genocideprevention/documents/A\\_HRC\\_37\\_65\\_AdvanceEditedVersion.pdf](https://www.un.org/en/genocideprevention/documents/A_HRC_37_65_AdvanceEditedVersion.pdf).

74. If achieving consensus is impossible, however, voting in the Sixth Committee could be employed, consistent with past practice of the Sixth Committee, as well as other Main Committees and the Plenary. The Draft Articles could be seen as a “special case,” warranting voting due to their connection to human rights, humanitarian law, peace, and security.
75. Moreover, unlike other areas of international law in which “soft law” instruments may be effective and authoritative, experience has demonstrated, and the principle of legality requires, that criminal law suppression conventions must have clear definitions of crimes and modalities of enforcement.
76. Consensus as a general practice may be a useful starting point. However, it neither guarantees a positive outcome for a treaty adopted on the basis thereof, nor does it inevitably result in good decisions, as the U.N. Secretariat has noted.
77. The General Assembly has noted the desirability of adopting decisions and resolutions by consensus “when doing so. . . contributes to the effective and lasting settlement of differences, thus strengthening the authority of the United Nations.” If consensus, however, weakens or undermines the authority of the United Nations, voting is preferred.
78. The ILC and the codification process have been entrusted to the Sixth Committee since 1947. But the codification process, and the ILC itself, risk becoming increasingly irrelevant if the Draft Articles on Crimes Against Humanity do not progress to the next procedural phase given the broad support they have received from States. By voting on the Draft Articles, the Sixth Committee can protect, defend, and preserve the integrity of the International Law Commission and the important role it plays in the codification and development of international law.
79. Finally, if action in the Sixth Committee is impossible because States will not break consensus, depending upon the composition of the General Committee, the agenda item for Crimes Against Humanity could be shifted to the Third Committee or the Plenary. The Third Committee votes regularly and has a particular focus on humanitarian and human rights issues. It has worked on related conventions in the past, such as the Torture and Apartheid Conventions. The Torture Convention is a good example of how an initiative initially developed outside the U.N. system was subsequently brought within it, as is the Ottawa Landmines Treaty.