

CRIMES
AGAINST
HUMANITY
INITIATIVE



INITIATIVE
SUR LES CRIMES
CONTRE
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MODES OF LIABILITY

ABILA STUDY GROUP **CRIMES AGAINST HUMANITY**

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MODES OF LIABILITY

Proposed Revised Text for Article 6 of the Draft Articles on the Prevention and Punishment of Crimes against Humanity [ILC Draft]

Article 6 **Criminalization under national law**

1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.

2. Each State shall take the necessary measures to ensure that the following acts **or omissions** are offences under its criminal law:

(a) committing a crime against humanity **or contributing to the commission or attempted commission of such a crime by a group of persons acting with a common purpose**;

(b) attempting to commit ~~such~~ a crime **against humanity**; and

(c) ordering, soliciting, inducing, **instigating, planning**, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of ~~such~~ a crime **against humanity**;

(d) directly and publicly inciting the commission of a crime against humanity; and

(e) conspiring to commit a crime against humanity.

3. Each State shall also take the necessary measures to ensure that commanders and other superiors are criminally responsible for crimes against humanity committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.

[...]

Explanatory Notes

1. This proposal only addresses Draft Article 6(2) in relation to various modes of liability other than superior responsibility. It does not address other provisions of Draft Article 6. In the view of the Study Group, it might be useful for States to separate Draft Article 6's provisions into distinct articles, as the ILC Draft's approach of combining discrete issues could otherwise lead to some confusion.
2. This proposal is intended to clarify the various modes of liability that should be criminalized under national law. Specifically, it seeks to strengthen the Convention by including **common purpose liability** and expanding the list of accessory liability conduct to include **instigating** and **planning**. It also creates two new paragraphs to address the inchoate crimes of **directly and publicly inciting** and **conspiring** to commit crimes against humanity. The proposed additions help preserve essential tools for holding perpetrators accountable for international crimes, while also bringing the language more closely in line with the Convention's core objective of preventing and punishing crimes against humanity.¹
3. The addition of **common purpose liability** to paragraph 2(a) serves to expressly clarify the scope of responsibility to be criminalized within each State's legal system. This addition is crucial as crimes against humanity are rarely perpetrated by a single individual. Rather, they are almost always the result of coordinated group action. At the same time, the collective nature of group criminal conduct often obscures individual roles and responsibilities, making it challenging to attribute responsibility to group members using theories of criminal liability for individual conduct. As a result, nearly all legal systems, whether rooted in civil law² or common law³ traditions, have developed specific doctrines to address the

¹ The proposed additions do not suggest any hierarchy among the modes of liability but rather aim to ensure comprehensive liability.

² See, e.g., German Criminal Code (StGB) (1998) s 25(2) (providing “[i]f several persons commit an offence jointly, each person incurs a penalty as an offender (joint offenders)”) (unofficial translation); Peruvian Penal Code (Legislative Decree No 635 of 1991) art 23 (recognizing concept of co-perpetration); Colombian Penal Code (Ley 599 de 2000) art 29 (same); Cambodian Criminal Code (2011) art 26 (same); Federal Penal Code of Mexico (1931) art 22 (same); Ethiopian Criminal Code (Proclamation No 414/2004) art 35 (providing that two or more persons who commit crimes shall all be punished unless they can prove they played no part in the commission of the crime); Ukrainian Criminal Code (2010) arts 26-28 (providing that accomplices who share a common intent are held liable for the principals' crime). See also International Commission of Jurists, ‘Accountability Through the Specialized Criminal Chambers: Modes of Individual Criminal Liability Under Tunisian and International Law, Practical Guide 4’ (April 2023) <<https://www.icj.org/wp-content/uploads/2023/04/ICJ-Practical-guide-4-en-F-1.pdf>> 67 (noting same recognized in Tunisian case law).

³ See, e.g., *McAuliffe v The Queen* (1995) 183 CLR 108 (Australia) (recognizing joint enterprise liability to address group-based criminal conduct); *R v Jogee* (2016) UKSC 8 (United Kingdom) (same); Penal Code of Botswana (1964) art 22 (recognizing doctrine of common purpose liability); Shannon Hoctor, ‘The Genesis of the Common Purpose Doctrine in South Africa’ (2023) 26 *Potchefstroom Electronic Law Journal* 2 (discussing same regarding South Africa). See also Singaporean Penal Code (Chapter 224) (1872) sec 34

complexities of collective criminal conduct.

4. This approach is also utilized by international criminal tribunals, which have similarly applied a variety of legal approaches to hold individuals responsible for their role in collective criminal conduct. While terminology has varied across international criminal institutions, commonly used concepts include direct co-perpetration, indirect co-perpetration, contribution to a crime by a group of persons acting with a common purpose, and joint criminal enterprise, which are briefly explained in the paragraphs that follow.
5. **Direct co-perpetration** is a doctrine developed within the jurisprudence of the International Criminal Court (“ICC”) which permits it to impose criminal liability on individuals for crimes committed jointly by two or more persons.⁴ It requires: (i) the existence of a common plan among a plurality of persons; (ii) an essential contribution made by each co-perpetrator resulting in the implementation of that plan; and (iii) the requisite *mens rea* with respect to the crimes committed in implementing that plan.⁵
6. The concept of **indirect co-perpetration**, also a product of ICC jurisprudence, combines elements of co-perpetration and indirect perpetration, and is particularly useful when individuals from different parts of an organization—or from distinct organizations—collaborate to achieve a common criminal purpose that is physically executed by subordinates under the authority of someone other than the accused. It requires: (i) a common agreement or plan; (ii) that the accused exercised control over the direct perpetrators, either physically or through an organization through which the crime is committed; (iii) an essential contribution by each co-perpetrator; and (iv) awareness of the factual circumstances that enabled the accused to exercise control over the crime.⁶
7. Another theory developed through ICC jurisprudence is liability for **contributing “in any other way” to a group crime**. It requires proof that the perpetrators belonged to a group acting pursuant to a common criminal purpose, and that the accused intentionally contributed in a way that influenced the commission of the crime and

(rendering liable persons who commit a crime in furtherance of the common intention); Nigerian Criminal Code Act (Chapter 77) (1916) ch 2, sec 8 (same); Bharatiya Nyaya Sanhita (Indian Criminal Code) (No 45 of 2023) art 3(5) (same).

⁴ *Prosecutor v Ntaganda* (Appeal Judgment) ICC-01/04-02/06 (30 March 2021) para 1040 (citing *Prosecutor v Lubanga* (Appeal Judgment) ICC-01/04-01/06 A 5 (1 December 2014) para 473)). See also Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 25(3)(a).

⁵ *Prosecutor v Ntaganda* (n 4) paras 23, 918, 1060.

⁶ *Prosecutor v Ongwen* (Appeal Judgment) ICC-02/04-01/15 (15 December 2022) paras 6-11, 635-638; *Prosecutor v Katanga* (Trial Judgment) ICC-01/04-01/07 (7 March 2014) para 1399.

that this contribution was made either to further the group's criminal activity or with knowledge of the group's intent to commit the crime.⁷ This theory of accountability has been described as a "residual form of accessoryship [...] to vest the Court with jurisdiction over accessories whose conduct does not constitute aiding or abetting the commission of a crime".⁸ It should be noted that the ICC caselaw on modes of liability has been the subject of vigorous dissents and has been often criticized by scholars, suggesting it may not be particularly helpful to national systems that already have well-established approaches to collective criminality.

8. An alternative approach to common purpose liability can be found within the doctrine of **joint criminal enterprise**, which evolved from the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda, and other hybrid or internationally supported tribunals.⁹ Joint criminal enterprise doctrine seeks to hold individuals accountable for their participation in collective criminal conduct when they make a significant contribution to the execution of a group's common criminal plan or purpose.¹⁰ The ICTY identified three forms of joint criminal enterprise distinguished by context and *mens rea*: (i) all members shared the same criminal intent to commit a crime;¹¹ (ii) the accused member knowingly participated in a system of organized ill treatment with the intent to further that system;¹² and (iii) when a crime occurred as a natural and foreseeable consequence of a group's actions and the accused member foresaw and voluntarily assumed that risk.¹³

⁷ *Prosecutor v Al Hassan* (Trial Judgment) ICC-01/12-01/18 (26 June 2024) paras 1232-1248; *Prosecutor v Katanga* (n 6) para 1620. See also Rome Statute (n 4) art 25(3)(d).

⁸ *Prosecutor v Katanga* (n 6) para 1618. See also *Prosecutor v Al Hassan* (n 7) para 1243 ("The Chamber recalls the drafting history which shows that this provision was carefully crafted to reflect a balance between the approaches in different legal tradition[s].").

⁹ See, e.g., *Prosecutor v Tadić* (Appeal Judgement) IT-94-1-A (15 July 1999); *Prosecutor v Ntakirutimana and Ntakirutimana* (Appeal Judgment) ICTR-96-10-A and ICTR-96-17-A (13 December 2004) paras 461-468; *Prosecutor v Kvočka et al* (Appeal Judgment) IT-98-30/1-A (28 February 2005) paras 79-119; *Prosecutor v Brđanin* (Appeal Judgement) IT-99-36-A (3 April 2007) paras 363-365, 392-432; *Prosecutor v Brima et al* (Appeal Judgment) SCSL-2004-16-A (22 February 2008) paras 72-80; ECCC (Appeal Judgement) Case 002/01 (23 November 2016) paras 773-789; *Prosecutor v Mustafa* (Trial Judgment) KSC-BC-2020-05 (16

¹⁰ *Prosecutor v Tadić* (n 9) para 227. This mode can also be utilized when the accused or another member of the joint criminal enterprise did not perpetrate the crime themselves, but rather used other persons as tools to do so. *Prosecutor v Brđanin* (n 9) paras 410-413.

¹¹ For example, this may apply to all members of a paramilitary group that set out to kill civilians, even if it cannot be established that all members killed civilians themselves.

¹² For example, this may apply to persons responsible for running a concentration camp, even if they did not personally harm the victims.

¹³ *Prosecutor v Tadić* (n 9) para 228. For example, this framework may be used to charge with murder members of a unit sent to forcibly remove civilians from their home in violation of international law, provided the killing of some civilians was a natural and foreseeable result of the removal process and this risk was wilfully accepted by the accused members.

9. Ultimately, although the doctrines vary with respect to the terminology used and specific elements required, all hold individuals liable for forms of collective criminality.
10. This proposal recommends using the general phrase “**contributing to the commission or attempted commission of such a crime by a group of persons acting with a common purpose**”,¹⁴ rather than listing all such variations, to provide States with the flexibility necessary to comply with the provision by implementing a doctrine compatible with their existing national law frameworks.
11. The proposal also calls for the inclusion of **instigating** and **planning** in the list of accessory modes of liability, as these terms are well-established in the jurisprudence of the *ad hoc* tribunals and thus recognized in international practice.¹⁵ Their inclusion would ensure comprehensive coverage of conduct involving the prompting or preparation of crimes against humanity, and align the provision with customary international law.¹⁶
12. Planning requires that one or more persons design the criminal conduct constituting the crime that is later perpetrated.¹⁷ Instigating implies prompting another person to commit a crime.¹⁸ Both modes of liability require evidence that the instigation or planning substantially contributed to the commission of the crime¹⁹ and that the perpetrator either intended to instigate or plan the crime, or was aware of the substantial likelihood that the crime would be committed as a result of the instigation or planning.²⁰

¹⁴ The proposed language is drawn from Article 25(3)(d) of the Rome Statute and therefore already familiar to States Parties to the Statute.

¹⁵ See, e.g., *Prosecutor v Kordić and Čerkez* (Appeal Judgment) IT-95-14/2-A (17 December 2004) paras 26-27, 31-32; *Prosecutor v Nahimana et al* (Appeal Judgment) ICTR-99-52-A (28 November 2007) paras 479-80.

¹⁶ In addition, although instigation is similar to inducement—a mode of liability recognized by the Rome Statute and included in the Draft Articles—the limited ICC jurisprudence on this concept supports its explicit inclusion. In *Bemba et al*, the ICC Trial Chamber addressed the requirements of inducement and convicted one of the accused, Aimé Kilolo, and the Appeal Judgment affirmed that conviction. *Prosecutor v Bemba et al* (Trial Judgment) ICC-01/05-01/13 (19 October 2016) paras 72-82; *Prosecutor v Bemba et al* (Appeal Judgment) ICC-01/05-01/13 (8 March 2018) para 1085. More recently, however, in the case of *Al-Rahman*, the Trial Chamber recharacterized confirmed inducement charges as ordering. See *Prosecutor v Al-Rahman* (Decision on the Confirmation of Charges) ICC-02/05-01/20 (9 July 2021) para 133; *Prosecutor v Al-Rahman* (Trial Decision on the Prosecution’s Application for Notice to be Given Pursuant to Reg. 55(2)) ICC-02/05-01/20 (18 March 2022) para 10; *Prosecutor v Al-Rahman* (Trial Judgment) ICC-02/05-01/20 (6 October 2025) para 1012.

¹⁷ *Prosecutor v Nahimana et al* (n 15) para 479.

¹⁸ *Ibid*, para 480.

¹⁹ *Ibid*, paras 479-80.

²⁰ In *Akayesu*, for instance, the Trial Chamber concluded that the accused expected those he encouraged to perpetrate sexual violence. *Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998) para 452. See also *Prosecutor v Boškoski & Tarčulovski* (Appeal Judgment) IT-04-82-A (19 May 2010) para 68.

13. The addition of two new paragraphs 2(d) and 2(e) revitalize the suggestions of Iceland (on behalf of the Nordic countries) and Sierra Leone to include **incitement** and **conspiracy** in Draft Article 6.²¹
14. Including direct and public incitement and conspiracy would encourage broader accountability for crimes against humanity. Unlike inducing or instigating, which require prompting another to commit a crime that is actually carried out or attempted,²² incitement and conspiracy are both inchoate offenses, meaning they criminalize conduct that is “capable of constituting a step in the commission of another crime, even if that crime is not in fact committed”²³ Consistent with the draft treaty’s prevention mandate, these modes of liability not only punish harm once it occurs but also seek to prevent it.²⁴
15. Given the *jus cogens* nature of the prohibition of crimes against humanity,²⁵ on par with genocide,²⁶ the inclusion of direct and public incitement and conspiracy increases accountability by contributing to prevention as well as punishment, and thus better promotes the object and purpose of a Crimes against Humanity Convention.
16. Notably, although contemporary international criminal tribunals limit direct and public incitement to the crime of genocide, its application to crimes against humanity is supported by precedents dating back to Nuremberg, where the International Military Tribunal convicted Julius Streicher of persecution as a crime against humanity for inciting murder and extermination.²⁷

²¹ Sean D Murphy, Special Rapporteur ‘Fourth Report on Crimes against Humanity’ (18 February 2019) UN Doc A/CN.4/725, para 138. It is worth noting that several States raised the need for the inclusion of incitement even earlier, during the 2016 plenary discussion of the Second Report. See Leila Nadya Sadat, ‘A Contextual and Historical Analysis of the International Law Commission’s 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity’ (2018) 16 Journal of International Criminal Justice 683, 701-702.

²² See Rome Statute (n 4) art 25(3)(b); para 12 above.

²³ *Prosecutor v Nahimana et al* (n 15) para 720 (discussing direct and public incitement to commit genocide and conspiracy to commit genocide).

²⁴ See, e.g., *ibid* para 678 (observing that the drafters of the Genocide Convention criminalized direct and public incitement with the goal of forestalling the occurrence of genocide).

²⁵ See, e.g., UNGA, ‘Report of the International Law Commission (71st Session), Text of the Draft Articles on Prevention and Punishment of Crimes Against Humanity and Commentaries Thereto’ (20 August 2019) UN Doc A/74/10, preamble para 4.

²⁶ See, e.g., UNGA, ‘Peremptory Norms of General International Law (*Jus Cogens*) (73rd Session), Text of the Draft Conclusions and Annex Adopted by the Drafting Committee on Second Reading’ (11 May 2022) UN Doc A/CN.4/L.967, annex.

²⁷ *Trial of the Major War Criminals before the International Military Tribunal* (Judgment) (30 September-1 October 1946) XXII Blue Series 411, 549.

17. It is also worth noting that some States do not limit incitement to genocide. For instance, the Norwegian Penal Code applies incitement to all atrocity crimes equally.²⁸ Such laws reflect the reality that “the dangers of propaganda are general and equally valid for other international crimes, which are often no less horrendous than genocides.”²⁹
18. Moreover, the inclusion of direct and public incitement and conspiracy comports with the approach of international agreements, such as the Convention on the Prevention and Punishment of the Crime of Genocide.³⁰
19. Further, conspiracy is already available in multiple common law³¹ and civil law³² countries.

²⁸ Penal Code of Norway (2005) sec 108. Other countries, such as Germany and Sweden, sanction incitement to hatred of a group. See Criminal Code of Germany (StGB) (2021) sec 130 (“Whoever, in a manner suited to causing a disturbance of the public peace incites hatred against a national, racial, religious group or a group defined by their ethnic origin, against sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population, or calls for violent or arbitrary measures against them.”) (informal translation); Swedish Criminal Code (1962) ch 16, sec 8 (allowing for prosecution of a person who issues a “statement or other communication that is disseminated, threatens or expresses contempt for a population group by allusion to race, colour, national or ethnic origin, religious belief, sexual orientation or transgender identity or expression”) (informal translation). Ukraine likewise prohibits “wilful actions inciting national, racial or religious enmity and hatred”. Ukraine Criminal Code (2001), art 161 (informal translation). Other countries such as Botswana, Burkina Faso, Cambodia, and Colombia prohibit incitement to any criminal offense. Criminal Code of Botswana (1964) art 391; Criminal Code of Cambodia, art 495 (2009); Penal Code of Colombia (2000) art 348; Penal Code of Burkina Faso (2018) art 69. India prohibits the publication or circulation of false information that incites a class or community “to commit an offence against any other class or community”. Bharatiya Nyaya Sanhita (India) (2024) art 353(1)(c).

²⁹ Wibke K Timmerman, ‘Incitement in International Law’ (Routledge, 2015) 220; Jérôme de Hemptinne, ‘Incitement’, in Jérôme de Hemptinne et al, ‘Modes of Liability in International Criminal Law’ (CUP, 2019) 396. Moreover, international agreements already prohibit public incitement for purposes other than averting genocide. For instance, the Council of Europe Convention on the Prevention of Terrorism sought to achieve its goal by mandating States to criminalize the “public provocation to commit a terrorist offence.”, which entails “the intent to incite the commission of a terrorist offence”. Council of Europe Convention on the Prevention of Terrorism (adopted 16 May 2005, entered into force 1 June 2007) CETS 196, art 5.

³⁰ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art III(b)-(c).

³¹ See, e.g., Criminal Law Act of England and Wales (1977) sec 1.1; The Criminal Attempts and Conspiracy (Northern Ireland) Order 1983, art IV. Similarly, the United States Code contains dozens of criminal conspiracy provisions, including conspiracy to commit any other federal crime, see US Code Title 18, Crimes and Criminal Procedure (2023) sec 371, and conspiracy to commit some specific form of misconduct, ranging from civil rights violations to drug trafficking, see *ibid* sec 241 (civil rights conspiracies); US Code Title 21, Food and Drugs sec 846 (drug trafficking conspiracies).

³² See, e.g., Tunisian Criminal Code (1913) art 131 (criminal association is punishable); French Penal Code (1994) art 450-1 (regarding “any group formed or agreement established” aimed at committing a crime) (unofficial translation); German Criminal Code (1998) sec 30(2) (agreeing to commit a crime is punishable); Act on Punishment of Organized Crimes and Control of Proceeds of Crime of Japan (1999) art 6-2 (planning to commit a serious crime); Law No 10.001 on the Central African Penal Code (2010) art 412 (joining a group or participating in an agreement is punishable); Comprehensive Organic Criminal Code of Ecuador (2014)

20. There is also State support for the inclusion of these modes of liability. Numerous States indicated agreement with the proposal submitted by Iceland (on behalf of the Nordic countries) and Sierra Leone on the inclusion of conspiracy and incitement.³³ For example, the Russian Federation noted that the list should include incitement.³⁴ Jordan, Cameroon, and Palestine also issued statements in support of the inclusion of direct or indirect incitement.³⁵ The United Kingdom recognized that arguments to include conspiracy and incitement might exist and that it is appropriate for Draft Article 6(2) to conceive of various modes of liability.³⁶ The United States also recognized that addressing indirect and direct liability is “vital”³⁷

21. For these reasons, expanding the list of modes of liability to include common purpose liability, instigation, planning, conspiracy, and direct and public incitement not only preserves essential mechanisms for holding perpetrators accountable for crimes against humanity, but also more closely aligns with the Convention’s core objective of preventing and punishing crimes against humanity.

art 370 (illicit association is punishable); Colombian Penal Code, Ley 599 de 2000, art 340 (conspiring to commit a crime is punishable).

³³ See Murphy, ‘Fourth Report on Crimes against Humanity’ (n 21) para 138.

³⁴ ‘Compilation of Government Statements at the Sixth Committee Resumed Session on Crimes Against Humanity, April 1-5 and April 11, 2024: Russian Federation’ (September 2024) 91 <<https://bpb-us-e2.wpmucdn.com/sites.wustl.edu/dist/b/2004/files/2024/10/2024-Second-Resumed-Session-Compilation-of-Government-Statements-1.pdf>>.

³⁵ ‘Jordan Statement Before the Resumed Session of the Sixth Committee on Crimes Against Humanity Cluster 3’ (April 2024) 3 <https://www.un.org/en/ga/sixth/78/pdfs/statements/cah/41mtg_jordan_3.pdf>; Cameroon ‘Cluster III: Articles 6, 7, 8, 9 et 10’ (April 2024) 2 <https://www.un.org/en/ga/sixth/78/pdfs/statements/cah/42mtg_cameroon_3.pdf>; ‘Compilation of Government Statements at the Sixth Committee Resumed Session on Crimes Against Humanity April 1-5 and April 11, 2024: Palestine’ (September 2024) 154 (n 34).

³⁶ ‘Compilation of Government Statements at the Sixth Committee Resumed Session on Crimes Against Humanity, April 10-14, 2023: United Kingdom of Great Britain and Northern Ireland’ (June 2023) 70 <<https://bpb-us-e2.wpmucdn.com/sites.wustl.edu/dist/b/2004/files/2024/10/2024-Second-Resumed-Session-Compilation-of-Government-Statements-1.pdf>>.

³⁷ United States Statement, April 2023 Resumed Session of the Sixth Committee (12 April 2023) <https://www.un.org/en/ga/sixth/77/pdfs/statements/cah/41mtg_us_3.pdf> (“With respect to the modes of liability encompassed by Draft Article 6, paragraph 2(c), we note that it would be vital for any future convention on crimes against humanity to address both direct and indirect modes of liability. However, we recognize that States’ domestic criminal systems vary, and States may take different approaches to questions of complicity, whether they view it primarily through the lens of accomplice liability, conspiracy, participation in a joint criminal enterprise, common purpose, or another mode of responsibility. Accordingly, we think it would be important for any future convention to allow for flexibility in how States implement their obligations in that regard.”).