

## United States' Response to the International Law Commission's Request for Information

### On Domestic Legislation and Decisions of National Courts

#### Regarding Crimes Against Humanity

The United States is pleased to respond to the International Law Commission's request to provide relevant information regarding domestic legislation and decisions of national courts regarding crimes against humanity

The International Law Commission requested information on whether the State's national law at present expressly criminalizes "crimes against humanity" as such. The United States does not expressly criminalize "crimes against humanity" as such. There are several U.S. laws criminalizing conduct that may in some circumstances amount to crimes against humanity, namely a criminal prohibition on torture, *see* 18 U.S.C. § 2340A; a criminal prohibition on war crimes, *see* 18 U.S.C. § 2441, and a criminal prohibition on genocide, *see* 18 U.S.C. § 1091. However, these statutes do not criminalize all conduct that might amount to crimes against humanity, and some of the constituent acts of crimes against humanity as defined in certain international texts are not found in U.S. domestic law. There are also a host of other statutes with extraterritorial application that might apply depending on the circumstances (e.g., terrorism offenses, statutes dealing with international violent crime, etc.), and there are state-level criminal laws that may address several of the acts falling within the scope of crimes against humanity but do not necessarily apply to acts committed outside the United States.

The International Law Commission also requested information on the text of the relevant criminal statute(s). The relevant statutes are

#### **Torture Statute, 18 U.S.C. § 2340**

- (a) **Offense.**— Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life
- (b) **Jurisdiction.**— There is jurisdiction over the activity prohibited in subsection (a) if—
  - (1) the alleged offender is a national of the United States, or
  - (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.
- (c) **Conspiracy.**— A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy

#### **War crimes statute, 18 U.S.C. § 2441**

- (a) **Offense.**— Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
- (b) **Circumstances.**— The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).
- (c) **Definition.**— As used in this section the term “war crime” means any conduct—
- (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
  - (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
  - (3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or
  - (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians
- (d) **Common Article 3 Violations.**—
- (1) **Prohibited conduct.**— In subsection (c)(3), the term “grave breach of common Article 3” means any conduct (such conduct constituting a grave breach of common Article 3 of the international conventions done at Geneva August 12, 1949), as follows.
    - (A) **Torture.**— The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind
    - (B) **Cruel or inhuman treatment.**— The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful

sanctions), including serious physical abuse, upon another within his custody or control.

- (C) **Performing biological experiments.**— The act of a person who subjects, or conspires or attempts to subject, one or more persons within his custody or physical control to biological experiments without a legitimate medical or dental purpose and in so doing endangers the body or health of such person or persons.
- (D) **Murder.**— The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause
- (E) **Mutilation or maiming.**— The act of a person who intentionally injures, or conspires or attempts to injure, or injures whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause, by disfiguring the person or persons by any mutilation thereof or by permanently disabling any member, limb, or organ of his body, without any legitimate medical or dental purpose.
- (F) **Intentionally causing serious bodily injury.**— The act of a person who intentionally causes, or conspires or attempts to cause, serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war
- (G) **Rape.**— The act of a person who forcibly or with coercion or threat of force wrongfully invades, or conspires or attempts to invade, the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object
- (H) **Sexual assault or abuse.**— The act of a person who forcibly or with coercion or threat of force engages, or conspires or attempts to engage, in sexual contact with one or more persons, or causes, or conspires or attempts to cause, one or more persons to engage in sexual contact
- (I) **Taking hostages.**— The act of a person who, having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons.
- (2) **Definitions.**— In the case of an offense under subsection (a) by reason of subsection (c)(3)—

(A) the term “severe mental pain or suffering” shall be applied for purposes of paragraphs (1)(A) and (1)(B) in accordance with the meaning given that term in section 2340(2) of this title,

(B) the term “serious bodily injury” shall be applied for purposes of paragraph (1)(F) in accordance with the meaning given that term in section 113(b)(2) of this title;

(C) the term “sexual contact” shall be applied for purposes of paragraph (1)(G) in accordance with the meaning given that term in section 2246(3) of this title;

(D) the term “serious physical pain or suffering” shall be applied for purposes of paragraph (1)(B) as meaning bodily injury that involves—

- (i) a substantial risk of death;
- (ii) extreme physical pain,
- (iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or
- (iv) significant loss or impairment of the function of a bodily member, organ, or mental faculty; and

(E) the term “serious mental pain or suffering” shall be applied for purposes of paragraph (1)(B) in accordance with the meaning given the term “severe mental pain or suffering” (as defined in section 2340(2) of this title), except that—

- (i) the term “serious” shall replace the term “severe” where it appears; and
- (ii) as to conduct occurring after the date of the enactment of the Military Commissions Act of 2006, the term “serious and non-transitory mental harm (which need not be prolonged)” shall replace the term “prolonged mental harm” where it appears

**(3) Inapplicability of certain provisions with respect to collateral damage or incident of lawful attack.**— The intent specified for the conduct stated in subparagraphs (D), (E), and (F) or paragraph (1) precludes the applicability of those subparagraphs to an offense under subsection (a) by reasons of subsection (c)(3) with respect to—

(A) collateral damage; or

(B) death, damage, or injury incident to a lawful attack.

(4) **Inapplicability of taking hostages to prisoner exchange.**—Paragraph (1)(I) does not apply to an offense under subsection (a) by reason of subsection (c)(3) in the case of a prisoner exchange during wartime

(5) **Definition of grave breaches.**— The definitions in this subsection are intended only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that Article

### **Genocide Statute, 18 U.S.C. § 1091**

(a) **Basic Offense.**— Whoever, whether in time of peace or in time of war and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such—

(1) kills members of that group;

(2) causes serious bodily injury to members of that group,

(3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;

(4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;

(5) imposes measures intended to prevent births within the group, or

(6) transfers by force children of the group to another group;

shall be punished as provided in subsection (b).

(b) **Punishment for Basic Offense.**— The punishment for an offense under subsection (a) is—

(1) in the case of an offense under subsection (a)(1), where death results, by death or imprisonment for life and a fine of not more than \$1,000,000, or both, and

(2) a fine of not more than \$1,000,000 or imprisonment for not more than twenty years, or both, in any other case

(c) **Incitement Offense.**— Whoever directly and publicly incites another to violate subsection (a) shall be fined not more than \$500,000 or imprisoned not more than five years, or both

- (d) Attempt and Conspiracy.**— Any person who attempts or conspires to commit an offense under this section shall be punished in the same manner as a person who completes the offense.
- (e) Jurisdiction.**— There is jurisdiction over the offenses described in subsections (a), (c), and (d) if—
- (1)** the offense is committed in whole or in part within the United States; or
  - (2)** regardless of where the offense is committed, the alleged offender is—
    - (A)** a national of the United States (as that term is defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)),
    - (B)** an alien lawfully admitted for permanent residence in the United States (as that term is defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101));
    - (C)** a stateless person whose habitual residence is in the United States; or
    - (D)** present in the United States.
- (f) Nonapplicability of Certain Limitations.**— Notwithstanding section 3282, in the case of an offense under this section, an indictment may be found, or information instituted, at any time without limitation.

The International Law Commission also requested information on under what conditions the State is capable of exercising jurisdiction over an alleged offender for the commission of a crime against humanity (e.g. when the offense occurs within its territory or when the offense is by its national or resident). As reflected in the statutory language above, the torture statute provides for jurisdiction where the alleged offender is a national of the United States, or the alleged offender is present in the United States, regardless of the nationality of the victim or alleged offender. The war crimes statute gives rise to jurisdiction where the alleged offender or victim is a member of the U.S. military and/or a U.S. national. The genocide statute provides for jurisdiction where the offense is committed in whole or in part in the United States or if the alleged offender is a U.S. national, a lawful permanent resident of the United States, a stateless person whose habitual residence is in the United States, or is present in the United States.

The International Law Commission also requested information on decisions of the State's national courts that have adjudicated crimes against humanity. Because there is no explicit criminal prohibition on crimes against humanity, as such, in the United States, U.S. courts have not adjudicated prosecutions for crimes against humanity.