

Written contribution of Estonia on the draft articles on crimes against humanity, as adopted on first reading by the International Law Commission at its 69th session

Estonia would like to thank the International Law Commission for its valuable work done and for the draft articles on crimes against humanity as adopted by the ILC at its 69th session. In reply to the Secretary-General of the United Nations' request, Estonia would like to use this opportunity to provide the following comments and observations on the draft articles on crimes against humanity.

Estonia warmly welcomes the significant achievement made by the ILC on this highly relevant topic and for the contribution to the codification and development of international law. Estonia has always been committed to promoting respect for international law and rules-based international order. Respect for and promotion of international law is an existential matter for the international community for safeguarding peace and security.

Currently crimes against humanity lack an international treaty that national laws, measures and international cooperation could build upon in fighting against impunity. Draft articles on crimes against humanity drafted by the ILC are intended to serve as a basis for the elaboration of a future international convention.

In the opinion of Estonia, draft articles take into account the developments of international law, set a realistic outlook for the future and constitute an appropriate basis for the preparation of a convention against crimes against humanity. Estonia is of the position that it is high time and of utmost importance to act with full responsibility in preventing and ending crimes against humanity and bringing to justice those who are responsible for crimes against humanity.

Estonia is convinced that crimes against humanity, which are among the most serious crimes and are of concern to the international community as a whole, must be prevented in conformity with international law, as provided in the preamble of the draft articles, and impunity for the perpetrators must be put to an end. In our view, draft articles on crimes against humanity have a crucial role in creating strong legal measures to prevent crimes against humanity and to punish the perpetrators. Estonia welcomes the formulation of draft articles on crimes against humanity and a clear vision to go on with the work towards a future international convention.

In Estonia's view, all States should undertake to investigate serious crimes and to prosecute those whose culpability is proven in accordance with law and the standards of the rule of law. Estonia believes that no State should ignore preventing nor investigating the crimes against humanity. Thus, we firmly support the general obligation to prevent and to punish crimes against humanity, as provided in draft article 2. Estonia would like to emphasise that crimes against humanity form part of international customary law and are non-derogable norms, but it is important to reach a universally recognised written provision in respect of these crimes as well as to achieve greater legal clarity.

In principle, Estonia supports the approach taken in draft article 3 as concerns definition of crimes against humanity and its full correspondence with the wording of article 7 of the Rome Statute. It is in order to avoid any discrepancy or conflict of the wording and possible different interpretation

of crimes against humanity. At the same time, Estonia would like to point out that the current definition of crimes against humanity as reflected in draft article 3 and in the Rome Statute implies only in respect of civilian population. This has been the case historically, but the purpose of this restriction is being questioned more and more and there are claims that the scope of the application of the composition of the offence should be without such a restriction. Taking from its historical experience, Estonia would have liked to raise the question whether this is an appropriate time to review this historical restriction of the composition of crimes against humanity.

For example the description of the composition of the offence in § 89 of the Estonian Penal Code is broader and does not include the restriction to civilians as a general clause applicable to the protected persons.

Estonian Penal Code § 89. Crimes against humanity

(1) Systematic or large-scale deprivation or restriction of human rights and freedoms, instigated or directed by a state, organisation or group, or killing, torture, rape, causing health damage, forced displacement, expulsion, subjection to prostitution, unfounded deprivation of liberty, or other abuse of civilians, is punishable by eight to twenty years' imprisonment or life imprisonment.

(2) The same act, if committed by a legal person, is punishable by a pecuniary punishment.

On the other hand, it could be considered whether it would be justifiable to retain the policy element in article 2, paragraph 2 (a) of the Rome Statute “...pursuant to or in furtherance of a state or organisational policy to commit such an attack” also in the draft article. Pursuant to this subparagraph, a crime against humanity should be the expression of the policy of a state or another organisation, not e.g. extensive spontaneous violence. This element is a disputable innovation in the composition of crimes against humanity in article 7 of the Rome Statute, which is not required for example in the ICTY and ICTR Statutes or in the definition of crimes against humanity in international customary law.

Estonia would like to express its concern in relation to the wording of the definition of „forced pregnancy“ in draft article 3, paragraph 2 (f) which is complemented with the following sentence: „This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.“ Taking into account that the first sentence of the definition specifically emphasises the convention to cover cases of *unlawful confinement* of a woman *forcibly been made pregnant* with the *intent of affecting the ethnic composition* of any population or *carrying out other grave violations of international law*, this supplementary sentence is confusing and should be considered irrelevant and therefore removed from the text.

Estonia also asks for reconsideration of the definition of “gender“ in draft article 3, paragraph 3. The proposed wording of the definition is in accordance with article 7, paragraph 3 of the Rome Statute. However, the Rome Statute was composed 20 years ago and this definition does not reflect the current international human rights law. The proposed definition is too narrow and would exclude transgender and intersex persons. It would be necessary for the future convention on crimes against humanity to ensure protection of these persons, considering that transgender and intersex persons are more vulnerable to persecution.

As a minimum, we consider it important to revise the definition in line with the clarification of the Rome Statute definition made by the Office of the Prosecutor for the International Criminal Court.

According to the 2014 „*Policy Paper on Sexual and Gender-Based Crimes*“, the definition of gender (in the Rome Statute) acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys. This revision would also take into account more recent developments of international law, e.g. the Council of Europe Convention on preventing and combating violence against women and domestic violence that also includes a definition of gender.

Estonia welcomes that draft article 4 specifies the obligation of prevention and stipulates that no exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.

Estonia is convinced that impunity for crimes against humanity cannot be stopped without the cooperation of States and relevant intergovernmental and other organisations. We need to strengthen our common efforts to bring an end to crimes against humanity and make perpetrators accountable. Therefore, Estonia welcomes draft article 4, paragraph 1 (b), which provides that each State undertakes to prevent crimes against humanity in cooperation with other States, relevant intergovernmental organisations, and, as appropriate, other organisations.

Estonia underlines that every State has a responsibility to ensure that its national law prohibits crimes against humanity and to create the capability to investigate serious international crimes and to prosecute them. In order to make the whole system work, every country has to play its role.

Estonia is a State abiding by the rule of law. Relevant agencies investigate all the crimes against humanity they know about and punish those whose guilt is possible to prove in accordance with the standards of the rule of law. Referring to article 89 of the Estonian Penal Code (provided above), Estonia supports draft article 6, paragraph 1, which stipulates that each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law. We are also supportive of draft article 7, which provides *inter alia* that each State shall take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles.

Estonia would like to highlight that the wording of the consideration of immunities stipulated in draft article 6, paragraph 5 could be stronger. There is no reason to become detached from the provisions of article 27, paragraph 1 of the Rome Statute.

Estonia also highlights the importance of fair treatment of the alleged offender, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law. Therefore, Estonia welcomes draft article 11.

Estonia also welcomes the particular attention of the ILC to the victims of crime against humanity and inclusion of a specific article dedicated to this issue. Draft article 12 addresses the rights of victims, witnesses and other persons affected by the commission of a crime against humanity. However, the draft article does not provide a definition of a victim of crime against humanity and this is left to national jurisdictions. In order to ensure that victim's rights are fully recognized and ultimately realized, a clear and universal understanding could be helpful in determining the scope

of victims. We propose to specify who can qualify as victims of a crime against humanity or alternatively to give at least a minimum set of rights of protection that the victims be entitled to.

In draft article 12, paragraph 3, the ILC has paid specific attention to the questions of reparation and restitution, which we certainly welcome. At the same time, not much attention has been paid to the procedural safeguards and other substantive rights of the victims. We would also like to point out that specific needs of particularly vulnerable victims or groups of victims of crimes against humanity (for instance children whose best interest should prevail) deserve separate attention that could be addressed in draft article 12. Strengthening international legal framework and standards provide a basis for eliminating impunity and improving accountability for crimes committed against children in times of conflict and political violence.

Estonia hopes that these comments on draft articles contribute to the formation of convention on the prevention and punishment of crimes against humanity. The draft articles on crimes against humanity are an important step towards the future convention and we once again thank the International Law Commission for the most valuable contribution in this regard.