

**Draft Articles on Crimes Against Humanity**  
**adopted by the International Law Commission (A/72/10 at Chapter IV)**

**Comments by the Government of New Zealand**

**30 November 2018**

**Introduction**

1. New Zealand thanks and congratulates the Special Rapporteur, Mr Sean D. Murphy, and the Commission for the work that has gone into the Draft Articles and their Commentaries. The Draft Articles represent an opportunity to address a gap in the international legal framework, particularly in addressing inter-state cooperation in national laws on the prevention of crimes against humanity. In this respect the Draft Articles are an important step in efforts to ensure serious international crimes are prevented and that those responsible for them are held accountable.
2. New Zealand welcomes the opportunity to comment on the Draft Articles and their Commentaries. As a general comment, New Zealand is pleased to observe that the Draft Articles have been formulated in a way which complements the Rome Statute.

**Specific Comments**

Draft Article 2

3. New Zealand supports the inclusion of Draft Article 2 setting forth the general obligation of States to prevent and punish crimes against humanity and recognises that the form of Draft Article 2 follows that of Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide 1948. New Zealand is of the view however, that Draft Article 2, being in the nature of a “General obligation” as indicated by its heading, could make it clearer that the obligation being referred to is that of preventing and punishing crimes against humanity. This could be achieved, for example, by phrasing the Draft Article in terms such as: “States

undertake to prevent and punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict.”

#### Draft Article 4

4. New Zealand notes that the Commentary to Draft Article 4 explains (with reference to the interpretation of the International Court of Justice of Article 1 of the Genocide Convention) that the obligation on a State to prevent an act which is a crime under international law also has the effect of prohibiting that State from itself committing that act. New Zealand accepts that this is the case, and recognises that Draft Articles 2 and 4 would have the effect of prohibiting States from committing crimes against humanity. Nevertheless, New Zealand considers that any doubt on this question could be avoided if Draft Article 4 also explicitly stated that States themselves are prohibited from committing crimes against humanity.

#### Draft Article 3(3)

5. New Zealand observes that Draft Article 3, paragraph 3, defines the term “gender”, by replicating Article 7(3) of the Rome Statute. The negotiations which led to that definition in the context of the Rome Statute were contentious, and naturally, occurred prior to the subsequent development of jurisprudence, policy and practice relevant to the interpretation and application of the term to criminal accountability and in other contexts, by the ICC, the Office of the Prosecutor, other international organisations, international instruments and States themselves. New Zealand domestic law recognises biological sex and gender identity as distinct concepts. For the purposes of a convention based on these Draft Articles, New Zealand would prefer a definition which better reflected that distinction and the ways in which gender is experienced and expressed in contemporary society, if a definition is considered necessary at all.

#### Draft Article 14(8)

6. In New Zealand, mutual legal assistance is largely governed by the Mutual Assistance in Criminal Matters Act 1992 for both requests made by New Zealand to other States and requests made by other States to New Zealand. New Zealand’s legal system does not require the existence of a mutual legal assistance treaty or convention in order to request or provide mutual legal assistance. As such, New Zealand requests the Commission to consider the formulation of Draft Article 14, paragraph 8, in light of the position of New Zealand and other

States which may not require treaties of mutual legal assistance. New Zealand would prefer a formulation in which the draft annex applies to requests pursuant to Draft Article 14 if the States in question are not bound by such a treaty, or which do not otherwise have a legal basis to provide such assistance.

### **Concluding Remarks**

7. New Zealand trusts that these comments will be of assistance to the Commission in its continuing work and looks forward to the Commission's further revision of the Draft Articles and their Commentaries in due course.