

COMMENTS ON ILC DRAFT ARTICLES ON CRIMES AGAINST HUMANITY

The Nordic countries Denmark, Finland, Iceland, Norway and Sweden would like to express their appreciation to the International Law Commission for the opportunity to submit written comments and observations on the draft articles on Crimes Against Humanity, as adopted by the Commission in 2017.

The Nordic countries are very grateful to the International Law Commission and Special Rapporteur Mr. Sean D. Murphy for their work on this important topic, and would like to take this opportunity to reiterate our commitment to this valuable project on the prevention and punishment of crimes against humanity. We believe that the draft articles will contribute greatly to this end. In view of the upcoming second reading of the draft articles, we hereby submit the following comments and observations to the Secretary-General:

The Nordic Countries refer to our previous comments made in statements in the sixth committee.

The draft articles on crimes against humanity have a significant potential for great practical relevance to the international community. Among the three core international crimes, only crimes against humanity lack a convention. International norms can in turn contribute to national laws, national jurisdiction and cooperation among States in the fight against impunity. The Nordic countries will continue to support this project that we consider a welcome and timely contribution to the fight against impunity. The draft articles may serve as a good basis for a future convention on the prevention and punishment of crimes against humanity.

The Nordic Countries welcome the fact that the ILC has retained the definition of the term **“crime against humanity”** in Article 7 of the Rome Statute as the material basis for the draft articles. This point has been raised by the Nordic countries, as well as by many other delegations in the sixth committee. However, the Rome Statute was adopted twenty years ago. By retaining the definition *verbatim*, the draft articles fail to take into account the evolving jurisprudence by the ICC and other tribunals and international practice.

This is particularly evident in regard to the definition of **“gender”** retained from Article 7 paragraph 3 of the Rome Statute. While the ILC has elaborated on some elements of the crime “Crimes against humanity”, such as “widespread or systematic”, “directed against any civilian population” and “with knowledge of the attacks”, there is no similar study of the definition of “gender”. The Nordic countries are of the view that the definition of “gender” contained in draft article 3 paragraph 3, does not reflect current realities and content of international law. Current definitions of the term acknowledge the social construction of gender, and the accompanying roles, behaviors, activities, and attributes assigned to women and men, and to girls and boys. The Nordic countries consider that the definition of gender in the draft articles must take this development into account and be updated accordingly.

Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crime:

Gender, in accordance with article 7(3) of the Rome Statute (‘Statute’) of the ICC, refers to males and females, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviors, activities, and attributes assigned to women and men, and to girls and boys.

ICRC:

The term “gender” refers to the culturally expected behavior of men and women based on roles, attitudes and values ascribed to them on the basis of their sex, whereas the term “sex” refers to biological and physical characteristics.

WHO:

Gender refers to the socially constructed characteristics of women and men – such as norms, roles and relationships of and between groups of women and men.

UN Women:

Gender refers to the roles, behaviors, activities, and attributes that a given society at a given time considers appropriate for men and women.

Furthermore, many parts of the definitions in the draft articles contain elements that are open to interpretations and value judgments. It is worth noting that according to Article 9 of the Rome Statute, the Elements of Crimes adopted by the Assembly of States Parties, shall assist the Court in the interpretation of the Statute.

According to draft article 3, paragraph 1, subparagraph (k), a constituent of a “crime against humanity” could also consist of “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”.

The provision in draft article 3, paragraph 1, subparagraph (k) resembles a provision permitting analogy. The principle of legality in criminal law, based on international human rights treaties, does not permit analogy to the detriment of a prosecuted person. Although Article 7, paragraph 1, subparagraph (k) of the Rome Statute contains a corresponding provision, Article 22 of the Statute also specifically provides on the principle of legality in criminal law. Article 22, paragraph 2 in the Statute prohibits analogy and requires that in case of ambiguity, the definition shall be interpreted in favor of the person being prosecuted. The ILC’s draft article do not contain such a provision. Moreover, it appears from Articles 1 and 5 of the Rome Statute that the jurisdiction of the ICC is limited to ‘the most serious crimes of international concern’. Such a provision is conducive to influencing the interpretation of penal provisions by keeping it reasonably narrow. The possible convention must not contain any provisions permitting analogy to the detriment of a prosecuted person.

In light of the above, an essential question from the perspective of the extent of criminal liability and the obligation to enforce it is how to interpret, first, the attack element included in the definition of the offence and, second, the question of when the constituent act is considered committed ‘as part of’ such an attack.

Having committed the constituent act 'as part of' an attack is a precondition for liability that is both essential and largely open to interpretations. Therefore, this precondition should, as a minimum, be discussed more extensively in the commentaries to the draft articles. At the time being the discussion on the 'as part of' element is rather limited. In any case, the element must be given a narrow content.

Part III of the Rome Statute lays down provisions on general principles of criminal law. The set of draft articles of the ILC lacks provisions on certain issues regulated by Part III of the Rome Statute. For instance, the ILC's draft articles lack a provision on the mental element of a crime corresponding to Article 30 of the Rome Statute. The precondition that the perpetrator had knowledge of the attack, required in the introductory sentence of ILC draft article 3, paragraph 1 on the definition of crimes, means that the mental element is taken into account only in relation to the attack-criterion of the elements of crime. Therefore, the potential convention should regulate the mental element in more detail, where it should be limited to intent and knowledge.

The Nordic countries have previously stressed the importance of the principle of **non-refoulement**. The current draft article 5 is an important provision for the purpose of preventing persons from being exposed to crimes against humanity. Although the said provision is focused on avoiding the exposure of a person to crimes against humanity, this provision is without prejudice to other obligations of non-refoulement arising from other treaties and customary international law. **In fact, the Nordic countries do not believe that the draft provision seeks to extend obligations of states regarding non-refoulement beyond existing obligations, but we look forward to engaging in further discussions on the precise scope of the provision.**

The Nordic countries attach great importance to **due process** considerations, which are particularly pertinent in the context of criminal law. We agree with the ILC that the alleged offender shall at all stages of the proceedings be guaranteed fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law, as reflected in draft article 10. In relation to the obligation in draft article 5, paragraph 6 to ensure that crimes against humanity shall be punishable by **appropriate penalties** that take into account their grave nature, the Nordic countries believe that the draft article should draw inspiration from Article 77 of the Rome Statute of the International Criminal Court, which does not include the death penalty as an applicable penalty for genocide, crimes against humanity and war crimes.

The commentary notes that in general, international instruments have sought to encourage States to establish a relatively wide range of **jurisdictional bases under national law** to address the most serious crimes of international concern. This is instrumental for eliminating the risk of impunity. In addition to territorial jurisdiction, the draft article obliges states to establish active personality jurisdiction. Furthermore, if the State considers it appropriate, it may also establish jurisdiction over stateless persons habitually residing in that State's

territory, or in cases where the victim is a national of that State. We would like to note that the Nordic countries, under their respective criminal codes generally have active personality jurisdiction not only over stateless persons residing in our countries, but also over resident foreign nationals. We may also, under certain circumstances, exercise criminal jurisdiction over crimes committed abroad, directed at our nationals or at permanent residents.

ILC's draft article 7, together with draft article 10, paragraph 1 sets out the obligation to extradite or prosecute (*aut dedere aut judicare*). We wish to note that, in order to effectively support the *aut dedere aut judicare* obligation, national courts need to be granted jurisdiction to try the alleged offender if he or she is not extradited or surrendered. Depending on the circumstances, this may require resorting to a jurisdictional base other than just territorial or active personality jurisdiction. We note that draft article 7 does not exclude the exercise of a broader jurisdictional base, if such a basis is provided for under relevant national law. Indeed, under international law, crimes against humanity are widely seen as crimes subject to universal jurisdiction. Therefore, the Nordic countries would encourage adding a specific reference to **universal jurisdiction** at the end of draft article 7, paragraph 3.

In UN instruments (i.e. UNCAC article 44 paragraph 11), the obligation to extradite or prosecute is often limited to instances where a State refuses extradition because extradition of nationals is prohibited. However, the wording of draft article 10 is general and not limited to the non-extradition of nationals. Consequently, it involves a widening of the principle. The Nordic countries are not opposed to consider such an expansion of the principle *per se*. However, we think it would be useful to assess whether it is always necessary for such cases to be submitted to the competent authorities for the purpose of prosecution, even without the requesting state calling for such submission. In Norway for instance, a refused extradition request is to be forwarded to the competent authorities for prosecution if the state seeking extradition requests Norway to take on the proceedings. An equivalent to this practice follows from UNCAC article 44 paragraph 11.

Draft article 13, paragraph 2 provides that an offence covered by the draft articles shall not be regarded as a **political offence** and, accordingly, a request for extradition based on such an offence may not be refused on these grounds alone. However, the definition of the crime in draft article 3 is open to interpretations and value judgments in many respects, which may prove problematic in respect to the application of draft article 13, paragraph 2.

Finally, the commentaries to the draft articles describe the related treaty instruments and international case law in a helpful and analytical manner. It is worth noting that especially the international case law on punishability largely concerns acts committed in connection to armed conflicts, whereas the set of ILC draft articles would apply to crimes against humanity as provided in draft article 2, regardless of whether the relevant crime was committed during an armed conflict or not. Accordingly, it would be beneficial if the commentaries would pay increased attention to the application of the elements of crime in situations without an armed

conflict. In this context, it is important that the positions stated on the interpretation indicate a sufficiently narrow scope of application of the elements of crime.

The Nordic countries would like to once again thank the International Law Commission and Special Rapporteur Mr. Sean D. Murphy for the important work undertaken on this topic. We hope the above comments and observations will be of value to the further refinement of the draft articles.