

**ILC DRAFT ARTICLES ON CRIMES AGAINST HUMANITY**  
**WRITTEN COMMENTS OF THE UNITED KINGDOM**  
**29 November 2018**

1. At its sixty-ninth session (2017), the International Law Commission (**ILC**) requested States to submit to the Secretary-General any comments and observations they may have on the ILC's draft Articles on crimes against humanity (the **draft Articles**) by 1 December 2018.<sup>1</sup> Further to that request, the comments of the United Kingdom (the **UK**) are set out here. The UK also remains open to any further dialogue with the ILC that would assist in the completion of this project.

**General Remarks**

2. The UK is grateful to the Commission and to the Special Rapporteur, Mr. Sean Murphy, for their impressive and important work on this topic. The draft Articles navigate this complex and sensitive area well through a practical approach that draws significant inspiration from international criminal law precedents.
3. The UK would like to stress that it is supportive of the draft Articles subject to the comments it makes here. It acknowledges that currently there is no general multilateral convention establishing a framework for the national prosecution of crimes against humanity, including mutual legal assistance, and that this represents a lacuna given the existing frameworks for other serious crimes such as genocide, war crimes and torture. As such, the UK sees benefits in developing an extradite-or-prosecute convention in respect of crimes against humanity.
4. The UK appreciates the careful consideration that the Special Rapporteur, the Drafting Committee and the ILC as a whole have given to the inter-relationship between their work and the Rome Statute of the International Criminal Court (the **Rome Statute**). As the UK has previously emphasised,<sup>2</sup> and as the Special Rapporteur and Commission clearly intend, a future convention on this subject will need to complement, rather than compete with, the Rome Statute. A new

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<sup>1</sup> *Report of the International Law Commission, sixty-ninth session, A/72/10*, paragraph 43.

<sup>2</sup> See the UK's statement to UNGA 6th Committee (24 October 2017), available [here](#).

convention could facilitate national prosecutions, thereby strengthening the complementarity provisions of the Rome Statute.

5. The UK also reiterates its view that the expansion of the scope of this work into issues such as civil jurisdiction, amnesty and immunity would be unhelpful to the goal of a widely accepted convention and appreciates the fact that there has been no such expansion to date. In particular, the UK is clear that there is no conflict between *jus cogens* rules and the rule of State immunity, as the rules address different matters.<sup>3</sup> The UK therefore takes the view that it would not be appropriate for the draft Articles to deal with the immunities of State officials. such immunities are in any event being dealt with under another topic on the ILC's current programme of work.
6. The UK addresses the individual draft Articles in turn below.

### **Preamble**

7. The UK notes that at paragraph 3 of the Preamble to the draft Articles the ILC has taken the view that the prohibition on crimes against humanity is a peremptory norm of general international law. The ILC has taken this view previously.<sup>4</sup>
8. The UK further notes that these draft Articles are focused on establishing individual criminal liability for crimes against humanity. In this context, the UK is unclear on the benefits of including a statement on whether the prohibition on crimes against humanity is a peremptory norm of general international law. The UK is aware that the ILC is looking at the subject of *jus cogens* in a separate piece of work and suggests that this question is left to be considered following the outcome of that work.

### **Draft Article 3 – Definition of crimes against humanity**

9. The UK supports the ILC's decision to use the Rome Statute's definition of crimes against humanity for the purposes of the draft Articles. In general, the UK would urge against any deviation from that definition in order to ensure consistency between the two instruments and to avoid any confusion over

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<sup>3</sup> *Jurisdiction Immunities of the State (Germany v. Italy)*, Judgment, paragraph 93.

<sup>4</sup> See paragraph 4 of the ILC's Commentary on the Preamble.

which crimes do or do not fall within the scope of “*crimes against humanity*”. Further, many of the States Parties to the Rome Statute of the International Criminal Court will have given effect to the Rome Statute definition in their domestic law and may be disinclined from making substantive amendments to that definition.<sup>5</sup>

10. However, the UK is aware that consistency with the Rome Statute may not be possible in three cases. These are in relation to draft Articles 3(1)(h), 3(2)(i) and 3(3), as discussed below.

#### *Draft Article 3(1)(h) - persecution*

11. The final part of draft Article 3(1)(h) says: “*or in connection with the crime of genocide or war crimes*”. This contrasts with article 7(1)(h) of the Rome Statute which says: “*in connection with [...] any crime within the jurisdiction of the Court*”.

12. It is not possible to transfer the Rome Statute language across to the draft Articles. However, the cross-reference to genocide and war crimes is unsatisfactory in the absence of a definition of those crimes.

13. In the UK’s view, the preferable solution would be to simply delete “*or in connection with the crime of genocide or war crimes*”. The UK considers that this amendment would make little practical difference, as in the vast majority of situations any persecution that would occur in connection to the crime of genocide or war crimes would also occur in connection to one of the other crimes referred to in draft Article 3(1). In addition, removing those words would hopefully avoid the complications that leaving them in would likely create. Finally, where States like the UK have implemented the definition of crimes against humanity in the Rome Statute into their national law, they should be able to continue with that slightly wider definition without conflicting with the definition in the draft Articles (as draft Article 3(4) permits broader definitions).

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<sup>5</sup> The UK’s definition can be found in Schedule 8 to the International Criminal Court Act 2001.

*Draft Article 3(2)(i) – definition of “enforced disappearance of persons”*

14. As regards draft Article 3(2)(i), the definition of “*enforced disappearance of persons*” in the draft Articles follows the one in the Rome Statute.
15. However, the UK recognises that since the Rome Statute, a number of States have ratified the International Convention for the Protection of All Persons from Enforced Disappearance (the **Enforced Disappearances Convention**), which has a slightly different definition. The UK is not a signatory to that Convention.
16. In the UK’s view, the draft Articles should continue to use the definition of “*enforced disappearance of persons*” in the Rome Statute. The definition in the Enforced Disappearances Convention appears to be wider than that in the Rome Statute. As such, if the draft Articles use the definition in the Enforced Disappearances Convention, the signatories to the Rome Statute would potentially be required to amend their national legislation implementing the Rome Statute to give effect to a future convention based on the draft Articles.

*Draft Article 3(3) – definition of “gender”*

17. Draft Article 3(3) defines “gender” as referring to two sexes – male and female. Consequently, persecution of persons who do not consider themselves as male or female in connection with another crime referred to in draft Article 3(1) would potentially fall outside the scope of crimes against humanity. There is therefore the question of whether or not this definition of gender is appropriate despite the fact that it follows the wording of the Rome Statute. In the UK’s view, it is no longer appropriate and therefore should be dropped from the draft Articles. States may then, if necessary, negotiate a new definition should they decide to pursue a convention based on the draft Articles.

*Broader definitions of crimes against humanity in national law*

18. As a final point on draft Article 3, paragraph 41 of the Commentary on draft Article 3 notes that “*Any elements adopted in a national law, which would not fall within the scope of the present draft articles, would not benefit from the provisions set forth within them, including on extradition and mutual legal assistance.*” While this is perhaps an obvious point, there may be some benefit in including wording along these lines in the draft Articles themselves to avoid

any disputes between States in the context of mutual legal assistance or extradition.

## **Draft Article 4 – Obligation of prevention**

### *Undertaking to prevent*

19. The UK considers that the undertaking to prevent crimes against humanity as set out in draft Articles 2 and 4 constitutes a proposal for the progressive development of the law (*lex ferenda*). As such, in the UK's view, the Commentary to draft Article 4 should make this position clear.
20. The UK also notes that the undertaking to prevent is not intended to be limited to the specific obligations set out in paragraphs (1)(a) and (b) of draft Article 4. This is evident from the drafting of draft Article 4(1), as well as paragraph 7 of the Commentary to draft Article 4, which cited the International Court of Justice (ICJ) to the effect that the undertaking to prevent "*is not merely hortatory or purposive, and is not merely an introduction to later draft articles*". Further, it seems the obligations created by the undertaking are intended to be broad. Paragraph 7 of the Commentary on draft Article 4 notes that at the provisional measures phase of the *Bosnian Genocide Case*, the Court determined that the undertaking in the Genocide Convention imposed "*a clear obligation*" on the parties "*to do all in their power to prevent the commission of any such acts in the future*".
21. Helpfully, the Commentary to draft Article 4 seeks to provide more detail on what the undertaking requires (e.g. for States to use best efforts).<sup>6</sup> However, this analysis is limited as it draws heavily on the findings of the ICJ in the *Bosnian Genocide Case*, which is specific to the case of genocide. The courts may take a different approach in the context of crimes against humanity. Further, even if the approach were the same, the burden placed on States by such an approach is likely to be greater when applied to crimes against humanity as compared to genocide, given the wider ranging nature of the former.
22. Consequently, the UK has concerns about creating such a broad, and potentially ever expanding, set of obligations for States in relation to crimes

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<sup>6</sup> See paragraph 12 of the Commentary to draft Article 4.

against humanity. The lack of certainty increases the risk of disputes about the exact requirements placed on States, especially in terms of any obligations they might have to act extraterritorially.

23. In light of this, the UK would ask the ILC whether there are any specific obligations, which would be required to satisfy the undertaking to prevent, that it has not included in paragraphs (1)(a) and (b) of draft Article 4. If there are, it may assist to include them explicitly and thus to give as much certainty as possible to what is required by States when accepting the undertaking at draft Articles 2 and 4(1). In the UK's view, a longer but exhaustive list of obligations is preferable to a shorter but unlimited one.

#### *Territory under its jurisdiction*

24. In a number of places in the draft Articles (draft Articles 4(1)(a), 7(1)(a), 7(2) and 8), the draft Articles make reference to "*any territory under its jurisdiction*". In the UK's view, this should be limited to "*in its territory*". First, this provides greater certainty as to where the obligations set out within the draft Articles apply, as it will not always be clear whether territory is under the *de facto* jurisdiction of the State. Second, even if the position is clear, it may not always be practical to apply the relevant draft Articles where a State exercises *de facto* control over territory.

### **Draft Article 6 – Criminalization under national law**

#### *Statute of limitations*

25. While the UK has no concerns with draft Article 6(6) regarding the prohibition on statutes of limitation for crimes against humanity, it may be helpful for the draft Articles to state that this does not mean that States are obliged to prosecute crimes against humanity that took place before such crimes were criminalised in their law.

#### *Liability of legal persons*

26. The UK is aware that the Special Rapporteur would appreciate comments on draft Article 6(8) in particular. In the UK's view, it is unclear what draft Article 6(8) adds to the legal position. Those States that have liability for legal persons

as a matter of course will likely allow such liability for crimes against humanity. Those States that do not have such liability are unlikely to change their position because of draft Article 6(8). Thus, draft Article 6(8) risks creating controversy without having any substantive legal effects.

## **Draft Article 7 – Establishment of national jurisdiction**

### *Jurisdiction over ships*

27. The UK notes that draft Article 7(1)(a) requires a State to establish its jurisdiction over ships registered in that State. The Commentary to draft Article 7 explains this approach as follows: “*Further, territorial jurisdiction often encompasses jurisdiction over crimes committed on board a vessel or aircraft registered to the State*”.<sup>7</sup>

28. In the UK’s view, the Commentary is not quite accurate in this respect. The jurisdictional link between a State and a ship is that of nationality, not territory. Further, that nationality link is not conferred only by registration. As confirmed by article 91(1) of the United Nations Convention on the Law of the Sea, “*Ships have the nationality of the State whose flag they are entitled to fly*”. It is entitlement to fly the flag of a State, rather than where a ship is registered, that is critical for the grant of nationality to a ship, although the UK recognises that registration is a major means by which nationality is granted. The UK respectfully requests that the draft Articles reflect this position.

### *Jurisdiction through presence*

29. The UK broadly supports the approach taken in draft Article 7(2) (and in draft Article 10) to require States to exercise jurisdiction over crimes against humanity when the alleged offender is present in the absence of extradition. However, signing up to such an obligation would require the UK to amend its domestic law on crimes against humanity, as presence in the UK alone is not currently sufficient for the exercise of jurisdiction.<sup>8</sup> Consequently, before becoming a party to a convention containing this extension of jurisdiction, the UK would need to assess in full the impact on its justice system.

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<sup>7</sup> Paragraph 6.

<sup>8</sup> See section 51 of the International Criminal Court Act 2001.

## **Draft Article 12 - Victims, witnesses and others**

### *Definitions*

30. The UK supports the decision to avoid defining the term “*victim*” (as discussed at paragraphs 3 and 4 of the Commentary to draft Article 12) given the need to reflect the differing approaches at national level. It also supports the decision not to define “*protective measures*” in draft Article 12(1) (as discussed in paragraph 10 of the Commentary to draft Article 12) given the need to ensure the necessary flexibility.

### *Reparations*

31. Further, the UK considers paragraph 20 of the Commentary to draft Article 12 to be helpful, as it indicates that draft Article 12(3) could be satisfied by civil claims processes. However, it may be helpful to make this position more explicit to ensure that there is no presumption that States must establish compensation schemes, although they can do so if they wish.

32. Finally, with regard to Article 12(3), the UK has considered whether “*cessation and guarantees of non-repetition*” strictly fall within the scope of “*reparation*”. While cessation or guarantees of non-repetition may not actually “*repair*” material or moral damages, it is quite possible that victims may seek such forms of action and thus the UK sees no issue with including them within the list.

## **Draft Articles 13 and 14 – Extradition and Mutual Legal Assistance**

33. The UK does not have any specific comments on the draft Articles dealing with extradition and mutual legal assistance. However, should the ILC take the view that those draft Articles need to be simplified to ensure greater support from other States, the UK would not oppose such a decision.