

**Written contribution by the Federal Republic of Germany
on the draft articles on crimes against humanity
adopted by the International Law Commission**

The Federal Republic of Germany has the honour to present to the International Law Commission the following comments and observations on the draft articles on crimes against humanity adopted, on first reading, by the International Law Commission at its 69th session, as requested by the Under-Secretary-General for Legal Affairs in his communication Ref. LA/COD/66 of 11 September 2017.

In 2017 the Commission concluded its first reading of the set of 15 draft articles on crimes against humanity and commentaries thereto. Germany welcomes the work of the International Law Commission on this important topic. Germany wishes to thank Special Rapporteur Sean Murphy for his reports and commends the Commission for having finalised the First Reading.

As a staunch supporter of international criminal law, Germany attaches great importance to the topic at hand. It acknowledges that there is no general multilateral framework governing the prosecution of crimes against humanity and is convinced of the usefulness of the adoption of a specialized Convention on Crimes against Humanity. The Convention would not only complement treaty law on core crimes, but would foster inter-state cooperation with regard to their investigation, prosecution and punishment. A future Convention on Crimes against Humanity ought to provide further impetus to end impunity for atrocity crimes.

The Rome Statute establishing the International Criminal Court regulates the relations between States and the International Criminal Court and addresses the prosecution of crimes falling under its jurisdiction. The Rome Statute is not focused on steps that States should be taking to prevent and punish crimes against humanity. A Convention on Crimes against Humanity would in this respect close a gap in the existing international legal framework.

Germany believes that a Convention on Crimes against Humanity would contribute to the implementation of the complementarity provisions of the Rome Statute by encouraging national prosecutions. Ultimately, the Convention would serve to encourage the wider acceptance of the International Criminal Court's jurisdiction and promote the universality of the Rome Statute.

Germany sees the orientation towards the language of the Rome Statute as a precondition for the success of the project. A Convention on Crimes against Humanity must avoid conflicts with the Rome Statute and ensure consistency with existing rules and institutions of international criminal law, foremost the definitions of crimes against humanity contained in the Rome Statute.

Germany welcomes the fact that the Commission as a result of the first reading does not propose any institutionalised mechanism under the draft Convention as this would bear the danger of creating space for different interpretations.

With regard to the draft articles on crimes against humanity contained in document A/72/10 Germany wishes to submit the following specific comments for consideration:

Art. 5 Non-refoulement

- In para. 2, the language of the second half-sentence (“including...”), which is in line with Art. 16 of the Convention on Enforced Disappearance, serves to clarify that the general human rights situation in the state must be taken into account when assessing whether a real threat of enforced disappearance is at stake. In the case of crimes against humanity, however, the general situation is already covered in the facts of the crime that presuppose a widespread or systematic attack on the civilian population (see Art. 3 para. 1). The second half-sentence therefore appears systematically superfluous.

Art. 9 Preliminary measures when an alleged offender is present

- In para. 1 last sentence Germany proposes to substitute “to enable any... proceedings to be instituted” by “... to be conducted” as the measures in question must be kept up for as long as necessary in order to secure the full duration of the proceedings.
- The obligation under para. 3 to „immediately notify“ the states referred to in Art. 7 para. 1 appears new under international public law. It poses important questions with regard to the strategy of inquiry and foreign policy considerations. Germany therefore proposes to redraft the provision on the following lines: “When a State, pursuant to this draft article, has taken a person into custody, it shall endeavor to consult, as appropriate, with the States referred to in draft article 7, paragraph 1, in order to indicate whether it intends to exercise jurisdiction and whether to exchange its findings.”

Art. 13 Extradition

- Para. 1 gives rise to questions with regard to the extradition for co-extradited offences (e.g. genocide and war crimes) which are not covered by Art. 1 and 3. It would be unfortunate if the draft articles led to the result that perpetrators were only extradited specifically for crimes against humanity, but that other acts committed within the same situation were not covered. It should be examined whether Art. 13 could not allow for accessory extraditions and be supplemented by a paragraph which is aligned with Art. 2 para. 4 of the UN Model Treaty on Extradition (https://www.unodc.org/pdf/model_treaty_extradition.pdf): “If a request for extradition includes several separate offences each of which is punishable under the laws of both States, but some of which do not fulfil the conditions as an extraditable offence covered by the present draft articles, the requested State may grant extradition for the latter offences provided that the person is to be extradited for at least one extraditable offence.”

Art. 14 Mutual legal assistance

- The language of para. 7 is based on other UN conventions, e.g. Art. 18 para. 6 of the Convention against Transnational Organized Crime and Art. 46 para. 6 of the Convention against Corruption. The latter two, however, do not provide for the

additional half-sentence "except that the provisions of this article provide for greater mutual legal assistance". This addition should be rejected because it causes legal uncertainty. It is practically significant that specific bilateral or (regional) multilateral agreements, where they exist, take priority in co-operation on crimes against humanity.

- Germany supports the designation of a "central authority" under Annex 2, as also provided for by the Convention against Transnational Organized Crime as well as the Convention against Corruption.