

Joint Nordic comments on the International Law Commission's Draft articles on Prevention and Punishment of Crimes Against Humanity

I. Introduction

The Nordic countries, Denmark, Finland, Iceland, Norway, and Sweden, commend the work of the International Law Commission (ILC), which at its 71st Session (2019) adopted the Draft articles on Prevention and Punishment of Crimes Against Humanity (hereinafter referred to as 'articles').

The Nordic countries refer to our previous comments made in statements in the Sixth Committee and our written submissions to the ILC and hereby, in view of the upcoming resumed session in the Sixth Committee, submit the following comments to the Secretary-General.

Crimes against humanity are amongst the most serious crimes under international law and their prevention and punishment are of concern to the international community as a whole. While being clearly prohibited under international law, the prevention and punishment of crimes against humanity lack a dedicated treaty. This constitutes a gap in the international treaty framework that needs to be filled.

The Nordic countries continue to steadfastly support the recommendation by the ILC to elaborate a convention on crimes against humanity on the basis of the draft articles.

II. Introductory provisions (preamble and Article 1)

The Nordic countries consider that the preambular paragraph provides a balanced conceptual framework for the draft articles, usefully setting out the general context in which they were elaborated and their main purposes.

The preamble rightly recalls that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*). As such, this prohibition is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The preamble refers to the definition contained in Article 7 of the Rome Statute as a model for the ILC when drafting the definition of "crimes against humanity" in the present articles. The Nordic countries welcome the ILC's decision to base the definition on the Rome Statute but wish to stress that no State would have to become a State Party to the Rome Statute to join a future convention on the prevention and punishment of crimes against humanity. A future convention would address the horizontal relations between States, whereas the Rome Statute addresses the vertical relations between the International Criminal Court (ICC) and the State Parties. The jurisdiction of the court is complementary to national criminal

jurisdictions and, as recognized in the preamble, it is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity.

The Nordic countries agree that the effective prosecution of such crimes must be ensured by taking measures at the national level and by enhancing international cooperation, including with respect to extradition and mutual legal assistance. We reiterate that the elaboration of a convention, on the basis of the articles, would constitute a valuable contribution to this effect.

The Nordic countries also welcome the reference to the rights of victims, witnesses and others in relation to crimes against humanity, as well as the right of alleged offenders to fair treatment.

The Nordic countries consider that Article 1 contributes to legal clarity and certainty as regards the scope of the articles. The provision clarifies that the draft articles have two overall objectives: the prevention and the punishment of crimes against humanity. As highlighted by the preamble, the obligation to prevent and punish goes hand in hand and putting an end to impunity for the perpetrators of crimes against humanity contributes to the prevention of these horrendous crimes.

III. Definition and general obligations (Articles 2, 3 and 4)

As stated above, the Nordic countries continue to strongly support the ILC's decision to use the definition in Article 7 of the Rome Statute as the material basis for the definition of "crimes against humanity". This definition enjoys broad international support, extending beyond the 124 States Parties to the Rome Statute. We therefore consider this definition to be a good basis for a future convention.

International law has seen important developments since the drafting of the Rome Statute was completed 25 years ago. In that light, the Nordic countries would suggest further clarifying the respective definitions of the underlying offences of 'forced pregnancy', 'enforced disappearance' and 'persecution'.

The Nordic countries reiterate our support for the decision of the ILC not to retain the Rome Statute definition of "gender", which we believe does not reflect current realities and content of international law. Keeping with the ILC's approach in this regard, a future convention on crimes against humanity would constitute an important tool to assist States in their efforts to prevent and punish gender-based crimes. Furthermore, the Nordic countries would like to explore the potential of listing other gender related crimes as independent crimes against humanity.

The Nordic countries welcome that the general obligation of States "not to engage in acts that constitute" crimes against humanity is made explicit in Article 3, paragraph 1. We support the phrasing which recognizes that crimes are committed by persons, but that the

“acts” that “constitute” crimes against humanity may be attributable to States under the rules of State responsibility.

The Nordic countries welcome the clarification in Article 3, paragraph 2 – supported by treaty practice, jurisprudence, and well-settled acceptance by States – that crimes against humanity are crimes under international law that must be prevented and punished whether or not committed in time of armed conflict, and whether or not criminalized under national law.

The Nordic countries also welcome the clarification in Article 3 paragraph 3 that no exceptional circumstances whatsoever may be invoked as a justification of crimes against humanity.

The Nordic countries also support Article 4 and the further operationalisation of the obligation to prevent crimes against humanity, in conformity with international law. We reiterate that international efforts to eliminate these horrendous crimes can only be successful if a future convention devotes sufficient attention to prevention. In that spirit, the Nordic countries would like to follow up on the proposals made by other member states and build on earlier discussions within in the ILC to add a monitoring mechanism to the existing draft convention.

IV. National measures (Articles 6, 7, 8, 9, and 10)

The Nordic countries consider the legal obligation in Article 6, paragraph 1, pertaining to criminalization under national law to be of critical importance. We welcome in this regard also paragraph 5 which provides that the official position of the alleged perpetrator is not a ground for excluding criminal responsibility. We note, as clarified by commentaries of the ILC, that this paragraph has no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary law. We equally note that Article 7 of the ILC Draft Articles on Immunity of State officials from foreign criminal jurisdiction states that immunity *ratione materiae* shall not apply in respect of crimes against humanity.

The Nordic countries support the clarification in Article 6, paragraph 6, that crimes against humanity shall not be subject to any statute of limitations.

The Nordic countries note the obligation in Article 6, paragraph 7, to ensure that crimes against humanity shall be punishable by appropriate penalties. We reiterate in this regard our view that the death penalty under no circumstances can constitute an appropriate penalty.

As previously stated, the Nordic countries support Article 7, which imposes an obligation to establish a relatively wide range of jurisdictional bases for domestic investigations and prosecutions. This is instrumental to reduce the impunity gap by ensuring that States do not become safe havens for perpetrators of crimes against humanity. We also welcome that the article provides flexibility and allows for the exercise of a broader jurisdictional base, if

provided for in national law (paragraph 3). In the latter regard, the Nordic countries share the widely held view that under international law, crimes against humanity give rise to universal jurisdiction.

Article 8 clarifies that investigations must be prompt, thorough and impartial. The Nordic countries agree with the observation made in the commentaries that investigations must be conducted in good faith.

As regards Article 9, which provides for certain preliminary measures to be taken by the State in the territory under whose jurisdiction an alleged offender is present, the Nordic countries recall that an alleged offender shall be guaranteed at all stages of the proceedings fair treatment and full protection of his or her rights under applicable national and international law, including human rights law and international humanitarian law.

The Nordic countries also welcome the provision on *aut dedere aut judicare* as contained in Article 10, read together with Article 7, paragraph 2. As previously stated, we consider these provisions to be critical in the fight against impunity and we welcome the acknowledgement of the role of international courts and tribunals in this fight.

V. International measures (Articles 13, 14, and 15)

The Nordic countries reiterate that clear provisions on inter-state cooperation are key to reach the overall goals of prevention and punishment of crimes against humanity. In our view, articles 13 and 14, read together with the annex, constitute a strong addition to international law and contribute to the implementation of the principle of complementarity as prescribed by the Rome Statute for States Parties.

The articles in question are succinct and strike the right balance in terms of being effective and broadly acceptable to States. It is an important point that the text of the articles builds on widely adhered to treaty provisions that have been previously accepted by States and is not dependent on adherence to any other treaty. We consider this to be one of the strengths of the articles.

The overall structure of articles 13 and 14 is clear and reflects the nature of extraditions and mutual legal assistance in practice. They are complemented by the annex, which is an integral part of the articles. The carefully thought-out internal balance is a central element of the present articles overall and therefore these particular articles should, as pointed out by the ILC, be considered in the overall context of the draft convention.

The Nordic countries reiterate our support for Article 13, paragraph 3, which provides that an offence covered by the 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.

As regards Article 13, paragraph 11, the ILC commentary points out that this paragraph may strictly speaking not be necessary for an extradition occurring solely pursuant to the present articles. The Nordic countries, however, agree with the ILC that paragraph 11 enhances the articles in terms of extradition pursuant to extradition treaties or national law, since this will help prevent extradition requests made on impermissible grounds.

With regards to Article 13, paragraph 13, the Nordic countries prefer the wording “where appropriate” to be used in connection with the obligations for requested States to consult. That wording would be in line with the commentaries of the draft articles as well as previously accepted language from other relevant treaties.

Article 14, paragraph 8, on the application of the Annex, helps close any potential gaps in terms of mutual legal assistance. Notably, point two of the Annex, on the designation of a central authority, strengthens effective communication between States and allows for speedy and effective cooperation.

The Nordic countries welcome that the Ljubljana-The Hague Mutual Legal Assistance and Extradition (MLA) Convention was adopted at the 18th Plenary Session of the MLA Diplomatic Conference in Ljubljana on 26 May 2023. The MLA Convention is more detailed and covers mutual legal assistance on more than crimes against humanity, whereas the text of the present articles is more concise. In our view the two processes usefully complement each other in the fight against impunity at international level.

The Nordic countries consider that Article 15 on the settlement of disputes strikes a careful balance and may lay a good foundation for universal membership of a future convention on the prevention and punishment of crimes against humanity.

VI. Safeguards (Articles 5, 11 and 12)

The Nordic countries reiterate the importance of the principle of non-refoulement and consider Article 5 an important provision for preventing persons from being exposed to crimes against humanity.

The principle of non-refoulement forms a central protection and safeguard under international human rights law, humanitarian law, refugee law, and customary international law. The principle is thus not new, nor specific to the draft articles on crimes against humanity. Although Article 5 focuses on avoiding the exposure of a person specifically to crimes against humanity, this provision is without prejudice to other obligations of non-refoulement arising from other treaties and customary international law.

According to article 5 the non-refoulement obligation is triggered when there are “substantial grounds” for believing that a person would be in danger of being subjected to a crime against humanity. The Nordic countries would favour to use the criterion “serious risk” as provided

for in Article 19(2) of the Charter of Fundamental Rights of the European Union and as reflected in the jurisprudence of the European Court of Human Rights.

The Nordic countries attach great importance to due process considerations, which are particularly pertinent in the context of criminal law. We welcome the broad scope of Article 11, which concerns the fair treatment of any person against whom measures are being taken at all stages of the proceedings, from investigation to imprisonment.

We agree that an alleged offender shall at all stages of the proceedings be guaranteed fair treatment and full protection of his or her rights under applicable national and international law, including international human rights law, as reflected in Article 11. As we have previously stated, the right to a fair trial is a key element of fair treatment and a procedural means to safeguard the rule of law.

The Nordic countries welcome Article 12, which addresses the rights of victims, witnesses and other persons affected by the commission of a crime against humanity. We reiterate that victims and survivors are at the heart of international criminal justice today and welcome, in this regard, that Article 12 covers many essential elements on victim and witness rights and participation. This is in line with a survivor-centred approach, based on the agency and rights of the individuals involved.

Victims and survivors of the most serious international crimes, such as crimes against humanity, have a right to reparation for the harm they have suffered. The Nordic countries welcome the comprehensive concept of reparation included in Article 12, which rightly reflects the evolution in international human rights law on this matter. We welcome paragraph 3 and the non-exhaustive list of forms of reparation, which include, but are not limited to, restitution, compensation, satisfaction, rehabilitation, cessation and guarantees of non-repetition.