



United Kingdom Mission
to the United Nations

COMMENTS AND OBSERVATIONS

OF

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

ON

**THE DRAFT ARTICLES ON PREVENTION AND PUNISHMENT OF CRIMES
AGAINST HUMANITY**

ADOPTED BY

THE INTERNATIONAL LAW COMMISSION AT ITS SEVENTY-FIRST SESSION

1st DECEMBER 2023

1. The UK remains strongly supportive of the ILC's work on crimes against humanity and of the development of the draft articles into a Convention. The substantive discussion at the Sixth Committee in April 2023 was constructive and illuminating. The UK hereby provide further written comments on this issue.

2. Crimes against humanity are among the worst crimes we face. Over the years since Nuremberg, we have seen such crimes recognised in almost all regions of the world. Indeed, they are, tragically, all too familiar in the contemporary world. When the relevant criteria are satisfied, they include the most inhumane acts known to humankind, including sexual violence, apartheid, enslavement and enforced disappearances.

3. The lack of a general multilateral convention establishing a framework for the national prosecution of crimes against humanity represents an unwelcome omission given the existing frameworks for other serious crimes such as genocide, war crimes and torture. Not only does the absence of such a framework undermine the prevention and prosecution of crimes against humanity, it also undermines efforts to give victims and survivors the justice and accountability they seek.

4. As such, the UK continues to see the need to fill the lacuna by developing an extradite-or-prosecute regime in respect of crimes against humanity and considers that a convention has the clear potential to strengthen international and domestic laws in relation to such crimes. Effective extradition arrangements are more important than ever and in that context, where it can be, the UK's position is that justice is best pursued in the territory where the offence took place.

Preamble

5. The preamble rightly starts by recognising the horror caused by crimes against humanity and the threat such crimes pose to us all. This is the critical context from which the convention arises. It then highlights some important aspects of the draft

Articles including tackling impunity, prevention of such crimes, the rights of victims and witnesses as well as offenders, and the need for effective prosecution.

6. The UK is cognisant of the significant impact that crimes against humanity have had on people across the world, regardless of their age or gender. Accordingly, the UK would support changing paragraph one of the preamble so that it refers to “people” as a whole rather than “children, women and men”.

7. In April 2023, the UK noted that it would be interested to hear the views of the other Committee members on including language in the preamble around the importance of a survivor-centred approach to punishing crimes against humanity.

8. The UK notes what other states have said in that regard and has the following suggestions to strengthen the language of the preamble:

(1) After “Considering the rights of victims, witnesses and others in relation to crimes against humanity” add the following: “. And noting the vital part they play in the judicial process.”

(2) Replace the words: “as well as the right of alleged offenders to fair treatment” with “Recognising also the right of alleged offenders to fair treatment at all stages of proceedings.”

(3) Add the following words “Considering that those who have experienced harms, such as those who have witnessed crimes against humanity and children born of sexual violence, may also suffer as a result of crimes against humanity.”

and

(4) The UK would also welcome a reference to the need to specifically protect the rights of the child in the preamble and is open to how that is set out. While the UK is open to alternative wording, one possibility would be to add: “Bearing in mind that, as indicated in the Declaration of the Rights of the Child and the Convention on the Rights of the Child, “the child, by reason of his physical and mental immaturity, needs special

safeguards and care, including appropriate legal protection, before as well as after birth”.

9. The UK notes that the seventh preambular paragraph refers to Article 7 of the Rome Statute. This could be expanded to refer to the fact that that provision was based on the work of the ILC and State practice at the time it was negotiated.

Draft Article 1 – Scope

10. The UK is content with draft Article 1 which simply highlights the two core aims of the Articles: prevention and punishment.

Draft Article 2 – Definition of crimes against humanity

11. The definition of “crimes against humanity” has a history that goes back to the Charter of the International Military Tribunal established at Nuremberg in 1945. It has been carefully developed over the years since, including by the ILC, the Security Council and the UN more broadly.

12. With this in mind, the UK supports the definition of crimes against humanity that has been used in Article 2 as it is the definition that has emerged from over 75 years of practice, and was supported by 120 states that voted in favour of adopting the Rome Statute at the Rome Conference. It has also been consolidated by a now large jurisprudence of both national and international tribunals. Indeed, in this respect, it is noted that many experts consider the definition to be a codification of customary international law given its widespread acceptance.

13. That said, the consideration of the draft Articles does provide an opportunity to reflect on the definition. The UK does not rule out changes where appropriate but approaches any changes cautiously.

14. In respect of some of the specific definitions:

Draft Article 2(1)(k) – other inhumane acts and forced marriage

15. Forced marriage is not specifically listed as a crime in the draft Articles. International criminal law jurisprudence already recognises that forced marriage is a crime against humanity. For example, in the Ongwen Case before the ICC¹, forced marriage was held to be an other inhumane act. Given this recognition in existing jurisprudence, the draft could be updated to explicitly include forced marriage as a crime against humanity. The UK is currently considering what the definition of forced marriage could look like and would welcome the thoughts of others on this point.

Draft Article 2(1)(f) – definition of forced pregnancy

16. Given the lessons learned from the application of the Rome Statute and given the repugnance of forcible interference with reproductive rights to the values international criminal law protects, the UK would be in favour of exploring how the definition of forced pregnancy found in draft Article 2(1)(f) could be strengthened. The UK proposes several changes to this definition: (1) replacing the words “the unlawful confinement of a woman forcibly made pregnant” with “forcibly making a person pregnant, without their free and full consent”; (2) removing the words “This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.”; and (3) adding the words “For the purposes of this paragraph, children and those lacking capacity cannot give free and full consent.” at the end of the sub-article.

Draft Article 2– definition of “gender”

17. The UK welcomes and supports the Commission’s decision not to include the definition of gender found in the Rome Statute within draft Article 2. Some States raised concerns with this approach. In the UK’s view the approach taken by the ILC on this matter reaffirms the nature of the proposed convention as targeted at national prosecutions of crimes against humanity and thus, unlike at the ICC, it is unnecessary to provide a single definition of gender.

¹ Trial Judgment. The Prosecutor v Dominic Ongwen.4 ICC-02/04-01/15 4 February 2021 available [here](#).

Draft Articles 3 and 4 – General Obligations and Obligation of Prevention

Undertaking to prevent

18. The UK considers Articles 3 and 4 to be of vital importance to tackling the scourge of crimes against humanity as the aim of all States should be to prevent these crimes from occurring in the first place.

19. In particular, the UK welcomes the fact that draft Article 3(1) specifies that each State has an obligation not to engage in acts that constitute crimes against humanity. This clarifies the content of the first general obligation and that such acts may be attributable to the State under the rules on the responsibility of States for internationally wrongful acts.

20. The second general obligation of the draft Articles is contained in draft Article 3(2) which provides that each State undertakes to prevent and punish crimes against humanity. Article 4 then sets out in paragraphs (a) and (b) what obligations each State undertakes in relation to the prevention of crimes against humanity. This approach to the structure of the draft Articles provides States with clarity as to their obligations under this article.

21. It is important to note that the Commentaries see the obligation to prevent as one of conduct rather than one of result. The UK therefore welcomes the additional guidance provided by the ILC at paragraphs 6 to 11 of the Commentaries to draft Article 4 on the issue of what specific preventative measures are envisaged.

Draft Article 6 – Criminalization under national law

22. Article 6 is at the heart of the legal regime that the draft Articles are seeking to establish. Criminalization is an important part of prevention by making it clear that individuals who commit crimes against humanity shall face justice. Moreover, criminalization also emphasises for survivors of crimes against humanity that the world recognises the harm they have suffered and considers that harm to be punishable.

The UK has already criminalized crimes against humanity under its national law. It is right therefore that draft Article 6(7) requires offences to be punishable by appropriate penalties that take into account their grave nature.

23. Further, given the complexity of crimes against humanity, it is appropriate that draft Article 6(2) has various modes of responsibility, which also reflect the practice of international courts. We are conscious the approach taken sought “to allow national legal systems to approach such accessorial responsibility in a manner consistent with their criminal law”.² However, we can see that there may be arguments to include other modes of responsibility such as “*conspiracy*” and “*incitement*”.

Official position

24. As regards draft article 6(5), the UK notes the statement in the Commentaries that its effect is that where an offence is committed by a person holding an official position, that fact alone does not exclude substantive criminal responsibility. The UK position is that paragraph 5 has no effect on any procedural immunity that a foreign State official may enjoy, which continues to be governed by general and customary international law.

Statute of limitations

25. The UK strongly supports the inclusion of draft Article 6(6) which requires States to ensure that statutes of limitations do not apply to crimes against humanity. This will allow survivors to seek judicial remedy when they are ready, which could be many years after the incident. However, it may be helpful for the draft Articles to state that the obligation in draft Article 6(6) does not mean that States are obliged to prosecute crimes against humanity that took place before such crimes were criminalised in their law. The UK welcomes the clarification made by the Commission in paragraph 33 of the Commentaries to draft Article 6 which expressly confirm that position.

² Paragraph 12 Commentaries on draft Article 6.

Draft Article 7 – Establishment of national jurisdiction

26. Article 7 provides for extraterritorial jurisdiction over crimes against humanity, in similar terms to the Torture Convention. This reflects the gravity of the crimes and the interest of the international community of States in bringing an end to impunity for them, and ensuring that perpetrators cannot escape justice by moving between States. It is also an important signal to victims and survivors that the international community treats these crimes with appropriate gravity. When Article 7 is taken alongside the extradite or prosecute provision in Article 10, the draft articles provide wide jurisdiction based on the presence of a suspect on the territory of a relevant State.

27. However, it remains the UK's view that, it is preferable for crimes to be prosecuted in the State in which they occurred. This reflects the reality that the authorities of the State in whose territory an offence is committed are generally best placed to prosecute that offence, not least because of the obvious advantages in securing the evidence and witnesses necessary for a successful prosecution.

28. Further, the UK notes that if this approach was agreed to in any Convention, it would be required to make changes to its domestic legislation in order to implement the Convention.

Jurisdiction under Article 7(1)(a)

29. Separately, on draft Article 7(1)(a) this should refer to a State's "territory", rather than "territory under its jurisdiction".³

³ We also note that the basis of jurisdiction over ships is not part of the principle of territoriality but rather that it turns on the entitlement to fly the flag of a state. For example, in the *Enrica Lexie* arbitration before the Permanent Court of Arbitration (PCA), the PCA said that 'the test under the Convention for establishing a jurisdictional link between a vessel and a State is whether a vessel possesses the nationality of that State, as opposed to whether or not it is found in a public register or flies a flag' at paragraph 1029.

Draft Article 8 – Investigation

30. In respect of draft Article 8, the UK would like to emphasise that the investigation referred to is not a criminal investigation as such, which may be the impression given by the positioning after draft Articles 6 and 7. Rather, as noted in the Commentaries, “*such an investigation should be contrasted with a preliminary inquiry into the facts concerning a particular alleged offender who is present in a State*”. Instead, “*Such an investigation, which must be conducted in good faith, can lay the foundation not only for identifying alleged offenders and their location, but also for helping to stop (pursuant to draft article 3) the continuance of ongoing crimes or their recurrence by identifying their source.*” This broader investigation when there is reasonable ground to believe crimes against humanity are occurring on a State’s territory is a critical part of the prevention mechanisms within the draft Articles.

Draft Article 9 – Preliminary measures when an alleged offender is present

31. The UK does not currently have further comments on Article 9. However, it is of course vital that where a State is satisfied that the circumstances warrant it, that preliminary steps in line with national law are taken quickly to ensure that further criminal acts are avoided and an alleged offender is not able to flee.

Draft Article 10 – *Aut dedere aut judicare*

32. The UK notes that this provision includes the possibility of extradition to another State or a competent international criminal court or tribunal. The UK notes that the structure of this provision is that there is an obligation on a State to submit a case for the prosecution of a suspect on its territory to the appropriate authorities who shall take their decision in the same manner as other offences of a similarly grave nature, under their national law. That obligation does not arise where it agrees to extradite that individual to another State or international court. Article 10 therefore allows a State to recognise an extradition or transfer request from an international tribunal, but it is not required to agree to such a request by virtue of this provision.

Draft Article 11 – Fair Treatment of Alleged Offender

33. The need to be treated fairly and the right to a fair trial and full protection of one's rights are fundamental tenets of the rule of law. The ability of any person against whom measures are being taken to contest those measures is essential to the proper functioning of justice. As such, the UK welcomes the Commission's drafting of draft Article 11.

Draft Article 11(1) – Reference to human rights law and international humanitarian law

34. Specifically on that point, the UK notes the Commission's decision to include references to human rights law and international humanitarian law in draft Article 11(1) and notes positively the references, in paragraph 7 of the Commentaries to draft Article 11, to the specific standards found in Article 14 of the ICCPR and also the 1949 Geneva Conventions and Additional Protocols 1 and 2.

Draft Article 11(2) – Entitlement to visitation and Stateless person and consular access

35. The UK has two short observations on draft Article 11(2). First, the UK underlines the importance of ensuring that the provisions of paragraph 2 in respect of the State of nationality are fully consistent with the provisions in Article 36 of the Vienna Convention on Consular Relations, which in general regulates communication and contact with nationals of a sending State. Second, it notes that the language in draft Article 11(2)(a), which provides that a State can exercise a consular function over a stateless person, appears to be novel in international law and it is not clear how this process would work in practice.

Draft Article 12 – Victims, witnesses and others

36. The real cost of crimes against humanity is the devastating impact upon victims, survivors, their families and communities. The UK government is determined to prevent crimes against humanity, as putting an end to such crimes is the greatest legacy we can leave to those who have suffered from them.

37. However, when crimes against humanity do occur, we must listen and respond appropriately to victims and survivors. It is important to engage with, and respond to, the needs of victims and survivors, as accountability in their eyes may be broader than criminal proceedings. The absence of a crimes against humanity framework fails to give the victims and survivors of such crimes the recognition and redress they deserve. For justice to be delivered, it is important that victims, survivors and witnesses be empowered to have their voices heard in proceedings. We must try to reduce the barriers that these people face when seeking justice, notably retraumatisation, reprisals, stigma and rejection.

Draft Article 12(1) – Right to Complain to Competent Authorities

38. In draft Article 12(1), the UK welcomes the right to complain being available to “any person who alleges that acts constituting crimes against humanity have been or are being committed.” The Commentaries to draft Article 12, at paragraph 8, clarify that “any person” includes but is not limited to a victim or witness of a crime against humanity, and may include legal persons such as religious bodies or non-governmental organizations.

39. In draft Article 12(1), the UK also has additional drafting suggestions:

(1) In draft Article 12(1)(a) the UK is supportive of adding the language “and be informed about the progress and result of that complaint” at the end of the subparagraph;

(2) In draft Article 12(1)(b) the UK would make a number of edits focussed on the effective protection of those involved in the process so that it would read:

“(b) **the safety, well-being and privacy of complainants, victims, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, is protected. Protective measures shall include protection against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given and may include the use of communications technologies; and**”;

(3) The UK would add a new 12(1)(c) that would provide for the following of international best practice::

“(c) procedures and evidentiary rules that follow international best practice in evidence collection are established, with the objective of avoiding the re-traumatisation of victims.”

40. In draft Article 12(2), the UK would balance the need to protect victims and offenders by adding a cross reference to draft Article 12(1)(b) as follows:

*“Each State shall, in accordance with its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 11 **and draft article 12(1)(b).**”*

41. In regard to draft Article 12(3) the UK is currently considering a form of words, to try and ensure that stigma and rejection by one’s community, which can often arise in these circumstances, is avoided. The UK would welcome thoughts from others.

42. The UK welcomes the clarification provided by the Commentaries to draft Article 12 in paragraph 9 where they confirm that with regards to these obligations, State authorities have a duty to proceed to a prompt and impartial investigation whenever there are reasonable grounds to believe that acts constituting crimes against humanity have been or are being committed in any territory under the State’s jurisdiction.

Draft Article 12(1)(b) – Protective measures

43. Draft article 12(1)(b) sets out certain protective measures that states must take and provides that complainants, victims, witnesses, their relatives, representatives and others shall be protected against ill treatment or intimidation.

44. While the Commentaries to draft Article 12 helpfully clarify at paragraph 11 that: *“The term ‘ill-treatment’ relates not just to the person’s physical well-being, but also includes the person’s psychological well-being, dignity or privacy”*, it would be preferable to set that out on the face of any future Convention and in so doing more closely replicate Article 68 of the Rome Statute. In doing so specific reference could be made to having *“their safety, physical and psychological wellbeing, dignity and privacy protected’*, and the need for States, when considering the protection of witnesses and victims, to have regard to all relevant factors, including their age, gender, health and the nature of the crime. This is particularly important where the crime involves sexual or gender violence or violence against children.

45. Specifically, the UK supports reference to the need to protect the rights of the child and others with vulnerabilities. We are open to how that is drafted.

Draft Articles 13, 14, 15 and Annex

46. As the UK noted with regards to draft Article 7 in Cluster 3 of its statements in April 2023, it is preferable for crimes to be prosecuted in the State in which they occurred but that given the seriousness of the crimes addressed by the draft Articles, it is right that the draft Articles include provisions covering extradition and mutual legal assistance (MLA) so that there is no safe haven for perpetrators. .

47. It is important that the provisions of the draft Articles covering extradition and MLA are well understood and provide a predictable set of rules by which States can cooperate effectively to deal with alleged crimes against humanity.

Draft Article 13 – Extradition

56. With regards to the extradition provisions provided in the draft Articles, the UK notes that these are based on similar provisions in the UN Convention Against Corruption (UNCAC) and we are generally supportive of the drafting.

57. Moving onto some of the specific subparagraphs of draft Article 13:

Draft Article 13(2) and (3) – future extradition treaties and “political offence”

58. In relation to draft Articles 13(2) and (3) the UK would support an amendment of the draft Article to more closely reflect the UNCAC upon which they are based by including a reference to ‘domestic law provisions’ in both subparagraphs.

59. Draft Article 13(2) would then read:

*“Each of the offences covered by the present draft articles shall be deemed to be included as an extraditable offence in any extradition treaty existing between States **subject to their domestic law provisions.**”*

60. Draft 13(3) would then read:

*“For the purposes of extradition between States **and based on their domestic law provisions**, an offence covered by the present draft articles shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives.”*

Draft Article 13(9) – Deeming the offence to have occurred in the requesting state

61. As with regards to draft Article 7, the UK notes here that signing up to such an obligation would require the UK to amend its domestic law on crimes against humanity, as currently, UK law has limitations on extra-territorial jurisdiction for particular offences.

Draft Article 13(11) – Extradition requests based on impermissible grounds

62. The UK notes that the list of impermissible grounds has been expanded to reflect the list of factors found in draft Article 2(1)(h) and appears to be wider than those found in the treaties upon which these draft Articles are based such as UNTOC and UNCAC. We question whether this broader scope is necessary given that the

Commentaries are clear that there is no obligation on the requested State to extradite if it is believed that the request is being pursued on grounds that are impermissible under international law.

Draft Article 14 – Mutual Legal Assistance

63. With regards to the MLA provisions set out in the draft Articles, the UK notes that these are based on similar provisions in the United Nations Convention against Transnational Organized Crime (UNTOC) and UNCAC and we are generally supportive of the drafting. There are many instances where States' cooperation is important. For survivors of crimes against humanity, including conflict-related sexual violence, the UK notes the importance of putting survivors at the heart of the evidence gathering process to avoid the need for multiple testimonies and thereby reducing the risk of re-traumatisation.

Draft Article 14(2)

64. The UK notes that paragraph 2 of draft Article 14 refers to providing assistance to the fullest extent possible in relation to “investigations, prosecutions, judicial and other proceedings”. We note the reasoning for this provided in the Commentaries and simply state that it might be preferable for the sake of clarity if the text here was consistent with the annex which covers further detail on MLA provisions and refers to “*investigations, prosecutions and judicial proceedings*” without referring to “*other proceedings*”.

Draft Article 14(3) – types of assistance that may be requested

65. The UK notes that subparagraph 3(a) of draft Article 14 is not found in UNCAC and appears quite broad in scope. It covers: identifying and locating alleged offenders and as appropriate victims, witnesses or others which would appear to cover the entirety of a criminal investigation. The UK would be interested in views on why this subparagraph is thought to be required given that subparagraph (3)(j) appears to cover “*any other type of assistance not contrary to national law of the requested state.*”

TAnnex

Paragraph 14 – Use of information by the requesting state

66. The UK notes that the current paragraph on confidentiality is based upon article 46, paragraph 20 of UNCAC. However, the UK would prefer slightly more detailed language in this instance, along the following lines:

“The requested Party shall keep the fact and substance of the request confidential, except to the extent necessary to execute the request or where the requesting Party specifies confidentiality is not required. The requested Party shall promptly inform the requesting Party in cases where confidentiality cannot be ensured.”

Paragraph 16 – Video links

67. Paragraph 16 concerns the use of the video links. The UK wonders if the following language in paragraph 16 could be removed: *“if it is not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State”*. The rationale for this proposed change is that in the view of the UK, the use of video links is an equally valid option rather than a secondary less attractive option, than appearing in person. Indeed, the importance of such options has become clearer in light of the global pandemic.

Paragraph 22 – Fiscal matters

68. Lastly, the UK notes that while most of the text has been taken from UNCAC, there is no text reflecting UNCAC Article 22 on Fiscal Matters which states that *“States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters”*. The UK would prefer if that language was included in the Annex to the draft Articles.