

CLUSTER 2 – ARTICLES 2, 3 AND 4

ILC DRAFT ARTICLES ON CRIMES AGAINST HUMANITY UK POSITION FOR SIXTH COMMITTEE SESSION 10-14 APRIL

Thank you Madam/Mr Chair.

1. The UK will now comment on draft Articles 2, 3 and 4 in turn.

Draft Article 2

2. Starting with draft Article 2, we note that 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.

3. 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 has been accepted by the 123 States Parties to the Rome Statute following a negotiation that was open to all States. It has also been consolidated by a now large jurisprudence of both national and international tribunals. Indeed, in this respect we note the views of many experts that this definition amounts to a codification of customary international law.

4. That said, we should take the opportunity presented to us by any new convention to reflect on the definition. We do not rule out changes where appropriate but we would approach any changes cautiously and taking into account the impact on international accountability, including on the ICC.

5. Moving onto some of the specific definitions:

Draft Article 2(1)(h) – persecution

6. We note that persecution only falls within crimes against humanity if connected to another act within draft Article 2(1). This approach is narrower than that taken in the Rome Statute and elsewhere

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7. The UK remains open minded in respect of how this provision develops and would be open to considering alternative drafting suggestions.

8. The UK notes positively the recently published ICC Policy on the Crime of Gender Persecution¹ and believes this can be a helpful interpretive tool in relation to such crimes.

Draft Article 2(1)(k) – other inhumane acts

9. The UK notes that 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, the UK notes that in the Ongwen Case before the ICC², 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.

Draft Article 2(f) – definition of forced pregnancy

10. 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(f) could be strengthened. We would welcome the views of the other Committee members on this issue.

Draft Article 2– definition of “gender”

11. The UK had previously commented that the definition of gender (as referring to two sexes – male and female) contained in the then draft Articles was no longer appropriate as persecution of persons who do not consider themselves as male or female in connection with another crime referred to in draft Article 2(1) would potentially fall outside the scope of crimes against humanity and that it should be

¹ ICC Policy on the Crime of Gender Persecution: Available [here](#) -

² Trial Judgment. The Prosecutor v Dominic Ongwen.4 ICC-02/04-01/15 4 February 2021 available [here](#).

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dropped from the draft Articles³. The UK therefore welcomes and supports the Commission's decision not to include the definition of gender found in the Rome Statute within draft Article 2.

Draft Article's 3 and 4 – General Obligations and the Obligation of Prevention

Undertaking to prevent

12. 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.

13. 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.

14. 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.

15. It is important to note that the Commentary sees 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 Commentary to draft Article 4 on the issue of what specific preventative measures are envisaged.

Territory under its jurisdiction

³ The UK's statement to the 71st Session of the ILC (29 November 2018), available [here](#).

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16. Regarding draft Article 4(a), the UK had previously submitted that in its view, references in the draft Articles to “any territory under its jurisdiction” should be limited to “*in its territory*”. The reason for this proposed change was that the UK felt it 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 that position is clear, there may be issues with the practicality of applying the relevant draft Articles where a State exercises *de facto* control over territory such as whether *de facto* control would be sufficient to establish the necessary legislative, judicial and administrative jurisdiction to meet the requirements of this provision.

Draft Article 4(b) – undertaking to cooperate

17. We note draft Article 4(b), concerning the undertaking to cooperate internationally to prevent, and can see the benefit of international cooperation in the effective prevention of crimes against humanity. However, we are not aware of a direct parallel in other treaties for the suppression of serious international crimes. We note that the qualifier “as appropriate” appears in relation to cooperation with organisations other than inter-governmental organisations, but we raise the question whether a similar qualifier for example “where appropriate” might apply to the whole of this provision.

Thank you Madam/Mr Chair.