

**Written comments submitted by Malta**  
**on the International Law Commission’s Draft articles on Prevention and**  
**Punishment of Crimes Against Humanity**

**I. Introduction**

The crime of genocide and war crimes are the subject of international conventions that require States within their national law to prevent and punish such crimes, and to cooperate among themselves toward those ends. By contrast, there is no global convention dedicated to preventing and punishing crimes against humanity and promoting inter-State cooperation in that regard. With crimes against humanity being one of the gravest atrocities known to humankind, including acts of murder, sexual violence, torture, apartheid, deportations or forcible transfer of population, persecution, the need for a dedicated treaty is evident.

Malta strongly commends the work of the International Law Commission (ILC), which at its 71<sup>st</sup> Session (2019) adopted the draft articles on Prevention and Punishment of Crimes Against Humanity (hereinafter referred to as “draft articles”).

The ILC draft articles constitute a good basis for the elaboration of a Convention on the Prevention and Punishment of Crimes against Humanity. In submission pursuant to OP 6 of Resolution 77/249 of the UN General Assembly, Malta would like to make some comments on the respective draft articles. A new treaty has significant potential to advance justice and, if adopted, could be an essential tool in the fight against impunity, including for sexual and gender-based crimes. Our comments below are made in view of also ensuring that the future Convention is gender competent, as we advocate for: A) welcoming the exclusion of the definition of “gender” from the ILC draft articles, B) improving the definition of “persecution”, C) underscoring that there should be a discussion on apartheid, D) overall support to having a Convention on the Prevention and Punishment of Crimes Against Humanity.

**II. Malta’s comments in relation to specific paragraphs of the draft articles**

**A. Definition of “gender”**

The [draft article 2 of the Crimes Against Humanity](#) mirrors [article 7 of the Rome Statute](#).

On gender, according to the Commentary to the draft articles, the ILC approach in the draft articles is based on the definition of crimes against humanity found in the Rome Statute. There is, nevertheless, an important difference:

While there is an express definition of “gender” in the article 7, paragraph 3 of the Rome Statute

*“for the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above”*

there is no definition of the term “gender” in the CAH Draft Articles.

The International Law Commission explained this decision in the following way: “*the Commission decided not to include the definition of “gender” found in article 7, paragraph 3, of the 1998 Rome Statute, thereby allowing the term to be applied for the purposes of the present draft articles based on an evolving understanding as to its meaning*”<sup>1</sup>.

Malta agrees with this change brought forward by the ILC, ensuring that the regressive definition of “gender” from the Rome Statute remains excluded. Malta considers that this approach should be reflected in a future Convention on the Prevention and Punishment of Crimes Against Humanity.

## **B. The Crime of Persecution - Article 2 (1)(h) of the ILC Draft Articles**

In the Rome Statute, the definition of “persecution” includes a limitation. It makes persecution a crime only if committed in connection with another crime:

*“persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”<sup>2</sup>*

That limitation reflects a similar position in the the Charter of the International Military Tribunal, commonly known as the Nürnberg Charter:

*“Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connexion with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to*

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<sup>1</sup> ILC Draft Articles Commentary, page 46, paragraph 42 [Draft articles on Prevention and punishment of crimes against humanity, with commentaries, 2019](#)

<sup>2</sup> Rome Statute, Article 7 (1)(h).

*commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan”<sup>3</sup>*

The ILC retained this limitation in Article 2(1)(h) of the draft articles and explains it as follows:

*the clause “in connection with any act referred to in this paragraph” has been retained due to: (a) a concern that otherwise the text would bring within the definition of crimes against humanity a wide range of discriminatory practices that do not necessarily amount to crimes against humanity; and (b) a recognition that subparagraph 1 (k) encompasses, in accordance with its terms, other inhumane acts. As such, the “in connection with any act referred to in this paragraph” clause provides guidance as to the nature of the persecution that constitutes a crime against humanity, specifically persecutory acts of a similar character and severity to those acts listed in the other subparagraphs of paragraph 1. Separately, it is noted that the clause “or other grounds ...” in subparagraph (h) allows for persecution on grounds other than those expressly listed, provided that such grounds “are universally recognized as impermissible under international law”. Certain other grounds have been suggested in this regard, such as persecution in the form of acts targeting children on the basis of age or birth.*

While noting this explanation of the ILC, Malta considers that this limitation is no longer necessary and that there is room for improving this provision. The act of persecution as a crime against humanity should be an autonomous crime and should not be conditional upon any other crime. This rationale was also reflected in the 2015 Appeal Judgement of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the case of Prosecutor v. Vujadin Popovic et al., para 738: “*The Appeals Chamber reiterates that persecution as a crime against humanity does not require that the underlying acts are crimes under international law*”.<sup>4</sup>

Malta therefore recommends deletion of the last phrase of draft article 2, paragraph 1, h) “in connection with any act referred to in this paragraph”.

### **C. The Crime of Apartheid - Article 2(2)(h) of the Draft Articles**

The current language of Article 2(2)(h) of the Draft Articles on Prevention and Punishment of Crimes Against Humanity replicates the definition of the crime against humanity of apartheid codified in Article 7(1)(j) of the 1998 Rome Statute.

The inclusion of the crime of apartheid in the Rome Statute sought to close a lacuna in international criminal law, and with it a corresponding impunity gap. This accomplishment by States was founded upon a triple recognition: first, that apartheid, a crime of such gravity as

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<sup>3</sup> Charter of the International Military Tribunal, Article 6 (c).

<sup>4</sup> See details here:

[https://www.icty.org/x/cases/popovic/acjug/en/150130\\_judgement.pdf](https://www.icty.org/x/cases/popovic/acjug/en/150130_judgement.pdf)  
<https://cld.irmct.org/notions/show/651/persecution>

would shock the conscience of humanity, could once again emerge; second, that it was a crime distinct from persecution on the ground of race, which was also codified; and third, that it was imperative that the international legal system be strengthened in its ability to bring future perpetrators of the crime of apartheid to justice.

Malta thus strongly welcomes the inclusion of draft article 1(j). However, should there be a broad support in favour of amending the ILC draft articles, Malta considers that States should have a broad discussion on whether the definition of apartheid in Article 2 (h) should more accurately define the essence of a crime perpetrated by those who seek to institute and maintain a form of governance designed to systemically oppress and dominate a subset of society, including when based on gender.

The crime of apartheid should be broadened to include inhumane acts committed in the context of an institutionalized regime of systematic oppression and domination by one gender group over another gender group or groups and committed with the intention of maintaining that regime.

Malta therefore proposes the following amendment (in underline) to the definition of the “crime of apartheid”, contained in Article 2(2)(h) of the draft articles:

*“the crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups, **or by one gender group over another gender group or groups**, and committed with the intention of maintaining that regime.*

The codification of the crime of gender apartheid will enable victims and survivors – present and future – to hold perpetrators to account for the totality of crimes committed by systematized oppression which the crime of gender persecution alone cannot and does not capture.

#### **D) Elaboration of a Convention**

By resolution 77/249 (2022), UNGA decided that the 6th Sixth Committee would resume its session for five days, from 10 to 14 April 2023, and for six days, from 1 to 5 and on 11 April 2024, in order to exchange substantive views, including in an interactive format, on all aspects of the draft articles, and to consider further the recommendation of the Commission regarding the elaboration of a Convention.

Malta delivered two statements in April 2022 on Cluster I (introductory provisions) and V (safeguards) of Crimes Against Humanity, during the 6th Committee resumed session, as well as a statement in October 2023, during the 78th Session of the 6th Committee, underscoring

the need of a global instrument dedicated to preventing and punishing crimes against humanity and promoting inter-state cooperation; as well as concluding that during the April 2023 resumed 6th Committee session echoed a common position from the majority of UN Member States that accountability for crimes against humanity is essential.

We therefore reiterate that a Convention is required and that it will serve an important gap filling role in the current treaty framework.

### **III. Conclusions**

Over the course of history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity<sup>5</sup>. Malta is strongly committed to advancing a survivor-centric approach to the Draft Articles on Prevention and Punishment of Crimes Against Humanity, putting the rights and agency of survivors and victims at the forefront of all actions, and ensuring that they are treated with dignity and respect and supported to make informed decisions with regard to accessing protection, justice and remedy based on their own needs and priorities. A Convention on the Prevention and Punishment of Crimes Against Humanity would represent an important step towards achieving the respective objectives.

These written comments are presented as part of our efforts to engage in fruitful discussions on the draft articles leading to the elaboration of a Convention.

Malta recalls that the ILC recommended the elaboration of a Convention by the General Assembly or by an international conference of plenipotentiaries based on the Draft Articles. We reiterate our support for the elaboration of a Convention on the basis of the Draft articles, as recommended by the ILC, preferably by an international conference of plenipotentiaries.

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<sup>5</sup>First Preambular paragraph of the [Draft articles on Prevention and punishment of crimes against humanity, with commentaries, 2019](#)