



NOTE VERBALE

Min-BuZa.
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**ILC 'Draft articles on Prevention and Punishment of Crimes Against Humanity' –
Comments and Observations of the Kingdom of the Netherlands**

The Permanent Mission of the Kingdom of the Netherlands to the United Nations presents its compliments to the Secretary-General of the United Nations and would like to inform the latter of the following. With reference to General Assembly resolution 77/249 of 30 December 2022, in which the Assembly invites States to submit by the end of 2023 written comments and observations on the draft articles and on the recommendation of the Commission, and requests the Secretary-General of the United Nations to prepare and circulate a compilation of those comments and observations well in advance of the session of the Sixth Committee to be held in 2024. The Kingdom of the Netherlands shares its comments and observations below.

The Kingdom of the Netherlands refers to the comments and observations submitted to the Secretary General of the United Nations for the purpose of the 71th session of the International Law Commission (ILC) and reiterates its position that Crimes against Humanity are among the most serious crimes under international law and their prevention and punishment is of concern to the international community as a whole. Despite being categorically prohibited under international law, civilian populations continue to be victims of such atrocities and perpetrators continue to act with impunity.

The draft articles on Crimes against Humanity, delivered by the International Law Commission (ILC) four years ago, brought us a lot closer to the objectives that were identified when the ILC started its work in 2013, namely filling a gap in the international legal framework for the prevention and punishment of the most serious international crimes. The current international context once again illustrates the need to fill the gap in the international legal framework.

The elaboration of a convention based on the draft articles, as recommended by the ILC, would strengthen the international criminal justice system and would contribute to strengthening national laws and criminal jurisdiction in the fight against impunity for crimes against humanity. The Kingdom of the Netherlands would therefore strongly welcome the opening of treaty negotiations. We look back at a lively and constructive discussion on the draft articles during the first resumed session of the Sixth Committee last April. The resumed sessions offer an appropriate forum for further scrutiny of the draft articles and at the same time offer the possibility to make concrete progress towards the opening of treaty negotiations. We welcome the further discussion during the resumed session in April 2024.

The Kingdom of the Netherlands supports the approach by the ILC to largely retain the definition of crimes against humanity contained in the Rome Statute. Drawing from existing legal instruments can provide us with a good model for the definition of crimes against humanity. Differences in terminology must be avoided to ensure legal certainty.

Nevertheless, as to the definition of gender, the Kingdom of the Netherlands supports the removal of this definition from the draft articles. The Kingdom of the Netherlands considers this definition of gender, which is included in the Rome Statute, as too limited and not inclusive. Any further development of the definition of Crimes against Humanity should be based on the jurisprudence from international and national judicial bodies.

The Kingdom of the Netherlands further considers the prohibition of crimes against humanity as a peremptory norm of international law, from which no derogation is permitted and which is applicable to all States. The Kingdom of the Netherlands therefore particularly welcomes the clauses on the *jus cogens* character of the prohibition of crimes against humanity in paragraph 4 of the preamble.

The Kingdom of the Netherlands reiterates that the draft articles and a possible future convention apply to both prevention and punishment of crimes against humanity, which are two separate obligations. With regard to the obligation to prevent, the Kingdom of the Netherlands notes that such an obligation is contained in both article 3(2) and article 4 of the draft articles. These two prevention clauses should, in turn, be seen as two separate obligations, each with their own object and scope. We note that the obligation to prevent under article 3(2) of the draft articles is inspired by, and equivalent to, the obligation under article I of the Genocide Convention. Therefore, the Kingdom of the Netherlands is of the view that international jurisprudence clarifying the scope of Article I of the Genocide Convention, including – under certain circumstances – the responsibility of third states, applies analogously to this draft article. Thus, in line with the ruling of the International Court of Justice in the case of *Bosnia and Herzegovina vs Serbia and Montenegro* of 2007, the obligation to prevent under article 3(2) of the draft articles is an obligation of conduct, not of result, which depends on the ability of states to exert influence on possible perpetrators of crimes against humanity. Territorial states have the primary responsibility to protect their populations from serious international crimes.

While article 4 of the draft articles also contains an obligation to prevent, it is of a different nature than that in article 3(2). While also an obligation of conduct, article 4 requires states to take concrete preventive measures. Unlike article 3(2), which may – under certain circumstances – have extraterritorial implications, the first paragraph of article 4 contains a clear delineation of scope, as it is limited to any territory under a state's jurisdiction. The due diligence required to prevent crimes against humanity is higher where a state has influence over individuals that are on a territory under its jurisdiction.

The Kingdom of the Netherlands recognizes and welcomes the development in both national and international criminal law in which the position of victims is strengthened.

Furthermore, concerning article 6 of the draft articles, The Kingdom of the Netherlands supports the non-applicability of statutory limitation periods in criminal proceedings regarding crimes against humanity which is also reflected in national legislation.

On a final note, The Kingdom of the Netherlands would like to refer to the Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes, which was adopted in Ljubljana in May 2023. This Convention pursues a similar objective of fighting impunity for the most serious crimes as the draft articles of the ILC on crimes against humanity. The Ljubljana-The Hague Convention has a broader scope than the draft articles as it also encompasses other international crimes and its main objective is to facilitate international cooperation in the investigation and prosecution of international crimes through mutual legal assistance and extradition. Not all States may sign up to and ratify both the Ljubljana-The Hague Convention as well as the Crimes against Humanity Convention, if this is to be materialized. The Netherlands therefore considers that the Ljubljana-The Hague Convention and

the draft articles offer complementary frameworks, which not only could co-exist but mutually reinforce each other and could be further developed side by side.

To ensure legal certainty, the Kingdom of the Netherlands underlines the importance of consistency between the text of a future Crimes against Humanity Convention and the Ljubljana-The Hague Convention. In that regard, we would like to specifically draw the attention to the following draft articles that lead to obligations contrary to what follows from the Ljubljana-The Hague Convention. First of all, based on article 11(2)(a) of the draft articles, a stateless person shall be entitled to communicate with the state which is willing to protect that person's rights, whilst in the Ljubljana-The Hague Convention that person is only entitled to communicate with the state where that person habitually resides. In addition, the Kingdom of the Netherlands would favor the deletion of "under the jurisdiction" in article 13(1) of the draft articles in order to align it with article 49 of the Ljubljana-The Hague Convention, which is limited to "the territory of the requested State Party". Furthermore, concerning article 13(11) of the draft articles, the Kingdom of the Netherlands would wish to establish the same grounds for refusal as in article 51(1) of the Ljubljana-The Hague Convention.

Finally, The Kingdom of the Netherlands proposes to add a time limit of six months to article 15(2) of the draft articles in line with article 86 of the Ljubljana-The Hague Convention. This concerns agreed language and is included in – amongst others - the United Nations Convention on Transnational Organized Crime.

The Permanent Mission of the Kingdom of the Netherlands to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurances of its highest consideration.

New York
H.E. Mr. Antonio Guterres
Secretary-General of the United Nations
United Nations Headquarters
3019 New York, m 10017

C.c. Office of Legal Affairs

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