

**Response of New Zealand to the request of the General Assembly of resolution
77/249 for Comments and Observations on the International Law Commission's
Draft Articles on Crimes against Humanity**

Preliminary comments and observations

1. Crimes against humanity, alongside genocide and war crimes, represent the most serious crimes of concern to the international community as a whole. Unlike genocide and war crimes, there is no dedicated multilateral treaty addressing the prevention and punishment of crimes against humanity, leaving a gap in the international treaty law framework. New Zealand reaffirms its position that the International Law Commission's ("ILC") Draft Articles on the Prevention and Punishment of Crimes against Humanity ("Draft Articles") present an important opportunity to close this gap.
2. Crimes against humanity are well-founded in customary international law, and addressed in some treaties including the Rome Statute of the International Criminal Court ("ICC"). While the Rome Statute significantly progressed the work of defining crimes against humanity and addressing impunity in respect of such crimes, it does not resolve the legal gap that remains in respect of their prevention and punishment.
3. A future convention will strengthen inter-State cooperation and build national capacities to prevent, investigate and prosecute crimes against humanity by clearly defining a minimum standard framework for doing so. New Zealand considers that the Draft Articles constitute a strong basis on which to develop this future convention.
4. In addition to codifying existing customary international law, New Zealand sees a dedicated convention on crimes against humanity based on the Draft Articles as complementing and supplementing existing international law. We highlight the following two strengths of the Draft Articles in this regard:
 - a. The Draft Articles are grounded in existing international law. The language of the Draft Articles draws from and replicates existing provisions on prevention and punishment in other treaties, including Genocide Convention of 1948 and the Convention against Torture of 1984, which establish obligations agreed to by States.
 - b. The Draft Articles complement, rather than contradict, existing international legal regimes. The Draft Articles conceptualise States as the primary bearers of responsibility for investigating and prosecuting crimes against humanity, while strengthening national capacities and inter-State cooperation regarding the prevention, investigation and prosecution of such crimes. We consider that the Draft Articles enhance the ICC's complementarity regime, and help fill a gap in the existing treaty regimes relevant to crimes against humanity without conflicting with those regimes.

Specific comments

Fourth preambular paragraph

5. The fourth preambular paragraph recalls that the prohibition of crimes against humanity is not only a rule of customary international law, but also a peremptory norm of general international law (*jus cogens*). This language reflects the ILC's view and

accords with New Zealand's understanding of the peremptory character of the prohibition.¹

Draft article 2: Definition of crimes against humanity

6. New Zealand considers that the definition of crimes against humanity in article 2 reflects a careful and appropriate balance between competing values. We welcome that the article 2 definition largely replicates the definition of crimes against humanity contained in article 7 of the Rome Statute. We recognise the advantages of drawing from the Rome Statute definition, which has been accepted by the States Parties to the Statute and is widely used in national laws.
7. Noting these benefits, New Zealand nevertheless remains open to adjustments to the definitional language which would ensure it remains fit for purpose in the context of a future convention. We support the work of the ILC in this regard, including:
 - a. The inclusion of a "without prejudice" clause in the definition. Article 2(3) contains a "without prejudice" clause, while article 7 of the Rome Statute does not. The inclusion of the "without prejudice" clause in the definitional language by the ILC ensures that a future convention will not call into question broader definitions that may exist in international law or States' national laws. While article 7 of the Rome Statute does not itself contain a "without prejudice" clause, we observe that article 10 of the Statute nevertheless states that nothing in the definitional language "shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute". We consider that the "without prejudice" clause in article 2 consequently does not represent a substantial departure from the approach taken by the Rome Statute.
 - b. The reference to "gender" in the definition. New Zealand welcomes the ILC's removal of the definition of "gender" from the definitional language to reflect the evolution of international human rights law and international criminal law since the Rome Statute's adoption.² New Zealand continues to remain open to definitional and other language directed towards ensuring enhanced prevention and accountability measures for sexual and gender-based crimes.

Draft article 3: General obligations

8. New Zealand welcomes the clarification in article 3(2) that crimes against humanity are crimes under international law "whether or not committed in time of armed conflict". This language, which reflects State practice and jurisprudence, confirms that crimes against humanity are international crimes regardless of the existence of a nexus with armed conflict.
9. We note that the Genocide Convention similarly recognises that genocide can be committed either during armed conflict or peacetime.³ We consider it appropriate for a

¹ Refer also International Law Commission, Draft articles on Prevention and Punishment of Crimes against Humanity, with commentaries, 2019 at p 24.

² At pp 45 – 46.

³ Article 1 of the Genocide Convention states: "The Contracting Parties confirm that genocide, **whether committed in time of peace or in time of war, is a crime under international law** which they undertake to prevent and to punish" (emphasis added).

future convention to similarly take account of the reality that, unlike war crimes, crimes against humanity can occur at any time including outside of armed conflict.

Draft article 6: Criminalization under national law

10. Article 6 is central to the effectiveness of any future convention. National laws and prosecutions are indispensable facets of the international criminal justice framework. By establishing a harmonized minimum standard framework for criminalization under national law, article 6 will help address the risk of impunity with respect to crimes against humanity. This approach will mitigate potential loopholes that may result from diverging definitions under States' national laws.

11. New Zealand welcomes the approach taken by the ILC in article 6(3) to address the different modes of criminal responsibility for crimes against humanity while maintaining flexibility for the operation of national laws in the context of different legal systems, which we consider will facilitate effective domestic implementation.

12. New Zealand notes that it has criminalized crimes against humanity under its national laws under the [International Crimes and Criminal Court Act 2000](#).

Draft article 11: Fair treatment of the alleged offender

13. New Zealand welcomes the inclusion of the safeguards set out in article 11 which reference rights and guarantees under international law. We note the importance of due process considerations in the context of criminal law for safeguarding the rule of law. We observe that the approach taken by article 11 accords with other treaties addressing crimes.⁴

Draft article 12: Victims, witnesses and others

14. New Zealand welcomes the inclusion of article 12 addressing the rights of victims, witnesses and other persons affected by the commission of a crime against humanity. As the first preambular paragraph underscores, the victims of crimes that deeply shock the conscience of humanity throughout history remain at the core of the need for a future convention.

15. New Zealand is open to further language in the Draft Articles directed towards enhancing the protection of the rights and role of victims, witnesses and persons affected by crimes against humanity.

16. New Zealand supports the flexibility integrated into article 12(3), which preserves States' discretion over the determination of the appropriate form of reparation. This approach recognises that in the aftermath of the commission of crimes against humanity, various scenarios may arise which require reparations to be tailored to specific circumstances.

⁴ Fourth Report of the Special Rapporteur on crimes against humanity (A/CN.4/725) at para [212] and Addendum to the Fourth Report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1) at 41 – 45.