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ADVISORY REPORT ON

The ILC Draft Articles on Crimes Against Humanity

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1. Introduction

In a letter of 6 February 2018, the Minister of Foreign Affairs requested the Advisory Committee on Issues of Public International Law (Commissie van advies inzake volkenrechtelijke vraagstukken, CAVV) to prepare an advisory report on the draft articles of the International Law Commission (ILC) on crimes against humanity. The minister expressly requested that the CAVV comment on the relationship between the ILC draft articles and the initiative, supported by The Netherlands, towards a multilateral treaty on mutual legal assistance for the core crimes of genocide, crimes against humanity and war crimes (MLA-treaty for core crimes). The minister's request for an advisory report followed the invitation by the UN Secretary-General to States, international organisations and civil society to submit comments and observations to the draft articles by 1 December 2018. In his letter, the Minister of Foreign Affairs indicated that the CAVV advisory report may be of considerable added value for the formulation of a formal reaction by the Netherlands to the draft articles on Crimes against Humanity. With a view to facilitating the government in this endeavour and given the existing deadline for submitting comments to the UN Secretary-General, this advisory report has – exceptionally – been drafted in English.

A draft advisory report was prepared by prof. dr. L.J. van den Herik. The draft advisory report was discussed and completed by the CAVV in a collective email setting. The advisory report was adopted on 31 August 2018.

In this advisory report, some reflections and comments are offered on (i) the gap-filling nature of the ILC draft articles aiming at a specialized convention, (ii) the relationship with other treaty-regimes, especially the Rome Statute of the International Criminal Court and the proposed new multilateral treaty on mutual legal assistance and extradition for the domestic prosecution of the most serious international crimes (MLA-treaty)¹, (iii) the provisions on prevention (draft articles 2 and 4), (iv) the need for reflection on a monitoring mechanism, (v) the question of statutory limitations for victims in civil litigation.

2. The gap filling function of the draft articles on crimes against humanity

The topic “crimes against humanity” was included in the ILC's programme in 2013 and a special rapporteur, Sean D. Murphy, was appointed in 2014. The inclusion of this topic in the agenda of the ILC corresponds with calls by scholars who for long have been advocating a specialized crimes against humanity treaty, especially the late professor Cherif Bassiouni and professor Leila Sadat.² A specialized global convention on crimes against humanity will complement the treaty regimes that exist for the other two (categories of) crimes, viz. genocide

¹ Joint Statement on International Initiative for Opening Negotiations on a Multilateral Treaty for Mutual Legal Assistance and Extradition in Domestic Prosecution of Atrocity Crimes, see https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Netherlands-Joint-ENG.pdf

² M.C. Bassiouni, 'Crimes against Humanity: The Need for a Specialized Convention', 31 *Columbia Journal of Transnational Law* (1994), 457-494 and L.N. Sadat, *Forging a Convention for Crimes against Humanity*, Cambridge University Press, 2011.

and war crimes. It will not only codify existing rules under customary international law, such as the obligation to prevent, but it will also serve a gap filling purpose more widely.

For instance, draft article 15 aims to fill a gap in the context of enforcing State responsibility particularly by providing clauses on dispute settlement and a basis for jurisdiction of the International Court of Justice (ICJ). This provision will complement article IX of the Genocide Convention and ensure that disputes submitted to the ICJ would not need to be framed in terms of genocide in order to assert jurisdiction. As such, the provision and a specialized convention on crimes against humanity more widely may reduce the over-focus on genocide and its legal regime.

Many other proposed draft articles purport to fill gaps in the context of individual criminal responsibility, especially regarding enforcement at the national level. They do so by requiring States to adopt national legislation, including an obligation to extradite or prosecute (*aut dedere aut judicare*), and particularly also by offering the legal regime necessary to enable and facilitate mutual legal assistance (MLA) and extradition. The detailed MLA-provisions offer a robust and much needed model for State cooperation, which is arguably the most important gap to be filled.

While the CAVV sympathizes with calls that more clear-cut provisions are also needed on questions of amnesty and immunity of State officials, it appreciates that these questions are of such nature that they might become insurmountable obstacles to the adoption of a specialized treaty. It thus understands the policy choice that these matters are left to find a place elsewhere, either in the context of a separate treaty-regime or under customary international law. The CAVV does highlight the reference to the *jus cogens* nature of the prohibition on crimes against humanity in the preamble and it finds this reference very relevant for future discussions on amnesty and immunity of State officials in relation to crimes against humanity.

3. Relationship with other treaty-regimes

The draft articles on crimes against humanity complement existing treaty regimes in international criminal law regarding other core crimes and regarding the creation of international jurisdiction, especially for the International Criminal Court (ICC). It also has synergies with the MLA-treaty for core crimes, which would update the existing treaty-regimes for genocide and war crimes, and which introduces a new regime for crimes against humanities. This section discusses the relationship between the draft articles and other treaty regimes, with a focus on the Rome Statute and the MLA-treaty for core crimes, which is currently being negotiated.

3.1 The Rome Statute of the International Criminal Court

The Rome Statute is a treaty with multiple functions and dimensions. It establishes the International Criminal Court and offers the procedural framework that guides the ICC's operation. It enacts crime definitions and modes of liability and, in addition, Chapter IX of the ICC Statute regulates *vertical* State cooperation between States and the ICC. The draft articles complement this regime as they regulate *horizontal* State cooperation, i.e., cooperation between States. The draft articles thus offer supporting structures that correspond with the idea that the ICC is complementary to national criminal jurisdictions. By offering mutual legal assistance

and extradition provisions, the draft articles effectively assist States in living up to their responsibilities for domestic prosecutions of crimes against humanity. In light of a shared interest to combat impunity through rule of law structures, the CAVV observes that even States and State parties that may have come to display a certain ambivalence towards the ICC do retain an independent, perhaps even increased, interest in a global crimes against humanity convention as this encourages and facilitates domestic prosecutions.

The relationship between the Rome Statute and the draft articles is thus generally a mutually beneficial one. Nonetheless, States have expressed concerns about potential conflicts between the two documents, mainly also regarding possible definitional divergences. Pursuant to these concerns and with a view to fostering legal certainty and stability of the definition, the draft articles have adopted the ICC definition without any change. The CAVV fully supports this choice and agrees that even minor changes would open a Pandora's box. Given the need for legal certainty and the wish to avoid fragmentation, it is imperative that the draft articles as well as the MLA-treaty for core crimes, which is currently being negotiated, adhere to the ICC definition and take this as a starting point.

This being said, the CAVV does appreciate the inclusion of draft article 3(4), which allows for future definitional evolution.³ In this regard, the CAVV wishes to draw particular attention to shortcomings of the ICC definition from a gender perspective. These shortcomings regard the limited list of gender crimes in Article 3(1)(g) and particularly the definition of gender in Article 7 (3)⁴ which seems to equate "gender" with "sex", thus ignoring the understanding that "gender" is a social construct. It is also unclear whether sexual orientation is properly covered. In its commentary, Amnesty International has also proposed changes as regards the definition of enforced disappearance and persecution.⁵ Again, the CAVV understands the policy choice not to renegotiate the definition of crimes against humanity at this point in time and regards such proposed changes as avenues for possible future evolution.

3.2 The MLA-treaty for core crimes

The Netherlands is one of the States promoting the initiative towards an MLA-treaty for core crimes, which would update the regime as laid down in the Genocide Convention and the Geneva Conventions, and also create a legal basis for inter-State cooperation and mutual legal assistance for the investigation and prosecution of crimes against humanity. As regards the interrelationship between this initiative and the draft articles, the CAVV holds the opinion that the two initiatives are not competing or mutually exclusive in character, and that they can very usefully co-exist.

³ Draft article 3(4) reads "This draft article is without prejudice to any broader definition provided for in any international instrument or national law."

⁴ Article 7(3) of the ICC Statute reads, "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. Draft article 3(3) is copied from this provision.

⁵ Amnesty International, 17-Point Program for a Convention on Crimes against Humanity, point 1, <https://www.amnesty.org/download/Documents/IOR5179142018ENGLISH.pdf>.

Concrete provisions in the draft articles lay the basis for such a mutually reinforcing relationship, such as draft article 14(5).⁶ Moreover, even if both initiatives materialize and are effectively turned into treaties, not all States may sign and ratify both treaties. Therefore, the mutual legal assistance provisions (including those regarding extradition) of the crimes against humanity-articles should be as detailed as possible so that they can serve on a stand-alone basis to facilitate inter-state cooperation.

From this perspective, some observations are made here for further reflection and fine-tuning. As a general observation, it is noted that meticulous and detailed provisions providing an explicit legal basis for a specific request are preferred over vague and abstract provisions, as specificity increases the chances that the request is granted. It is in this vein that the following detailed suggestions are made with respect to the MLA provisions of the draft articles on crimes against humanity, inspired also by provisions of EU and Council of Europe conventions:

- Article 12(2) should also explicitly protect against secondary and repeated victimization of victims, as well as protect the victim against the risk of emotional or psychological damage, and protect her or his dignity during interrogation or hearings, as also provided in Article 18 of the EU Victims Directive.⁷
- A provision similar to Article 13(8) could be included regarding extradition of nationals for prosecution purposes, encouraging States to extradite their own nationals while relying on the proviso that they shall be allowed to return to their home country to serve their foreign sentence.⁸
- To underline our previous observation that specific, detailed provisions are to be preferred over more general ones, Article 14(3)(b) regarding the taking of evidence by videoconference may be further detailed and patterned upon Article 9 of the Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters⁹ as well as upon Article 10 of the Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union.¹⁰
- Article 14(3)(e) could be made more specific and lay the basis for examining *and observing* objects and *public* sites.
- Mutual legal assistance with a view to obtaining forensic evidence, as now included in Article 14(3)(e), would be better placed in a separate subparagraph.

⁶ Draft article 14(5) reads, “States shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this draft article.”

⁷ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57, 14 November 2012.

⁸ Cf. the suggestion by H. van der Wilt, ‘The Draft Convention on Crimes against Humanity: Extradition and Mutual Legal Assistance’, in *Journal of International Criminal Justice* (forthcoming).

⁹ Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters, Council of Europe, European Treaty Series, No. 183, 8 November 2001.

¹⁰ Annex to the Council Act of 29 May 2000, OJ C 197/1, 12 July 2000.

- The word “voluntary” restricts Article 14(3)(i) as it excludes a legal basis for forced appearance in a requesting State, whereas this might be needed in given cases.

The above observations serve to further solidify the proposed regime, while underscoring that the regime is already very diligent and detailed in character. As indicated, the CAVV deems the extradition and mutual legal assistance regime that the proposed articles put in place of paramount importance, filling the largest currently existing gap; a gap which seriously undermines possibilities for domestic prosecution and accountability. It thus welcomes this part of the draft articles in particular as a crucial next step in the fight against impunity.

4. The obligation to prevent

The Genocide Convention has often been criticized for paying mere lip service to the notion of “prevention”, despite the fact that that term features prominently in the Convention’s title.¹¹ For long the legal value of article I of the Genocide Convention remained uncertain and the scope and content of the obligation to prevent genocide were considered nebulous too. In its *Bosnia Genocide* Judgement of 2007, the ICJ addressed the lack of clarity and unequivocally stated that article I constitutes a legally binding provision,¹² with extraterritorial reach, and thus also articulating an autonomous obligation for third States to prevent genocide.¹³ The ICJ founded this obligation on States’ “capacity to influence” and it formulated an obligation that exists independently of the responsibilities of the United Nations and the Security Council in particular. As also stated in an earlier CAVV advisory report, this obligation does not entail a unilateral and unauthorized right or duty to use force.¹⁴

As for crimes against humanity, the obligation to prevent features, in addition to the preamble, in two separate provisions, draft articles 2 and 4. With a view to reinforcing the preventive dimensions of a future crimes against humanity-convention, it is important to clarify the interrelationship between the two provisions and particularly to underscore draft article 2’s independent and autonomous status.

Draft article 2 offers a general preventive obligation and reads,

“Crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.”

This provision is patterned upon Article 1 of the Genocide Convention.¹⁵

¹¹ The full title of the Convention reads “Convention on the Prevention and Punishment of the Crime of Genocide.”

¹² ICJ, *Bosnia Genocide* case, paras. 162-165.

¹³ *Ibid.*, para. 430.

¹⁴ CAVV, *The use of the term ‘genocide’ by politicians*, Advisory report number 28, March 2017, p. 10. See also the report by the Advisory Council on International Affairs (AIV), *The Netherlands and the Responsibility to Protect: The Responsibility to Protect People from Mass Atrocities*, Advisory report number 70, June 2010.

¹⁵ Article I of the Genocide Convention reads “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.”

Draft article 4 is entitled “obligation of prevention” and reads,

“1. Each State undertakes to prevent crimes against humanity, in conformity with international law, including through:

(a) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction; and

(b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

2. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.”

Presenting a more concrete obligation to take specific legislative, administrative, judicial or other preventive measures, this provision is copied from human rights treaties and transnational criminal law treaties. In contrast to draft article 2, draft article 4(1) is territorially and jurisdictionally limited. Draft article 4 also introduces an obligation to cooperate with other States and international organizations for preventive purposes in paragraph 2, which may be said to have some synergies with article 41 of the draft Articles on State Responsibility.

The commentary to draft article 2 states that, “the content of this general obligation will be addressed through the various more specific obligations set forth in the draft articles that follow, beginning with article 4.” Such a statement links the two provisions and seems to deny independent meaning and application for draft article 2. In his first report, the Special Rapporteur instead differentiated more clearly between the different function and scope of the two prevention provisions, and connected the general prevention provision of draft article 2 expressly to its counterpart in the Genocide Convention.¹⁶ The general and extraterritorial obligation to prevent in draft article 2 is effectively an obligation to rescue with extraterritorial reach, just like article I of the Genocide Convention, keeping in mind again that any action taken must be “in conformity with international law”. These are emergency obligations when atrocity crimes are on the verge of being committed or to prevent further escalation when they are already ongoing. Draft article 4, instead, is more truly preventive in nature as it obliges States to take measures in their own territory ensuring that the conditions in which crimes against humanity can be committed do not arise. Given the different territorial scope and function of the two provisions, it is important to underscore the autonomous status of draft article 2, which is not only an opening provision but has as much independent legal value as the ICJ attributed to article I of the Genocide Convention.

The CAVV sees article I of the Genocide Convention and draft article 2 on crimes against humanity effectively as twin-provisions. The argument that these two provisions should be regarded as paired, not only in terms of having autonomous legal standing but also as regards contents, also flows from the CAVV’s earlier advisory report that differentiation between genocide and crimes against humanity serves no purpose in the prevention phase,¹⁷ a proposal with which the Dutch government agreed.¹⁸ The linking of the two provisions also corresponds

¹⁶ *UN Doc. A/CN.4/680*, 17 February 2017, paras. 112-113.

¹⁷ CAVV, The use of the term ‘genocide’ by politicians, advisory report of March 2017, p. 14.

¹⁸ Government response to advisory report no. 28 on the use of the term ‘genocide’ by politicians, Parliamentary Records (2017-2018) 34 775 V, no. 44, p. 4.

with their shared origins, and with the practice that the two crimes are consistently coupled in R2P-settings.¹⁹ It is also consistent with the need to avoid overuse of the genocide-label.

5. Monitoring mechanism

Special Rapporteur Murphy has consciously refrained from making proposals regarding a monitoring mechanism, as he considered that the selection of a mechanism depended on factors other than legal reasoning.²⁰ The CAVV advises the government to advance concrete suggestions in this regard, as it agrees with professor Sadat's observation that "a convention without a monitoring mechanism is likely to be an 'orphan'".²¹ Recognizing the need to avoid duplication of mechanisms as well as unnecessary bureaucracy, the CAVV suggests that the mandate and functions of a mechanism remain limited and well-defined. It sees two distinct functions that a mechanism could take on:

- a. Monitoring the implementation of required legislation;
- b. Offering a discursive space, i.e., a platform on which States with capacity to influence are invited to explain their specific conduct vis-à-vis a given situation in light of their obligation to prevent genocide and crimes against humanity. Without going into institutional details, the existence of such a platform linked to the Genocide and (future) Crimes against Humanity Convention would gradually clarify the notion of "capacity to influence" while also recording the decision-making of States in response to a certain situation while taking account of their overarching obligations to prevent genocide and crimes against humanity.

6. Statutory limitations in civil litigation

Draft article 6(5) states that, "Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations." The provision does not concern the applicability of statutory limitations in civil proceedings, nor is this expressly addressed in draft article 12(3), which governs victims' right to reparation. The CAVV notes the recommendations of Amnesty International regarding the non-applicability of statutory limitations to civil tort suits.²² It also recalls recent case law from Dutch courts, in which it was held that, in certain very special circumstances, it is unreasonable for the State to invoke statutory limitations in civil litigation.²³ Given these developments and

¹⁹ CAVV, The use of the term 'genocide' by politicians, advisory report of March 2017, p. 10.

²⁰ *UN Doc. A/CN.4/704*, 23 January 2017, paras. 222-238.

²¹ Leila Sadat, 'A Contextual and Historical Analysis of the International Law Commission's 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity', *Journal of International Criminal Justice* (forthcoming).

²² Amnesty International, 17-Point Program for a Convention on Crimes against Humanity.

²³ *Rechtbank 's-Gravenhage* (Hague Court of First Instance), trial judgement, ECLI: NL: RBSGR: 2011: BS8793, 14 September 2011. See for an analysis of this case and subsequent case law, L. van den Herik, 'Addressing "Colonial Crimes" Through Reparations? Adjudicating Dutch Atrocities Committed in Indonesia', 10 *Journal of International Criminal Justice* 963-705 (2012) and L. van den Herik, 'Reparation for Decolonisation Violence: A Short Overview of Recent Dutch Litigation', *Heidelberg Journal of International Law*, 2018/2.

also acknowledging the *jus cogens* nature of the crimes concerned, the CAVV considers that there is merit in placing the question of non-applicability of statutory limitations in tort proceedings on the agenda.²⁴ The CAVV fully recognizes the important function that statutory limitations can fulfil in tort law. Having this in mind, it might be suitable to include a provision in the draft articles encouraging States to consider restricting the invocation of statutory limitations in certain clearly specified circumstances. As civil litigation concerning acts that may amount to international crimes is likely to increase in the years to come, such provision could serve as useful guidance.

7. Conclusion

By way of conclusion, the key elements of this advisory report are summarized:

- **The CAVV welcomes the ILC draft articles on crimes against humanity and holds that a specialized global convention on crimes against humanity would complement the treaty regimes that exist for the other two core crimes, genocide and war crimes.**
- **The draft articles aim to codify existing rules under customary international law, such as the obligation to prevent, and they also serve a gap filling purpose more widely, for instance by providing a dispute settlement clause and a basis for jurisdiction of the International Court of Justice. This may reduce over-focus on genocide and its legal regime.**
- **The draft articles offer a robust and much needed model for State cooperation. By so doing, they fill a striking gap and offer a legal regime to enable and facilitate mutual legal assistance and a legal basis for extradition for crimes against humanity.**
- **The relationship between the draft articles and the Rome Statute of the ICC is mutually beneficial. Specifically the segment of the draft articles that concerns mutual legal assistance and extradition can effectively assist States in living up to their responsibilities for domestic prosecutions of crimes against humanity. The draft articles thus offer support structures that correspond with the idea that the ICC is complementary to national criminal jurisdictions.**
- **Despite certain inadequacies of the Rome Statute definition of crimes against humanity, as for instance regarding its gender-dimensions, the CAVV fully supports the choice to adopt the Rome Statute definition of crimes against humanity without any change for reasons of legal certainty.**
- **While overlapping to some extent, the draft articles on crimes against humanity and the MLA-treaty for core crimes are mutually supportive and do not compete.**
- **Even if both initiatives materialize and are effectively turned into treaties, not all States may sign up to and ratify both. Therefore the mutual legal assistance provisions (including those regarding extradition) of the draft articles on crimes against humanity should be as detailed as possible so that they can serve on a stand-alone basis**

²⁴ See for a more elaborate treatment of the issue and the arguments supporting non-applicability of statutory limitations to civil tort suits, L. Zegveld, *Civielrechtelijke verjaring van internationale misdrijven*, inaugural address, University of Amsterdam, delivered on 13 November 2015.

to facilitate inter-State cooperation. While underscoring that the proposed regime in the draft articles is already very diligent and detailed, the CAVV advisory report offers several concrete suggestions for further reflection.

- **It is important to clarify the interrelationship between the two draft articles on prevention, draft articles 2 and 4. Specifically, the CAVV wishes to underscore draft article 2's independent and autonomous meaning.**
- **In conformity with its earlier advisory report on the use of the term “genocide” by politicians, the CAVV highlights that article I of the Genocide Convention and draft article 2 on crimes against humanity should be seen as twin-provisions in terms of content and scope.**
- **Building on the view that “a convention without a monitoring mechanism is likely to be an ‘orphan’”, the CAVV advises the government to advance suggestions for a monitoring mechanism, and it offers some concrete views on the mandate and tasks of such mechanism.**
- **While underscoring the important function that statutory limitations can fulfil in tort law, the CAVV considers that there is merit in placing the question of non-applicability of statutory limitations in tort proceedings for victims on the agenda.**