# INTERNATIONAL LAW COMMISSION

## Draft articles on crimes against humanity

## Written Comments and Observations of the Federative Republic of Brazil

## 1 December 2023

**BRAZIL'S COMMENTS AND OBSERVATIONS ABOUT THE DRAFT ARTICLES ON CRIMES AGAINST HUMANITY ADOPTED BY THE INTERNATIONAL LAW COMMISSION ON SECOND READING, PURSUANT TO PARAGRAPH 6 OF THE UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 77/249**

1. The Permanent Mission of Brazil to the United Nations has the honor to refer to the letter by the Office of Legal Affairs of the United Nations regarding comments and observations on the draft articles on crimes against humanity adopted, on second reading, by the International Law Commission (LA/COD/66) and has the honor of submitting the following information:

GENERAL COMMENTS

2. The International Law Commission (ILC) work on the topic of crimes against humanity seeks to fulfill an important gap in the international system, which already relies on global conventions to prevent and punish genocide and war crimes. Brazil has supported this process since its beginning and considers that the set of draft articles presented by the International Law Commission is a good basis for the negotiation of a future convention on the topic.

3. After five years of extensive work, the ILC recommended the "elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles". A convention on the prevention and punishment of crimes against humanity might bring an important contribution to international criminal law. An international convention on crimes against humanity would not overlap with the Rome Statute. Rather, bearing in mind that the articles are meant to be enforced by domestic courts, it would ensure accountability for these serious crimes at the national level, regardless of whether the States concerned are parties to the Rome Statute, given the principle of complementarity, or not.

PREAMBLE

4. Brazil reiterates its opinion on the need for the preamble of a future convention on crimes against humanity to incorporate paragraphs referring to the principles of the UN Charter related to the

general prohibition of the use force and on non-intervention in the internal affairs of any State – in similar fashion as, for example, the Rome Statute. This could dispel fears of misuse of the convention, as allegations of crimes against humanity must not be used as a pretext for aggression and interference in internal affairs of a State. Reiterating the principles of the Charter in the preamble could contribute to universal adherence to a future convention on such crimes.

5. Furthermore, Brazil welcomes the recognition of the prohibition of crimes against humanity as a peremptory norm of general international law, to which the jurisprudence of several international, regional and national tribunals attests. While not all the provisions of the draft articles constitute *jus cogens*, there should be no doubt that no derogation to the prohibition of such crimes is acceptable. Any caveat in this respect would be inconsistent with the seriousness that international law attaches to crimes against humanity.

6. While we acknowledge that a significant part of world population lives in countries that are not members of the International Criminal Court and, therefore, are not bound by its Statute, we consider that the proposal by the International Law Commission and its rapporteur of a preambular paragraph that takes into consideration the definition of crimes against humanity set forth in the Rome Statute would contribute to avoid fragmentation of international law. Besides the fact that they largely reflect customary international law, it is of paramount importance to ensure as much as possible coherence in the prosecution of the perpetrators of such crimes at the national and international levels. The fact that as of November 2023 there are 123 States parties to the Rome Statute should not be disregarded. This paragraph is also important to guarantee conformity of the application of a future convention with the principles of complementarity and *non bis in idem*.

SCOPE OF THE DRAFT ARTICLES (ARTICLE 1)

7. For the sake of clarity, it would be advisable to preserve the provision on the scope of the draft articles in a future convention on crimes against humanity. Expressly circumscribing their scope to the prevention and punishment of crimes against humanity as set out in draft article 2 would fix clear boundaries for the interpretation and application of all the provisions of a future convention, in its different aspects, by domestic courts.

8. Moreover, the scope *ratione temporis* of a future convention negotiated on the basis of the articles should be interpreted, given the absence of a provision to the contrary, in accordance with article 28 of the Vienna Convention on the Law of Treaties, on the non-retroactivity of treaties.

## DEFINITION OF CRIMES AGAINST HUMANITY (ARTICLE 2)

### Mental elements

9. The mental element in the chapeau of paragraph 1 in article 2 ("with knowledge of the attack") could benefit from further elaboration. From the four *mentes reae* that may characterize a criminal state of mind (acting purposely, knowingly, recklessly or negligently), only intention and knowledge pertain, in principle, to such serious criminal conducts as crimes against humanity.

10. Therefore, it could be advisable to describe the mental elements of crimes against humanity by means of the expression "with knowledge of the attack or the intent for the acts to be part of the attack". An express reference to "intent" in addition to "knowledge" might facilitate the task of domestic courts, when applying a future convention, of deciding on the appropriate penalty to be imposed in accordance with the specific conduct in analysis, whose severity may be aggravated if the act was committed not only knowingly, but also with specific intent. In this respect, it is important to remind that the Elements of Crimes under the 1998 Rome Statute - the latter making use of a similar wording as the one in the ILC`s draft articles - clarified that "the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population". Moreover, the ILC itself, in its 2019 comments on the draft articles, stated that "it is the perpetrator’s knowledge or intent that his or her act is part of the attack that is relevant to satisfying" the mental requirement of a crime against humanity, no matter the personal motives behind the conduct.

Gender Aspects

11. Brazil welcomes the initiative taken by the ILC, upon adopting the draft articles on second reading, to eliminate former paragraph 3 of the article on the definition of crimes against humanity.

12. On the one hand, Brazil understands that the definition of gender contained therein was not on a par with its current meaning under international human rights law and did not take into account contemporary developments in discussions thereon.

13. On the other hand, considering the current discussions on this issue, it would be a pragmatic decision to avoid a definition of what constitutes gender in a future convention, which does not preclude the development of customary law. Leaving for Member States to interpret the meaning of the term in accordance with their national legislations can alleviate concerns that would prevent ratification of a future convention. In this respect, one must always bear in mind that the instrument will be interpreted and enforced by domestic courts.

14. At the same time, there are gender aspects of the draft articles that might deserve further elaboration in a future convention. Important as it is to classify rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization as crimes against humanity, these conducts do not exhaust all forms of sexual and gender-based violence of such gravity as that of a crime against humanity. It would be desirable to specify as much as possible, in light of the principle of strict legality that guides criminal law, other forms of sexual and gender-based violence of comparable gravity, especially if conducts of such nature not expressly referred to in the draft articles have already been identified in jurisprudence.

15. This is the case, for example, of forced marriage, considered an inhumane criminal conduct by the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the International Criminal Court (ICC). As properly spelled out in the ICC's Appeals Judgment in the *Ongwen* case, the concept of forced marriage may be understood as the recourse to physical or psychological force, or threat of force, or to a repressive environment to coerce someone into a conjugal union.

16. The same goes for manifestations of reproductive violence of similar gravity as that of forced pregnancy and enforced sterilization. As much as forcibly impregnating and coercing someone to reproduce, the systematic denial of the right to procreate by means of forced abortion or contraception is contrary to the core values of humankind, and thus amounts to a serious crime of international law. In this respect, it is worth noting that the Constitutional Court of Colombia considered forced abortion and forced contraception as war crimes.

17. A future convention might also benefit from expressly criminalizing inhumane acts committed in the context of an institutionalized regime of deliberate, systematic and complete subjugation of an entire social group based on their gender, depriving it from fundamental rights, including the possibility to partake of the public sphere free from oppression, in a manner contrary to international law. For comparison purposes, when it comes to racial discrimination, the draft articles already provide for the punishment of a systematic subjugation of the same intensity through the crime of apartheid.

Persecution

18. Brazil understands that the conduct of persecution referred to in paragraph 1 (h) should be a stand-alone crime, as it was in the Statutes of the International Criminal Tribunals for former Yugoslavia (ICTY) and Rwanda (ICTR), instead of a simple means to commit other acts listed in paragraph 1.

19. There are two main arguments to be considered here.

20. In the first place, there may be instances of persecution not associated with any other conduct referred to in article 2 that by themselves may have the severity of a crime against humanity. The ICTY, in the Kupreskic case and others, rejected the notion that persecution should be linked to crimes found elsewhere in its Statute and affirmed that a narrow definition of persecution is not supported in customary international law. The ILC itself provided guidance in its comments on how to address legitimate concerns over the risks of bringing within the definition of crimes against

humanity a wide range of discriminatory practices that do not necessarily amount to crimes against humanity.

21. An improved phrasing of the conduct could draw inspiration from the ILC`s comment according to which persecution that constitutes a crime against humanity is such as has a similar character and severity to those acts listed in the other subparagraphs of paragraph 1. Furthermore, it is important to bear in mind that, absent the connection requirement, persecution to be punished under a future convention would only be the one perpetrated as part of a widespread or systematic attack directed against a civilian population.

22. In the second place, the need for a connection with another conduct in article 2 would either make persecution, however grave it could be, never punishable in itself or, if it were all the same to be punishable on its own, entail the possible risk of double jeopardy. This is because, in many legal traditions, in accordance with the merger doctrine, a criminal conduct perpetrated as an accessory means to commit a more serious crime should be absorbed, in principle, into the main conduct for the definition of the corresponding penalty.

Enforced disappearance

23. When it comes to the definition of enforced disappearance in paragraph 2 (i), it is Brazil's view that it should not be more restrictive than the definition of the crime set forth in the International Convention for the Protection of All Persons from Enforced Disappearance. The removal from the protection of the law is not a constituent element of the crime but a consequence of it, while the duration of the disappearance is irrelevant to the gravity of risks inflicted upon its victims. Therefore, Brazil would like, in the context of negotiations based on the ILC articles, to propose the elimination of the reference to the intention of removing people from the protection of the law for a prolonged period.

Other Inhumane Acts

24. Domestic courts of States in which the principle of strict legality plays a central role in criminal law may face legal challenges in applying a provision such as the one in paragraph 1 (k) concerning "other inhumane acts". The definition of criminal offenses must be as narrow as possible. The use of broad terms that give wide margin for interpretation such as "inhumane" and "of similar character" might prevent serious conducts from being punished or rather lead to convictions for crimes against humanity resulting from criminal conducts of a less grave nature. For this reason, it would be necessary to strike a balance between, on one hand, the need to ensure accountability for serious crimes of international law still not narrowly codified in law, in light of the practical unfeasibility of exhausting all acts of such nature that may ever be committed in reality, and, on the other, the importance of specifying as much as possible punishable conducts. In this sense, a corresponding subparagraph in paragraph 2 could bring up examples of other inhumane acts already described in international jurisprudence.

Slave trade

25. Brazil would favor the inclusion in the list of crimes against humanity, alongside enslavement in paragraph 1 (c), of slave trade, understood as the abduction, kidnapping, acquisition or disposal of any person, regardless of, inter alia, age, race, gender, migration, refugee or statelessness status for the purpose of reducing them to or maintaining them in any form of enslavement.

GENERAL OBLIGATIONS (ARTICLE 3)

26. In article 3, Brazil considers that the explicit reference to the obligation of States not to engage in acts that amount to crimes against humanity is an important provision, as it is a corollary of the obligation to prevent them. We are also supportive of the notion that crimes against humanity are not exclusively perpetrated in conflict settings (paragraph 2) and of the language according to which no circumstances whatsoever could ever justify the perpetration of such heinous crimes (paragraph 3).

OBLIGATION TO PREVENT (ARTICLE 4)

27. As for draft article 4 (a), Brazil believes that the provision could benefit from an express reference to both *de jure* and *de facto* jurisdictions. It would enhance the legal certainty of the article as to the obligation of States to prevent crimes against humanity in any territory they control.

*NON-REFOULEMENT* (ARTICLE 5)

28. Brazil commends the ILC for the inclusion of the principle of *non-refoulement* in the draft articles. It reflects an understanding widely shared by the international community that no state should expel or return people to territories where their life or freedom would be at risk. This principle is enshrined in a set of international and regional instruments, such as the Fourth Geneva Convention, the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, the 1969 American Convention on Human Rights and the 1981 African Charter on Human and Peoples` Rights.

29. Initially envisaged in the 1951 Refugee Convention, the principle of *non-refoulement* today has a broader scope. Many human rights monitoring bodies have interpreted their respective instruments as establishing an absolute prohibition of expulsion or return, normally based on the risk of "irreparable harm". Brazil recognizes the *jus cogens* character of the principle of non-refoulement.

CRIMINALIZATION UNDER NATIONAL LAW

30. Laudable though it is the ILC`s attempt not to be too prescriptive so as to allow proper policy space to Member States, Brazil believes that article 6 (3) would benefit from a more detailed approach in terms of legal certainty. In article 2 (1), knowledge of the systematic or widespread attack is established as a constituent element ("*mens rea*") of a crime against humanity by its perpetrator. In its turn, article 6 (3) states that commanders or superiors must be held accountable

for their subordinates` acts if they had knowledge or had a reason to have knowledge of them. "Having a reason to know" may seem too vague a term for a criminal provision. Therefore, it could be advisable to use the same terms as those in article 28 (a) (i) of the Rome Statute, which specifies that the reason to know is verified in light of the circumstances of the time. Alternatively, a formulation such as found in article 86, paragraph 2, of the Additional Protocol I to the Geneva Conventions could prove to be even more accurate ("had information which should have enabled them to conclude in the circumstances at the time"). Otherwise, there would be a theoretical risk of strict liability being applied, what would not be in line, in principle, with international jurisprudence.

31. It is also Brazil's view that statutory limitations should neither apply to crimes against humanity (as stated in paragraph 6) nor to civil or criminal lawsuits whereby their victims seek redress and reparations. Brazil would welcome addition of language in this respect.

ESTABLISHMENT OF NATIONAL JURISDICTION (ARTICLE 7)

32. Nothing in the present draft articles shall be interpreted as affecting immunities of State officials from foreign criminal jurisdiction. In its comments, the ILC acknowledged that "paragraph 5 has no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law". In any case, it would be very important, for the benefit of legal certainty, to complement this article with an explicit provision in this regard. Brazil also highlights that the establishment of national jurisdiction, especially by means of the principle of universality, may not serve other interests than those of justice.

INVESTIGATION (ARTICLE 8)

33. Brazil commends the ILC for its balanced drafting of article 8 and interprets it as an obligation by States which is not contingent on formal complaints filed by the victims with authorities, who must investigate whenever there are reasonable grounds to believe that acts constituting crimes against humanity have been or are being committed in any territory under the jurisdiction of their

State. Still, this obligation must be without prejudice to the right of victims to present complaints to the competent authorities.

PRELIMINARY MEASURES WHEN AN ALLEGED OFFENDER IS PRESENT (ARTICLE 9)

34. Brazil notes with appreciation the provision in paragraph 3 according to which a State that has taken a person into custody shall immediately notify the States referred to in draft article 7, paragraph 1, of the fact and of the circumstances which warrant the detention. However, Brazil reiterates that the State with the closest links to the crime must have priority in exercising jurisdiction over it, in order to prevent abuse of universal jurisdiction. This is the rationale of Brazilian criminal law.

*AUT DEDERE AUT JUDICARE* (ARTICLE 10)

35. Brazil welcomes the inclusion of the *aut dedere aut iudicare* principle in the draft articles, as it may be an important instrument to fight impunity. This principle is set out in numerous international conventions and, according to the case-law of the International Court of Justice, creates an *erga omnes partes* obligation. Therefore, each State party has an obligation to comply with it in any given case.

36. It is worth mentioning that, depending on the legal instrument under consideration, the obligation may be placed primarily on prosecution, rather than extradition, or vice versa. In this respect, article 10 must be read in conjunction with the other articles on national jurisdiction and extradition. In order to prevent the abuse and misuse of the principle of universal jurisdiction, as indicated above, it is essential to recognize the jurisdictional priority of States with the closest links to the crimes, which are those referred to in article 7 (1).

37. In this context, Brazil believes that article 10 would benefit from two different paragraphs. The first one could build upon the current draft, in order to set out the obligation to prosecute when the custody State has a direct link to the crime, the suspect or the victim, unless it decides to extradite or surrender.

38. The second paragraph would apply in cases where the custody State has no direct link to the crime, the offender or the victim. Extradition would be established as the primary obligation, while the surrender to international criminal tribunals, as appropriate, or prosecution, as envisaged in article 7(2), would be considered as the alternatives. In the same manner as the jurisdiction of international criminal tribunals, universal jurisdiction shall be complementary to the criminal jurisdiction of States with direct links to the crime, and should only be applied when the States referred to in article 7(1) are unwilling or unable to genuinely carry out the investigation or prosecution.

FAIR TREATMENT OF THE ALLEGED OFFENDER (ARTICLE 11)

39. On the fair treatment of the alleged offender, Brazil reiterates that draft article 11 could be strengthened in order to bring it closer to the fair trial guarantees provided for in other international instruments. For instance, some of the guarantees referred to in article 55, on the rights of persons during an investigation, and in Article 67, on the rights of the accused, of the ICC treaty are currently not present in the draft articles.

40. Even though paragraph 1 of draft article 11 establishes the right to a fair treatment in broad terms, the text would certainly benefit from more detailed language. To this end, inspiration could be drawn from the Rome Statute.

VICTIMS, WITNESSES AND OTHERS (ARTICLE 12)

41. The article on victims, witnesses and others could benefit from a definition of victim. For example, Rule 85 of the Rules of Procedure and Evidence of the International Criminal Court could provide a model on which to base a future definition.

42. Brazil commends the ILC's language on the need for measures to ensure the victims' right to reparation, to have their views and concerns considered in the criminal proceedings and to be protected from ill-treatment and intimidation as a consequence of any complaint, alongside with

other complainants, witnesses, relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the draft articles.

EXTRADITION (ARTICLE 13)

43. Brazil notes with satisfaction that article 13 paragraph 11 preserves the right of the requested State not to extradite when there is substantial ground for believing that the accused may be punished on account of that person`s gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group or political opinions. Brazil understands that it also protects the accused from being prosecuted or punished on account of their orientation or gender identity.

44. Yet, Brazil believes that draft article 13 could be improved by an additional paragraph according to which nothing in a future treaty could be interpreted as imposing an obligation to extradite when the person is to appear before an extraordinary court, or when there are substantial grounds for believing that the person may face punishment inconsistent with their most fundamental human rights principles, as is the case, for Brazil and many other countries, of the death penalty. Other constitutional principles should also be observed in this regard.

MUTUAL LEGAL ASSISTANCE (ARTICLE 14) AND ANNEX

45. Brazil notes that the language on mutual legal assistance is in general consistent with other international treaties and welcomes its acknowledgement that mutual legal assistance shall be subject to the conditions provided for by the national law of the requested State. Brazil also appreciates the flexible approach adopted by the ILC in connection with the application of the annex, in case a State is bound by one or more treaties of mutual legal assistance. This approach has the potential to facilitate wide adherence to a future convention by States bound by other treaties, while provides them with an optional tool to ensure the prevention and punishment of crimes against humanity through mutual legal assistance.