

*Translated from Spanish*

## **Permanent Mission of Colombia to the United Nations**

### **Observations of the Republic of Colombia, pursuant General Assembly resolution 77/249 of 30 December 2022, concerning the draft articles on prevention and punishment of crimes against humanity of the Internatioanal Law Commission**

Pursuant to resolution 77/249 of 30 December 2022, by which the General Assembly invited States to submit, by the end of 2023, written comments and observations on the draft articles on prevention and punishment of crimes against humanity of the International Law Commission and on the recommendation of the Commission, the Republic of Colombia hereby submits the following observations:

- Given its unwavering commitment to combating impunity for the most serious crimes that shock the conscience of humanity, Colombia believes that an international legally binding instrument on the prevention and punishment of crimes against humanity will serve to consolidate and strengthen international criminal law.
- Colombia considers that the focus of the Commission's draft articles on prevention and punishment of crimes against humanity, namely, the effective prosecution of such crimes through the implementation of measures at the national level and the enhancement of international cooperation, is appropriate. Colombia believes that these are, in fact, the areas where gaps still exist, and that States would benefit from an instrument of positive law that addresses those areas.
- In this regard, the comments of Colombia concerning specific articles are provided below.

#### **Preamble**

Colombia notes that, while the preamble recognizes that the Rome Statute of the International Criminal Court defines the aforementioned crimes as international crimes and establishes the jurisdiction of the Court, the draft articles provide for the regulation of international cooperation and judicial assistance between States and for the adoption of prevention policies in national law.

Colombia also agrees with the assertion in the draft preamble that the prohibition of crimes against humanity is a *jus cogens* norm, given that crimes against humanity constitute a threat to the peace, security and well-being of the world.

In this regard, Colombia agrees that there is a need to prohibit the commission of crimes against humanity, in accordance with international law, and to ensure that such crimes do not go unpunished.

Colombia also welcomes the emphasis in the draft preamble on the victims of crimes that deeply shock the conscience of humanity and on the fight against impunity for such crimes.

## **Article 1**

In the view of Colombia, it is clear that the objective of the draft articles is to ensure that States prevent the commission of crimes against humanity, exercise their criminal jurisdiction to prosecute such crimes and enhance international cooperation measures.

This article is inspired by and follows closely article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide and is thus a clear continuation of the international norms adopted by the international community to refer to the most heinous acts committed in various international contexts.

In this respect, the draft articles are not incompatible with, but rather complementary to, the Rome Statute, and their scope of application is different. Therefore, the obligations arising from the future convention would allow for a separation between, on the one hand, a State's consent to accept the jurisdiction of the International Criminal Court, and, on the other hand, the expression of a State's consent to be bound by international obligations relating to international cooperation and legal assistance for the prevention and punishment of the commission of these crimes.

Colombia believes that article 1 clarifies that the purpose of a convention on this subject is to prevent the commission of crimes against humanity and to punish crimes against humanity as a criminal matter, focusing in particular on the measures that States can take at the national level in accordance with their respective domestic law, and views this as a positive development.

## **Article 2**

The text of draft article 2 closely follows the definition contained in article 7 of the Rome Statute and the Elements of Crimes adopted by the Assembly of States Parties to the Rome Statute.

Paragraph 3 of this article constitutes a "without prejudice" clause that excludes any other definition of such crimes that may be set forth in international or national law and is broader than the definition used in the draft article.

While it is clearly useful to have definitions, in an international criminal law instrument, of the crimes covered by that instrument, such definitions are also required from the standpoint of national law. When a State complies with this obligation, undoubtedly, the substantive definition of the punishable conduct enshrined in national law must be fully compatible with the generic definition provided in article 2.

The core of the definition is contained in paragraph 1, where it is clarified that the crime must be committed (i) as part of a widespread or systematic attack, (ii) against any civilian population and (iii) with knowledge of the attack.

Colombia appreciates that the Commission used significant legal precedents, such as the Rome Statute and the jurisprudence of the Nuremberg Tribunal, the Commission's 1954 draft Code of Offences against the Peace and Security of Mankind and its 1996 draft Code of Crimes against the Peace and Security of Mankind, the statutes and decisions of several ad hoc criminal tribunals, and the practice and jurisprudence of the International Criminal Court, as the basis for the definition. In the view of Colombia, the elements of the definition emanate not from a particular treaty or tribunal but rather from State practice in matters of criminal law and what the international community has recognized as correct and acceptable. Colombia supports this approach.

Regarding the specific list of acts that constitute crimes against humanity and their definitions, Colombia believes that the definitions of crimes in the draft article should be at least as broad as those in the Rome Statute, but if other international treaties or customary law contain broader definitions, it is preferable to use these, given that this instrument will not confer jurisdiction to a court but instead will contain obligations for States, to be implemented in their own national courts and systems.

In this connection, Colombia believes that the definition of persecution, for example, might be too limited, and it would be better to use broader concepts from customary international law and the jurisprudence of regional tribunals, such as the Inter-American Court of Human Rights.

Concerning the definition of enforced disappearance, Colombia prefers the definition of that crime provided in the International Convention for the Protection of All Persons from Enforced Disappearance or in the Inter-American Convention on Forced Disappearance of Persons.

Colombia supports the Commission's decision to dispense with the definition of gender contained in the Rome Statute, which is clearly too limited.

At the same time, Colombia would like to note that, given the contents of paragraph 1 (k), it is aware that the list of acts is not exhaustive. This provision is useful, as it allows for additional offences to be covered under national law, and, as international criminal law continues to develop, new categories of crimes against humanity could in future be covered by the draft article.

However, Colombia also wishes to note the possibility that this provision could lend itself to an overly broad interpretation. Therefore, in order to guarantee legal certainty and the principle that there can be no crime without law, it may be appropriate to refer to the adoption of a restrictive approach to interpretation and to the principles of *nullum crimen sine lege* and *in dubio pro reo*, perhaps in the preamble.

### **Article 3**

Draft article 3 expressly prohibits States from engaging in these acts. Colombia considers this prohibition to be appropriate and it welcomes the fact that this article not only addresses crimes against humanity from a punitive perspective but also refers to the obligation of every State not to engage in such acts.

The wording of article 3, paragraph 2, should be improved. Indeed, the key phrase that establishes that crimes against humanity are international crimes, whether or not they are criminalized in national law, should be placed in a separate sentence to make clear its significance. With respect to the general obligation of prevention, Colombia believes that the fact that this obligation is one of means and not of result and that it is measured by a standard of due diligence should be made clearer in the text of the provision itself.

All aspects of the draft articles concerning State responsibility with regard to prevention in relation to peremptory norms of general international law should be clearly reflected in the draft article.

Colombia understands that paragraph 3 of the draft article, which provides that no exceptional circumstances may be invoked as a justification of crimes against humanity, refers to the conduct of both States and non-State actors, and welcomes this provision.

### **Article 4**

Draft article 4 elaborates further on the obligation to prevent crimes against humanity set forth in draft article 3, paragraph 2. The obligation of prevention also extends to the prevention of acts that could constitute crimes against humanity and is a feature of most of the multilateral treaties that deal with crimes.

Colombia believes that the obligation of prevention should never be used to justify aggression. However, given the lack of clarity regarding what acts are “in conformity with international law” in terms of prevention, especially with regard to the role of third States, the obligations set out in the draft article are perhaps too vague and would benefit from greater specificity.

With regard to subparagraphs (a) and (b) of article 4, Colombia notes that they are somewhat unclear in terms of their jurisdictional scope, particularly compared to the more detailed provisions in draft article 7.

In general terms, article 4 seems relatively vague and could be improved by further clarification.

### **Article 5**

With respect to draft article 5, on non-refoulement, Colombia notes that this obligation is understood to be without prejudice to other, similar obligations emanating from treaties or customary international law.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains very similar provisions to those in draft article 5. Article 11 of the Inter-American Convention to Prevent and Punish Torture, article 33 of the 1951 Convention relating to the Status of Refugees and article 16 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance also contain similar provisions.

However, Colombia believes draft article 5 is unclear in terms of its relationship to draft article 13, paragraph 11.

### **Article 6**

With regard to draft article 6, Colombia believes this provision is relevant, as it would prevent potential discrepancies between the crime defined in the international instrument and the crime as defined in national law, and thereby close potential gaps.

The draft article also sets forth a requirement that legislative measures must be adopted to criminalize, among other forms of participation, the commission of the crimes listed, which of course is quite pertinent. In this respect, Colombia wishes to draw attention to the fact that national laws, within the framework of the regulatory power of States, may include provisions that go beyond customary international law in relation to matters such as those referred to in paragraph 2 (c) of article 6.

The draft article requires States to take measures in respect of the responsibility of commanders or superiors, subordinates acting “pursuant to an order of a Government or of a superior, whether military or civilian”, and persons holding an official position. While article 28 of the Rome Statute contains a more detailed standard by which criminal responsibility applies to a military commander with regard to the acts of others, the exclusion of superior orders as a defence is provided for in various instruments, including those regulating special criminal tribunals, as well as treaties such as the Convention against Torture, the Inter-American Convention on Forced Disappearance of Persons and the International Convention for the Protection of All Persons from Enforced Disappearance.

In this regard, Colombia believes that, in order to provide greater legal certainty, the inclusion of a more explicit statement indicating that superior status shall not have an impact on a sentence or on its mitigation should be considered. Colombia is aware of the relationship between paragraph 5 and the rules on immunity, as well as the Commission’s current work on the subject and the link to the contents of draft article 7, and believes that it is important to further clarify all these provisions in a holistic manner, avoiding discrepancies that create uncertainty.

Paragraph 6, on the non-applicability of statutes of limitation to crimes against humanity as a principle to be adopted in national law, and paragraph 7, on ensuring punishment by appropriate penalties, are appropriate, and are similar to measures that the State of Colombia is already obligated to adopt, for example, within the framework of the Inter-American Convention on Forced Disappearance of Persons, which, in its article III, provides that the States parties undertake to criminalize the forced disappearance of persons and to impose an appropriate punishment commensurate with its extreme gravity, and, in its article VII, states that criminal prosecution and the penalty for the forced disappearance of persons shall not be subject to statutes of limitations. However, in the view of Colombia, the gravity of the offence is not the only criterion relevant to paragraph 7; reference should also be made to the nature of the offence committed.

Regarding the contents of paragraph 8, Colombia believes that this matter should be left to the discretion of the State, to be regulated under its national law.

That said, in order to implement provisions such as these in its domestic law, Colombia must reform its Penal Code in order to criminalize certain crimes against humanity that are not set out therein. However, at present, public prosecutors (investigating entity) must verify the presence of the contextual elements mentioned in the definition of crimes against humanity, based on customary law, and prove that underlying conduct was committed in order for an offence to be declared a crime against humanity within the

framework of criminal proceedings. A convention on this subject would therefore be beneficial for the judicial authorities by facilitating the adaptation of national law to international law, in the context of both ordinary and transitional justice. A positive norm in this area would also have the effect of generating legal certainty in relation to the aforementioned declarations of crimes against humanity.

Nevertheless, Colombia believes it is relevant to note in relation to article 6 that these obligations on States should be understood to be without prejudice to any broader definition contained in another international instrument, customary international law or regional or international case law applicable to a State.

It would be worth considering the possibility of including the criminalization of the “financing” of crimes against humanity, taking into account the decisive role played by those who finance these atrocity crimes, whether they are natural or legal persons or criminal organizations.

#### **Article 7**

With regard to draft article 7, on the establishment of national jurisdiction, Colombia agrees that it is advisable for the draft article to establish the State’s jurisdiction to prosecute on the basis of territoriality, the nationality or place residence of the perpetrator and passive personality.

With respect to territorial jurisdiction, it may be appropriate to refer to both *de jure* and *de facto* jurisdiction, for example, by mentioning persons under the jurisdiction or control of a State.

The passive personality criterion could activate the jurisdiction of national courts to prosecute crimes against humanity, as it enables the State to protect its nationals, ensure that crimes against humanity committed against them are punished, protect their fundamental rights and ensure that they receive reparation as victims of atrocity crimes.

Colombia considers that paragraph 2 sets forth a valuable mechanism for preventing impunity for the commission of these crimes. Therefore, including this provision as a rule of positive law will provide great legal certainty, particularly in light of the nature of crimes against humanity.

Colombia also considers the inclusion of paragraph 3 – which provides that the exercise of any other criminal jurisdiction established by a State in accordance with its own national law is not excluded – to be important.

## Article 8

With regard to draft article 8, Colombia considers it highly relevant to include the obligation of the State to carry out a prompt, thorough and impartial investigation of acts that may be considered crimes against humanity when such acts are committed in its territory. This obligation concerns the State's role as guarantor of the observance of human rights in its territory. It also relates to the adoption of domestic measures, whether it be the establishment of an independent judiciary or the criminalization of relevant acts in national law, in order to ensure the prevention and punishment of the commission of crimes against humanity.

## Article 9

Colombia considers that draft article 9, on the preliminary measures to be taken when an alleged offender is present in the territory of a State, is necessary in a possible future instrument, so that States will apply their domestic law, with the necessary speed, in order to prevent the suspect from escaping, ensure that evidence is not tampered with and assume the appropriate jurisdiction over the case. In that regard, article 6 of the Convention against Torture includes, among others, provisions related to paragraphs 1, 2 and 3 of draft article 9.

## Article 10

Draft article 10 enshrines the principle of *aut dedere aut judicare*. Colombia believes that the taking of punitive measures in the event of non-extradition is based on the shared interest in prosecuting and punishing crimes against humanity, which by their nature are crimes against humankind as a whole. It also notes that the Convention against Torture and the International Convention for the Protection of All Persons from Enforced Disappearance contain similar provisions.

Colombia also accepts the explicit reference to the conventional character of the provisions on universal jurisdiction in respect of crimes against humanity, which has already been recognized in the jurisprudence of the high courts of Colombia.

## Article 11

Concerning draft article 11, on fair treatment of the alleged offender, Colombia notes that this provision focuses on persons under investigation against whom measures have already been taken in connection with an investigation into crimes against humanity.

Although the draft article provides for guarantees of fair treatment, including a fair trial, protection of the rights of the alleged offender that should be guaranteed during



a legal investigation, and entitlement to communicate and to be visited by representatives of the State or States of which such a person is a national, in the view of Colombia, the text should include stronger guarantees, covering both the judicial process and the investigation phase, such as (i) the obligation of States to investigate and punish crimes within a reasonable period of time, (ii) the presumption of innocence, (iii) the right of accused persons to a defence, (iv) the right not to testify against oneself or one's family members, (v) the right to appeal, (vi) the right to public proceedings and to contest evidence, (vii) the application of the principle of the non-retroactivity of criminal law and (viii) the right to consular assistance, among many other guarantees enshrined in various treaties and in customary international law and recognized by international and regional courts.

In Latin America, the Inter-American Court of Human Rights has recognized a broad array of criminal procedural safeguards and general human rights protection guarantees. Such guarantees should be included in this provision to complement those indicated above.

Alternatively, instead of a more detailed list, the article could at least include a general reference to the fact that these guarantees are just the minimum required, and that additional guarantees might be required pursuant to customary law or State obligations under other instruments or regional or national law.

## **Article 12**

Colombia notes that draft article 12, which refers to victims, witnesses and others, enshrines both the protection of persons who report crimes against humanity and witnesses and their relatives and representatives against ill-treatment and intimidation, and the rights and special treatment of victims (with the term "victim" being defined in accordance with national law).

Colombia agrees that the category of persons to whom protection shall be granted has been expanded, including in the 2000 United Nations Convention against Transnational Organized Crime, the 2003 United Nations Convention against Corruption and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.

In this regard, in addition to the aforementioned measures, draft article 12 obliges the State to enable the views and concerns of victims to be presented and considered, and to ensure that victims can obtain reparation for material and moral damages.

On this last point, it should be emphasized that reparation measures should be both individual and collective. The draft article provides for the specific situations and contexts in

which it is appropriate to make reparations to victims. This offers States the flexibility to approve, in accordance with their domestic law, specific measures, which are not limited to the forms of reparation set out in draft article 12.

This comprehensive reparative concept is also found in the International Convention for the Protection of All Persons from Enforced Disappearance.

Colombia considers it vital that a future treaty on crimes against humanity protect the rights of victims, as this is a fundamental aspect of the prevention, repression and punishment of crimes against humanity. Draft article 12 serves as an important impetus towards the establishment of specific procedural scenarios that enable victims to participate in ordinary proceedings.

Colombia would also be open to including a definition of victim in draft article 12, such as, for example, the definition set forth in rule 85 of the Rules of Procedure and Evidence of the International Criminal Court, rather than leaving the definition of a victim of crimes against humanity up to each State.

### **Article 13**

This draft article provides for two developments in relation to extradition that are not found in conventional rules applicable to all conduct constituting crimes against humanity and that are not covered by the reference to the peremptory character of the punishment of such acts: the obligation to “extradite or prosecute” and the use of the convention as a sufficient source for extradition procedures.

In the view of Colombia, the content of the article is consistent with State practice on extradition. Colombia also believes that the tool of international cooperation established in paragraph 4 is significant, in that it can be used to close institutional and diplomatic gaps, such as the absence of or failure to adhere to bilateral or multilateral extradition treaties, in order to deliver justice in the most serious cases.

Colombia further notes that the text of this draft article is consistent with article III of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, resolution No. 1/03 on the prosecution of international crimes of the Inter-American Commission on Human Rights, the Rome Statute itself, article 8 of the Convention against Torture, articles 11 and 13 of the Inter-American Convention to Prevent and Punish Torture, and article V of the Inter-American Convention on Forced Disappearance of Persons.

However, paragraph 5 of draft article 13 is confusing. According to practice in extradition matters, where several treaties are applicable for extradition purposes, it is possible to

choose which one should govern a specific extradition process.

Paragraph 5 creates, under the draft articles, an obligation for States that have extradition treaties in force to provide notification of their selection, i.e., whether they intend to use any of the existing treaties or this prospective convention to execute extradition requests. Paragraph 5 (b) creates an obligation for States that do not use the draft articles as the legal basis for cooperation on extradition to seek to conclude extradition treaties with other States in order to implement this draft article. There is no similar obligation for States that have not concluded extradition treaties.

Furthermore, the article appears to be based on the rule that if a State requires a treaty in order to extradite (according to paragraph 5), it should either (a) choose this treaty or (b) choose another existing treaty. The provision indicating that a State will assume only the obligation to “seek, where appropriate, to conclude treaties on extradition”, set out in paragraph 5 (b), seems to undermine the aim of this article, as it could weaken the direct application of this instrument.

Lastly, as concerns the link between this draft article and draft article 7, the issue of the hierarchy of competing requests needs to be addressed.

#### **Article 14**

With respect to draft article 14, on mutual legal assistance, Colombia notes that it arose from the need to have a legal framework governing mutual legal assistance in relation to crimes against humanity, in order to gather information and evidence and to have predictable means of cooperation among States, bearing in mind that there is currently no universal or regional treaty that specifically addresses this type of assistance.

The type of clauses set forth in the draft article have proven to be acceptable, for example, to the States parties to the 2000 United Nations Convention against Transnational Organized Crime and the 2003 United Nations Convention against Corruption.

Draft article 14 establishes as a general obligation that States “shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings”. With respect to legal persons, it establishes cooperation only “to the fullest extent possible”, taking into account the differential treatment that may be given within national legal systems to legal persons, and it refers not only to judicial proceedings, but also to any other type of proceedings that may be brought against them, such as administrative proceedings.

The draft article also sets out in a non-exhaustive list the types of assistance that may be requested. The list is broadly worded so as to cover all types of assistance that might

be relevant to the investigation and prosecution of a crime against humanity. Given that such crimes may involve situations where assets are stolen and that mutual legal assistance in relation to those assets may be valuable, the draft article includes a reference to “bank secrecy”. The draft article also makes provision for a State to transmit information it considers important to another State, even without receiving a formal request.

The provisions of draft article 14 are not aimed at ensuring the cooperation of States with international criminal courts or tribunals, which have the mandate to prosecute alleged offenders, as this type of cooperation continues to be governed by the constituent instruments of such courts and tribunals and by the legal relationship of each State with them.

However, the wording of paragraph 2 could give rise to isolationist interpretations with the claim of pointing out distortedly that the future international treaty would oblige signatory States to incorporate the criminal liability of legal persons into their laws. To prevent faulty hermeneutics, it is suggested that it should be made clear that a legal person could be considered criminally, civilly or administratively liable under national law.

Colombia also notes that other instruments and initiatives on these matters are not inconsistent with a potential provision of this nature. When executing a request for mutual legal assistance, States may choose the applicable instrument upon which they will base the request. Of course, if there are various instruments, the usual practice under the rules of treaty law is for the respective State to implement the later or special treaty.

## **Article 15**

With respect to draft article 15, Colombia notes that the mechanism provided for therein is relatively standard and has been used in other treaties on international criminal law, such as the Convention against Corruption and the United Nations Convention against Transnational Organized Crime.

In the view of Colombia, the mechanism has been well thought out, although perhaps paragraph 1 should refer to all the means of dispute settlement contained in the Charter of the United Nations, not only direct negotiations.

## **Annex**

With regard to the annex, Colombia notes that it is procedural in nature, as it refers to the procedures to be carried out by the so-called requesting State and requested State in

respect of requests for mutual legal assistance related to crimes against humanity. Colombia considers that the annex contains generally accepted language used in rules of this type, and it sees value in including it in the future treaty, especially insofar as it concerns the designation of a central authority, which is a mechanism that works very well for this type of mutual legal assistance request.

- With respect to the recommendation of the International Law Commission, Colombia believes that having an international convention on the prevention and punishment of crimes against humanity is a matter of the utmost importance to the international legal community, and, in particular, for those who are currently victims of these atrocity crimes in various areas of the world.
  - Colombia believes that a legally binding international instrument on crimes against humanity will serve to consolidate and strengthen international criminal law and enable States to take additional measures to facilitate the prevention, investigation, punishment, prosecution and cooperation in respect of the commission of these crimes.
  - Colombia also considers that the draft articles are not incompatible with, but rather complementary to, the Rome Statute, and their scope of application is very different. The obligations arising from the future convention would allow for a separation between, on the one hand, a State's consent to accept the jurisdiction of the International Criminal Court, and, on the other hand, the expression of a State's consent to be bound by international obligations in the context of international cooperation and legal assistance for the prevention and punishment of the commission of these crimes.
  - For Colombia, it is clear that, in the event that they become a convention, these articles could contribute to ensuring accountability and combating impunity in a variety of ways.
  - Colombia will continue to participate actively in the process devised by the Sixth Committee to continue analysing this product of the Commission and to begin to initiate a negotiation process that will lead to the adoption of a convention on this matter.
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