

# **Comments of the Czech Republic on the International Law Commission's Draft Articles on Prevention and Punishment of Crimes Against Humanity**

submitted pursuant to the resolution of the General Assembly A/RES/77/249

The Czech Republic welcomes the opportunity to present written comments on the set of Draft Articles on Prevention and Punishment of Crimes Against Humanity pursuant to resolution of the General Assembly A/RES/77/249.

## **General comments**

The International Law Commission's draft provides an excellent basis for negotiations and future convention on prevention and prosecution of crimes against humanity. We welcome the fact that many of the provisions of the draft were modelled on existing provisions from other multilateral conventions that had been widely supported by States. We also appreciate that the articles are not overly prescriptive and enable States to implement them in accordance with their domestic legal system and practice. Such reliance on existing legal regimes and avoidance of undue complexity should encourage ratification and wide acceptance of the articles by States, when a convention is concluded on their basis. The Czech Republic believes that current discussions will facilitate negotiations and future adoption of the convention on the prevention and punishment of crimes against humanity.

## **Preamble**

As regards the preamble, in our opinion it properly encapsulates the basic principles on which the future convention should be based. These principles reflect the seriousness of crimes against humanity, which are of concern to the international community as a whole. We note with satisfaction that the preamble expressly characterizes the prohibition of crimes against humanity as a peremptory norm of general international law (*jus cogens*). This prohibition is clearly accepted and recognized as a peremptory norm of international law under customary international law and the preamble reflects this fact.

## **Article 1**

We note that the provision in article 1 reiterates the scope of the draft articles indicated by their title. We are aware that similar provision was not included, for example, in the United Nations Convention against Torture or the United Nations Convention on Enforced Disappearances. On the other hand, article 1 rightly emphasizes the importance of the draft articles and its two primary purposes, the prevention and punishment of crimes against humanity. The article also provides general orientation to the whole set of articles. Similar provision is also included in article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide.

## **Article 2**

Article 2 ensures the important objective to harmonize the definition of crimes against humanity under national laws of States. We welcome the approach by the Commission to take article 7 of the Rome Statute as the reference point for article 2. The Rome Statute contains the first, widely recognized and accepted comprehensive treaty definition of crimes against humanity.

In our opinion, possible expansion or narrowing of the definition could blur the lines of the definition of crimes against humanity under treaty law. The flexibility in this area is sufficiently guaranteed by paragraph 3 of article 2, which provides that the draft is without prejudice to any broader definition provided for in an international instrument, customary international law or national law. We believe that also States, which are not Parties to the Rome Statute, would regard the stability and consistency of the treaty definition of crimes against humanity as reasonable and valuable. At the same time, we are aware of certain concerns regarding the interpretation of the suggested definition of crimes against humanity. Therefore, also for the sake of facilitating consensus, we are convinced that the definition has to be construed strictly and narrowly. Its interpretation has to take into account that crimes against humanity represent conduct “which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world”.

### **Article 3**

Article 3 contains a paragraph explicitly stating the obligation of States not to commit crimes against humanity. This addition explicitly endorses the finding of the International Court of Justice in the Bosnian Genocide case, that there also exists a prohibition addressed directly to States. It means that States must not engage in crimes against humanity and must ensure that others within their jurisdiction and control do not commit crimes against humanity, including armed forces, rebel groups, and other non-state actors. The article also rightly emphasizes, in its second paragraph, the obligation to punish crimes against humanity, whether or not committed in time of armed conflict, and emphasizes that “no exceptional circumstances whatsoever” may be invoked as a justification for crimes against humanity.

### **Article 4**

Article 4 on prevention is an indispensable part of the draft. It requires States to establish a normative and administrative infrastructure against the occurrence of crimes against humanity. These obligations of prevention are familiar and similar to those in the Convention against Torture and other widely endorsed international treaties. The generic terminology is desirable in order to include any conceivable preventive measure. Perhaps, the article might benefit from mentioning certain concrete examples of preventive measures, following the pattern of relevant provisions of previous conventions (the United Convention against Torture or the United Nations Convention on Enforced Disappearances). Further, draft article 4 rightly incorporates the requirement that States must act “in conformity with international law” when they take action to prevent the commission of crimes against humanity. This requirement excludes the possibility to invoke the provision in support of the legality of use of force without relevant State consent or without authorization by the Security Council.

### **Article 5**

The Czech Republic appreciates the inclusion of article 5 concerning the application of the principle of *non-refoulement*. Apart from refugee law, this principle is already incorporated in Geneva Conventions, it is part of the interpretation of human rights treaties and is included in extradition and other criminal law treaties. Nevertheless, with respect to crimes against humanity, it is important to reiterate and emphasize the prohibition of sending persons to a country where they might be at risk. The article serves this purpose well.

## **Article 6**

Article 6 is indispensable for the implementation of the proposed convention. The article uses neutral and generic wording which, according to the Czech Republic, is appropriate for this type of draft convention. The States would be able to specify in their national law criminalization of conduct associated with crimes against humanity.

As regards modes of participation under article 6, paragraph 2, the Commission phrased them in broad language, which allows states to specify these modes in their national criminal law and to retain their existing terminology. We welcome that the text is not overly prescriptive. Generic approach is adopted also in respect of the superior responsibility under article 6, paragraph 3, and superior orders in article 6, paragraph 4. We consider the text of these provisions adequate and reasonable.

We welcome the inclusion of paragraph 5 of article 6 providing for the irrelevance of official position when prosecuting crimes against humanity. We note that the Commission “did not find it necessary to specifying that the official position cannot be raised as a ground for mitigation or reduction of sentence, because the issue of punishment is addressed in draft article 6, paragraph 7”. On the other hand, in criminal law, the legal certainty is of paramount importance. Therefore, it might be appropriate to exclude the official position as a ground for mitigation or reduction of sentence expressly in the text of the article.

According to Commission’s commentary, paragraph 5 has no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction; such immunity continues to be governed by relevant conventional and customary international law. We agree with this position and interpretation. This conclusion is equally valid for other conventions against so-called “official crimes”, such as enforced disappearances or torture, and does not need to be stated in the text of the draft articles. Crimes against humanity are by definition committed pursuant to the policy of the government of a state to attack part of its population. Therefore, the definition and the whole structure of obligations under the draft articles lead to the inapplicability of the immunities *ratione materiae*. On the other hand, this does not apply to the immunities *ratione personae* enjoyed under customary international law by incumbent Heads of State, Heads of Government and Foreign Ministers.

We support and commend the text on the prohibition of statutes of limitation under article 6, paragraph 6. This prohibition is important because significant time will often elapse before it is possible to investigate, prosecute, and punish these types of crimes. We also welcome the inclusion of the provision on the liability of legal persons in article 6, paragraph 8. At the same time, we take note of the fact that there is a divergence of views among states on this issue. There is also no uniform approach in relevant existing treaties. In this regard, we note that the provision is very flexible and allows States to respect their national legal principles when establishing criminal, civil, or administrative liability of legal persons.

## **Articles 7, 8, 9 and 10**

Article 7 constitutes, together with article 9 on preliminary measures when the offender is present in the territory, the prerequisite for the implementation of obligation *aut dedere, aut judicare* under article 10. The principle of *aut dedere, aut judicare* is a necessary element to ensure that States do not become safe havens for the perpetrators of crimes against humanity. Further, we welcome that the article 10 includes the word “surrender” and thus reflects different terminology used in various international instruments. The surrender to the international criminal tribunal would obviously be possible only where relevant state has recognized the jurisdiction of such tribunal. In general, these articles, including article 8 on investigation, are

well conceived and their adoption as part of a convention on crimes against humanity would constitute a substantive development in the prosecution of crimes against humanity.

## **Article 11**

Article 11 expressly provides for basic principles of fair treatment of the alleged offenders. The text of the article reflects and refers to relevant rights and guarantees in universal and regional human rights instruments and, in principle, aptly summarizes the norms protecting the alleged offender for purposes of prosecuting crimes against humanity.

## **Article 12**

Article 12 appropriately reflects the increasing attention for victims in international criminal justice, including their participation in criminal procedure and the reparation of their suffering. We support its inclusion in the future convention. In our opinion, one article devoted both to the issue of participation and the issue of reparations seems to be *prima facie* sufficient, since its purpose is to state basic principles in this area.

## **Articles 13 and 14**

Articles 13 and 14 on extradition and mutual legal assistance provide an excellent basis for further negotiations. The Commission decided to model these provisions mainly on the existing, widely accepted provisions of the UN Convention against Corruption and the UN Convention against Transnational Organized Crime. We consider this decision prudent.

Article 13 is, in general, not overly prescriptive, yet it provides sufficient legal clarity for States using it as the basis for extradition from another State. The grounds for refusing extradition are dealt with in general terms, with reference to national law or applicable treaties. In this regard, it is important that whatever the reason for refusing extradition, the obligation to submit the case to its own competent authorities for prosecution under article 10 remains applicable. We note with satisfaction that, apart from paragraph 12 of article 13, the issue of multiple request for extradition is not dealt with in detail in the draft articles and was left to the discretion of States. There are huge differences among State practice in this area and the requested State should be able to take into account all criteria relevant in the concrete situation of multiple requests.

As regards article 14, in our opinion it provides much needed and, in general, sufficient legal framework for mutual legal assistance in this area. We note that the articles do not affect a States' obligations under other treaties on mutual legal assistance. It also encourages States to enhance their mutual legal assistance through concluding other agreements or arrangements. These provisions allow necessary flexibility in this area. At the same time, states should use the instrument, which provides higher level of assistance in the concrete case.

In general, we are of the opinion that articles 13 and 14 provisions would constitute a necessary and welcome basis for the interstate cooperation in dealing with crimes against humanity.

## **Article 15**

We appreciate the inclusion of the provision on the settlement of disputes in the articles. We note that the article 15 provides for immediate resort to the International Court of Justice, if the negotiations between States fail, unless States agree to submit the matter to arbitration. This approach reflects the seriousness of the crimes against humanity and finds its model in relevant existing generally treaties on other crimes under international law. As regards the opt-out from

the jurisdiction of the ICJ, we reserve our position on this issue, which deserves further analysis – also with regard to other widely accepted criminal law treaties. The same applies to possible reservations and the question whether they should be expressly prohibited. Generally, we should try to avoid insisting on provisions and arrangements, which could unnecessarily undermine the ability of States to ratify the future convention. Our common aim should be to create a workable treaty that does not deepen, but closes the divide among states in the area international criminal justice.

## **Annex**

The Annex contains a number of generally known procedural regulations on mutual legal assistance. In our opinion, it would be a useful guidance for international cooperation concerning crimes against humanity. It can serve as a model for cooperation or even, perhaps, for implementation as national legislation.