

Comments and Observations by the Government of Japan on the Draft Articles on  
Prevention and Punishment of Crimes against Humanity

*I. Japan's general comments on the draft articles*

Japan acknowledges the significance of prevention and punishment of crimes against humanity. With an understanding that our discussion on the present draft articles is without prejudice to the question of their future adoption as a convention, Japan is honored to submit comments and observations on the draft articles to help deepen our discussion. Japan will continue to give the draft articles sincere consideration and would like to reserve its right to make further comments on them.

Crimes against humanity are defined in the Rome Statute of the International Criminal Court, which has been playing a crucial role in prosecuting and punishing individuals who have committed crimes against humanity. Japan has been in support of the Court's activities, and in this regard, and from the perspective of legal stability, Japan is of the view that the present draft articles should be consistent with the Rome Statute that provides for State Parties' obligation to cooperate with the Court.

The ultimate purpose of the draft articles is to prevent and punish crimes against humanity, and for this purpose, criminalization of crimes against humanity at the national level is one of the key objects of the present draft articles. Although "crimes against humanity" *per se* are not criminalized under Japan's national law, most of the acts that constitute crimes against humanity as articulated in the draft articles would be punishable in Japan under its existing national criminal law. Furthermore, Japan considers that the ultimate purpose of the draft articles can be achieved by ensuring the punishment of a perpetrator of those crimes before the International Criminal Court through surrender of the person to the Court.

*II. Cluster 1*

[Draft article 1]

Japan considers that draft article 1 should provide for a temporal scope of application of the draft articles. It is important to clarify that the draft articles would not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the convention with respect to that party, accurately reflecting the intention of the commentary of the International Law Commission.

### III. Cluster 3

[Draft article 6, paragraphs 1, 2 and 7]

Japan is of the view that criminalization of crimes against humanity in the draft articles would not necessarily require each State to codify each crime in its national law as an independent offence defined by the same language as draft article 2, and that it would suffice for achieving the purpose of the draft articles to appropriately criminalize the acts that constitute crimes against humanity in each State's national law.

Japan's suggestion in this regard is to modify draft article 6, paragraph 1, as follows:

"Each State shall take the necessary *legislative or other* measures to ~~ensure that~~ *avoid impunity of perpetrators of the acts that constitute* crimes against humanity ~~constitute offences under its criminal law.~~"

Japan also suggests modifying draft article 6, paragraph 2, as follows:

"Each State shall take the necessary *legislative or other* measures to ~~ensure that~~ *avoid impunity of perpetrators of* the following acts ~~are offences under its criminal law:...~~"

Japan considers that the "measures" here include surrender of an offender to the International Criminal Court to ensure his or her punishment, in some cases, if any, without criminalization of the act(s) in its national law. Furthermore, in the view of Japan, the "measures" articulated in draft article 6, paragraph 7, would also include surrender of an offender to the International Criminal Court. These will likely help end impunity—the purpose of the draft articles—and encourage more States to be parties to a Convention.

[Draft article 6, paragraph 3]

Japan understands that draft article 6, paragraph 3, does not require each State to establish the act as an independent offence. Japan has taken necessary measures to establish criminal responsibility of the commanders and other superiors as in complicity provisions under its national criminal law, which, we believe, suffices to meet the obligation of this paragraph. In addition, Japan is of the view that the language used in draft article 6, paragraph 3, should not "foreclose any State from adopting a more detailed standard in its national law, such as appears in Article 28 of the Rome Statute, should it wish to do so," as pointed out by the International Law Commission in its commentary.<sup>1</sup> It is preferable to clarify this point in the draft articles.

[Draft article 6, paragraph 6]

Japan establishes a statute of limitations for certain crimes to avoid a

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<sup>1</sup> International Law Commission, 'Draft articles on Prevention and Punishment of Crimes against Humanity, with commentaries' (2019) UN Doc A/74/10, p.74, para.(22) of commentary on draft article 6

misjudgment due to dissipation of evidence as well as persistence of instability of legal relationship and considers this is also the case for many other States. In this regard, Japan believes that it is necessary to carefully consider whether to abolish the statute of limitations concerning all the offences which constitute crimes against humanity as defined in the draft articles.

[Draft articles 7 and 10]

Regarding draft article 7, paragraph 2, and article 10, Japan considers these obligations could be implemented by ensuring surrender of a perpetrator to the International Criminal Court.

Regarding draft article 10, Japan understands that “the obligation [here] is to “submit the case to its competent authorities for the purpose of prosecution”, meaning to submit the matter to police and prosecutorial authorities, who may or may not decide to prosecute in accordance with relevant procedures and policies”, as the International Law Commission pointed out in its commentary,<sup>2</sup> and that whether to prosecute an offender is left to the reasonable discretion of prosecutorial authorities.

[Draft article 9]

Japan deems it necessary to provide for the condition “the circumstances so warrant” under draft article 9, paragraph 1, in order to take the alleged offender into custody or take other legal measures to ensure his or her presence.

Regarding draft article 9, paragraph 3, which articulates that a State “shall immediately notify the States under draft article 7, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention”, it may not be possible for Japan to notify the State as referred here under its national law depending on the required information due to confidentiality of investigation, and believes that it is important to ensure flexibility, for example, by modifying it as “notify, *where appropriate*, the State...”.

#### IV. Cluster 4

[Draft article 13]

Reiterating the view that the draft articles should be consistent with the Rome Statute mentioned in the general comments, Japan considers draft article 13 should be consistent with Article 90 of the Statute that provides for competing requests for

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<sup>2</sup> International Law Commission, ‘Draft articles’ (see footnote 1 above) p.93, para.(3) of commentary on draft article 10

extradition and surrender. Specifically, the present draft articles should contain a provision that surrender to the International Criminal Court shall be given a priority when such request to a Party to the Rome Statute is made by the Court.

Draft article 13, paragraphs 2 and 6, articulate the extraditable offences as “covered by the present draft articles”. It would be advisable to place limitations, with such expression as “without prejudice to its national law”, to make it acceptable for more States.

Further, as it will be a requested State that assesses on a case-by-case basis whether an offence is a political offence, further consideration on draft article 13, paragraph 3, which excludes the exception of political offence, would be necessary.

[Draft article 14]

Japan is of the view that mutual legal assistance would be executed within the scope of national law of the requested State, which the Annex, paragraph 6, clarifies.

With this in mind, Japan would like to carefully consider the expression “, including by video conference” in draft article 14, paragraph 3, subparagraph (b). If this provision remains, further discussion on the criterion would be necessary.

## V. *Cluster 5*

[Draft article 5]

Draft article 5 refers to the prohibition on expelling, returning (refouling), surrendering or extraditing a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity. Japan notes with concern whether this is identical to or expands the scope of the existing principle of non-refoulement, which prohibits a State from expelling or returning a person within its territory to where his or her life or freedom would be at risk, as defined in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the International Convention for the Protection of All Persons from Enforced Disappearance.<sup>3</sup> Japan requests that this point should be clarified.

From a practical point of view, Japan believes that further discussion and

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<sup>3</sup> Convention Relating to the Status of Refugees (adopted on 28 July 1951, entered into force on 22 April 1954) 189 UNTS 137 Article 33; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984, entered into force on 26 June 1987) 1465 UNTS 85 Article 3; International Convention for the Protection of All Persons from Enforced Disappearance (adopted on 20 December 2006, entered into force on 23 December 2010) 2716 UNTS 3 Article 16

clarification are needed on how a government considering an expulsion, return, surrender or extradition should apply the following requirements: “substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity” in another country, and “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.

*VI. Annex*

[Costs]

Japan believes a requesting State should bear special costs for hiring an interpreter related to the execution of mutual legal assistance. Thus, Japan suggests including in Annex, paragraph 20, a new provision to articulate that such costs shall be borne by the requesting State.