

*Translated from Spanish*

## **Comments of Mexico on the draft articles on prevention and punishment of crimes against humanity and the recommendation of the International Law Commission**

The following comments and observations of Mexico are submitted pursuant to paragraph 6 of General Assembly resolution 77/249, in response to the invitation to States contained therein. Mexico will first provide specific comments and observations on the draft articles, grouped under the same thematic clusters as served as the basis for delegations' participation in the exchange of views at the resumed session. It will then comment on the recommendation of the International Law Commission contained in chapter IV of the report on the work of its seventy-first session (A/74/10).

By way of introduction, Mexico expresses its satisfaction at the resumed session held from 10 to 14 April 2023. The substantive debate during that session demonstrated the broad interest of delegations in the draft articles. Mexico therefore hopes that this process of constructive exchanges will continue at the second resumed session to be held in the spring of 2024.

As it has already indicated on many occasions, Mexico recognizes the quality and legal rigour of the draft articles. It also reiterates that they reflect a balance between codification and progressive development, and are the result of an inclusive and deliberative process. Mexico makes the following specific comments on certain draft articles with the aim of enhancing the analysis thereof and sharing its national position.

### **I. Specific comments by thematic cluster**

#### **Cluster 1**

##### **Preamble and draft article 1**

- The preamble provides a conceptual framework that sets out the general context and the main purposes of the draft articles. Given that the Commission has drawn inspiration from language used in the preambles of international treaties relating to the most serious crimes of concern to the international community, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute, it would be valuable to consider other relevant instruments relating to the core elements of crimes against humanity, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance, among others.
- It is relevant that, in the fourth preambular paragraph, the prohibition of crimes against humanity is considered to be a peremptory norm of general international law (*jus cogens*).

## Cluster 2

### Draft article 2

- The wording of the draft article, for example, the definition of “crimes against humanity” and the elements of those crimes set forth in paragraph 1, reflects the normative progress evident in the statutes of the international criminal courts and tribunals and in the Rome Statute of the International Criminal Court, in their jurisprudence and in other documents relevant to the Commission’s study.
- Mexico recognizes significant developments, such as the inclusion of the “without prejudice” clause, which implies that the definition contained in the draft articles does not affect any broader definitions provided for in other international instruments, customary international law or national law.
- Mexico also welcomes the fact that the draft articles do not include a definition of “gender”, since that permits a broad interpretation, enabling future developments in the areas of international human rights law and international criminal law to be taken into account.
- There is room for this draft article and, in general, the whole set of draft articles to be strengthened. In that regard, Mexico considers that, in future negotiations, it would be appropriate to analyse other aspects and new crimes such as slave trafficking, forced marriage and gender apartheid. In general, it will be important to strengthen the gender perspective, and the rights of victims and survivors.

### Draft article 3

- The recognition in the draft articles of the general obligations not to engage in acts that constitute crimes against humanity, the obligations to prevent and punish such crimes, whether or not committed in time of armed conflict, and the prohibition on invoking exceptional circumstances as a justification for their commission, is considered appropriate.
- The commission of crimes against humanity is a violation of peremptory norms of international law (*jus cogens*), as rightly stated in the preamble. For that reason, it is essential to examine these obligations in the light of the articles on responsibility of States for internationally wrongful acts, in particular articles 41 and 58 thereof.

### Draft article 4

- This draft article elaborates upon the obligation to prevent crimes against humanity. Mexico considers the reference to the adoption of legislative, administrative or judicial measures to be appropriate.
- It is also important that, as the International Court of Justice determined with regard to the crime of genocide,<sup>1</sup> States act within the limits of international law when fulfilling their obligations of prevention. The reference to that requirement is therefore appropriate.

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<sup>1</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, para. 430.

## Cluster 3

### Draft article 6

- Draft article 6 sets out the various general obligations of States to take measures at the national level to criminalize, prosecute and punish crimes against humanity.
- Crimes against humanity are not specifically criminalized in Mexico. However, like various other States, it does criminalize the majority of the acts when committed on an isolated basis. Mexican law covers offences such as murder, slavery, illegal deprivation of liberty, torture, injury, offences against liberty and normal psychosocial development, discrimination, enforced disappearance and kidnapping.<sup>2</sup> It is important to recognize normative advances of this nature.
- Mexico recognizes two innovative aspects of draft article 6. In particular, it notes the inclusion, in paragraph 8, of the liability of legal persons for the commission of crimes against humanity.

### Draft article 7

- Mexico acknowledges the bases for the establishment of jurisdiction by States set out in draft article 7. Paragraph 1 is in line with the bases for jurisdiction generally recognized in both the domestic law of States and numerous international treaties.
- Mexico considers it relevant to review the question of active personality jurisdiction in the case of stateless persons habitually resident in a State's territory, and also the possibility of including that category of person in relation to passive personality jurisdiction.

### Draft article 10

- The inclusion of the principle of *aut dedere aut judicare* in a dedicated draft article is considered appropriate, bearing in mind that, in order to prevent and punish crimes against humanity, judicial cooperation must be strengthened. The obligation to extradite or prosecute is an important tool in that regard.
- The previous work of the International Law Commission and its final report on the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)" submitted to the General Assembly in 2014<sup>3</sup> are relevant to an analysis of this issue.

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<sup>2</sup> 1931 Federal Penal Code; 2017 General Act for the Prevention, Investigation and Punishment of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 2003 Federal Act on the Prevention and Elimination of Discrimination; 2017 General Act on Enforced Disappearance of Persons, Disappearance Perpetrated by Individuals and the National Missing Persons System.

<sup>3</sup> Report of the International Law Commission on the work of its sixty-sixth session (2014), chapter VI. The obligation to extradite or prosecute (*aut dedere aut judicare*). Available at: <https://legal.un.org/docs/?path=../ilc/reports/2014/english/chp6.pdf&lang=EFSRAC>.

## **Cluster 4**

### **Draft article 13**

- This draft article covers in greater detail the cases where a State decides to extradite. Under draft article 10, the obligation to extradite or prosecute is met when a State submits the case to its competent authorities. The State may also extradite the individual in question. For Mexico, these clarifications are important as a basis for any future negotiations on judicial cooperation.

### **Draft article 14**

- This draft article provides a solid legal basis for the development of mutual legal assistance. It will be important to establish as clearly as possible the terms under which States are required to cooperate, and their obligations and powers in that regard.
- Meanwhile, the draft annex to the draft articles may serve as the legal basis for any judicial cooperation and extradition processes between two or more States that are not bound by a treaty of mutual legal assistance.

### **Draft article 15**

- For Mexico, it is appropriate that there be a mechanism granting the International Court of Justice jurisdiction to hear disputes between States concerning the interpretation and application of obligations arising from the draft articles.
- Such a mechanism should be mandatory and, for that reason, paragraphs 3 and 4 of the current draft article should be deleted.

## **Cluster 5**

### **Draft article 5**

- The inclusion and formulation of the principle of non-refoulement is consistent with various international treaties in force. Mexico also considers that the principle is an essential component of efforts to prevent crimes against humanity. For that reason, Mexico agrees with the relevance and content of this draft article.

### **Draft article 11**

- Due process is a fundamental component of the administration of justice. Paragraph 1 of the draft article must therefore be interpreted in the broadest sense to encompass all stages of criminal proceedings.

- Mexico reiterates the importance of the right to consular notification set out in paragraphs 2 and 3, as contained in article 36 of the Vienna Convention on Consular Relations, which has been subject to interpretation by the International Court of Justice in numerous cases.<sup>4</sup>

## **Draft article 12**

- Generally speaking, Mexico supports the content of this draft article. It stresses that the list of forms of reparation set out at the end of the paragraph is illustrative and not exhaustive. States must be able to determine forms of reparation with flexibility, taking into account the context and specific characteristics of each case.

## **II. Comments on the Commission's recommendation**

As already indicated during the debates of the Sixth Committee, including at the 2023 resumed session, Mexico recognizes the value of the draft articles and agrees with the Commission's recommendation that a convention be elaborated on the basis of the draft articles.

This recommendation was considered by the Sixth Committee for the first time in 2019 and reference was made to it in General Assembly resolutions 74/187, 75/136, 76/114 and 77/249. By means of its resolution 77/249, the Assembly established a deliberative process and a defined road map for giving full consideration to the Commission's recommendation. In the view of Mexico, the broad interest of delegations in these draft articles underscores the need to move to a negotiation stage.

Furthermore, as stressed in these comments and observations, the draft articles have been prepared by the Commission with the necessary rigour and are therefore considered to provide a solid basis for beginning the negotiation process. However, Mexico considers that there is room to strengthen the current draft articles with regard to the aspects already mentioned in its comments on draft article 2.

With that purpose in mind, the various issues raised in the debates of the Sixth Committee, especially at the resumed session held in the spring of 2023, must be appropriately examined. A space for negotiation would provide the opportunity to fulfil the mandate of the General Assembly regarding the codification and progressive development of international law, as set forth in Article 13, paragraph 1 (a), of the Charter of the United Nations.

In conclusion, at its next session, the General Assembly should take a decision on the next steps with regard to the deliberative process and the Commission's recommendation. In the view of Mexico, this decision should allow negotiations to begin with a view to achieving a convention for the prevention and punishment of crimes against humanity, which would close a gap in international law.

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<sup>4</sup> *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, I.C.J. Reports 1998; *LaGrand (Germany v. United States of America)*, I.C.J. Reports 2001; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, I.C.J. Reports 2004; *Jadhav (India v. Pakistan)*, I.C.J. Reports 2019.