Response of the Republic of Türkiye to the International Law Commission’s Request for Comments and Observations on the Draft Articles on Crimes Against Humanity

Türkiye is pleased to respond to the International Law Commission’s (ILC) request for comments and observations on the draft articles on crimes against humanity. Without prejudice to the comments and observations made in our previous statements, we would like to kindly bring to the attention of the Commission the following considerations on the topic.

General comments

Türkiye attaches great importance to the ILC’s past and current work on international criminal law. We believe that ILC’s work on crimes against humanity, carry potential to contribute significant ways to the ongoing global struggle to counter impunity for serious violations of international law. A comprehensive, global codification of "crimes against humanity" would benefit the entire international community, however such codification should accurately reflect well-established principles of international law so as to attract wide acceptance. In that regard, we believe there is still a long way to go forward, given the divergent views among Member States with regard to the content of the draft articles. With this understanding, Türkiye wishes to underline the importance of the principle of consensus within the Sixth Committee as a crucial element for preserving the unity and consistency of international law.

Crimes against humanity, compared to certain other categories of international crimes, are also more susceptible to political exploitation. Hence, addressing the rules concerning their prevention and punishment require special care due to sensitive nature of the subject matter, the proposed rules, concepts and mechanisms should be established with utmost diligence, in a structured and inclusive manner and in full clarity. In order to secure the broadest acceptance of any proposed convention on crimes against humanity, legitimate concerns of all member States must be taken into account and there should be no attempt to impose legal definitions derived from other international agreements that do not enjoy universal acceptance.

The draft articles should reflect widely accepted principles on the subject and contain safeguards against their potential abuse with political motives. In the absence of such safeguards, any convention could give rise to tensions between the States and undermine rather than strengthen the efforts to promote justice.

Preamble and Draft Article 1

As expressed by the members of the Commission themselves and also acknowledged by international tribunals, the definition and components of crimes against humanity are complex in many dimensions. The preamble reflects these complexities. In that regard, we refer to and reiterate concerns in our previous statements, especially regarding the reference made to the Rome Statute in preambuler paragraph 7. Since preamble is meant to show the general direction of the draft convention, we believe the reference to the Rome Statue in preamble is not necessary or useful and may cause hesitation on non-State parties. Thus, we believe further deliberations are required to ensure wider acceptance of the draft articles.

Türkiye welcomes the preamble's emphasis on the primary responsibility of States to investigate and prosecute crimes against humanity, yet we believe further clarification could be provided on the issue of jurisdiction, if we formulate the eight preambuler paragraph as follows:

"Recalling that it is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity and affirming that priority should be given to the territorial jurisdiction".

We recognize that the preamble had been partly inspired by wording found in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter Genocide Convention). That said, we should not rule out considering alternative drafting suggestions for the preamble. For example, we believe that for the purposes avoiding ambiguity, the preamble should include a clear statement that the draft articles would not modify international humanitarian law or criminalize conduct undertaken in accordance with that law, which was *"lex specialis"* in situations of armed conflict.

It is also our firm belief that the prohibition of retroactive application should be explicitly stipulated in the draft articles, since non-retroactivity of treaties is a widely accepted principle of international law.

Türkiye is content with the wording of the draft article 1 which explains the scope and simply declares that the core aim of the draft articles is prevention and punishment of crimes against humanity.

Draft article 2: Definition of crimes against humanity

We believe that draft article 2 is the most important provision in the draft articles, since the definition of crimes against humanity had implications for the entire set of the obligations and rights envisaged in the other provisions. Noting that the definition in the draft article 2 is largely based on the Rome Statute, we would like to point out that this wording could further complicate the modalities of building a legal edifice on consensus since the Rome Statute, to date, has only been acceded by fewer than two thirds of United Nations Member States.

Thus, as a non-party to the Statute, Türkiye suggests that there is value in giving further consideration to the definition of crimes against humanity in the draft articles. Some of the terms used in the definition lacked clarity and could complicate national prosecutions under a future convention based on the draft articles. In that regard, we also would like to reiterate that the key requirements of crimes against humanity, such as "widespread attack", "systematic attack", "attack directed against any civilian population" and "organizational policy to commit such an attack", that are dealt with in draft Article 2, are ambiguous.

As expressed by the Turkish delegation during the preparatory work of the Rome Statute, we support upholding the "conjunction" between the terms "widespread attack" and "systematic attack". We still have concerns that the definition in the Rome Statute over-broadens the scope of the crimes against humanity. We suggest that, in order to avoid ambiguity, the requirements of "widespread" and "systematic" are accepted as two distinct elements, both of which must be met, rather than alternative to one another.

We acknowledge that some Member States support the approach taken by the ILC to retain largely the definition of crimes against humanity contained in the Rome Statute, since a major deviation from the definition in the Rome Statute may cause a dilemma for the state parties to the Statute. However, one should also bear in mind that, disregarding non-State Parties' concerns may also lead to that, only States Parties to the Rome Statute embrace those rules, but others opt out of it.

We also would like to note that the definition of forced pregnancy under draft article 2/2(f) refers to "with the intent of carrying out other grave violations of international law." Commentary gives reference to the Rome Statute, however Türkiye believes further clarification on this criteria is required.

Furthermore, we wish to raise our concerns over *"nullum crimen sine lege"* principle with regards to draft article 2/1(k) which refers to "other inhumane acts". Türkiye cautions against the potential misuse such wording and supports the view that this phrase has to be narrowly interpreted. Such an open-ended wording might create interpretation problems in different legal systems especially when there is no binding mechanism, such as the one established by the International Criminal Court (ICC), in relation to this Convention.

Also as an extension of the idea above, we would like to point out that lacking of the general institution and tools of the ICC while using the definition verbatim may pose a serious problem. It is undeniable that the definitions of core crimes in the Rome Statute are not existing in a loop, but as a part of a complex mechanism and interpreted in accordance with the Elements of Crimes and the jurisprudence the Court developed over the years. Applying the same definition in many different legal systems with no such supplementary tools will possibly cause uncertainty, confusion and complication.

Finally, with regard to the "without prejudice" clause in **draft article 2/3,** we would like to caution against adopting too broad a definition, as the majority of States would not accede to a convention whose application cannot be foreseen.

Draft article 3: General obligations

According to draft 3/1 "States" have the obligation not to engage in acts that constitute crimes against humanity. However, as well-established in international jurisprudence "States" cannot be perpetrators of the international crimes, their duty is limited to prevent and punish them. The international legal liability of States emerging from their failures to comply with their international obligations is not an area within the scope of international criminal law. One of the main purposes of the convention is said to be closing the gap in the prevention of atrocity crimes, Türkiye believes that pushing such a different understanding will create a rift.

Draft article 4: Obligation of prevention

Türkiye considers further clarification is required on obligation to prevent referred to in Article 4. We share the concerns of other States that the current approach creates a broad and potentially ever expanding set of obligations for States, in relation to crimes against humanity. In that regard, we support the suggestion that the phrase "any territory under its jurisdiction", used in draft article 4 (a) and elsewhere in the draft articles, should be amended to "in its territory". In our understanding, the *de facto* control exercised by a State might not be sufficient to establish the legislative, judicial and administrative jurisdiction required for compliance with the

provision. With regard to draft article 4 (b), we have questions on the scope of the obligation to cooperate with other States and relevant organizations, given that there is no guidance on which organizations are referred in this paragraph or how to address situations where such cooperation might not be possible. Thus we believe, it would be more suitable to apply "where appropriate" to the whole of this provision.

Draft article 5: Principle of "*non-refoulement*"

While acknowledging that "*non-refoulement*" is one of the fundamental principles of human rights law, Türkiye believes that the draft article 5 is unclear on as to how this principle will be applied. We share the concerns of other delegations that the phrases such as "substantial grounds to believe" can be open to abuse and politicization of extradition and legal assistance procedures. Thus, we believe further clarification is required on the application of "non-refolument" principle with regard to crimes against humanity.

Draft Article 6: Criminalisation under national law

Paragraph 31 of the commentary to draft article 6 states that, the fifth paragraph of the said draft article is without prejudice to the "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." For clarity, Türkiye recommends that this statement should be incorporated into the text of the draft article itself. This would ensure that this draft article will be interpreted in accordance with well-established principles of international law.

With regard to draft article 6/6 which stipulates that States have to ensure that statutes of limitations shall not apply to crimes against humanity, we support the suggestion that in order to avoid confusion, it would be helpful to state in the draft articles that States were not obligated to prosecute crimes against humanity that had occurred before such offences had been criminalized in their national law, as mentioned by the ILC in paragraph (33) of its commentary to draft article 6.

We believe that draft article 6/8, which provides that the state shall take measures to establish criminal, civil or administrative liability of legal persons for the offences referred to in the current draft article, does not reflect existing customary international law. As acknowledged by the commentary to this draft article, most tribunals to date did not include a provision on criminal liability of legal persons. There is neither sufficient state practice, nor established rules of customary international law to this effect. Thus, we suggest further discussion would be helpful as to the necessity of this provision.

Draft article 7: Establishment of national jurisdiction

One of the fundamental principles of international criminal law is that States have the primary sovereign prerogative to exercise jurisdiction in their national courts over crimes that have been committed in their territory or by their nationals. This principle is consistent with the notion that the State with territorial or active personality jurisdiction is usually best suited to effectively prosecute crimes. Thus, we believe that it is in the interest of justice that territorial or national jurisdiction should be given primacy over passive nationality jurisdiction. In our view, draft Article 7 falls short of addressing the question of priority of jurisdiction in order to avoid the potential conflicts of jurisdictions and should be amended accordingly.

As some member States pointed out, article 7 of the Rome Statute does not apply to the nationals of non-State parties. Thus, Türkiye strongly supports the view that a similar provision should also be included in the draft articles with regard to the nationals of non-State parties. In our understanding draft article 7 only permits States to establish jurisdiction over crimes committed by a national of a State party and does not extend to establishing jurisdiction over nationals of States non-parties.

Draft article 8: Investigation

Türkiye considers it a crucial requirement that investigations should be 'prompt, thorough and impartial'. However, some aspects of draft article 8 warrants further consideration. For example, the scope of the "reasonable grounds" needed prior to taking persons into custody for crimes against humanity is ambigious and open to abuse. In that regard, we reiterate our view that it would be preferable for crimes to be investigated where they occurred for interests of justice.

Draft article 9: Preliminary measures when an alleged offender is present

With regard to draft article 9, it is our firm belief that any legal measure directed against an alleged offender should not be arbitrary and in full compliance with the internationally recognized fair trial standards. We believe that draft article 9 should be reformulated and safeguards should be introduced in order to prevent its abuse for political purposes. In our view, the said provision should not affect the rules of international law on immunity.

Draft article 10: *Aut dedere aut judicare*

Türkiye welcomes inclusion of this principle in the draft articles however we would like to emphasize that the responsibility under this draft article must be read in compliance with other responsibilities of the States according to international and domestic law.

Draft Article 13: Extradition

In relation to draft article 13, we believe that States with territorial jurisdiction are often best placed to achieve justice, given their access to evidence, witnesses and victims. States with nationality jurisdiction also have significant interests in securing accountability with respect to their nationals. In our view, draft article 13 should not be interpreted as requiring States to extradite their nationals.

With respect to the political offence exception, we share the concerns raised by other delegations that the current wording of draft article 13/3 made it sound as if the principle of non-extradition for political offences was being cancelled outright. That presented a possible loophole that could allow States to circumvent due process in extradition cases by claiming that crimes against humanity had been committed. Given that the future outcome of the draft articles could not cover every possible scenario, serious thought should be given as to whether it was appropriate to leave no room for discretion by States. The inclusion of safeguards was crucial to preventing the draft articles from being abused and to promoting their wide acceptance by States.

Draft article 14: Mutual legal assistance

In our view, the draft article 14 should not seek to encompass all mutual legal assistance issues that might arise during the investigation and prosecution of crimes against humanity. We

believe certain aspects of the draft Article 14 require further discussions, especially those regarding the use of information by the requesting state. In general more clarity is required regarding issues of mutual legal assistance.

Draft article 15: Settlement of disputes

With respect to draft article 15, Türkiye welcomes the inclusion in paragraph 3 of a process by which States could declare that they did not consider themselves bound by paragraph 2. The opt-out provision could have a positive influence on the accession and ratification of a future convention based on draft articles.