



Resumed 78th session of the United Nations General Assembly Sixth Committee: Agenda item 80 crimes against humanity – Cluster II (definition and general obligations)

2 April 2024

Statement by Ms Alexandra Hutchison, Legal Adviser and First Secretary, Permanent Mission of Australia to the United Nations

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Thank you Chair,

Australia acknowledges the particular importance of this Cluster on the definition of crimes against humanity and general obligations.

We have reflected closely on the statements, submissions and other observations made to date on the draft articles within this Cluster by States, observers, civil society, academia and others.



Draft article 2

From the outset, Australia reaffirms its in principle support for the definition of crimes against humanity set out in draft article 2.

We acknowledge this definition draws heavily from Article 7 of the Rome Statute of the International Criminal Court (ICC), to which some United Nations (UN) member States are not party.

However, as others have said this week, the International Law Commission (ILC) did not prepare these draft articles in a vacuum.

And draft article 2 reflects what was – and in our view largely still is – the prevailing view of the international community on the definition of crimes against humanity after decades of evolution from the Nuremberg Charter and beyond and robust multilateral negotiations.



We note there are different views on whether or not this definition reflects customary international law.

However, as others have said this week, the purpose of the draft articles was not limited to codification of customary international law. It was about putting forward a balanced set of draft articles that could garner the widest possible support as the basis for negotiation by States.

Australia's support for draft article 2 is not based simply on its consistency with the Rome Statute.

Rather, it is because there is benefit in basing negotiations on a definition that has such broad and cross-regional acceptance and implementation into national laws.



Doing so helps to avoid the fragmentation of international criminal law and to instead promote harmonisation to the fullest extent. This, in turn, strengthens the basis for international cooperation and the consistent application of the law, supports the principle of complementarity and reduces the space for disputes to arise.

Further, Australia does not agree with the assertion that the use of this definition in a future convention would exclude States not party to the ICC from joining the convention nor somehow indirectly bind them to obligations under the Rome Statute.

Chair,

Upon reviewing States' submissions and statements, Australia wishes to reiterate our support for some particular elements of draft article 2.



First, we fully support the requirement in the chapeau of draft article 2 that acts must be committed as part of a ‘widespread or systematic attack’. After decades of jurisprudential development, there is a clear international consensus that these are disjunctive, not cumulative, requirements.

Second, Australia supports the inclusion of a ‘without prejudice’ clause in paragraph (3) of draft article 2. We do not consider this creates any risk of ambiguity in the scope of obligations, as some States have suggested.

Rather, this provision simply makes clear that the definition in draft article 2 is the floor, not the ceiling. It is the minimum base that States would be required to reflect in their national criminal laws as a common foundation for international cooperation. But this would not preclude States from choosing to implement stronger protections under their national laws, nor would it preclude the further development of international law over time.

The ‘without prejudice’ clause is, therefore, an important inclusion to ensure the coherence of the draft articles with other national, regional and international legal frameworks, now and into the future.



Third, Australia notes there are different views on whether or not the draft articles should a definition of ‘gender’.

We support the ILC’s decision not to include such a definition and agree with Canada that this is the best way to bridge different views among States.

Further, we note that there is not the same *need* to include a definition of ‘gender’ in the draft articles as there as in the Rome Statute. For the Rome Statute, the inclusion of such a definition was necessary as it was establishing an international court that required clearly defined jurisdiction.

These draft articles, however, serve a different purpose of empowering States to fulfill their primary responsibility to prevent and punish crimes against humanity. States do not require a definition of gender in any future convention to be able to exercise their jurisdiction under it. The absence of a definition of ‘gender’ instead enables States to apply such definitions that used within their national systems.



Chair,

Notwithstanding that Australia supports the definition set out in draft article 2, we acknowledge there may be benefit in considering some adjustments to ensure it reflects the most recent normative developments, avoids fragmentation of international law and thereby remains fit for purpose in preventing and punishing crimes against humanity.

For example, in Australia's view, under sub-paragraph (1)(h) of draft article 2, further consideration should be given as to whether persecution should be recognised as a standalone crime without any nexus requirement to another crime against humanity, consistent with the definition of persecution found in customary international law and other international criminal law treaties.

Separately, Australia also considers that if the list of protected grounds with respect to persecution were to be reopened in future negotiations, there would be value in recognising Indigenous Peoples' status as a protected ground. Indeed, Australia is further considering how Indigenous perspectives could be mainstreamed throughout the draft articles.



Chair,

As part of the adjustments we are considering to draft article 2 to support its object and purpose, Australia is also engaging with proposals by States and civil society organisations to include additional crimes.

First, Australia would welcome further consideration of the proposal from Sierra Leone and others to incorporate the slave trade in the definition of crimes against humanity.

International law has long recognised the serious nature of acts of slave trade as a *jus cogens* norm and requires States to prevent and punish them. Yet, despite their gravity, contemporary international treaty law and jurisprudence continue to overlook them.



Second, consistent with the proposals from a number of delegations, Australia considers there is merit in considering whether draft article 2 should codify forced marriage as a crime against humanity, noting it has been recognised as such in a number of significant cases before international criminal courts and tribunals.

Finally on draft article 2, Australia is also considering ways in which the draft articles could address conduct that has been described as ‘gender apartheid’, as well as proposals to recognise reproductive violence as a crime against humanity.

Draft article 3

Chair,

I will now turn briefly to draft article 3. Australia supports the general obligations set out in this draft article.



In particular, we support the important reaffirmation in paragraph (2) of draft article 3 that crimes against humanity can be committed both in peacetime and during armed conflict, where such acts are committed as part of a widespread or systematic attack directed against any civilian population.

We note that some States have questioned whether crimes against humanity can be committed in peacetime, arguing that the use of the term ‘civilian population’ in the chapeau of draft article 2 somehow implies that the scope of crimes against humanity is limited to acts committed in armed conflict.

Australia does not agree with this assertion and nor is it supported by the jurisprudence of international courts and tribunals, as outlined in the ILC’s commentaries to the draft articles.

On the contrary, Australia considers that the effect of the term ‘civilian population’ in the chapeau is to generally exclude non-civilians (i.e. combatants) from the class of victims of crimes against humanity.



Acts that would otherwise constitute crimes against humanity against combatants in the context of an armed conflict would amount to war crimes or violations of international humanitarian law, which are classes of crimes dedicated specifically to addressing violations in armed conflicts.

Draft article 4

Chair,

Australia further supports the ILC's approach to the obligation to prevent crimes against humanity under draft article 4.

We appreciate that it provides high-level and non-exhaustive guidance on the scope of this duty, while maintaining a level of flexibility for States when implementing preventive measures that are most appropriate for their national systems.



It also makes clear, for the avoidance of doubt, that all preventive measures and interstate cooperation must be in conformity with international law.

We consider the balance struck by the ILC in draft article 4 is sufficient and appropriate for States to be able to implement the duty to prevent effectively, noting also the existing jurisprudence on such an obligation, as outlined in the ILC's commentaries.

Nonetheless, Australia notes that some States have suggested draft article 4 should be elaborated for clarity or precision. We remain open to engaging on specific proposals to that effect.

Chair,

In conclusion, we remain convinced that the draft articles in this Cluster provide a strong and balanced basis for future negotiations on a convention on crimes against humanity.



I feel compelled to emphasise that this does not mean a cut and paste exercise. As we have said, Australia sees merit in making adjustments, including to the definition, that support the overall objective of preventing and punishing crimes against humanity.

But the Sixth Committee's deep engagement to date on the draft articles continues to give us confidence that States are ready to use them as a valuable starting point for future negotiations.

Thank you.