

Crimes against humanity

Agenda item 80

78th session (resumed)

DRAFT DECLARATION FOR THE USE OF EXCHANGE OF VIEWS ON

THEMATIC CLUSTER II

DRAFT ARTICLES 2, 3 AND 4

Madame Chair, and distinguished delegates,

We would like to share our views on Cluster II. With regard to Article 2, Türkiye would like to reiterate its concern that modelling the definition largely after the Rome Statute could further complicate the modalities of building a legal edifice on consensus. As was previously pointed out by some Member States, Rome Statute is not signed or ratified by more than one-third of UN Member States. Thus, Türkiye remains hesitant about the extent to which draft article 2 reflects customary international law. To further substantiate our concerns, it should be noted that existing definitions in international treaties and instruments differ on a variety of issues.

As a non-party to the Rome 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 proposed future convention based on the draft articles, such as “attack directed against any civilian population” and “organizational policy to commit such an attack”. In that regard, we refer to our previous statements.

In this context, we also would like to reiterate that our view, 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.

Furthermore, Türkiye notes that the phrase ‘with knowledge of’, owing to the ambiguity surrounding the elements and extent of ‘knowledge’, causes diverging opinions in international courts and tribunals. For this reason, Türkiye is of the opinion that the phrase ‘with knowledge of’ must be clarified through the widest possible consensus.

With regard to the question as to ‘whether “persecution” should be a standalone crime, and whether to delete the connection to other acts in the paragraph’, Türkiye is not fully convinced about reconstructing ‘persecution’ as a standalone crime under the customary international law. We believe that the definitions of the underlying offences of ‘persecution’ should be clarified, since in the draft articles and customary international law ‘persecution’ is an extremely vague, almost kind of an umbrella term.

We would like to take this opportunity to stress that as another civil law tradition country we agree with Brazil’s position that vague and catch-all terms like other inhumane acts are in contradiction with the strict legality principle that we adhere to.

Finally, with regard to the “without prejudice” clause in draft article 2/3, we would like to note that there exists no need to make such a reference given that, as is well established, international law is not and cannot prevent states from accepting different definitions under their national jurisdictions. Even in circumstances where a State has entered into a treaty obligation to this effect, as a natural consequence of the principle of sovereignty, a broader or narrower definition in domestic law will not result in the invalidity of that definition.

A particular issue that the Turkish Delegation has observed is that there is a serious possibility that the omission of paragraph three of the definition provided in the Rome Statute may cause disagreements among States and a considerable number of States may refrain from acceding a future convention for this very reason. Minding that, Türkiye calls for further studies and an exchange of views to reach the broadest possible consensus on the matter for enhancing the success of a future convention.

Article 3

With regard to draft article 3/1, Türkiye finds the wording vague and misleading. As is widely accepted, “States” cannot be perpetrators of international crimes, their duty is limited to prevent and punish them. With this understanding, we suggest the following reformulation: ‘Each State has the obligation to refrain from establishing and implementing policies that may lead to a widespread and systematic engagement of the acts that constitute crimes against humanity under its territory.’

In the context of this draft article, Türkiye reiterates its previous suggestion that the draft articles would not alter international humanitarian law (IHL) or international human rights law, which constitute *lex specialis*.

Türkiye concurs that draft article 3/2 might be expanded to confirm that CAH can be committed by non-state actors as well.

Türkiye also believes that clarification is needed about the responsibility of ‘failed states’ if CAH occurs on their territories.

As to the question on the scope of obligation of prevention, as is established by the ICJ in *Bosnia v. Serbia*, ‘it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide (para 430)’. Türkiye shares this understanding as to CAH as well, which clearly emphasises that its obligation is one of conduct and the extent of the obligation should be limited to the state’s actual capabilities and powers at the time of the offence.

Article 4

Türkiye considers further clarification is required on the 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 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”.

Türkiye considers that a future convention may benefit from an explicit recognition of the well-established principle that a state's responsibility is limited to the extent of its powers and authority.

Further with regard to the draft article 4/1(a), the term 'or other appropriate preventive measures' appears rather ambiguous and too broad. Türkiye believes that the phrase should be further clarified.

As to draft article 4 (b), regarding the scope of the obligation to cooperate with other States and relevant organizations, 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.

As to the question, 'whether there is a need to include a reference to cooperation with international courts and tribunals after "as appropriate"', the inclusion of such a reference may contradict non-State parties' positions, because the membership to international courts and tribunals and their jurisdictional reach is limited. Alternatively, we suggest, the addition of such a reference and thus the obligation in question may be explicitly limited to the member states who recognized the jurisdiction of the court or tribunal in question.

I thank you.