

## **Crimes against humanity**

### **Agenda item 80**

#### **78<sup>th</sup> session (resumed)**

#### **DRAFT DECLARATION FOR THE USE OF EXCHANGE OF VIEWS ON**

#### **THEMATIC CLUSTER III**

#### **DRAFT ARTICLES 6,7,8,9 AND 10**

Thank you Mr. Chair,

Our delegation is going to have several observations regarding the articles under this thematic cluster.

#### **Article 6**

With respect to Draft Article 6, paragraph 1, we concur with the view that the current definition of crimes against humanity in Draft Article 2 does not necessarily align with customary international law. We reiterate that variations exist among the domestic laws of States that have criminalized crimes against humanity, as highlighted in the commentary. For this reason, we suggest that the requirement stipulated in Draft Article 6/1 must not be construed as mandating states to adopt verbatim the definition provided in Draft Article 2.

As regards Draft Article 6, paragraph 5, we consider that further clarification is required regarding the rather ambiguous term ‘necessary measures’. As stated in the ILC commentary, the fifth paragraph 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 the sake of the principle of legality, Türkiye recommends that this statement should be incorporated into the text of the draft article itself.

With regard to Draft Article 6, paragraph 6, we welcome the clarification made by the ILC in paragraph 33 of its commentary, according to which States are not-obligated to prosecute crimes against humanity that occurred before such offences were criminalized in their national law. We believe that this clarification should be incorporated into the draft articles as well.

With reference to our previous comments, we would like to restate that paragraph 8 does not reflect existing customary international law. As acknowledged in the commentary, mandates and treaties of most courts and tribunals to this date have not included a provision on criminal liability of legal persons. The liability of legal persons has also not been included in many treaties addressing crimes at the national level. There is neither sufficient State practice nor established rules of customary international law to this effect. Thus, the said provision should be excluded.

#### **Article 7**

Turning to Draft Article 7, my delegation reiterates the legal principle that states have the primary entitlement stems from their sovereignty to exercise jurisdiction in their national courts over crimes 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. We believe that a direct reference to this principle should be included in the article. Türkiye also concurs with the view that Draft Article 7/1(a) and Article 7/2, should refer to a State's 'territory', rather than 'territory under its jurisdiction'.

With regard to Draft Article 7, paragraph 1(c), unlike territorial or active personality jurisdiction, passive nationality jurisdiction has a long-standing contentious status in international law. The inclusion of passive nationality jurisdiction poses a clear risk of being exploited for political purposes and causing conflicts of jurisdiction. Indeed, this has been one of the very reasons why passive personality jurisdiction was left out of the Rome Statute. Thus, we strongly suggest omitting any reference to passive nationality jurisdiction.

It is also our understanding that universal jurisdiction under Draft Article 7 can only be exercised in respect of nationals of State Parties to a possible future convention. The said Draft Article only permits States to establish jurisdiction over nationals of other State Parties.

## **Article 8**

As to Draft Article 8, my delegation is of the opinion that the term "reasonable grounds" is ambiguous and open to abuse. Furthermore, Draft Article 8 should express that the effectiveness and promptness of the investigation will not be subject to an objective test, rather such an assessment will be made in relation to the capacity and factual realities of each State in question. Draft Article 8 is also missing the necessary safeguards to prevent misuse for political purposes.

Türkiye concurs with the view that Draft Article 8 should refer to a State's 'territory', rather than 'territory under its jurisdiction'. Similarly, we firmly believe that giving priority to States with the strongest jurisdictional links is also an essential step in order to reduce 'jurisdictional conflicts' and ensure effective investigations.

Furthermore, from the textual reading of Draft Article 8, it appears that the mere commission of acts constituting crimes against humanity, even without the necessary contextual element present for the occurrence of crime against humanity *per se*, may give rise to the State's duty for investigation. To avoid such confusion and ensure clarity, we suggest that the draft text should be amended, and the contextual element should be explicitly referred to.

## **Article 9**

With regard to Draft Article 9, we believe that safeguards should be introduced in order to prevent abuses for political purposes. The said, provision should not affect the rules of international law on immunity. Given the nature of draft article 9, we believe that an explicit reference to this very principle is necessary.

With respect to the final paragraph of Draft Article 9, the Turkish legal system does not permit an immediate notification of the State in the manner mentioned in the article, since our legal system aims to protect the alleged offender's fundamental rights by entailing explicit consent or request of the offender to make such notification. As pointed out by some other States, confidentiality of investigation may also constitute a legitimate reason for the delay or omission of such a notification. In light of these facts, in order to provide flexibility, the relevant part of the draft provision could be modified as follows: 'When a State, pursuant to this draft article, has taken a

person into custody, it *shall notify, where appropriate*, the States under draft article 7, paragraph 1’.

As to the question ‘whether the words “as appropriate”, in para. 3, give excessive discretion to the investigating State?’, Türkiye believes that it is necessary to provide flexibility in treaty provisions concerning an issue such as investigations, which is at the core of state sovereignty. Since the expression 'as appropriate' serves the purpose of providing this flexibility it must remain in the scope of the article.

## **Article 10**

Türkiye is hesitant about whether Draft Article 10 is necessary given that Draft Article 7, paragraph 2 is already recognised *aut dedere aut judicare* principle. We suggest that either the necessity of Draft Article 10 in relation to Draft Article 7/2 should be clarified or Draft Article 10 should be omitted.

We also reiterate that the strongest jurisdictional link should take precedence. We are thus against the idea that the obligation to prosecute should be considered to take precedence over the obligation to extradite as a general rule.

For the Turkish Delegation, the reference to international criminal courts and tribunals in the text of the draft article 10 is undesirable for two reasons. First, as pointed out by some other member States, while international criminal courts and tribunals play a complementary role, Draft Article 10 is formulated in a manner that implies the status of national jurisdictions and the jurisdiction of international criminal courts and tribunals are on par. Second, the jurisdiction of international criminal courts and tribunals is usually not accepted by a considerable number of Member States. For these reasons, the reference to international courts and tribunals should be omitted or should be regulated in a separate paragraph, in which it should be clarified that these courts and tribunals have a complementary role, and the relevant obligation only applies to the Member State to the court or tribunal in question.

Finally, with regard to the question as to ‘whether there is a need to explicitly address the question of universal jurisdiction?’, Türkiye would like to stress that while universal jurisdiction is not recognised by all states, the understanding of the States that do recognise such a jurisdiction varies. Therefore, Draft Article 10 should avoid creating obligations in relation to universal jurisdiction.