



UN GENERAL ASSEMBLY SIXTH COMMITTEE: Resumption of the Seventy-Seventh Session

Crimes against humanity: Cluster 3

12 April 2023

Statement by Australia

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Thank you Mr Chair,

Cluster 3 sits at the heart of the International Law Commission's (ILC) draft articles to ensure criminal accountability for crimes against humanity.

Australia supports the general approach adopted by the ILC to these provisions and their objectives. We will offer some brief observations today on how they might be further refined and improved.

Draft article 6: Criminalisation under national law

First, Australia supports the approach taken in draft article 6 to establish a framework of minimum common standards among States for legislating criminal responsibility and punishment of crimes against humanity.



In that context, the obligation in paragraph 1 is particularly important. That is, States should ensure crimes against humanity – *as defined* in draft article 2 – constitute offences under national law.

Without this provision, there would be a risk of States relying on existing provisions in their domestic criminal law. This would see continued divergences across national systems, leading to opportunities for impunity for the particularly heinous conduct that constitutes crimes against humanity.

Australia also strongly supports the inclusion of paragraph 5 to preclude the use of official capacity as a substantive defence against criminal responsibility.

This is separate to the issue of immunities of State officials and does not affect their application. These immunities are regulated through customary international law and treaty law on immunities for particular classes of officials.

Australia supports the ILC's decision not to address this issue in the scope of the draft articles.

Australia further welcomes that paragraph 8 of draft article 6 provides for the liability of legal persons for crimes against humanity in domestic legal systems where such personality is recognised.



We are cognisant of the differences in national approaches to the liability of legal persons for crimes. However, in our view, paragraph 8 is sufficiently flexible to accommodate diverse legal systems.

Draft article 7: Establishment of national jurisdiction

Moving to draft article 7, Australia supports the approach adopted to require States to establish jurisdiction over crimes against humanity on a number of grounds, without being unduly prescriptive in how that jurisdiction is exercised.

This approach provides the necessary flexibility to accommodate different factual circumstances and to support the obligations under draft article 10 (*aut dedere aut judicare*).

Australia observes that paragraph 2 requires States to establish jurisdiction over crimes against humanity allegedly perpetrated by a person present on their territory.

We support this paragraph, which requires the territorial presence of the alleged offender, as a form of territorial jurisdiction.

We consider that, taken as a whole with the rest of draft article 7, it establishes sufficient jurisdictional bases through which States can meet the objective of ensuring accountability for crimes against humanity.



Draft article 8: Investigation

Turning to draft article 8, Australia strongly supports the requirement that investigations should be ‘prompt, thorough and impartial’.

We further support that investigations should be conducted where the State has reason to believe crimes against humanity are being committed or have been committed on its territory – not only where formal allegations have been made.

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

For draft article 9, Australia considers that paragraph 1 provides States with an appropriate measure of discretion to assess whether apprehension into custody is ‘warranted in the circumstances’.

Given the general nature of this obligation, Australia suggests that paragraph 1 could be strengthened by providing further detail on the considerations that should inform a State’s decision to take an alleged offender into custody.

In our view, such considerations would include, inter alia:

- whether the relevant authorities are satisfied to a reasonable standard that the person has committed crimes against humanity prior to taking the person into custody;



- the potential application of international law with respect to immunity;
- whether the State has received a request from another State to take the alleged offender into custody to ensure that person's presence at extradition hearings.

This would ensure such decisions accord with procedural safeguards and other rules of international law.

Australia also suggests that paragraph 1 should include a reference to the fair treatment obligations owed to alleged offenders held in custody in accordance with draft article 11 (fair treatment of the alleged offender).

Draft article 10: *Aut dedere aut judicare*

Finally, in relation to draft article 10, Australia considers that this provision appropriately preserves prosecutorial discretion to decide whether sufficient evidence exists to support a prosecution.

Thank you.