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

Crimes against humanity: Cluster 5

13 April 2023

Statement by Australia

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Thank you Chair,

The provisions in Cluster 5 build into the draft articles an array of fundamentally important protections for victims, witnesses and those at risk of being subjected to crimes against humanity, as well as alleged offenders.

Draft article 5: *Non-refoulement*

Australia appreciates the intention behind draft article 5 on *non-refoulement*.

We acknowledge the views from some States that it may overlap with existing obligations under international law.

In our view, compliance with these existing obligations would, in the majority of instances, likely constitute compliance with draft article 5. We note that the Special Rapporteur appears to share this view, having observed in his Fourth

Report that draft article 5 was consistent with *non-refoulement* provisions contained in numerous treaties, and strengthened them in the context of crimes against humanity.

In terms of the specific threshold that would give rise to the *non-refoulement* obligation, Australia's view is that for there to be 'substantial grounds' for a person to be in danger of being subjected to the relevant conduct, there must be a personal, present, foreseeable and real risk to that person.

Our view is that this standard – established by various expert treaty bodies and international courts – would apply in respect of *non-refoulement* arising in relation to a crime against humanity.

While the commentaries helpfully reinforces this point with a number of examples, draft article 5 itself could potentially provide greater clarity around this standard.

Draft article 11: Fair treatment of the alleged offender

Australia is supportive of draft article 11 on the fair treatment of the alleged offender, and the important protections it prescribes.

These safeguards are critical for the legitimacy of any accountability efforts.

Our preliminary view is that draft article 11 strikes the right balance, without being too prescriptive, in relation to the wide array of rights to which a suspect or defendant before a national court is entitled under international law.

We do not consider it necessary for the draft articles to elaborate on the well-established body of international human rights law that defines the meaning and scope of 'fair treatment' and 'fair trial'.

Draft article 12: Victims, witnesses and others

Finally, Australia is supportive of draft article 12, which addresses the rights of victims and witnesses in a way that is consistent with other treaties concerning crimes.

We would suggest that paragraph 1 of this article could benefit from clarification that this obligation would apply with respect to alleged crimes against humanity occurring *'within the territory under that State's jurisdiction'* – an interpretation that seems to be reflected in the commentaries.

As foreshadowed during Cluster 1, Australia is also considering how the draft articles could strengthen the integration of gender equality and First Nations perspectives. Draft article 12 could potentially benefit from this deeper analysis and we would welcome further discussion in this regard.

Thank you.