Translated from Spanish

Comments and observations of the Argentine Republic on the draft articles of the International Law Commission on crimes against humanity

4 December 2023

I. Preliminary comments

1. In line with its commitment to international criminal law and the international criminal justice system, international human rights law and international humanitarian law, and in view of the inadequacy of the current, incomplete treaty rules and obligations arising from customary international law, the Argentine Republic reaffirms the importance of having an international convention on the prevention and punishment of crimes against humanity that would enshrine States' commitment not to engage in crimes against humanity, to prevent and punish such crimes, and, as appropriate, to extradite in respect of such crimes. Notwithstanding the existence in customary law of the obligation to prevent and prosecute crimes against humanity, a multilateral instrument that defines the content and scope of customary law is required.

2. The Argentine Republic appreciates the efforts of the International Law Commission to prepare the draft articles on prevention and punishment of crimes against humanity, which are aimed at establishing a treaty framework specific to the issue through the negotiation of a multilateral convention.

3. The domestic law of Argentina provides for a high level of protection and engagement in respect of the prevention and punishment of crimes against humanity. In this regard, it is worth mentioning Act 26.200, on the implementation of the Rome Statute of the International Criminal Court, which establishes a penal system for offences over which the Court has jurisdiction, and which regulates cooperation between the State of Argentina and the Court. This law provides that the acts described in the Rome Statute, which include crimes against humanity, are punishable in the Argentine Republic. It should also be noted that the country grants constitutional status to, among other human rights instruments, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the General Assembly on 26 November 1968 and ratified by Act No. 24.584. In addition, Act No. 27.156 provides that the penalties or criminal proceedings for the crime of genocide, crimes against humanity and war crimes contemplated in the Rome Statute and in international human rights treaties with constitutional status shall not be subject to amnesty, pardon or commutation, under penalty of the absolute and irrevocable nullity of the act that provides for such amnesty, pardon or commutation. It is also worth highlighting that, not only has international criminal law been incorporated into national law, but international provisions have also figured in Argentine jurisprudence in recent years, as, for example, in the judgments in the *Arancibia Clavel*, *Simón* and *Mazzeo* cases.

II. Articles by cluster

1. Cluster 1 (preamble and article 1)

The Argentine Republic believes that the principles included in the draft preamble are appropriate and valuable as they offer a conceptual framework for the draft articles. At the same time, they are consistent and ensure complementarity with the various existing treaty regimes that are applicable, to a certain extent, to crimes against humanity (such as the Rome Statute, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Convention for the Protection of All Persons from Enforced Disappearance).

With regard to the fourth preambular paragraph, the Argentine Republic agrees that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*), which entails *erga omnes* obligations for States to prevent, prosecute and, as appropriate, to extradite. This is recognized by the Commission in its commentary to the preamble to the draft articles under discussion and in article 26 of the draft articles on responsibility of States for internationally wrongful acts. This matter, moreover, has been addressed in jurisprudence.

In this respect, it is worth recalling that in paragraph 3 of its resolution 3074 (XXVIII), the General Assembly declares that "States shall cooperate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose".

2. Cluster 2 (articles 2, 3 and 4)

With regard to article 2, Argentina approves of the use of article 7 of the Rome Statute – which was negotiated and agreed upon by 160 States and currently has 137 signatory States and 124 States parties – as the basis for the definition of crimes against humanity.

Notwithstanding the foregoing, several subsequent legal developments, such as the definition of "forced disappearance of persons" set forth in the 1994 Inter-American Convention on Forced Disappearance of Persons and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, are also significant.

The above-mentioned treaties do not include the phrase "with the intention of removing them from the protection of the law for a prolonged period of time" used in the draft article 2, paragraph 2 (i), which is the main difference between the definitions.

The Argentine Republic believes that it would be preferable to use a definition that is in line with the latest legal developments, like that used in the International Convention for the Protection of All Persons from Enforced Disappearance, which contains the expression "placing such a person outside the protection of the law" but does not include a reference to intention or time, like the definition given in the draft articles does.

Argentina considers appropriate the removal of the definition of the term "gender", previously

included in article 3, paragraph 3, which relied on a binary gender system based on biological classification, without taking into account the broad concept of gender identity.

Article 3 sets out the general obligations on States not to engage in crimes against humanity and to prevent and punish such crimes, even under exceptional circumstances, such as armed conflict, internal political instability or any other public emergency. In other words, States have the obligation to prevent crimes against humanity under all circumstances, including in the aforementioned exceptional situations. Article 4 contains a specific obligation for States to adopt effective legislative, administrative, judicial or other appropriate and effective preventive measures, and to cooperate with other States and with relevant international organizations and other organizations, as appropriate, to prevent such crimes.

In the commentary to draft article 3, the Commission notes that, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice decided that the substantive obligation under article I of the Genocide Convention, whereby the parties undertake to prevent and not to commit the crime of genocide, was not, on its face, limited by territory, but, rather applied "to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations ... in question". Argentina understands this clarification to be applicable to both draft articles 3 and 4, since the Commission explains in the commentary to draft article 4 that that provision elaborates upon the obligation to prevent crimes against humanity that is set forth, in general terms, in draft article 3.

3. Cluster 3 (articles 6, 7, 8, 9 and 10)

The Argentine Republic reiterates that, in order to prevent potential impunity and guarantee the right to a fair trial and due process, article 6, on criminalization under domestic law, should include a provision establishing an obligation for States to take the necessary measures to ensure that their national laws provide for crimes against humanity to be investigated and prosecuted in accordance with procedural rules and in ordinary courts.

A provision explicitly prohibiting amnesties for those responsible for crimes against humanity should also be included in article 6. States should not be able to invoke provisions of national law, such as those granting amnesty, to avoid the obligation to investigate and punish those responsible.

Although article 7 includes the traditional principles for the exercise of criminal jurisdiction (territorial jurisdiction, active personality jurisdiction, passive personality jurisdiction, jurisdiction when the alleged offender is present in a territory under the jurisdiction of the State and it does not extradite or surrender the person), without excluding the exercise of any other jurisdiction provided for in national law, it might restrict the broad concept of universal jurisdiction. Universal jurisdiction is in itself a basis that enables jurisdiction to be exercised based solely on the nature of the crime, regardless of where it was committed, the nationality of the victim or the alleged offender, or any other connection to the national interests of the State exercising jurisdiction.

With regard to article 10, which sets forth the obligation to extradite or prosecute (*aut dedere aut judicare*), the Argentine Republic considers that this is a relevant provision to prevent crimes from going unpunished when the requested State does not grant extradition when the suspect is in its territory.

4. Cluster 4 (articles 13, 14, 15 and annex)

With a view to making a substantive contribution in respect of the concept of extradition (article 13), the Argentine Republic reiterates the following suggestions, which it put forth during the first substantive discussion of the draft articles:

- Include a reference to the channels for the transmission of extradition requests, namely, the diplomatic channel and the central authorities, as was done in the annex on requests for assistance;
- Refer to the concept of pretrial detention with a view to extradition and the possibility of pretrial detention based on a Red Notice of the International Criminal Police Organization (INTERPOL) or by means of the diplomatic channel;
- Incorporate the concept of extradition *ficta*, which is a useful tool when extradition for purposes of enforcing a sentence is refused owing to the nationality of the person (article 13, paragraph 10);
- Include the concept of simplified extradition for cases in which the extraditable person gave his or her consent (article 13, paragraph 8);
- Provide for the possibility that the scope of the draft articles may go beyond legal qualification;
- Include in the annex a section on pretrial detention in cases of extradition and on extradition that sets out the requirements of these international legal cooperation tools;
- Include the principle of speciality, which establishes that an extradited person cannot be prosecuted by the requesting State for acts committed prior to and that are different from those constituting the crime for which extradition was granted.

With regard to article 14, Argentina reiterates that it would be useful to provide for the taking of statements by videoconference (article 14, paragraph 3 (b)). It is suggested that a reference to obtaining digital evidence should be included (article 14, paragraph 3). The reference to the transmission of information on a spontaneous basis as a mechanism for formal international cooperation, whereby the competent authorities of a State transmit information to the competent authority in another State, without receiving a prior international legal request for assistance in criminal matters (article 14, paragraph 6), is relevant.

Regarding the possibility of entering into agreements or arrangements with international mechanisms established by the United Nations or by other international organizations and that have a mandate to collect evidence with respect to crimes against humanity, it should be noted that

such agreements are different in nature from the traditional mechanisms for international legal cooperation, which regulate cooperation between national jurisdictions of different States, and it is therefore suggested that details on the structure and implementation of such agreements or arrangements should be included (article 14, paragraph 9).

With respect to the annex, in principle, Argentina considers relevant the designation of the central authority as a transmission channel. While the diplomatic channel is an available alternative, INTERPOL is generally foreseen as the conduit for pretrial detention for extradition purposes. More detail should therefore be provided where INTERPOL is referenced with respect to the processing of mutual legal assistance requests.

Central authorities can help expedite and facilitate requests for assistance by serving as a legitimate and direct formal channel between bodies of different countries with competence and expertise in the area of international legal cooperation. This expertise, in turn, facilitates the resolution of issues that arise in the processing of letters rogatory; such issues are strongly linked to differences in legal systems.

Furthermore, central authorities have mechanisms to collaborate with each other and tools that enable them to consult each other on requirements and procedures and the progress of requests, and even to exchange requests and results.

Regarding the procedures for submitting a request, it is suggested that the possibility of transmission by electronic means, the legal classification of the offence and the penalty should be explicitly referenced.

In addition, it would be useful to include an explicit reference to exemption from legalization and other similar formalities.

5. Cluster 5 (articles 5, 11 and 12)

The Argentine Republic considers it important to include provisions that address the situation of victims and witnesses, including provisions on access to justice, protection, participation and reparation. In this regard, Argentina welcomes article 12 and suggests solidifying the terms used by including a definition of "victim" of crimes against humanity that would be compatible with possible definitions or concepts set out in local jurisdictions. Furthermore, it is essential that this article include the right of victims to know the truth about the circumstances in which the crimes occurred. In this regard, the provisions contained in the Rome Statute and the Rules of Procedure and Evidence of the International Criminal Court could be used as a reference.

In practical terms, as the Argentine Republic has already pointed out, it should be borne in mind that, in some situations, the individuals requested to testify in person as victims, relatives or experts in the State investigating the facts, do not have travel documents. For example, stateless persons, refugees in camps of the Office of the United Nations High Commissioner for Refugees and persons in asylum situations often do not have identity documents from their country of origin or passports. With respect to such cases, it would be important to stipulate that the State where such

persons reside shall collaborate with the State that requires the testimony so that they have travel documents that can be stamped with the appropriate visas. The cooperation of third States through which the witnesses may need to transit should also be requested.