International Law Commission's Draft Articles on Prevention and Punishment of Crimes against Humanity

Comments and Observations of Australia

December 2023

Reference: LA/COD/66

At its seventy-first session, in 2019, the International Law Commission (**ILC**) adopted the draft articles on prevention and punishment of crimes against humanity ('draft articles')[1] and recommended to the General Assembly the elaboration of a convention on the basis of the draft articles. In its resolution 77/249 of 30 December 2022, the General Assembly invited States to submit written comments on the draft articles and on the recommendation of the ILC.

Building upon Australia's views expressed at the resumed session of the Sixth Committee in April 2023, we provide these comments on the draft articles and the recommendation of the ILC, as well as certain 'cross-cutting' issues, with a view to fostering deeper discussion at the resumed session of the Sixth Committee in 2024. In providing these comments, Australia hopes to strengthen the prospects for consensus on a decision at the seventy-ninth session of the General Assembly.[2]

Australia's comments are without prejudice to positions we may take in any future treaty negotiations on a convention on the prevention and punishment of crimes against humanity (**CAH Convention**).

Australia supports the overall structure and, for the most part, substance of the draft articles. In general, the draft articles would provide a strong basis for negotiations. In the spirit of constructive engagement, these comments therefore focus on select draft articles, where we consider there is an opportunity for them to be further developed.

Recommendation of the Commission

Australia is committed to pursuing accountability for serious international crimes and the elaboration of a CAH Convention firmly aligns with this commitment. We strongly support the recommendation of the ILC to elaborate a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles.

We consider that a CAH Convention would close the gap in the international legal framework governing accountability for serious international crimes. We acknowledge the views of those States who have queried whether such a gap exists, and offer the following two observations in that respect. First, as the ILC has observed, despite the prevalence of these heinous crimes, no treaty-level instrument requires States to prevent, punish and cooperate with respect to crimes against humanity, unlike serious international crimes of comparable gravity such as

[1] Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10).
[2] As envisaged by General Assembly Resolution 77/249 of 30 December 2022, para. 7.

genocide and war crimes.[3] The closest treaty-level codification of crimes against humanity – the Rome Statute of the International Criminal Court (**Rome Statute**) – does not impose obligations of prevention, nor does it impose a direct obligation (or framework) for inter-State cooperation in relation to domestic prosecutions. Secondly, a treaty-level instrument that comprehensively defines crimes against humanity would provide the foundation for harmonising domestic definitions of these crimes and support inter-state cooperation in pursuit of accountability.

As a product of the ILC – one to which States contributed views over a number of years – the draft articles provide a well-developed and balanced basis from which diplomatic negotiations should commence. As set out in our comments below, Australia considers there to be several aspects of the draft articles that could be further developed. We consider that negotiations on a CAH Convention would provide the opportunity, through our collective efforts, to resolve the current differences in views on the draft articles and refine the text in a way that would garner the broadest support from the international community. Australia also considers that consensus on a decision to elaborate a CAH Convention would underscore the vital role of the UN Sixth Committee in progressing the negotiation of legal instruments on the most important and pressing issues confronting humanity.

Cross-cutting issues

Negotiations on a future CAH Convention would provide an opportunity for States to consider how a treaty can best address a number of cross-cutting (and often intersecting) issues. These issues affect: what, how and against whom crimes against humanity are perpetrated; protection of victim-survivors; and assistance for States to fulfil their obligations under a future convention.

Gender

Australia is committed to gender equality and the human rights of all women and girls. We consider that any future negotiations on a CAH Convention would benefit from a gender mainstreaming approach to the text as a whole. This approach would reflect the different ways that crimes against humanity affect individuals on the basis of gender, and their experiences in the criminal justice system. In our view, this approach would also assist States in considering which of the crimes should be included in a future CAH Convention and provisions on protections for victims and witnesses. We acknowledge the work of civil society organisations, in particular, that have made substantive proposals in this regard, some of which we will address in comments on specific draft articles.

[3] International Law Commission, *Report of the International Law Commission,* 71st sess (29 April–7 June and 8 July–9 August 2019), UN Doc A/74/10, General commentary on the draft articles on the prevention and punishment of crimes against humanity, p. 22, para 45(1). We acknowledge the *Ljubljana-The Hague Convention* which was adopted on 26 May 2023 but is not yet in force. This convention, focused on international cooperation with respect to serious international crimes, would support a future CAH Convention but has different objectives as compared to the draft articles, which are based on the three pillars of prevention, punishment and cooperation with respect to CAH exclusively.

Indigenous perspectives

We consider that a future CAH Convention based on the draft articles would provide a solid basis to support accountability for crimes against humanity perpetrated against Indigenous Peoples. For example, the draft articles identify persecution on racial and other grounds as a distinct crime against humanity in certain circumstances.[4] Australia is, however, further considering how Indigenous perspectives could be mainstreamed throughout the draft articles. For example, we consider there may be opportunities to build upon the existing preamble to reaffirm the rights of Indigenous Peoples. Should a decision be taken to elaborate a CAH Convention, it will be important for any negotiation processes to structurally ensure the meaningful involvement of Indigenous Peoples.

Strengthening the capacity of domestic jurisdictions

Australia recalls its observation during the resumed session in April 2023 that the draft articles do not address the topic of capacity development, and the interventions of several States that had called for more to be done to strengthen national investigative, prosecutorial and judicial capabilities. We agree that building these capacities is essential for preventing and punishing crimes against humanity, and goes hand in hand with a treaty-level codification of these crimes. Australia's view is that a CAH Convention elaborated on the basis of the draft articles could play a catalytic role in facilitating greater international cooperation, and is further considering how the international community could best support those capacity strengthening efforts.

Monitoring mechanisms

During the resumed session in April 2023, some States expressed the view that a monitoring mechanism for a future convention would be desirable to support prevention obligations through early warning and sharing of best practice, such as legislative and investigative approaches. Australia is of the view that proposals for a monitoring mechanism should be considered in light of whether existing institutions and mechanisms could be leveraged to fulfil monitoring functions. We also note that the benefits of a monitoring mechanism would need to be balanced with securing broad support for a convention. In that context, in particular, any monitoring mechanism would need to be sustainable and non-interventionist.

Preamble

Australia considers that the preamble provides an important conceptual framework for the draft articles and establishes their main purposes. We note the legal value of a preamble in the context of treaty interpretation.[5]

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[4] Australia recognises that the Special Rapporteur on the rights of Indigenous Peoples joined a submission to the ILC dated 30 November 2018 by a group of 20 Special Rapporteurs and an independent expert, which recommends expanding and updating the list of grounds listed in Article 2(1)(h) upon which the crime against humanity of persecution may be committed. In response to this submission, the Fourth Report on Crimes against Humanity by Special Rapporteur Sean Murphy suggests that the "catch-all" wording of subparagraph (h) ("or other grounds…") "embraces other and evolving grounds on which persecution may be found" and recommends retaining the existing language (paragraph 60-61 and footnote 132, Fourth Report). Noting Australia's overall position on draft article 2, set out below, we would be open to recognising Indigenous Peoples' status as a protected ground from persecution in subparagraph (h).

[5] In accordance with article 31 of the 1969 *Vienna Convention on the Law of Treaties*.

Australia welcomes the preamble's emphasis on the primary responsibility of States to investigate and prosecute crimes against humanity, as well as the importance of the dual objectives of prevention and punishment of such crimes. These elements underpin the need for a CAH Convention, which is to equip States with the tools needed to fill the impunity gap that exists within the current international legal framework.

Australia considers the reference to the prohibition of crimes against humanity as having *jus cogens* status in the preamble to be an important one. It reflects that the prohibition of crimes against humanity is accepted and recognised by the international community as a norm from which no derogation is permitted. Australia finds the reasoning in the ILC commentaries substantiating its inclusion to be persuasive.

Australia recognises differing views over the inclusion, in the preamble, of a reference to the definition of crimes against humanity in Article 7 of the Rome Statute. Australia is a strong supporter of the International Criminal Court (**ICC**), but we recognise that this reference may deter some States from joining a future CAH Convention.

Australia recognises that any preamble will ultimately need to reflect the substantive content of any future treaty text and, to that end, Australia is open to considering additional preambular text. For example, there may be value in reaffirming the Purposes and Principles of the Charter of the United Nations.

<u>Draft article 2 – Definition of crimes against humanity</u>

Australia supports the ILC's decision to draw from the definition of crimes against humanity in the Rome Statute as the basis for draft article 2. We acknowledge that not all UN Member States are party to the Rome Statute, but are mindful of the benefits of drawing from its definitions. State practice has, over many years, developed and coalesced around these definitions. The definitions generally reflect a consensus view, enjoy broad, cross-regional acceptance, and have been subsequently implemented into many domestic legal systems.

Australia believes the ILC has generally taken a balanced approach in draft article 2. In this context, we recognise the need to balance consistency within international law with the need for a definition which is fit for purpose. Specifically, we support the ILC's decision to make a minor amendment to the Rome Statute definition by removing the definition of 'gender'. This enables the term to be applied in a manner which takes into account an evolving understanding of its meaning. As previously noted, we consider that any future negotiations on a CAH Convention would benefit from a gender mainstreaming approach to the text as a whole, and we recognise draft article 2 requires particular analysis in this regard.

We acknowledge that there may be further adjustments to the definition in the draft article that would assist with reflecting the development of international law since the Rome Statute was negotiated, and making any future convention fit for purpose and capable of garnering broad support. In this context, Australia acknowledges and is engaging with, for example (and without prejudice to its future positions on these), proposals by States and civil society organisations to include the slave trade and forced marriage as crimes against humanity, and the proposal to include the crime against humanity of 'persecution' as a standalone crime.[6]

[6] That is, to remove the nexus requirement currently reflected in draft article 3(1)(h) which requires persecution be connected with any act referred to in that provision, or with the crime of genocide or war crimes.

Australia is also considering ways in which the draft articles could address conduct that has been described as 'gender apartheid'.

Finally, Australia supports the drafting of the chapeau requirement such that the acts must be committed as part of a 'widespread or systemic attack' – that is, as disjunctive rather than cumulative requirements. The ILC's commentaries persuasively set out the rationale behind this drafting decision, noting jurisprudential developments over many years. Australia also supports the inclusion of a 'without prejudice' clause in draft article 2(3). We note that some States have expressed the view that this clause introduces ambiguity in the scope of obligations under a future convention. Australia considers that the definitions provision in any future convention would establish minimum, common definitions that all States Parties would be required to reflect in their domestic criminal law and which provide a foundation for inter-state cooperation through a future convention. A 'without prejudice' clause would, separately, confirm that States may reflect *broader* (ie, more protective, or additional) crimes against humanity in domestic law, and would complement and support existing or developing rules of international law.

Draft article 3 – General obligations

Australia supports the general obligations of States as set out in draft article 3.

We support the important confirmation that crimes against humanity can be committed in both peacetime and armed conflict, where such acts are committed as part of a widespread or systematic attack directed against any civilian population, which is reflected in draft article 3(2). We note the views of some States that the use of the term 'civilian population' in the chapeau implies a limitation in scope of crimes against humanity to acts committed during armed conflict. Australia considers that, on the contrary, the effect of this term is to generally exclude non-civilians (ie, combatants) from the class of victims of crimes against humanity. Acts that would otherwise constitute crimes against humanity against combatants in the context of an armed conflict would amount to a war crime or violation of international humanitarian law, which are classes of crimes dedicated specifically to addressing violations in armed conflicts. This position is supported by jurisprudence of international courts and tribunals and the ILC's Commentary to the Draft Articles.[7]

We recall some divergence in States' views over whether a future CAH Convention ought to apply to the acts of States, private persons, or both. Australia is of the firm view that the draft articles – and any future CAH convention elaborated on the basis of them – should create obligations binding the State alone; that is, they engage the responsibility of the State. In the context of draft article 3(1), for example, Australia understands that this provision creates an obligation for States not to engage in acts that constitute crimes against humanity through their own organs as well as through any other bases for attribution under the law of State responsibility. Draft article 3(2) similarly imposes obligations on States to prevent and punish crimes against humanity. We believe the approach of the ILC in this regard, including in draft article 3, is appropriate.

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[7] International Law Commission, *Report of the International Law Commission,* 71st sess (29 April–7 June and 8 July–9 August 2019), UN Doc A/74/10, General commentary on the draft articles on the prevention and punishment of crimes against humanity, p. 35, para 19

The criminal responsibility of individuals for crimes against humanity, and other serious international crimes, is appropriately addressed through the Rome Statute for those States that are party to that treaty. Australia notes that this is distinguished from States' obligations under draft article 6 to criminalise conduct in their domestic criminal law, which would give rise to individual criminal responsibility in a domestic sense.

<u>Draft article 4 – Obligation of prevention</u>

Australia supports the ILC's approach to draft article 4. We appreciate that it provides high-level and non-exhaustive guidance on the scope of States' obligation to prevent crimes against humanity, while maintaining a level of flexibility for States when implementing preventive measures that are most appropriate for their national systems. It also clarifies that all preventive measures and interstate cooperation must be in conformity with international law. We recall that some States have suggested that draft article 4 should be elaborated for clarity or precision. We remain open to engaging on specific proposals to improve the clarity of the text. In addition to the legislative, administrative and judicial measures identified in draft article 4, institutional and political measures, for example, also play critical roles in contributing to national prevention efforts.[8]

Australia notes the territorial scope of States' obligations under the draft articles are defined in draft article 4 (and several others) as extending to 'any territory under [the State Party's] jurisdiction', which we support.

<u>Draft article 5 – *Non-refoulement*</u>

Australia recognises the important objective of draft article 5, which is to prevent persons in certain circumstances from being exposed to crimes against humanity. In this sense, it is closely linked with draft article 4 on prevention. At the same time, we acknowledge the views of some States that there may be ambiguities in, and questions around the scope of, draft article 5 in its current form, and we continue to consider these views. In this context, we would be supportive of continued discussion on this provision.

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 reinforce this point with a number of examples, we consider that draft article 5 itself should provide greater clarity around this standard.

[8] The *'Framework for Action for the Responsibility to Protect: A Resource for States'* developed by the Asia-Pacific Centre for the Responsibility to Protect and the Global Centre for the Responsibility to Protect recommends measures to strengthen the national legal, political and institutional architecture as practical steps to support atrocity crime prevention and response (at p. 14). For example, the Framework for Action recommends States develop a whole-of-government policy, strategy, or plan for atrocity prevention, and train and resource government departments to promote awareness of structural risk factors.

Draft article 7 – Establishment of national jurisdiction

Australia supports the approach adopted by the ILC in draft article 7, which would require States to *establish* jurisdiction over crimes against humanity on a number of bases, without being unduly prescriptive as to how that jurisdiction is exercised. Accordingly, Australia considers that draft article 7(2) only provides for a basis for jurisdiction, and does not itself imply an obligation to submit a case for prosecution. Australia also recalls the Special Rapporteur's confirmation that jurisdiction under draft article 7(2) could only be exercised in respect of nationals of States Parties.[9]

Australia acknowledges that multiple States may have interests in exercising jurisdiction over a case involving a crime against humanity. This may be driven by, for example, access to evidence, witnesses and victims, or their significant interests in securing accountability with respect to, or justice for, their own nationals. As we have previously stated, we are of the view that the primary responsibility for investigating and prosecuting serious international crimes rests with the State in the territory of which the criminal conduct was alleged to have occurred, or the State of nationality of the accused.[10] We also consider that the draft articles (particularly draft articles 9 and 13) contain a clear and structured framework to support inter-state consultation to determine which State is best placed to exercise jurisdiction over a particular case.

Draft article 8 – Investigation

Draft article 8 provides an important framework for ensuring that States properly examine activities that may constitute crimes against humanity occurring on their own territory or under their jurisdiction. A provision based on this draft article would support the objectives of any future treaty to pursue accountability for, and prevent the commission of, crimes against humanity. Australia supports the general approach adopted by the ILC to this provision and, in particular, the requirements that this process is 'prompt, thorough and impartial'.

Australia notes that draft article 8 would require States to investigate 'whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed'. We consider that this provision would require States to undertake an examination where the State has reason to believe crimes against humanity are being committed or have been committed in any territory under its jurisdiction, not only when formal allegations have been made.

Australia considers that negotiations on any future convention would provide the opportunity to clarify different forms of inquiry by State authorities into alleged criminal conduct, which the draft articles refer to as an 'investigation', 'examination of information', and 'preliminary inquiry into the facts' in draft articles 8, 9(1) and 9(2) respectively. These terms refer to related but distinct forms of inquiry into alleged crimes. This would assist States to reach agreement on the meaning of these terms, and to ensure the text appropriately encompasses diverse legal systems which may follow distinct processes for criminal investigation and

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[9] Fourth report of the Special Rapporteur on the draft articles, para. 174.

[10] Canada, Australia and New Zealand's statement to the Sixth Committee on '*The scope and application of the principle of universal jurisdiction*', October 2022.

prosecution. To assist with clarification, Australia has set out the different processes it follows in its domestic system in these comments, where relevant.

In the context of investigations of alleged crimes in the Australian system, federal law enforcement authorities (which have jurisdiction to investigate federal crimes, including crimes against humanity) generally conduct an initial *assessment* of alleged criminal conduct that has been reported or where the authorities have themselves initiated an assessment. This assessment will evaluate whether to: initiate an investigation; refer the matter to another agency; or decline to investigate. A full *investigation* seeks to determine the facts relevant to the case in order to gather admissible evidence in relation to the elements of the relevant criminal offence. Australia expects such an assessment, and depending on the outcome, an investigation, to fall within the scope of draft article 8.

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

Australia supports the objectives of draft article 9 which, together with draft articles 7 and 8, provides the foundation for the 'prosecute or extradite' obligation reflected in draft article 10, and the extradition framework in draft article 13. Draft article 9 contains a number of related but distinct obligations, the purpose of which is to require States in whose jurisdiction an alleged offender is present to take that person into custody, either in anticipation of instituting a prosecution, or as a precursor to extraditing the alleged offender.

Australia takes this opportunity to offer its views on how safeguards under this provision may be strengthened, and potential amendments to draft article 9 that could assist with making it more broadly workable for States, noting the range of different investigative, prosecutorial and extradition processes that they follow.

Draft article 9(1) would require States to take an alleged offender into custody 'upon being satisfied, after an examination of information available to it, that the circumstances so warrant'. Draft article 9(2) would require States, immediately upon taking an alleged offender into custody, to 'immediately make a preliminary inquiry into the facts'. Australia understands that these provisions aim to provide States with flexibility to determine whether taking an alleged offender into custody is appropriate in the circumstances, consistent with domestic law and processes, which may differ as between States.

Australia considers that draft article 9(1) would benefit from an amendment to clarify that States Parties would be required to undertake measures in compliance with this obligation in accordance with their domestic law and policies and, in particular, safeguards around the detention of suspects. Australia suggests that draft article 9(1) should specify that authorities would need to be satisfied, to their relevant domestic law threshold, that a person has committed crimes against humanity *prior* to taking the person into custody. This would provide a reasonable basis upon which to hold an accused person in accordance with the basic rights to security of the person and freedom from arbitrary detention. Australia also suggests that draft article 9(1) require States to guarantee fair treatment to alleged offenders taken into custody in accordance with draft article 11. Pursuant to draft article 9, investigative authorities in Australia would consider a number of issues prior to taking a person into custody, such as the existence of information asserting a crime and the reliability of that information; the admissibility of that information; witness availability, and views of the prosecution service.

A further consideration that would inform whether the circumstances warrant taking an alleged offender into custody is whether the State in question has received a request from another State, in accordance with the receiving State's domestic law, to take the alleged offender into custody for the purposes of extradition if so ordered. This is separate to the obligation in draft article 9(3) to notify other States which may have jurisdiction over the alleged offender.

Draft article 10 – *Aut dedere aut judicare*

Australia supports the inclusion of draft article 10, which is a well-recognised feature of international crime treaties. While the obligation to prosecute under draft article 10 is broader than in other multilateral crime treaties, such as the *United Nations Convention against Transnational Organised Crime,*[11] Australia considers this is appropriate in light of the serious nature of the crimes involved. It is also in line with approaches in treaties addressing crimes of a similar gravity, such as the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*

Australia considers that draft article 10 appropriately preserves prosecutorial discretion to decide whether sufficient evidence exists to support a prosecution. In common law jurisdictions, such as Australia, a thorough criminal investigation would occur prior to a brief of evidence being provided to federal prosecutors, who decide independently whether there is sufficient evidence for a prosecution to proceed.

Draft article 11 – Fair treatment of the alleged offender

Australia is supportive of draft article 11, which contains fair treatment obligations with respect to any persons against whom measures are being taken in accordance with the draft articles, and which apply at all stages of the proceedings. The safeguards it prescribes are critical to preserving the rights of alleged offenders (which are owed under international law to alleged offenders of any crime), and for the legitimacy of any accountability efforts.

We acknowledge arguments by States on the scope of the draft article, some of which seek expanded protections for alleged offenders, others which seek narrower protections. It remains our view that draft article 11 strikes the right balance. It requires States to guarantee fair treatment in accordance with international and domestic law, which includes the comprehensive corpus of international human rights law (among others), repetition of which we do not consider is warranted in this context. This approach is appropriately distinguished from that in, for example, the Rome Statute, which is more prescriptive; in that context, it was necessary for a newly established international court to clarify those rights to which an accused was owed.

Draft article 12 – Victims, witnesses and others

Australia is supportive of draft article 12, which addresses the rights of victims and witnesses consistently with other international crime treaties. We would also, however, be open to addressing the rights of victims in a standalone article, as has been suggested by some States.

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[11] Article 16(1) of the *United Nations Convention against Transnational Organised Crime* requires States Parties to prosecute an alleged offender in cases where the State refuses to extradite solely on the basis that the alleged offender is one of its nationals and on request of the State Party seeking extradition.

We acknowledge the views expressed by civil society organisations on the rationale for incorporating a definition of 'victim' based on consultations with a broad range of victims and survivors, such as that it would reflect a harm-based approach rather than focusing on those against whom a crime was directly committed. We do, however, support the decision of the ILC not to define the term 'victim'. The ILC's approach follows standard practice in treaties that address the rights of victims within domestic law, which allows States to apply their existing law (provided that it is consistent with their international legal obligations).[12] Given that treaties and customary international law provide guidance on interpretation of this term, seeking to define it in a future CAH Convention is likely to introduce complexity in achieving a definition acceptable to a broad number of States, consistent with their domestic approaches.

Draft article 12(1) would benefit from clarification that this obligation would apply with respect to alleged crimes against humanity occurring 'within the territory under that State's jurisdiction'. This interpretation seems to be reflected in the commentaries, which note the relationship between draft article 12 and draft article 8, the latter of which requires States to conduct prompt and impartial investigations with respect to alleged crimes against humanity being committed on any territory under its jurisdiction.[13]

Australia also suggests that modifications are necessary to enable greater flexibility for States to implement the right to reparation, subject to their domestic legal framework. This could be achieved by requiring States to provide for this through their criminal justice system and subject to their domestic law. We consider this approach is appropriate given that the obligations contained in the safeguards provisions (particularly draft articles 11 and 12) focus on protections to be applied during criminal proceedings. This would not preclude States from implementing additional measures to provide reparations for victims through non-judicial or non-criminal mechanisms, but would not require it.

Draft article 13 – Extradition

Australia considers that the international cooperation provisions (draft articles 13 and 14 and the Annex) provide a structured framework to support inter-state cooperation and assist States to assume and discharge their primary responsibility to investigate and prosecute crimes against humanity. In Australia's view, the provisions are well considered and provide the level of detail necessary to support cooperation between States that do not have existing treaties or domestic frameworks that facilitate extradition for crimes against humanity. In this context, Australia considers these provisions could assist to strengthen States' national capacity to implement the 'prosecute or extradite' obligations reflected in draft article 10.

Draft article 13(12) requires a State in whose territory an alleged offender is present to give due consideration to an extradition request from a State with territorial jurisdiction. Australia understands that this provision is intended to recognise the strong interests in – and primary responsibility for – the investigation and prosecution of serious international crimes that rests with States with territorial jurisdiction. These States are often best placed to achieve justice, given their access to evidence, witnesses and victims. Australia also recognises the primary responsibility for investigation and prosecution that rests with the State of nationality of the

[12] International Law Commission, above n 7, p. 104, para 3.
[13] International Law Commission, above n 7, p. 105, para 9.

accused, which has significant interests in securing accountability with respect to its nationals. As such, Australia considers that paragraph 12 would benefit from requiring States to give due consideration not only to an extradition request from the State in the *territory* under whose jurisdiction the alleged offence occurred, but also from the State of *nationality* of the accused. We note that, in implementing a provision based on draft article 12(13) in a future CAH Convention, Australia would duly consider all extradition requests in line with domestic law and policies.

Draft article 15 – Settlement of disputes

Australia recognises the importance to any future treaty of a robust framework for the resolution of disputes related to its interpretation and application. As a general principle, Australia encourages States to turn to the International Court of Justice (**ICJ**) to resolve their disputes and is convinced that acceptance of the ICJ's compulsory jurisdiction by the widest possible number of States enables the Court to most effectively fulfil its role.

As drafted, draft article 15 requires States to, in the first instance, undertake to settle a dispute by means of negotiation. If unsuccessful, States may, at the request of one of the parties to the dispute, submit the matter to the ICJ, unless the States decide to proceed to arbitration. Draft article 15(3) enables States to effectively 'opt-out' of obligations which would otherwise require them to proceed to arbitration or dispute resolution through the ICJ.

This model of dispute resolution is reflected in other multilateral crime cooperation treaties such as the *United Nations Convention against Corruption* and the *United Nations Convention against Transnational Organized Crime*. It is, however, out of step with other treaties addressing serious international crimes of comparable gravity, including the *Convention on the Prevention and Punishment of the Crime of Genocide*, which recognises the compulsory jurisdiction of the ICJ in relation to disputes under those treaties at the request of the parties.

In Australia's view, draft article 15 provides a balanced starting point for negotiations on any future treaty. In the course of negotiations, States would need to carefully consider a range of factors with a view to striking a balance between drafting a treaty that would be acceptable to the largest number of States, while facilitating States Parties' compliance with it. In the context of negotiations, States will need to consider how the dispute resolution provision sits alongside the treaty as a whole and, in particular, a potential reservations clause. As drafted, we consider draft article 15 should limit the ability for States to make a declaration under paragraph 3 only upon ratification or accession.