

Written comments by Austria on the ILC Draft Articles on the Prevention and Punishment of Crimes against Humanity

December 2023

In response to the letter by the Office of Legal Affairs of the Secretariat of the United Nations of 20 January 2023, Austria would like to provide the following observations on the Draft Articles on the Prevention and Punishment of Crimes against Humanity elaborated by the International Law Commission (ILC):

Austria re-emphasizes the importance of the ILC's work in particular with regard to a future convention on the prevention and punishment of crimes against humanity. Such a convention is needed both for humanitarian as well as systematic reasons. It would be a necessary first step for a **complete and effective international criminal justice system** to hold perpetrators accountable. While many aspects, such as the definition of crimes against humanity, constitute customary international law, a convention on this topic would not only fill an existing gap in international treaty law but would also be a strong signal that international crimes cannot go unpunished.

Regarding the **preambular paragraphs**, we fully concur with the ILC's view that the prohibition of crimes against humanity already constitutes a peremptory norm of general international law.

As to the **scope** of a future convention (as stated in **Article 1**), the Convention would apply to the prevention and the punishment of crimes against humanity. Nevertheless, matters that may not be covered by a future convention would still – to a large extent – be regulated by customary international law. Other grave international crimes such as genocide or war crimes should remain regulated in dedicated conventions and not be touched upon by the convention in question.

The definition of crimes against humanity in **Article 2** of the proposed convention codifies customary international law. Thus, from a legal point of view, the definition is not “based” on Article 7 of the Rome Statute of the International Criminal Court as a matter of treaty law. It is evident that the Rome Statute and the proposed Convention are two individual and separate legal instruments with a different purpose and possibly different parties. The

commonality is the definition of crimes against humanity under customary international law, which is important to avoid fragmentation and to ensure consistency in the international legal system. The ILC Draft Articles, however, do not have a direct connection with the Rome Statute and being a State party to the Rome Statute is neither a precondition nor a consequence for the application of the definition.

Although prior conventions, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, have not expressly provided that States shall not commit the acts in question in those conventions, we see merit in explicitly mentioning the obligation of states “not to engage in acts that constitute crimes against humanity” in **Article 3 (1)**. This obligation is two-fold and applies to state organs as well as persons acting on the instructions or under the direction or control of the state. We also welcome the addition of the explicit obligation to prevent crimes against humanity in **Article 3 (2)**, as it is also stipulated in the Genocide Convention. Additionally, we welcome the explicit clarification in **Article 3 (3)** that no exceptional circumstances may be invoked as a justification for the commission of crimes against humanity.

The obligation of prevention in **Article 4** includes “effective legislative, administrative, judicial or other appropriate preventive measures”, which was inspired by the wording of the Convention against Torture. Since torture is one of the acts listed in the draft definition of crimes against humanity, a similar approach on the prevention of crimes against humanity is only consequential. At the same time, the explicit requirement of preventive measures to be “in conformity with international law” is in line with the jurisprudence of the International Court of Justice.

Crimes against humanity shall not be subject to any statute of limitations as drafted in **Article 6 (6)**, although we would prefer a clear prohibition without states having to take respective measures. As foreseen in **Article 6 (7)**, Austria has already criminalized crimes against humanity with appropriate penalties in Section 321a of the Austrian Criminal Code. We consider the emphasis on national criminal laws providing for appropriate penalties in the draft articles useful and would like to accentuate that existing national laws on the subject matter do not preclude states from engaging in a future convention.

Regarding the frequently discussed rules on the establishment of national jurisdiction in **Article 7**, we would like to underline that these rules are well established bases of criminal

jurisdiction under customary and treaty law, which can be found in many international conventions on combating international crimes. In this context, it should be stressed that Article 7, as the ILC has pointed out in its commentary, only requires states to *establish* jurisdiction by adopting the necessary national legislation but *not to exercise* such jurisdiction unless the alleged perpetrator is present in the territory under the State's jurisdiction. Thus, in fact, the convention does *not* require States to *exercise* universal jurisdiction, since based on Articles 8, 9 and 10, States may only exercise jurisdiction when the perpetrator is present in their territory, thus requiring a connection between the perpetrator and the forum State which is based on the territoriality principle.

Austria welcomes the inclusion of the duty of investigation in **Article 8** similar to the obligation in the Convention against Torture, which is key for effective prosecution and punishment. A broader obligation for a state to investigate acts committed outside its territory but still under its jurisdiction (in cases of a ship flying its flag or on board of an aircraft having the nationality of the State in which it is registered) could be discussed.

With regard to the principle of "Aut dedere aut judicare" in **Article 10**, it is Austria's understanding that the reference to a competent international criminal court or tribunal also comprises hybrid courts or tribunals that combine both national and international elements. Should any court or international tribunal not have jurisdiction, the obligations of Article 10 remain binding on the State on whose territory the alleged offender is present.