

Translated from French

Seventy-eighth session of the United Nations General Assembly

Sixth Committee

Comments of the Kingdom of Belgium on the draft articles on prevention and punishment of crimes against humanity

1. Introduction

Belgium welcomes the work carried out by the International Law Commission and the adoption, at the end of its seventy-first session, of the draft articles on prevention and punishment of crimes against humanity (hereinafter “the draft articles”).

Belgium is of the view that the draft articles constitute a very good basis for a discussion aimed at elaborating an international convention on the prevention and punishment of crimes against humanity. Such a convention would close a significant gap in international treaty law.

It is particularly important to ensure that the draft articles are consistent with other international instruments, notably the Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity, War Crimes and Other International Crimes, recently adopted in Ljubljana, Slovenia, on 26 May 2023.

Whereas the Commission’s draft articles embody a holistic approach and are aimed at addressing a wide range of rules and concepts, dealing exclusively with crimes against humanity, the Convention establishes a modern and comprehensive framework for mutual legal assistance and extradition in respect of the crime of genocide, crimes against humanity, war crimes and other international crimes.

The Commission’s draft articles and the Convention are therefore complementary and thus may coexist.

2. Introductory provisions (draft preamble and draft article 1)

Various principles of great importance to Belgium are articulated in the draft preamble.

The first three preambular paragraphs draw the connection between combating impunity for crimes against humanity and maintaining international peace and security, thus reflecting the purposes and principles of the United Nations. Accountability for the most serious crimes, which affect the entire international community, is essential to restoring public trust in inclusive institutions and thereby bringing about lasting peace. Far from being competing goals, peace and justice are mutually reinforcing.

It is rightly recalled in the fourth preambular paragraph that the prohibition of crimes against humanity is not just a rule of international law, but also a peremptory norm of general international law (*jus cogens*).

The eighth preambular paragraph emphasizes the primary responsibility of States in the prosecution of perpetrators of crimes against humanity. It is critical that States put in place the necessary legislative, judicial and administrative mechanisms that enable them to fulfil that duty. This principle is at the heart of the system established by the Rome Statute of the International Criminal Court, which provides that the Court is complementary to national courts.

The ninth preambular paragraph highlights the rights of victims, witnesses and others in relation to crimes against humanity. It is indeed particularly important to adopt a victim-centred approach. The inclusive nature of the accountability process is fundamental to ensuring its effectiveness and strengthening its credibility. The ninth preambular paragraph also underscores the right of alleged offenders to fair treatment. In this regard, the safeguard clauses set out in the draft articles are essential.

The last paragraph in the draft preamble stresses the importance of both national measures and international cooperation. Fighting impunity for crimes against humanity is the responsibility of all members of the international community, including intergovernmental organizations. Given that, as emphasized in the first preambular paragraph, crimes against humanity “deeply shock the conscience of humanity”, and, given that the obligation to punish such crimes has a customary, universal and peremptory character, this rule also obliges international organizations to cooperate in the punishment of crimes against humanity. If they failed to do so, such organizations would also fail in their duty to engage in international cooperation and would incur international responsibility, in view of the gravity of the crimes in question and the requirement to cooperate in order to put an end to such crimes.

3. Definition and general obligations (articles 2, 3 and 4)

a. Draft article 2: Definition of crimes against humanity

Draft article 2 defines crimes against humanity in similar terms to those in article 7 of the Rome Statute. This is also the definition Belgium introduced into its Penal Code in 1999, when crimes against humanity were criminalized under Belgian law.

Belgium nonetheless welcomes the omission in the draft articles of the definition of gender provided in the Rome Statute. As explained in the commentary to draft article 2, the developments in international human rights law and international criminal law that have taken place over the past 25 years, in particular with regard to sexual and gender-based crimes, should be taken into account. A convention that does not reflect in its definition of gender the current state of international law could marginalize lesbian, gay, bisexual, transgender and intersex (LGBTQI+) persons as well as other groups, and could lead to greater impunity for sexual and gender-based crimes that constitute crimes against humanity.

b. Draft article 3: General obligations

Paragraph 2 of draft article 3 provides that States undertake to prevent and punish crimes against humanity. In view of the judgment of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Belgium considers prevention and punishment to be two distinct obligations, even though the prosecution of crimes against humanity undoubtedly contributes to their prevention by having a deterrent effect.

Belgium shares the Commission's view that crimes against humanity can be committed not only in times of armed conflict but also in times of peace, and supports the clarification provided by the phrase "whether or not committed in time of armed conflict" at the end of paragraph 2.

Furthermore, it is particularly useful that paragraph 3 states that no exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.

c. Draft article 4: Obligation of prevention

Draft article 4 (b) is particularly important, as it emphasizes the need for States to cooperate with other States as well as with relevant intergovernmental organizations. Such organizations not only have a role to play in terms of prevention but also bear significant responsibilities in terms of punishing crimes against humanity.

4. National measures (articles 6, 7, 8, 9 and 10)

Together with the obligation to prevent crimes against humanity, the obligation to punish such crimes is the cornerstone of the draft articles. As noted above, the responsibility for the prosecution of crimes against humanity lies primarily with States. In order to assume that responsibility, States should adopt an appropriate legal framework, criminalizing such acts in their domestic law and recognizing the jurisdiction of national courts over such crimes.

a. Draft article 6: Criminalization under national law

The obligation for States to adopt the necessary and appropriate measures to ensure that crimes against humanity are criminalized under their criminal law, as established in draft article 6, is essential. It reflects a customary obligation which, in the view of Belgium, is binding on States. Like many States, Belgium has already criminalized crimes against humanity in its domestic law.

Belgium welcomes the clarifications provided in draft article 6 regarding the responsibility of commanders and other superiors, the irrelevance of an official position, without prejudice to any applicable international immunities, and the non-applicability of statutes of limitations to crimes against humanity.

With regard to the penalties referred to in paragraph 7 of draft article 6, Belgium considers that the phrase "appropriate penalties" should be understood to exclude the death penalty. Since crimes against humanity are among the most serious international crimes, affecting the entire international community, they are punishable under the Belgian Penal Code by life imprisonment.

b. Draft article 7: Establishment of national jurisdiction

In order to ensure effective punishment of alleged offenders, national courts should be given the broadest possible jurisdiction over crimes against humanity. Belgium therefore stresses the importance of the scenarios contemplated in draft article 7, which include territorial jurisdiction, active personality jurisdiction, passive personality jurisdiction and the jurisdiction resulting from the presence of the alleged offender in the State's territory, all of which it has established in its national law.

c. Draft article 8: Investigation

The obligation set out in draft article 8 for all States to “proceed to a[n] ... investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed” is another essential provision for combating impunity for such crimes.

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

Draft article 9 should be interpreted in the same way as all similar provisions contained in conventions of international criminal law (such as the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

It goes without saying that this provision cannot impede the application of the rules of international law with regard to immunity. This draft article is without prejudice to the ongoing work of the International Law Commission on immunity of State officials from foreign criminal jurisdiction.

e. Draft article 10: *Aut dedere aut judicare*

The rule set out in draft article 10, read together with draft article 7, paragraph 2, is a fundamental provision for combating impunity and preventing a person suspected of having committed a crime against humanity from obtaining safe haven in a State that, other than the presence of the person concerned on its territory, has no other connection with the crime or its alleged perpetrator.

The text of draft article 10 reproduces a formula used in other multilateral treaties of international criminal law, including the 1984 Convention against Torture. This provision should be interpreted in the light of the jurisprudence of the International Court of Justice, in particular its judgment of 20 July 2012 in *Questions Concerning the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.

As rightly stated in paragraph 2 of draft article 7, a State should prosecute the alleged perpetrator of a crime against humanity “in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles”. Prosecution, in this case, is not dependent on a prior extradition request; the State has the obligation to prosecute *proprio motu*, as also provided in the draft Code of Crimes against the Peace and Security of Mankind (draft article 9). The rule is thus (1) *judicare* or, (2) failing that, *dedere*.

The phrases *judicare aut dedere* and *judicare vel dedere* reflect more precisely than the maxim *aut dedere aut judicare* the obligation to punish crimes against humanity (such as war crimes, the crime of torture and enforced disappearance).

5. International measures (articles 13, 14, 15 and annex)

The inclusion of robust provisions on judicial cooperation between States in the draft articles is fundamental. Such cooperation must be guaranteed and strengthened in order to ensure the effective punishment of crimes against humanity. It is also essential to cases concerning the prosecution of crimes against humanity, which often involve international elements. It is therefore important to ensure that judicial cooperation is as broad as possible.

a. Draft article 13: Extradition

Draft article 13 offers a solid foundation for the execution of requests related to extradition. It is particularly useful for States, like Belgium, that make extradition conditional on the existence of a treaty with the requesting State. A clear and detailed procedure is essential to combating impunity for crimes against humanity and offers States the tools required to ensure that such crimes are punished.

b. Draft article 14: Mutual legal assistance

Draft article 14 and its annex constitute a comprehensive framework for the execution of requests for mutual legal assistance that would be applicable in the absence of, or in addition to, a binding mutual legal assistance treaty between the requesting and the requested States.

Belgium wishes to highlight in particular the proposal, contained in paragraph 2 of the annex to article 14, to designate a central authority “that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution”. Its experience at the national level (the international humanitarian law unit of the Federal Public Service for Justice acts as the “central authority” for processing inter-State mutual legal assistance requests concerning the most serious international crimes) has demonstrated the practical advantages of establishing such an authority in order to facilitate cooperation.

c. Draft article 15: Settlement of disputes

Draft article 15 is very useful for addressing any difficulties that might arise in the implementation of the draft articles. It would be appropriate, however, to include a compromissory clause similar to that contained in article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, which does not provide an option for refusing to accept the jurisdiction of the International Court of Justice. This would emphasize the importance of the Court's role in dispute resolution.

6. Safeguards (articles 5, 11 and 12)

a. Draft article 5: Non-refoulement

The principle of non-refoulement is an essential tool for the protection of human rights and may be found in a number of widely ratified international conventions, including the 1984 Convention against Torture and the 2006 Convention for the Protection of All Persons from Enforced Disappearance.

This principle has also been reaffirmed many times by various international and regional bodies and courts. It has also been incorporated into national law by many States, including Belgium.

b. Draft article 11: Fair treatment of the alleged offender

Paragraph 1 of draft article 11 reaffirms the obligation of States to ensure fair treatment of any alleged perpetrator of a crime against humanity, including a fair trial and full protection of his or her rights. Such guarantees must be ensured at all stages of the proceedings, in accordance with the highest international standards. The right to fair treatment has been enshrined in many international and regional conventions on the protection of human rights and is a crucial aspect of punishment of crimes against humanity.

In keeping with recent conventions related to international criminal law, paragraphs 2 and 3 of the draft article offer a useful reminder of the rights of detained persons to communicate with their State of nationality or a State otherwise entitled to protect their rights. These rights reflect those provided in article 36 of the 1963 Vienna Convention on Consular Relations.

c. Draft article 12: Victims, witnesses and others

As already mentioned, accountability for the most serious crimes is essential to restoring public trust in inclusive institutions and thereby bringing about lasting peace. It is therefore particularly important to adopt a victim-centred approach.

Not only must victims have the right to submit a complaint, they must also have their views and concerns considered at all appropriate stages of the proceedings and be guaranteed protective measures where appropriate.

Lastly, it is essential that States take the necessary measures to give effect to the right of victims to seek full reparation for the material and moral damages suffered. This means setting up efficient independent judicial bodies that are competent to rule on the right to compensation and are accessible to all victims.
