Translated from Chinese

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Comments of the Government of the People's Republic of China concerning the draft articles on prevention and punishment of crimes against humanity and the related recommendation of the International Law Commission

Introduction

In its report of 2019 (A/74/10), the International Law Commission recommended to the General Assembly the draft articles on prevention and punishment of crimes against humanity (hereinafter referred to as "the draft articles"), and recommended the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles. On 30 December 2022, the General Assembly adopted resolution 77/249, in which it invited States to submit written comments and observations on the draft articles and on the recommendation of the International Law Commission.

During the Second World War, the Chinese people suffered immensely from crimes against humanity and endured a devastating experience. With the aim of achieving equity and justice and promoting peace and security, the Government of China has consistently supported the prevention and punishment of crimes against humanity in accordance with the law, and has participated constructively in relevant discussions in previous sessions of the Sixth Committee of the General Assembly. The draft articles are an important achievement of the International Law Commission in recent years. The Government of China is grateful to the Commission and the Special Rapporteur for their contribution to this endeavour. In accordance with General Assembly resolution 77/249, the Chinese Government hereby submits, for the consideration of the General Assembly, the following comments on the draft articles and the recommendation of the Commission.

I. Comments on the draft articles

First of all, the Chinese Government emphasizes the following general comments on the draft articles:

Firstly, the endeavour to combat crimes against humanity should be consistent with the Charter of the United Nations and the universally recognized principles and rules of international law. Given the close link between crimes against humanity and international peace and security, and given that the draft articles are focused on imposing obligations on States in the areas of judicial cooperation and the prevention and punishment of crimes, in order to maintain stability in international relations, it is necessary to highlight the foundational status of the principles of the sovereign equality and territorial integrity of States and that of non-intervention in domestic affairs, and uphold the principle of the immunity of State officials from foreign criminal jurisdiction in accordance with international law. However, the draft articles fail to reflect those important principles and rules.

Secondly, defining crimes against humanity and the specific offences they encompass in a reasonable way is central to the draft articles and serves as the foundation for further stipulating the obligation of States to prevent and punish such crimes. In defining crimes against humanity, consensus should be fully forged, and the legitimate concerns of States should be addressed, rather than simply copying the relevant provisions of conventions that lack universality.

Thirdly, a convention on combating crimes, which requires States parties to fulfill their international obligations, should thoroughly consider national circumstances and differences in legal systems, and respect the discretion of States. Only by doing so can the convention be effectively implemented in practice. The draft articles, however, do not fully reflect those considerations.

With regard to the specific provisions of the draft articles, the Government of China wishes to make the following comments:

1. Preamble

The third preambular paragraph reads as follows: "*Recalling* the principles of international law embodied in the Charter of the United Nations". For the reasons stated above, the foundational status of the principles of sovereign equality and territorial integrity of States and that of non-intervention in domestic affairs should be highlighted in the preamble or draft articles, drawing on the provisions of international conventions, such as the United Nations Convention against Corruption,[1] the United Nations Convention against Transnational Organized Crime,[2] and the International Convention for the Suppression of the Financing of Terrorism.[3] The number of States parties to those Conventions, and their universality, greatly surpass those of the United Nations Convention on Jurisdictional Immunities of States and Their Property and the Rome Statute, which are cited in the commentary to the preambular paragraph.[4]

The fourth preambular paragraph provides that "the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*)". To support that view, reference is made in the commentary to the relevant findings of the Commission,[5] along with the judgments of the International Court of Justice, the International Criminal Court, individual regional human rights courts and some domestic courts. Under article 53 of the Vienna Convention on the Law of Treaties, only a rule "accepted

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[1] Article 4, paragraph 1, of the United Nations Convention against Corruption provides as follows: "States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States." There are 190 States parties to that Convention.

[2] Article 4, paragraph 1, of the United Nations Convention against Transnational Organized Crime provides as follows: "States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States." There are 192 States parties to that Convention.

[3] Article 20 of the International Convention for the Suppression of the Financing of Terrorism provides: "The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States." There are 190 States parties to that Convention.

[4] There are only 23 States Parties to the United Nations Convention on Jurisdictional Immunities of States and Their Property, which has not yet entered into force. There are only 124 States Parties to the Rome Statute.

[5] These findings include the commentary to draft article 26 of the draft articles on the responsibility of States for internationally wrongful acts, draft conclusion 23 of the draft conclusions on peremptory norms of general international law (*jus cogens*), and paragraph 374 of the report entitled "Fragmentation of international law: difficulties arising from the diversification and expansion of international law".

and recognized by the international community of States as a whole" can constitute a *jus cogens* norm. The studies and judgments cited above fail to meet the criterion of acceptance and recognition by the international community as a whole, and thus are insufficient to substantiate the prohibition of crimes against humanity as a *jus cogens* norm. There has in fact always been significant disagreement, both in the Commission and in the Sixth Committee, regarding whether the prohibition of crimes against humanity constitutes a *jus cogens* norm.

The seventh preambular paragraph reads as follows: "*Considering* the definition of crimes against humanity set forth in article 7 of the Rome Statute of the International Criminal Court". The appropriateness of such a reference is questionable. For a detailed analysis, please refer to the comments below concerning the definition of crimes against humanity set forth in draft article 2.

2. Draft article 2: Definition of crimes against humanity

(a) The definition does not reflect existing customary international law

The definition of crimes against humanity in draft article 2 almost reproduces article 7 of the Rome Statute,[6] which does not reflect existing customary international law. During negotiations on the Rome Statute, differences persisted among States regarding the definition of crimes against humanity. To date, more than one third of States throughout the world are not parties to the Rome Statute, and the definition of crimes against humanity set forth in the Rome Statute has not been universally accepted.

Among the various grave crimes, crimes against humanity are defined in a particularly diverse and inconsistent manner. There are 11 existing international treaties and instruments[7] that contain definitions of crimes against humanity, the wording of which differ significantly, among others, on the following aspects: whether such crimes can be committed in peacetime; whether the crime must have been perpetrated "with knowledge of the attack"; whether a perpetrator of any such crime must be "a Government or any organization or group"; whether such crimes must be committed on "national, political, ethnic, racial or religious grounds"; and whether crimes against humanity include certain acts such as apartheid and enforced disappearance of persons.

State practice shows that a significant number of States parties to the Rome Statute have not

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[6] There are only slight differences with regard to the understanding of "gender" and on specific expressions.

[7] These include: the Charter of the International Military Tribunal (1945); the Charter of the International Military Tribunal for the Far East (1946); the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, which were adopted by the International Law Commission in 1950; the draft Code of Offences against the Peace and Security of Mankind adopted by the Commission in 1954; the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968); the Statute of the International Criminal Tribunal for the Former Yugoslavia (1993); the Statute of the International Criminal Tribunal for Rwanda (1994); the draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission in 1996; the Rome Statute of the International Criminal Court (1998); the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (2001); and the Statute of the Special Court for Sierra Leone (2002).

criminalized crimes against humanity in their domestic law.[8] Even where some States parties have legislation on crimes against humanity, their definitions of such crimes vary significantly.[9] From the information submitted by some States, it is clear that certain offences set out in the their domestic law are not in fact crimes against humanity, but other crimes such as torture, genocide or war crimes. Domestic judicial practice on crimes against humanity is even more scarce. International practice in defining crimes against humanity is thus highly inconsistent, making it difficult to identify any customary international law in that area.[10]

(b) Other substantive flaws in the definition

Firstly, the definition given in the draft article is too broad. For example, draft article 2, paragraph 1 includes torture, enforced disappearance of persons and the crime of apartheid as crimes against humanity. Given that there are dedicated international conventions regulating the prevention and punishment of torture, enforced disappearance and apartheid, further consideration is needed as to whether those specific acts should be included in the definition of crimes against humanity, and whether such inclusion might result in confusion when applying the relevant rules.

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[8] At least the following 14 States parties to the Rome Statute have not included crimes against humanity in their criminal codes: Antigua and Barbuda, Belize, Bolivia, Japan, Jordan, Malawi, Mongolia, Namibia, Paraguay, Seychelles, Saint Lucia, Tanzania, Tajikistan and Vanuatu.

[9] For example, the Czech Republic states in its submission to the International Law Commission that, according to article 401 of its 2009 Criminal Code, which criminalizes crimes against humanity, the general elements of such a crime involve an "extensive and systematic attack", rather than a "widespread or systematic attack" as in article 7 of the Rome Statute. Finland, in its submission to the Commission, states that crimes against humanity are criminalized in chapter 11, section 3 of its 2008 Criminal Code; but the definition of such crimes differs from that given in article 7 of the Rome Statute as regards both the general elements of the crime and the specific types of acts. As to general elements, the criterion of "with knowledge of the attack" – which is a subjective aspect of the elements required under article 7 of the Rome Statute –is not required under chapter 11, section 3 of the Criminal Code of Finland. In terms of specific acts, the definition of crimes against humanity in the Criminal Code of Finland includes far fewer types of acts than does the Rome Statute; for example, it does not include the crime of apartheid, enforced disappearance of persons or other inhumane acts. In the case of Germany, the definition of crimes against humanity set forth in section 7 of the Code of Crimes against International Law (2002) does not include "other inhumane acts". In the case of Canada, the definition of crimes against humanity enshrined in the Crimes against Humanity and War Crimes Act (2000) differs considerably from that of the Rome Statute. The definition adopted in Canada leaves out many specific types of acts and omits the "widespread or systematic" requirement.

[10] Draft conclusion 2 of the draft conclusions on identification of customary international law adopted by the International Law Commission in 2018 provides as follows: "To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)." In other words, "general practice" and "*opinio juris*" are the two elements required for ascertaining the existence of a rule of customary international law and for determining its content. However, there is no such general practice or *opinio juris* to support the definition of crimes against humanity set forth in article 7 of the Rome Statute.

Secondly, the definition of certain specific criminal acts does not reflect international consensus. For example, in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) – an instrument that has 173 States parties –the definition of torture requires that "such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity", something that largely reflects international consensus. However, the definition of torture set forth in draft article 2, paragraph 2 (e) does not include such a qualification, and is thus clearly different from the aforementioned provisions of the Convention against Torture.

Thirdly, certain specific criminal acts listed in the definition are difficult to define, and therefore prone to unreasonably expanded interpretation and improper use. For example, draft article 2, paragraph 1 (k) provides that crimes against humanity include "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health". The definition is not only unclear as to which acts are referred to; it also lacks a sufficient basis.

In view of those considerations, the definition of crimes against humanity given in the draft articles is not well-founded and does not reflect international consensus, and therefore needs comprehensive and thorough examination and discussion.

3. Draft article 5: Non-refoulement

According to the commentary, this provision is analogous to relevant provisions of existing conventions such as the Convention relating to the Status of Refugees, 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. Nevertheless, lacking support from general State practice or *opinio juris*, draft article 5 is not a codification of existing customary international law but rather a proposed development of new rules. The restrictions imposed under draft article 5 on expulsion, return (*refoulement*), surrender and extradition go beyond existing international treaties and international consensus. Where crimes against humanity are broadly defined, such restrictions could easily be used as a pretext for refusing to perform the obligation to extradite, thereby undermining international judicial cooperation.

4. Draft article 6: Criminalization under national law

Under paragraph 1 of draft article 6, each State is required to ensure that crimes against humanity constitute offences under its criminal law. In light of the differences among the national legal systems and circumstances of each State, instead of requiring each State to make crimes against humanity offences under their criminal laws, it would be preferable to criminalize specific acts that constitute crimes against humanity, because, with the latter approach, the goal of effective prevention and punishment of crimes against humanity can also be achieved. The provisions of the draft articles should be worded in such a manner as to avoid giving rise to such misconceptions.

Draft article 6, paragraph 5 provides as follows: "the fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility". It is noted in the commentary that paragraph 5 has no effect on any procedural immunity that

a foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by treaty law and customary international law. The Government of China, though generally in agreement with the views expressed in such commentary, wishes to emphasize that, in practice, the immunity of State officials from foreign criminal jurisdiction has been generally recognized as customary international law and an inherent part of the principles of sovereign equality and non-interference in internal affairs, and is thus of great importance to the maintenance of stable relations among States. Practices in violation of that rule have not only given rise to disputes; they have also affected international relations. A mere reference to immunity in the commentary is not sufficient to balance the wording of the paragraph. There should be a specific provision to confirm the rules of immunity.

Draft article 6, paragraph 6 provides as follows: "Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations". China believes that crimes against humanity comprise many distinct offences, which, owing to their different levels of gravity, are subject to different penalties. Further study is needed to determine if statutes of limitations should not apply to any and all of such offences. In the commentary, the provisions of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) are invoked by way of support. However, that Convention has only 56 States parties. Moreover, the definition of crimes against humanity set forth therein differs significantly from that of the draft articles. For those reasons, the 1968 Convention is not sufficient evidence that crimes against humanity should not be subject to any statutory limitations.

Draft article 6, paragraph 8 addresses the liability of legal persons, an idea that is not supported by customary international law. The international community still has a long way to go before forming any consensus on the criminal liability of legal persons for crimes against humanity. In the commentary, it is also acknowledged that the criminal liability of legal persons has not featured significantly to date in most international criminal courts and tribunals. It is therefore not advisable to include an explicit provision on the matter in the draft articles. A more pragmatic approach would be to leave it to the discretion of each State.

5. Draft article 7: Establishment of national jurisdiction

Draft article 7, paragraph 2 provides as follows: "Each State shall also take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles 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." China believes that this provision should apply only to establishing national jurisdiction over the nationals of States parties, and such jurisdiction should not cover nationals of States non-parties.

Draft article 7, paragraph 3 provides as follows: "The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law." While the wording of that paragraph draws on article 5, paragraph 3, of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, this provision leaves room for misinterpretation, something that could lead to the improper invocation of crimes against humanity and undue expansion of a State's jurisdiction. Similar provisions are found in article 15, paragraph 6, of the United Nations Convention against Transnational Organized Crime (2000) and article 42, paragraph 6, of the United

Nations Convention against Corruption (2003), but those provisions are explicitly stated to be "without prejudice to the norms of general international law". That restrictive condition on States establishing such criminal jurisdiction is relevant to the prevention of the improper expansion of jurisdiction.

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

Draft article 10 provides that the State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender the person to another State or competent international criminal court or tribunal, submit the case to its competent authorities for the purpose of prosecution, and those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State. In accordance with the universally accepted principle of complementarity, the State has the primary role in exercising jurisdiction, with international criminal courts or tribunals playing a complementary role. In draft article 10, however, national jurisdiction has the same status as the jurisdiction of international criminal courts or tribunals, something that is inconsistent with the principle of complementarity.

7. Draft article 12: Victims, witnesses and others

Draft article 12, paragraph 3, provides that each State shall ensure that "the victims of a crime against humanity (...) have the right to obtain reparation for material and moral damages". Ensuring reparation for victims contributes to the administration of justice. Given the differences between national legal systems, it should be left to the discretion of each State to determine the form and scope of reparation for victims, such as whether to include "moral damages".

8. Draft article 13. Extradition

Draft article 13, paragraph 11, provides that the requested State is not required to extradite if there are substantial grounds for believing that the request has been made for purposes related to a person's "culture, membership of a particular social group, political opinions, or other grounds that are universally recognized as impermissible under international law". It is noted in the commentary that the term "membership of a particular social group" draws on the International Convention for the Protection of All Persons from Enforced Disappearance (2006). However, the Convention has only 71 States parties and is thus not sufficiently representative. Moreover, the connotations of "other grounds that are universally recognized as impermissible under international law" are unclear and may lead to significant differences in interpretation among the parties. It is therefore recommended that "culture, membership of a particular social group, political opinions, or other grounds that are universally recognized as impermissible under international law" be changed to "political opinion".

9. Draft article 14 Mutual legal assistance

Draft article 14, paragraph 9 provides as follows: "States shall consider, as appropriate, entering into agreements or arrangements with international mechanisms that are established by the United Nations or by other international organizations and that have a mandate to collect evidence with respect to crimes against humanity." Whether this provision is necessary warrants further examination. Given the politically sensitive nature of crimes against humanity, international organizations should obtain full endorsement and explicit authorization from the States concerned in order to engage in the relevant evidence-collection activities. The relevant treaties already provide for cooperation between States and, inter alia, the United Nations or international criminal justice institutions. In the case of other international organizations that are not treaty-

based, there is no need for such a provision, as it is for the States to consider cooperation according to their own circumstances.

10. Draft article 15: Settlement of disputes

In draft article 15, it is stated that disputes should first be addressed through negotiation. In cases where disputes are not settled through negotiation, States are given the option of formulating a reservation in respect of international judicial settlement. That provision is in line with the principle that the settlement of disputes between States should be based on the consent of the States concerned. Given the sensitive nature of crimes against humanity, that provision is particularly important.

II. Comments on the recommendation of the International Law Commission

The Commission recommends "the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles". Discussions in the Sixth Committee, however, have revealed significant divergences as to whether an international convention should be elaborated based on the draft articles. China believes that elaborating a dedicated convention on crimes against humanity is a major systematic project, and that all parties should undertake the following tasks in a responsible and prudent manner:

Firstly, they should take stock of State practice and solidify the basis for consensus. As the discussion on crimes against humanity deepens, divergences among States are emerging with regard to some core issues, such as the definition of crimes against humanity, the scope of States' obligations and the manner of their implementation. The main reason for the divergences is that, absent a comprehensive survey of State practice, the draft articles do not represent a codification of existing customary international law. Only through an extensive examination of State practice can discrepancies be bridged and consensus be broadened, with a view to finding the largest common denominator that can form the basis for negotiations on a convention.

Second, they should enhance international mutual trust and strengthen practical cooperation. In recent years, certain States, acting for political purposes and without any factual basis, have fabricated various pretexts to unilaterally label other countries as perpetrating "crimes against humanity" and interfere in their internal affairs on legal grounds. Such political manipulation only casts a shadow over international cooperation and undermines candid and effective dialogue and communication on crimes against humanity. The States concerned should change course and stop using crimes against humanity as a tool to accuse and undermine other countries. In so doing, they can build political mutual trust and create favourable conditions for negotiations on a convention.

Thirdly, they should avoid defining concepts overly broadly and should prevent the distortion of their true meaning. The concept of crimes against humanity should have a reasonable scope; but in recent years, there has been a trend to overstretch and expand it. Many relevant crimes go beyond the scope of customary international law and are not sufficiently supported by State practice. That trend, if allowed to develop, will increase the risk for crimes against humanity to be misused and distorted, thus defeating the purpose of combating impunity.

Moreover, even though there is currently no dedicated convention on crimes against humanity, the vast majority of States have criminalized crimes against humanity as such, or specific elements thereof, in domestic law. While there may be differences in the specific practices of States, they have all played a

positive role in preventing and punishing crimes against humanity. Specific acts constituting crimes against humanity are also prohibited under international humanitarian law and international human rights law. Pending the elaboration of a convention, States can continue to contribute jointly to the prevention and punishment of crimes against humanity by strengthening international cooperation and the implementation of domestic law in accordance with existing international law and domestic circumstances.

In view of the foregoing, China believes that conditions are not yet ripe for the elaboration of a convention based on the draft articles, and that it is necessary to make a cautious decision on whether to launch the process of elaborating a convention.