

Translated from French

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

The Kingdom of Morocco takes note of the report of the International Law Commission on the work of its seventy-first session, held from 29 April to 7 June 2019, which appears in *Yearbook of the International Law Commission, 2019*, vol. II, Part Two, and has the honour, in line with paragraph 6¹ of General Assembly resolution 77/249, distributed on 9 January 2023, to respond to the request, transmitted through the Secretary-General (see also A/77/416 dated 18 November 2022), that Governments submit observations and comments on the draft articles on prevention and punishment of crimes against humanity and on the Commission's recommendation for the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles by 1 December 2023 (*General Assembly Official Records, Seventy-fourth Session, Supplement No. 10, A/74/10*, para. 42).

The text, which comprises a preamble, 15 draft articles and commentaries thereto, and a draft annex, was discussed in the Sixth Committee in April 2023. The text is inspired in part by international and regional treaties, including the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, the Rome Statute of the International Criminal Court of 1998, the United Nations conventions against corruption, torture, enforced disappearance and transnational organized crime, the United Nations convention on jurisdictional immunities of States, the Charter of the United Nations, the Protocols Additional to the Geneva Conventions of 12 August 1949, and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). In terms of its structure, the text comprises (i) all the draft articles put forward as the basis for the elaboration of a convention recommended in paragraph 42 of the Commission's report; and (ii) explanations of the aforementioned draft articles with references to international conventions, such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the Rome Statute.

The preamble specifies no limit on the obligations of States in the light of other international instruments. Therefore, it would be advisable to (i) define, in the preamble, the relationship between the draft articles and international instruments related to international humanitarian law and international human rights law; (ii) specify the limit on the obligations of States as set out in other instruments related to international humanitarian law (such as the Geneva Conventions of 1949, Protocols I and II Additional to the Geneva Conventions of 1949, the Rome Statute, the customary rules of international humanitarian law, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women), in particular with regard to provisions that may contradict or overlap with regard to the terms "protection" or "responsibility", and (iii) include provisions on the protection of children, women, prisoners and refugees.

The key role of national institutions in combating crimes against humanity, in particular the role of national committees on international humanitarian law, are not mentioned in the draft articles. Provisions specifically addressing that aspect were needed.

¹ Translator's note: References have been corrected where appropriate.

The draft articles do not include final or transitional provisions clearly stating the obligations of States under the convention. Therefore, Morocco proposes adding final and transitional clauses to the draft articles that would address the matter of validity of treaty provisions and the means of acceding to or withdrawing from the convention (e.g., reservations and declarations).

Draft article 2: The definition of crimes against humanity contained in this provision is taken almost verbatim from Article 7 of the Rome Statute, with a few changes consisting of the insertion of “without prejudice” clauses, which are broadly and ambiguously worded in their description of the ways and means of preventing the acts in question, whether they are committed in situations of armed conflict or not, and which could be seen as placing binding obligations on States. Under the draft article, States are not merely obligated to refrain from any actions that could constitute a crime against humanity: they are also required to put in place reasonable measures to prevent their commission, to criminalize crimes against humanity in national legislation, and to provide for appropriate penalties commensurate with the grave nature of such crimes so that the perpetrators can be prosecuted by the national judicial system.

The definition, which is identical in its form and content to the requirements set out in Article 7 of the Rome Statute, as adopted more than 24 years ago, does not encompass various practices that could constitute contemporary forms of crimes against humanity. The Commission should study the possibility of considering, within the same framework and in a non-exhaustive manner, new forms of crimes against humanity, such as illegal medical experiments, environmental violations and the targeting of the cultural identity of different communities.

Paragraph 2 (e) of the draft article, which contains the definition of the term “torture”, is not consistent with the definition contained in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Indeed, under draft article 2, there is no requirement that the act be intentionally inflicted, whereas this is an important criterion under the aforementioned Convention. Therefore, Morocco proposes aligning the definition with the one contained in article 1 of the Convention to avoid duplication and discrepancies that may arise when the definitions are used in practice. In addition, the acts criminalized in paragraph 1 (k) of the draft article are expressed in general terms and are inconsistent, as crimes against humanity are also considered to be “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”. For this reason, alignment with the recommended definition was advisable.

Draft article 6: Paragraph 3 of the draft article sets out rules on individual criminal responsibility for crimes against humanity with regard to the responsibility of military commanders and heads of State and is broadly worded in a way that is not appropriate for a criminal rule, which should be precise and clear. Rather than affirming solely the rules of individual criminal responsibility as set out in the Rome Statute, the provision expands the notion of criminal liability by referring to it in connection with issues that are still the subject of debate in international law, such as the criminal liability of legal persons in paragraph 8 of the draft article.

Paragraph 6 sets out a fundamental rule stipulating that the offences referred to in the draft articles, including the crimes of torture and enforced disappearance, shall not be subject to any statute of limitations. The draft articles also provide that States shall take measures to ensure that offences

are not subject to any statute of limitations and ensure that alleged perpetrators cannot invoke their official positions as a ground for excluding their criminal responsibility. They also address the rights of victims, witnesses and others in relation to crimes against humanity, as they require each State to take the necessary measures to ensure that any person who alleges that crimes against humanity have been committed has the right to complain to the competent authorities. The term “any person” includes, but is not limited to, persons who are victims or witnesses of a crime, and can also refer to legal entities, such as religious organizations and non-governmental organizations. The draft articles also provide for mutual legal assistance between States as a legal instrument of mutual assistance in relation to crimes against humanity and for the rights, obligations and procedures related to the extradition of the alleged offender, and stipulate that extradition based on a political offence may not be refused on these grounds alone.

This raises questions as to the suitability and effectiveness of the draft articles, given that an offence that has both political and humanitarian dimensions can be easily exploited.

The principles established in treaties need to be unified, which requires the adoption of consistent rules to avoid the problems that may arise in practice as a result of duplicate provisions. Therefore, draft article 6 should provide specific controls on the application of a statute of limitations in respect of the crime of enforced disappearance, such as those set out in article 8 of the International Convention for the Protection of All Persons from Enforced Disappearance.

Paragraph 7 on appropriate penalties raised questions concerning the inclusion by certain States of death penalty clauses in their criminal codes, prompting proposals on (i) the non-imposition of the death penalty for crimes against humanity, and (ii) the inclusion of new paragraphs in draft article 13 introducing additional guarantees, such as a prohibition against extradition to a State where the offender may be judged by a special court or face the death penalty.

Draft article 7: The principle of complementarity between the draft articles and the Rome Statute of the International Criminal Court, in particular its article 17, extends the jurisdiction of the Court not only to cases involving States parties that are unwilling or unable to prosecute the offenders, but also States that are not parties to the Rome Statute.

Draft article 10: For a more logical flow, it would be advisable to place draft article 10 on the application of the principle of extradition immediately after draft article 13 on extradition, given that the two articles are interrelated.

Draft article 13: This draft article, which was inspired by provisions in the United Nations Convention against Transnational Organized Crime, signed in Palermo, and the United Nations Convention against Corruption, signed in Mérida, does not reflect article 16, paragraph 2, concerning the extradition of offenders, of the Organized Crime Convention, which provides for extradition in connection with offences other than those cited in the draft articles when the request for extradition includes several crimes, including ones that are covered by the draft articles. Therefore, Morocco proposes the addition of the following wording in draft article 13: *“If the request for extradition includes offences other than those covered by these draft articles, the requested State may apply this article also in respect of those offences”*. Morocco also proposes that this article be revised to take into account provisions contained in national laws related to the non-extradition of persons to a State where the alleged offender may be judged by a special court or face the death penalty.

Draft article 14: Morocco proposes that the following wording be added at the end of draft article 14 (Mutual legal assistance), paragraph 3 (*b*): “to the extent permitted under national law”.
