



**Comments and observations by Portugal to the text of the draft
articles on prevention and punishment of crimes against humanity
adopted by the International Law Commission**

I. Introduction

Throughout the past years, Portugal has had the opportunity, when discussing this topic at the 6th Committee, to underscore the relevance it attaches the topic of crimes against humanity and how it is, in its understanding, suitable for codification as other most serious crimes.

Portugal would like to express its appreciation to the Special Rapporteur, Mr. Sean Murphy, and to the International Law Commission for their thorough work on the topic "Prevention and punishment of crimes against humanity".

We believe that the set of draft articles that have been presented reflect the work of the Commission and the discussions held at the 6th Committee.

**II. On the recommendation of the International Law Commission on
the elaboration of a convention by the General Assembly or by an
international conference of plenipotentiaries on the basis of the
draft articles**

Portugal has always stated that an international legally binding instrument on crimes against humanity would be one more step in the common goal of the international community to make sure these crimes do not go unpunished.

We believe a convention is necessary and urgent to fill an important gap in international law and in the fight against the most serious crimes of international concern.



Portugal would like to highlight, in this regard, that out of the three most serious crimes of international concern that are brought before international courts and tribunals (genocide, war crimes and crimes against humanity), only crimes against the humanity do not have their own overall convention which provides for the prevention and punishment of these crimes and establishes a framework for cooperation between States.

Overall, we consider that the set of draft articles which was delivered by the ILC provides us with a good basis for negotiations on a suitable international legally binding framework, both at a substantive and procedural level, for the fighting of impunity and for ensuring accountability when crimes against humanity are committed.

Therefore, we welcome and support the recommendation of the Commission to the General Assembly to elaborate an international convention on the basis of the draft articles on prevention and punishment of crimes against humanity.

III. Comments and observations to the text of the draft articles on prevention and punishment of crimes against humanity adopted by the International Law Commission

1. Preamble

Portugal reads the preamble as also laying out a conceptual framework for the draft articles, defining the general context in which they were developed and their main objectives.

Furthermore, we would like to point out that the preamble is in part inspired by the language used in the preambles of international treaties relating to the most



serious crimes, including the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute.

In this regard, we would note that we see the reference to the Article 7 of the Rome Statute as underlining the existence of a definition of crimes against humanity and, therefore, it makes sense to have it in the preamble.

We would also like highlight the reference to the *jus cogens* nature of Crimes Against Humanity and the reference to the victims of these crimes.

2. Draft Article 1 – Scope

Regarding draft Article 1, Portugal would like to note the dual scope of the draft articles, which apply both to the prevention and to the punishment of crimes against humanity.

As was stated by Portugal and other States during our discussions at the 6th Committee, we believe they work hand in hand and are mutually supportive.

3. Draft Article 2 – Definition of crimes against humanity

In what concerns the definition of crimes against humanity, the International Law Commission based itself on the definition contained in the Rome Statute, which to Portugal seems the most logical solution. It is a definition that took a long time to developed and largely reflects customary international law. Furthermore, it enjoys broad support and was drawn from other existing international treaties.

In our view, it is important to maintain consistency and avoid fragmentation of International Law.



Therefore, Portugal supports the use of the definition contained in the Rome Statute as the basis for developing the definition in a future convention, notwithstanding the need for a few adjustments.

In this sense, we would like to underscore the suppression of the concept of "gender" by the International Law Commission, which we welcome. In Portugal's understanding, this will allow for greater flexibility and protection in comparison to solutions adopted in the past. Furthermore, such suppression updates the definition to the reality we currently live in.

Furthermore, other adjustments could be considered, namely in what concerns the definitions of "*enforced disappearance*" and of "*persecution*", that may benefit from being broadened and aligned with other existing instruments.

4. Draft Article 3 – General Obligations

Portugal sees draft Article 3 as a fundamental provision in the context of the draft articles, since it clearly establishes that each State has the obligation not to engage in and to prevent and punish crimes against humanity.

The entire set of the draft articles revolve around these obligations and the way to operationalize them.

5. Draft Article 4 – Obligation of Prevention

On draft Article 4, Portugal would like to stress that the obligation to prevent the commission of crimes is not specific to these draft articles and similar references to this obligation can be found in other treaties. The ILC has provided, in the commentaries to this draft Article, a comprehensive list of treaties where such references may be found.



Again, Portugal would like to note that the obligation to prevent and the obligation to punish go hand in hand and are mutually supportive.

When it comes to the qualification which can be found in the latter part of introductory paragraph of draft Article 4, Portugal would like to emphasize that, when engaging in measures of prevention – and as noted by the ICL in paragraph 5 of the commentaries, that quotes the International Court of Justice – “it is clear that every State may only act within the limits permitted by international law”. Therefore, we support the inclusion of the expression “*in conformity with international law*” in the introductory paragraph of draft Article 4.

This means to us that, when engaging in measures of prevention, such engagement must be consistent with the rules of International Law, namely those concerning the use of force established in the Charter of the United Nations, International Humanitarian Law and Human Rights Law.

We believe that the provisions in this draft Article provide a combination of flexibility and guidance that States can use when fulfilling this obligation and we acknowledge that the commentaries to the draft articles offer further guidance that can be useful in this respect.

Portugal would also like to note the reference contained, in these draft Articles, to cooperation between States which is one of its main tenets and reflect the duty to cooperate contained in UN Charter and other instruments of international law.

6. Draft Article 5 – Non-refoulement

Portugal welcomes the inclusion of an explicit reference to the principle of non-refoulement in draft Article 5.



This principle constitutes an essential protection under international human rights law, refugee law, humanitarian and customary law, and thus – while not new or specific to the draft articles on crimes against humanity – we support the inclusion of a provision that clearly prohibits States from expelling, returning, surrendering or extraditing a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.

7. Draft Article 6 – Criminalization under national law

Portugal would like to note that draft Article 6, along with draft Articles 7, 8, 9 and 10, deal with measures to be adopted by States to ensure that crimes against humanity constitute criminal offences under national law and that those responsible for such crimes may be prosecuted without undue limitations.

These provisions are essential to avoid impunity and to ensure accountability and, therefore, to guarantee the operationalization of the draft Articles on crimes against humanity. In general, Portugal is satisfied with the drafting proposed by the International Law Commission for this group of draft Articles.

In what concerns draft Article 6, namely its paragraph 5, we wish to underscore the importance of having a provision stating that a person holding an official position is not a ground for excluding substantive criminal responsibility. This ensures that senior officials, whether civil or military, do not benefit from any type of immunity before their own courts when an offence referred to in this draft Article was committed.

Paragraph 6, on the statute of limitations, and paragraph 7, on ensuring adequate penalties, follow the same logic of ensuring accountability without undue restrictions.



In any case, we would like to note that those penalties have to be in line with Human Rights law. In this sense, we would like to state the strong opposition of Portugal to the application of death penalty in any circumstance.

8. Draft Article 8 – Investigation

Draft Article 8 is of great importance. It not only requires that the State with jurisdiction acts promptly whenever there is a reasonable ground to believe that acts constituting crimes against humanity have been or are being committed, but also ensures that investigations are conducted with the necessary fundamental guarantees owed to those suspected of having committed such crimes.

States have *ab initio* priority over the ICC in the exercise of their jurisdiction of crimes against humanity, but their willingness to conduct a prompt thorough and impartial investigation is an important test on their willingness to do so.

9. Draft Article 10 – Aut dedere aut judicare

Portugal welcomes the inclusion of the *aut dedere aut judicare* principle in draft Article 10. The obligation to extradite or prosecute – that, in fact, offers a triple alternative: prosecuting in its own courts, extraditing to another State or surrendering to an international court or tribunal – is essential to avoid any loophole and ensure accountability.

It is also our understanding that amnesties and pardons are not compatible with the obligation to hold accountable those responsible for crimes against humanity.

10. Draft Article 11 – Fair treatment of the alleged offender



Portugal also welcomes draft Article 11 and the clarification that the rights of alleged offender must be guaranteed "*at all stages of the proceedings*".

We see the respect for the rules of fair treatment and for the rights of alleged offenders under applicable national and International law as an indispensable element to ensure the legitimacy of the efforts carried out in national courts to end impunity for crimes against humanity.

We note that the Commission recognized that the expression "*fair treatment at all stages of the proceedings*" is intended to incorporate all the guarantees generally recognized under International law to a detained or accused person, in particular those contained in article 14 of the International Covenant on Civil and Political Rights.

We see, with appreciation, the specific reference to "*fair trial*", which, under Human Rights law, includes the need for an independent judiciary to investigate and judge these crimes, the access of the defendant to lawyers of their choosing, the ability to confront evidence, and, thus, appears to be incompatible with investigation and judgement carried out by military courts.

We also welcome paragraph 2, which includes a right of consular access consistent with Article 36 of the Vienna Convention on Consular Relations and with customary international law.

11. Draft Article 12 – Victims, witnesses and others

As briefly highlighted when commenting on the Preamble, Portugal welcomes the particular importance afforded in the draft articles to the rights of victims, witnesses and other persons affected by the commission of a crime against humanity, and we therefore consider draft Article 12 of particular relevance.



Ensuring the protection of the rights of victims, witnesses and other persons affected by the commission of these crimes is not only consistent with international law, but also instrumental to empower victims to speak up, report crimes, participate in criminal proceedings and, ultimately, it is instrumental to promote the conditions that bring about accountability and justice.

Portugal notes that, in accordance with paragraph 2 of draft Article 12, the obligation contained therein is to be implemented "*in accordance with national law*", which grants States enough flexibility to tailor the requirement included in this provision to the characteristics of their criminal law system, and is without prejudice of additional obligations that each domestic system has established or might establish.

Finally, we support the principle contained in paragraph 3 according to which victims have the right to obtain reparation for damages, and this includes both material and moral damages.

While we welcome the principle reflected in this provision, we would be supportive of a stand-alone article dealing specifically with the right to obtain reparation for material and moral damages resulting from the commission of crimes against humanity.

12. Draft Article 13 – Extradition

Portugal views draft Article 13 as a logic consequence of the *aut dedere aut judicare principle* enshrined in draft Article 10.

While there is no obligation to extradite, there is, however, an obligation of each State to ensure that it takes the necessary measures to avoid impunity for crimes against humanity.



Therefore, extradition is an important tool to ensure accountability for these crimes when a State does not prosecute the alleged offender of crimes against humanity found in its territory.

In this sense, Portugal welcomes paragraph 4 of draft Article 13, whereby the draft articles may be considered as legal basis for extradition in respect of crimes against humanity, which is particularly important for those States requiring an extradition treaty to be able to carry out an extradition.

Notwithstanding, we should bear in mind that extraditions should always be in line with Human Rights law requirements.

13. Draft Article 14 - Mutual legal assistance

Draft Article 14, which establishes the legal basis for mutual legal assistance between States, including the annex provided for in paragraph 8, is of great practical importance.

Portugal welcomes the option to include detailed provisions on cooperation between States in gathering information and evidence to assist investigations or prosecutions being carried out in another State.

14. Draft Article 15 – Settlement of Disputes

In what concerns draft Article 15, dealing with the settlement of disputes on the interpretation or application of the draft articles, Portugal is satisfied with the two-step approach proposed by the International Law Commission to foresee the recourse to the International Court of Justice or to arbitration only if the dispute could not be settled through negotiations.



However, we do not support paragraph 3 of this draft Article, which allows States to opt-out from the jurisdiction of the ICJ or from arbitration as means to settle disputes. We understand that the ILC chose to follow the example of the UN Convention against Corruption. However, in our view, given the particular nature of crimes against humanity, the example to be followed should be the Convention on the Prevention and Punishment of the Crime of Genocide, which does not provide any such opt-out clause and the recourse to the ICJ suffers no limitation.