

Crimes against humanity

Agenda item 80

78th session (resumed)

DRAFT DECLARATION FOR THE USE OF EXCHANGE OF VIEWS ON
THEMATIC CLUSTER IV
DRAFT ARTICLES 13 , 14 AND 15

Thank you, Mr Chair,

In considering the draft articles included thematic cluster four, the Turkish Delegation makes the following points,

Article 13

With regard to paragraph 2 of Draft Article 13, Türkiye maintains that a general affirmation as to the recognition of crimes against humanity as “extraditable offences” does not preclude the grounds on which judicial cooperation in criminal matters can be refused under the regional and bilateral treaties, even when such matters concern allegations of crimes against humanity. In this context, Türkiye supports the view that it would be appropriate if the draft article in question were to reflect more closely the UN Convention Against Corruption (UNCAC), which functioned as the model convention for the draft article.

Türkiye understands paragraph 3 of Draft Article 13 in the same light, the provision in question merely refers to an obligation not to frame crimes against humanity as a political offence or as an offence inspired by political motives, which entails another negative obligation in terms of not refusing extradition “on these grounds alone”. While Türkiye agrees that crimes against humanity cannot be considered “political offences” or “offences inspired by political motives” as such; as illustrated in paragraph 7 of Draft Article 14, the provisions on “mutual legal assistance” within the framework of the Draft Articles “shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance between the States in question”. Therefore, there emerges a contradiction between the inherently narrow scope of paragraphs 2 and 3 of Draft Article 13 and the formulation of Draft Article 14. For example, given the principle of the presumption of innocence, State Parties to the European Convention on Mutual Assistance in Criminal Matters have the right to refuse any form of judicial cooperation in their relations with other States Parties of that Convention in any circumstance defined under Article 2.b of the said Convention at any stage prior to the conviction of an individual of a crime against humanity by a fair and impartial court. Türkiye considers that such potential contradictions should be further studied, and the draft article should be revised accordingly.

Another possible issue in paragraph 3 is the lack of a clear definition in international law as to the concept of ‘political offences’, which may lead to disagreements among parties and, therefore, further clarity is required.

As for paragraph 9 of Draft Article 13, Türkiye concurs with the view that it remains unclear that circumstances under which a State would consider offences as if they had occurred within the

territory of States that have established jurisdiction. If the paragraph in question refers to passive nationality jurisdiction and universal jurisdiction in this very context, Türkiye firmly believes that the paragraph should either be reformulated or omitted given that, as we previously noted regarding Cluster 3, both types of jurisdictions and their scope are profoundly contested in international law. Additionally, the term ‘necessary’ is rather vague and should be clarified. These unclaritys in paragraph 9 may also cause the violation of an accused’s fundamental rights stemming from the principle of legal certainty.

With regard to paragraph 11 of Draft Article 13, Türkiye agrees with the view that the list of impermissible grounds has been broadened to extend beyond those defined in the treaties from which the draft article draws, and we are uncertain about the necessity of this broader scope. We also concur with the view that the terms ‘membership to a particular social group’ and ‘other grounds that are universally recognised as impermissible under international law’ are unclear and may lead to substantial differences in understandings and applications among the parties.

Finally, Türkiye concurs with the view that Draft Article 13 does not mandate the extradition of the accused individual; instead, it requires the case to be presented for prosecution unless the offender is extradited or surrendered. Extradition remains an option as long as the State forwards the matter to its own prosecutorial authorities.

Article 14

Turning to Draft Article 14, as to paragraph 2, Türkiye would like to note that criminal liability of legal persons is not recognised under certain jurisdictions, which may cause some disagreements during the implementation, especially when two State Parties from different legal traditions on the matter required to assist to one another. We believe the paragraph in question should be further clarified and a more nuanced approach should be taken.

With regard to paragraph 4 of Draft Article 14, Türkiye suggests that some safeguards should be introduced and the relevant paragraph may be revised as follows: ‘States shall not decline to render mutual legal assistance pursuant to this draft article on the ground of bank secrecy, *provided that fundamental human rights norms, norms on the protection of personal data and trade secrets are duly observed.*’

As is noted and welcomed by some other Member States, Draft Article 14 does not include a dual criminality requirement. According to Member States who welcomed the exclusion of such a provision, this is not necessary as crimes against humanity must be criminalised under national laws. However, we would like to draw attention to the fact that while all parties of a possible future convention will be under the obligation to criminalise crimes against humanity under their national law, they may still use wider or narrower definitions, as the draft articles we are discussing do not put any obligation to its future State Parties to uniform their national approaches and due to the principle of national sovereignty, States may prefer varying definitions. Taking into account such

situations, in our opinion, it would be appropriate to add a provision as to the dual criminality requirement.

Article 15

Türkiye is content with the inclusion of paragraphs 3 and 4 of Draft Article 15, which provide the right not to consent to a dispute settlement mechanism or to withdraw such consent. We believe the existence of these provisions will allow more States to accede to a possible future treaty.

With regard to the question of ‘whether a possible future convention should have a monitoring mechanism?’, Türkiye is hesitant about the function of such a mechanism, given that while there exists a sufficient number of human rights mechanisms that undertake monitoring function, the criminal law nature inherent to crimes against humanity requires that qualification of acts amounting to crimes against humanity is best to be dealt with by competent judicial organs. Türkiye is also hesitant about a suggestion to establish an enforcement mechanism. We are uncertain about the role, competence and function of such a mechanism. This matter requires further reflection.