

International Law Commission's Draft Articles on Crimes Against Humanity

Comments of Australia

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Australia thanks the International Law Commission for its important work on this topic, and for producing a set of draft articles and accompanying commentary for States' consideration and comment. Australia also thanks the Special Rapporteur, Professor Sean Murphy, for his comprehensive exploration of the issues associated with, and his careful crafting of proposals for, the draft articles and commentary.

Australia appreciates the purpose of ILC attention on the subject: to provide a basis for States to consider closing the gap in the current structure of conventions regarding serious international crimes. Unlike genocide, war crimes, and torture, no specific regime governs the prevention and punishment of crimes against humanity.

Australia notes that the draft articles draw from, and build on, a wide range of international conventions covering not only the aforementioned serious international crimes, but also subject matter including corruption, terrorism, transnational serious and organised crime, trafficking of illicit drugs, extradition and mutual legal assistance. Australia also appreciates the Special Rapporteur's careful regard to a range of national and regional approaches.

Preliminary observations

Australia considers it appropriate that the draft articles are anchored in the core principle that it is, first and foremost, the primary responsibility of each territorial State to prevent and punish serious international crimes that occur within its jurisdiction. Australia respectfully submits that it would be useful for the draft articles themselves (as distinct from the preamble or commentary) to contain explicit reference to this primary responsibility.

Australia observes that draft article 4 usefully clarifies that States' specific obligation to prevent crimes against humanity can be implemented through cooperation with other States, relevant intergovernmental organisations, and, as appropriate, other organisations.

The draft articles as complementary to the Rome Statute

Australia appreciates that a clear priority in the preparation of the draft articles has been to complement the regime set forth in the *1998 Rome Statute of the International Criminal Court* (Rome Statute). The definition in draft article 3 mirrors the definition of crimes against humanity in article 7 of the Rome Statute. Australia also appreciates the confirmation, reflected in the general obligation contained in draft article 2, that crimes against humanity can be committed in both peacetime and armed conflict, where such acts are committed as part of a widespread or systematic attack directed against any civilian population.

Australia notes that the Special Rapporteur's reports evince an intention that the Elements of Crimes adopted by the Assembly of States Parties to assist the International Criminal Court in interpreting and applying the Rome Statute would similarly guide the interpretation of the definition in draft article 3, and respectfully submits that clarification that this is indeed the case would be useful.

Defining the territorial scope of a State's obligations

Australia observes that in defining the territorial scope of a State's obligations, the draft articles use the phrase "in any territory under its jurisdiction". The draft articles provide that States are to establish effective legislative, administrative, judicial and other preventive measures in any such territory;¹ to domestically criminalise crimes against humanity;² and to promptly and impartially investigate whenever there is reasonable ground [sic] to believe that acts constituting crimes against humanity have been or are being committed in any such territory.³ Accordingly, Australia respectfully submits that it would be useful to clarify that the obligations in draft articles 4, 6, 8 and 9 would not, for example, arise with respect to places of detention outside the territory of the State in circumstances where the State had control over the place of detention but not over the surrounding territory. Australia's position is that international obligations are primarily territorial, and that a high degree of control over territory is required for territory to be considered under a State's jurisdiction.

Draft article 5: Non-refoulement

Draft article 5 provides an express prohibition of *refoulement* of a person "to the territory under the jurisdiction of another State" where there are substantial grounds for believing the person would be in danger of being subjected to a crime against humanity. In determining whether such "substantial grounds" exist, a State's competent authorities are to take into account "all relevant considerations". These include, where applicable, the existence in the territory under the jurisdiction of the State to which the person is to be returned of a "consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law."⁴

Australia appreciates the intention behind this provision, and observes that many of the acts which may amount to crimes against humanity would be captured by existing *non-refoulement* obligations pursuant to the *1950 Convention Relating to the Status of Refugees* (Refugees Convention), the *1966 International Covenant on Civil and Political Rights* (ICCPR), and the *1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). Australia recalls that these instruments give rise to obligations not to expel, extradite or return a person, either directly or indirectly, to a place where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion (under the Refugees Convention); or where there are substantial grounds for believing he or she would be subjected to torture (under the CAT and the ICCPR) or to cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the death penalty (under the ICCPR and its Second Optional Protocol in relation to the death penalty).

Having regard to the definition of crimes against humanity contained in draft article 3, Australia considers there is significant overlap between the aforementioned obligations of *non-refoulement* and the proposed obligation with respect to crimes against humanity, and

¹ Draft article 4(1)(a).

² Draft article 6.

³ Draft article 8. Australia notes that the commentary confirms this is intended as a general obligation to investigate the situation as such, and is separate from the more granular obligations regarding the potential individual criminal responsibility of specific alleged offenders.

⁴ Draft article 5(2).

that compliance with these existing obligations would, in the majority of instances, constitute compliance with the proposed obligation.

Australia takes this opportunity to note its view, in accordance with that of the UN human rights committees, that, for there to be ‘substantial grounds’ that a person would be in danger of being subjected to conduct covered by the aforementioned existing *non-refoulement* obligations, there must be a personal, present, foreseeable and real risk to that person. This standard would in Australia’s view also apply in respect of *non-refoulement* arising in relation to a crime against humanity.

Draft article 7: Establishment of national jurisdiction

Australia notes that, in addition to the obligation to establish jurisdiction based on territory or active nationality, draft article 7 appropriately preserves for States’ discretion the ability to establish jurisdiction on the basis of passive personality.

Draft Article 10: aut dedere aut judicare

Draft article 10 contains an express *aut dedere aut judicare* obligation which requires the State in the territory or under the jurisdiction of which the alleged offender is present to submit the case to its competent authorities for prosecution, unless it extradites the person or surrenders him or her to a competent international criminal tribunal. The State’s competent authorities are obliged to take their decision on whether to proceed with the prosecution in the same manner as in any other case concerning a grave offence under national law.

Australia respectfully submits it would be useful to clarify that where the State in question is a common law jurisdiction, “submission to competent authorities for prosecution” would entail provision of relevant information to police for their evaluation and then, if sufficient information is available, investigation, in accordance with relevant procedures and policies. If a police investigation reveals sufficient evidence of criminal conduct, a brief of evidence would be prepared for a prosecutorial authority. A decision on whether to commence a prosecution would be made independently in accordance with relevant policies.

Draft article 12: Victims, witnesses and others

In addition to appropriate guarantees for the fair treatment and trial of an accused, draft article 12 makes specific provision for the rights of victims, witnesses and “others” such as relatives and representatives. States are to ensure their legal systems support victims’ rights to present their views and concerns at appropriate stages of proceedings, and to obtain reparations for crimes against humanity, whether individually or collectively.

Australia respectfully submits it would be useful to clarify that where the State in question is a common law jurisdiction, longstanding criminal trial procedures such as the opportunity to deliver victim impact statements at the point of sentencing would fulfil the intention of the provision, and that there is no intention that draft article 12 would require a common law jurisdiction to import into its criminal trial procedures opportunities for non-witness “participation” in a manner more readily understood in the civil law tradition.

With respect to draft article 12(3), Australia respectfully submits that it would be helpful for the commentary to clarify that a State would not be under an obligation to provide

compensation for victims of crimes against humanity perpetrated by a foreign government outside of the said State's territory or jurisdiction.

Draft articles 13 and 14: Extradition and mutual legal assistance

Australia appreciates the detailed elaboration of provisions within the draft articles to assist with extradition proceedings and mutual legal assistance requests relating to alleged crimes against humanity.

With respect to extradition, currently Australia may only consider extradition requests from States that are designated "extradition countries" by Regulations under domestic law, specifically the *Extradition Act 1988* (Cth), a piece of Australian domestic law. Designated "extradition countries" are generally States with which Australia has a bilateral extradition treaty, or, in the case of Commonwealth countries, an agreement of less-than-treaty status which Australia has agreed to treat as akin to obligations with respect to extradition. In the context of multilateral treaties ratified by Australia, the designation of other States as "extradition countries" is limited to the extradition regimes established under those multilateral treaties. An international convention containing provisions such as those contained in the draft articles could facilitate cooperation between Australia and States not currently designated as "extradition countries" with respect to cases involving crimes against humanity, if ratified by Australia.

With respect to mutual legal assistance, Australia notes that it is currently able to consider requests for mutual legal assistance from any country under its domestic law (the *Mutual Assistance in Criminal Matters Act 1987* (Cth)), including with respect to crimes against humanity.