



The Permanent Mission of Brazil to the United Nations has the honor to refer to the letter by the Secretary-General of the United Nations regarding comments and observations on draft articles on crimes against humanity adopted, on first reading, by the International Law Commission (LA/COD/66) and has the honor of submitting the following information:

1. Brazil expresses its appreciation to the International Law Commission (ILC), and particularly to the Special Rapporteur Sean Murphy, for the work on the topic of crimes against humanity. While it considers that the draft articles are close to the final product, Brazil welcomes the opportunity to provide comments on them.

2. Preliminarily, it is noteworthy that the Rome Statute of the International Criminal Court (ICC) inspired much of the draft articles, which is generally advisable as a means to ensure consistency within the international law system. The preamble of the draft articles, however, includes a paragraph ("recognizing that crimes against humanity threaten the peace, security and well-being of the world") that cannot be read in isolation from other preambular clauses of the Rome Statute that are currently absent from the draft articles. Hence, Brazil recommends the inclusion of the following paragraphs in the preamble:

(i) *Reaffirming* the purposes and principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations;

(ii) *Emphasizing* in this connection that nothing in the present draft articles shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State

3. Draft article 3 defines crime against humanity, mirroring article 7 of the Rome Statute. As stated above, it is generally preferable to use the Rome Statute as the basis for the draft articles. Nevertheless, the ILC text should not read the Rome Statute in isolation from other sources of international law, including international human rights law. More specifically, Brazil considers that paragraph 3 of draft article 3 does not reflect the current human rights definition of gender. Since 1998, there has been significant development on the matter in international *fora*. Even the ICC Office of the Prosecutor adopted an updated understanding of gender in its "Policy Paper on Sexual and Gender-Based Crimes". Therefore, Brazil recommends the deletion of paragraph 3 of draft article 3.

4. The definition of crime against humanity seems to take into consideration the original text of the Rome Statute, thus disregarding the amendments adopted since 1998. More specifically, draft article 3(g) criminalizes persecution as a crime against humanity only when there is a connection with "the crime of genocide or war crimes". This choice not only raises the question on whether there is actually the need to require such a link, but also fails to include another crime that is also under the purview of the ICC: the crime of aggression, whose jurisdiction was recently activated. Considered by the ILC as "the most indisputable example" of an international crime, or "the supreme international crime" (ILC Report, 1976, V. II, part 2, 121), the crime of aggression featured in the jurisdiction of some international tribunals, and forms part of the jurisdiction *ratione materiae* of the ICC. Hence, if the connection requirement is maintained for persecution as a crime against humanity, the draft article should include the link with the crime of aggression.

5. On draft article 5, it is commendable the inclusion of a "non-refoulement" clause in the draft articles. Initially envisaged in the 1951 Refugee Convention, the principle of "non-refoulement" today has a broader scope. Many human rights monitoring bodies have interpreted

their respective instruments as establishing an absolute prohibition of expulsion or return, normally based on the risk of "irreparable harm". Draft article 5 should follow a similar approach and include, as grounds for applying the "non-refoulement" principle, not only the risk that the person will be subjected to a crime against humanity, but also the risk of genocide, war crimes and torture. Furthermore, it could benefit from a provision prohibiting extradition when there are substantial grounds for believing that the person may face the application of the death penalty.

6. Brazil reads paragraph 5 of draft article 6 ("criminalization under national law") together with the ILC commentaries on this matter. In this regard, it considers that this provision has no effect on the procedural immunities that a foreign State official shall enjoy before a national criminal jurisdiction, in accordance with international customary law and in line with the case law of the International Court of Justice (ICJ).

7. Draft article 7, which deals with issues of jurisdiction, is similar to the provisions of other international instruments, such as the Convention against Torture (CAT). In its judgment on the case "Questions relating to the obligation to prosecute or extradite", the ICJ affirmed the understanding that the CAT provisions on the matter established universal jurisdiction as one of the basis for prosecuting suspects of torture. Paragraph 2 of draft article 7, by using almost the same language of CAT, also seeks to establish universal jurisdiction over crimes against humanity.

8. While there is no doubt on the need to ensure that crimes against humanity do not go unpunished, the means to attain this goal might deserve further debate, taking into account the developments of international law and institutions. The ILC work on crimes against humanity seeks to fulfill a gap on the international system, which already relies on global conventions to prevent and punish genocide and war crimes. Differently from the Genocide Convention or the Geneva Conventions and related protocols, which entered into force before the existence of the International Criminal Court, the draft articles on crimes against humanity are subsequent to the establishment of the Rome Statute system. As a consequence, its provisions must strengthen that system, including by prioritizing the International Criminal Court when the custody state has no nexus with the crime, the suspects or the victims.

9. Article 17 of the Rome Statute does not establish which forms of jurisdiction are acceptable grounds to trigger the complementarity principle and thus render a case inadmissible

before the ICC. In this regard, there have been doubts on whether states exercising universal jurisdiction would have primacy over the ICC. Given that the draft articles aim at complementing and strengthening the Rome Statute system, the text should provide that, where there might be a conflict between the exercise of universal jurisdiction and the ICC jurisdiction, the latter should prevail. Furthermore, the draft articles would benefit from the addition of safeguards to prevent the abuse of the universality principle, such as a provision giving jurisdictional priority to states with the closest links to the crimes.

10. Draft article 11 could be strengthened in order to bring it closer to the fair trial guarantees provided in the Rome Statute. Some of the guarantees provided in articles 55 and 63 of the ICC treaty are currently not present in the draft articles. Even though paragraph 1 of draft article 11 established the right to a fair treatment, the text would benefit from more precision, which could be attained by resorting to the language of the Rome Statute on the matter.