

Comments of the Government of Chile on the draft articles on crimes against humanity

For the Government of Chile, it is an honour to address the International Law Commission in relation to its draft articles on crimes against humanity, adopted on first reading, in order to submit the comments and observations requested by the Commission at its sixty-ninth session (2017).

In full conformity with its unwavering commitment to the protection and promotion of human rights, the Government of Chile would like to commend the Special Rapporteur, professor Sean Murphy, for its outstanding and rigorous work. His effort has resulted in an excellent project that coherently articulates the main international obligations arising from the customary prohibition of crimes against humanity, namely, the duty of states to prevent them and to punish them. The project provides welcome clarity on the scope of these obligations, and also intends to bolster the prosecution of these crimes at the national level, an objective which is plainly consistent with the complementarity principle governing the system of the International Criminal Court.

The project should be praised for its both comprehensive and responsible formulation, which follows the definition of crimes against humanity enshrined in the Rome Statute, and which draws on provisions from widely ratified treaties in order to shape the content of its obligations. Such an approach will enable these draft articles to gain widespread international acceptance, and hopefully, will also allow them to become the basis of a multilateral convention on the topic. In any event, this project is called to play a key role in preventing impunity for these heinous crimes, the occurrence of which constitutes an offence perpetrated against humankind as a whole.

In this context, the Government of Chile has the honour of submitting some comments and observations on the draft articles, with the aim of improving their text. Some additions will also be suggested in order to dispel any doubts that could arise in relation with their scope of application.

Concerning article 1 of the project, it would be most important to include a second paragraph, stating that these draft articles only apply in respect to crimes allegedly occurred after their adoption (or entry into force, in case they become a convention). The Special Rapporteur has correctly noted that “a new convention would only operate with respect to acts or facts that arise after the convention enters into force for that State” (Second Report, paragraph 73), basing this assertion in Article 28 of the Vienna Convention on the Law of Treaties.

In this context, and also to avoid any kind of interpretation with regard to the intention of the parties –expressly called for by Article 28 of the Vienna Convention of the Law of Treaties–, it would be relevant to expressly clarify the temporal scope of application of these draft articles. This would remove any doubts which states could have on this point and which could cause them to refrain from adhering to a convention on the topic. In any event, such addition would have no bearing on a state’s potential ability to prosecute crimes against humanity that were committed before the entry into force of such convention.

In relation to draft article 2, it correctly asserts that crimes against humanity are crimes under international law, regardless of whether they are committed in time of armed conflict or not. However, the drafting should be modified in order to make even more clear that states are under the duty of preventing and punishing them in any hypothesis. Therefore, draft Article 2 could be phrased as follows: “Crimes against humanity are crimes under international law, which States undertake to prevent and punish, regardless of whether or not they are committed in time of armed conflict”.

Concerning the excellent draft commentary to this article 2, it contains complete and consistent sources justifying the characterization of crimes against humanity as offences under international law, showing that a context of armed conflict is not a necessary element of their definition. However, paragraph 5 should be slightly modified. When referring to the notion of crimes against humanity contained in the Charter of the International Military Tribunal established at Nürnberg, the commentary states that the definition of these crimes, as amended by the Berlin Protocol, was linked to the existence of an armed conflict. However, it should be recalled that Article 6 of the Charter referred to the crimes of its letters a), b) and c) as “crimes coming within the jurisdiction of the Tribunal”, and presumably did not purport to define all the elements that these offences should possess in order to be qualified as crimes under general international law. In this sense, the Charter established the requirements that the crimes had to comply with in order to be within the jurisdiction of the Nürnberg Tribunal. Accordingly, the Berlin Protocol did not establish a new requirement asserting that these offences had to be linked with an armed conflict in order to be considered international crimes. Instead, it only excluded from the jurisdiction of the tribunal those crimes which did not possess such a link.

In light of the above considerations, it would be advisable to rephrase paragraph 5 of this draft commentary, in the sense that the Charter of the International Military Tribunal established at Nürnberg, as amended by the Berlin Protocol, required that crimes against humanity were directly or indirectly linked with Second World War in order to fall under the jurisdiction of that judicial body. In this sense, it should be recalled that the Berlin Protocol did not exclude jurisdiction for crimes against humanity that had been committed before the war, as long as they retained a connection with the other offences which were under the jurisdiction of the Military Tribunal. In relation with the following paragraphs of the draft commentary to article 2, they should also be adjusted to be consistent with this proposal.

Draft article 3 contains the definition of crimes against humanity as they will be employed in the following articles of the project. Although its drafting closely follows Article 7 of the Rome Statute, which should be positively highlighted, there are some precise aspects which could be revisited.

In relation to paragraph 1, letter h), it is not clear why the notion of persecution requires a necessary connection with other crimes against humanity, war crimes or the crime of genocide (in any event, the crime of aggression should be added). On this point, the respective commentary (paragraph 8) simply explains that the connection with these crimes is required “to adapt” the analogous phrase employed in article 7 of the Rome Statute “to the different context” of these draft articles. However, in the case of the former statute, it may be presumed that persecution was narrowly defined with the objective of restricting the scope of the offences under the jurisdiction of the Court. The formulation of its Article 7 does not imply that acts of persecution unconnected with other crimes should not be considered offences under general international law. Since the present draft articles do not confer jurisdiction to an international tribunal, the objective of restricting the scope of the concept of persecution is not necessarily applicable. In an instrument like the one under analysis, intending to establish a uniform definition of these crimes, such a restriction would imply that the intentional and severe deprivation of human rights by reason of the identity of a group is not sufficiently serious to be considered an international crime of itself. In light of this, the connection with other offences required by the last sentence of letter h) should be either removed, or the draft commentary should give reasons explaining why acts of persecution unconnected with other crimes are not to be considered offences under international law.

Notwithstanding the latter proposal, it should be noted that there is a subsequent definition of persecution provided for in the same article, in paragraph 2, letter g). This one could also be further improved, in order to avoid that states may sustain substantially different interpretations regarding which fundamental rights are covered by the notion of persecution and which content they should be given. A more precise determination would be relevant to avoid or minimize discussions between states in relation to which breaches of fundamental rights would trigger the obligations imposed by a potential convention on the topic, particularly the duty of *aut dedere aut judicare*. It would also minimize potential conflicts regarding the content of the fundamental rights concerned, which may vary according to the national laws of every country. Thus, with this aim, letter g) under analysis could define persecution as “the intentional and severe deprivation of universal fundamental

rights, as recognized under general international law, by reason of the identity of the group or collectivity". It is to be noted that the risk of fragmentation posed by several different interpretations is not present in the Rome Statute, since it establishes a judicial body capable of granting a uniform interpretation of the concepts therein contained.

Draft article 3, paragraph 2, letter a), defines the phrase "attack directed against any civilian population", referring to a course of conduct which is performed pursuant to or in accordance with an intentional policy. As the draft commentary correctly points out (paragraph 29), such policy may be directed by a state, or any group or organization with the capacity to plan a widespread or systematic attack. To appropriately reflect the latter point, the last phrase of letter a) could be modified as follows "...pursuant to or in furtherance of a State, group or organizational policy to commit such attack."

Afterwards, also in relation with draft article 3, paragraph 2, its letter d) could be slightly modified. It would be advisable to suppress the word "lawfully", since its inclusion would seem to give the state concerned an unlimited discretion to establish any legal conditions in order to regulate the presence of people in a given territory. Thus, if this word is kept, the forcible transfer of population would only seem to arise if a given state displaced the people concerned in violation of its own internal rules. Seemingly, even in that situation, the forcible transfer of population would not be wrongful under letter d) if international law provided a ground that allowed the transfer. Certainly, this cannot be the intention of the provision. In this context, this problem would be solved if the word "lawfully" was suppressed, and the phrase "without grounds permitted under international law" was replaced with "unless in conformity with international law". It would be clear that a state could not unilaterally displace a given population without any kind of justification, but could certainly proceed to move them if such action was allowed under international law. In the latter case, it is apparent that international law would not preclude the transfer or deportation of the people concerned if they were present in a given territory in violation of the municipal rules of the respective states, as long as these rules were in conformity with international law.

Draft article 3, paragraph 2, letter i), defines the expression "enforced disappearance of persons" in an overall satisfactory manner. However, the sentence "with the intention of removing them from the protection of the law for a prolonged period of time" should be removed. Its inclusion would require the difficult proof of a subjective intention for which scarce elements will usually be available, and in any event, there are no apparent reasons explaining why such a precise intention is necessary to consider this conduct as a crime. Although the sentence concerned follows the concept of enforced disappearance which the Rome Statute places under the jurisdiction of the International Criminal Court, its phrasing differs from the one employed in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. The latter definition should be preferred not only because it reflects the crime as it is currently understood, but also because it is an instrument which especially focuses on this offence, establishing a general definition which does not have to consider the jurisdictional issues that the Rome Statute involves.

In relation with the definition of enforced disappearance contained in the 2006 International Convention, article 2 only describes objective elements in order to individualize

this concept. After they are mentioned, the last sentence requires that the conducts giving rise to enforced disappearance are ones “which place such a person outside the protection of the law”. This refers to an objective effect that the conduct is required to cause, which may be easily obtained from the circumstances of the case, and certainly does not call for the determination of a precise subjective intention on the part of the perpetrator.

The definition of enforced disappearance employed by the 2006 Convention is substantially similar to the one contained in the 1992 Declaration on the Protection of All Persons from Enforced Disappearance, which provides the elements of the concept in the fourth recital of the preamble, without requiring a subjective element, as well.

With these considerations in mind, the inclusion of the sentence “with the intention of removing them from the protection of the law for a prolonged period of time” would have the effect of restricting once again the scope of application of this offence, discarding the objective formulation that was employed by the specific multilateral convention that was concluded on the subject, well after the adoption of the Rome Statute. Also considering that the present instrument intends to establish a universal definition of crimes against humanity, and that there are no incentives in order to restrict any jurisdiction conferred upon an international tribunal, the sentence under analysis should be suppressed.

In relation with draft article 3, paragraph 3, it should be noted that the definition of gender therein contained, although drawn from the Rome Statute, is not suitable for the context of persecution in which it is called to play a role. By establishing a restrictive interpretation in mandatory terms, the definition would seem to indirectly tolerate persecution by reason of gender identity, an outcome which could be hardly desirable, and one for which scarce reasons would be available. It should be noted that, in order to make it consistent with human rights law, even the Office of the Prosecutor of the International Criminal Court has sought to nuance the definition of “gender” as contained in the Statute. This may be easily explained, since persecution is not justifiable only because the people concerned assert to possess a gender other than those which are officially recognized. Accordingly, in its *Policy Paper on Sexual and Gender-Based Crimes* (June 2014), the Office of the prosecutor stated, after repeating the definition of “gender” contained in the Rome Statute, that “This definition acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys. The Office will apply and interpret this in accordance with internationally recognised human rights pursuant to article 21(3).”

The approach of the Prosecutor’s Office seems suitable for the context of persecution, actually precluding it by reason of gender identity. Therefore, in relation with the definition of “gender” contained in article 3, paragraph 3 it would be suggested to rephrase it as follows: “For the purpose of the present draft articles, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. This definition acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys.”

However, in case the suggestion just referred to was not ultimately accepted, paragraph 3 should at least be deleted altogether. Otherwise, persecution by reason of gender identity, impermissible under international law, would possibly go unpunished.

In any event, it should be made clear that the proposed modification of paragraph 3 or its complete deletion would certainly not oblige states to institutionalize recognition of genders other than male and female, nor would oblige them to officially recognize the gender identity asserted by a given person. However, these modifications would have the desirable effect of recognizing as a criminal offence the intentional and severe deprivation of human rights of people which identify themselves as belonging to other categories, without prejudice to the official status of the latter in the municipal system of the states concerned.

Regarding draft article 3, paragraph 4, it should be noted that the effect of this “without prejudice” clause lacks full clarity. It does not expressly state which would be the possible consequences of maintaining broader definitions of crimes against humanity in other instruments, nor explains which would be the relationship between those other definitions and the provisions of the convention. Therefore, the current text could be rephrased as follows: “This draft article shall not prevent the application of broader definitions of crimes against humanity provided for in national laws or other international instruments, insofar as that they are consistent with the content of the present draft articles”. In addition, the paragraph could also add another “without prejudice” clause, stating that the definitions contained in the present draft article shall not be understood as precluding other offences from being considered crimes against humanity under general international law or other international agreements.

Draft article 4 refers to the obligation of prevention. Its text is quite clear but at the same time gives enough flexibility to states in order that they can choose different means to perform this obligation. In relation to paragraph 1, letter a), it would only be suggested to replace the last part for the following “or other appropriate preventive measures in any territory under its jurisdiction or control”. Concerning paragraph 2, its drafting should be further clarified. Its current form would seemingly intend to prevent that exceptional circumstances are invoked as a defence so as to exclude or justify individual criminal responsibility, or as a defence brought before an allegation of state responsibility for an internationally wrongful act. However, this paragraph 2 does not refer to the obligation to punish these crimes, and therefore its respective draft commentary (paragraph 23) correctly clarifies that this provision only addresses the issues related to prevention. Accordingly, draft paragraph 2 should be rephrased as follows: “2. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification for failing to prevent or for tolerating crimes against humanity”.

Draft article 5 establishes an obligation of non-refoulement. Its text is generally clear and satisfactory. However, regarding the considerations that should be born in mind to determine the existence of danger, the standard included as an example in paragraph 2 could be revisited. Although it is drawn from the 1951 Geneva Convention on the Status of Refugees and the 1984 Convention against Torture, the present draft articles already contain a certain definition of persecution, which specifically refers to the risk posed by

violations of human rights. Therefore, it could be advisable to use an analogous formulation, so that the assessment of the risk of non-refoulement duly considers all the relevant hypotheses of persecution. With this aim, the phrase “consistent pattern of gross, flagrant or mass violation of human rights” could be replaced by “consistent pattern of severe and intentional deprivation of universal fundamental rights” (a formulation aligned with the proposal already put forward in relation with the definition of persecution).

Draft article 6, or its respective commentary, should also explore the possibility of including grounds for excluding responsibility, including mental incapacity and duress. These grounds could follow well the formulation contained in Article 31 of the Rome Statute, which specifically addresses the matter. This would be plainly consistent with an observation made by the Special Rapporteur in his Second Report, when he stated that “All jurisdictions that address crimes against humanity permit grounds for excluding criminal responsibility to one degree or another” (paragraph 55). Including these grounds in the present draft articles would prevent states from establishing substantially different rules on the matter, which would certainly be a desirable outcome.

Also in relation with this draft article, it is to be noted that its paragraph 7 should expressly exclude the application of the death penalty as a punishment for the commission of these crimes.

Now, regarding draft article 8, the obligation to proceed to a prompt and impartial investigation should also be triggered whenever an allegation that crimes against humanity have been or are being committed is brought before the competent authorities of that state.

Draft article 10 establishes the duty of *aut dedere aut judicare*. When explaining the content of the obligation, the drafting follows the formulation employed by the Convention on the suppression of unlawful seizure of aircraft. The latter is more precise than other international instruments establishing a similar duty, and therefore, this draft article is quite satisfactory.

However, it would be highly convenient to add a second paragraph regarding the principle of *ne bis in idem*. In this sense, the new paragraph should assert that the obligation established by this draft article shall not arise if the alleged offender has already been convicted or acquitted for the same offences. Notwithstanding this suggestion, the latter rule could also have an exception, which could follow the formulation employed by letters a) and b) of Article 20, paragraph 3, of the Rome Statute.

The well-founded commentary to draft article 10 should also be modified in a certain aspect. Its paragraph 8 states that “The obligation upon a State to submit the case to the competent authorities may conflict with the ability of the State to implement an amnesty”, which could be understood as allowing these general exclusions of responsibility in relation to these offences.

However, a general amnesty conferred in respect of crimes against humanity is impermissible. This would allow that these offences were left completely unpunished, and only because the state in which the perpetrators were present unilaterally decided to exclude

criminal responsibility for their commission. Accordingly, the first sentence of paragraph 8 under analysis should be rephrased as follows: “The obligation upon a State to submit the case to the competent authorities precludes the possibility of implementing an amnesty in relation to crimes against humanity.” In order to be consistent with this proposal, paragraph 11 of the same commentary should also be modified. Its first part should be rephrased, and its second part should be deleted altogether. Regarding the changes to be made to the first part of paragraph 11, the word “unlawfully” should be inserted between the words “amnesty” and “adopted”.

Draft article 12 concerns measures to be adopted in relation to victims, witnesses and other people. In order to duly safeguard the presumption of innocence, there should be minor changes in 2 provisions, applicable to those stages of the criminal proceedings in which the existence of the crime and the participation of the suspects have not yet been determined. In paragraph 1, letter b), the word “victim” should be replaced by the expression “alleged victim”, and in paragraph 2, the word “victims” should be replaced by “alleged victims”.

Also in respect to draft article 12, in its paragraph 1, letter b), after the word “witnesses” it would be desirable to include the words “judges, prosecutors”, so that the examples therein listed also include state officials.

As a last observation, related to draft article 13, the possibility of deleting the word “alone” used at the end of paragraph 2 should be considered. Its inclusion serves no apparent purpose, and in fact, may be misleading.

Finally, the Government of Chile would like to congratulate once again the Special Rapporteur on the subject, professor Sean Murphy, who has produced an outstanding project, called to make a decisive contribution to the strengthening of international criminal law.