Comments and observations of the Czech Republic on the draft articles on the topic „Crimes against humanity", adopted by the International Law Commission on first reading at its sixty-ninth session in 2017

The Czech Republic welcomes the draft articles on the topic „Crimes against humanity" contained in the Chapter IV of the Report of the International Law Commission on the work of its 69th session (2017) and expresses its appreciation to the Commission and especially to the Special Rapporteur Mr. Sean D. Murphy for their outstanding work on this topic.

The Czech Republic hereinafter presents the following comments and observations on the draft articles.

We followed the drafting of articles on crimes against humanity very closely and we note with satisfaction that the whole set of draft articles with commentaries was adopted on first reading last year. The absence of a convention on prevention and punishment of crimes against humanity and on judicial cooperation among States in prosecuting these crimes has been debated for a long time, but only conventions regarding certain crimes which form part of definitions of crimes against humanity have been concluded so far. The Czech Republic would like to express its support for the elaboration of the convention on crimes against humanity which if concluded would fill the legal gap and complement other conventions on prosecution of the most serious crimes under international law.

We note with appreciation that the draft articles are elaborated in a complex manner and include both the substantive and procedural aspects of investigation and prosecution of these crimes. In particular, we welcome the inclusion of the provisions on the protection of victims and witnesses, fair treatment of the alleged offenders and promotion of broad cooperation among States.

We note with satisfaction that the draft definition of the crimes against humanity, as contained in draft article 3, mirrors *verbatim* the definition of crimes against humanity set forth in Article 7 of the Rome Statute, except for the necessary contextual changes. The text of the draft article confirms that the definition of crimes against humanity under the Rome Statute has already received wide acceptance and is increasingly seen as a codification of customary international law on crimes against humanity. Since the small changes to the definition brought about the inclusion of genocide and war crimes in the text of the draft articles on crimes against humanity (draft article 3, paragraph 1 (h)) we believe that it would be desirable to include definition of those crimes in the commentary or at least to refer to existing international instruments where these crimes are defined (see. e.g. para 38 of the commentary to draft article 3).

Further, the crime of aggression is mentioned in the commentary to said draft article, but is not included in the text of the draft article itself with the explanation that this definition might be revisited once the requirements for the exercise of the jurisdiction of the International Criminal Court over this crime are met. We would prefer a text which would not be subject to

future changes. We expect that the Commission will deal with this issue during the second reading, as envisaged in the commentary.

Draft article 4, paragraph 1 (a), contains the obligation of prevention and covers all preventive measures, including effective "administrative" measures through which each State undertakes to prevent crimes against humanity. While we acknowledge that similar wording is used in Article 2, paragraph (1), of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to prevent acts of torture, given the systematic and widespread nature of crimes against humanity, we would appreciate that the Commission further elaborates in the commentary on the meaning of "administrative measures" with regard to prevention. The commentary in this regard might serve as a guideline for future implementation of the draft articles and therefore any detailed explanation would be of a great use.

Further, the draft article 4 seems to be an all-encompassing provision. While the general terminology might be desirable in order to include any conceivable preventive measure, we believe that the draft articles would benefit from including a provision mentioning concrete examples of preventive measures directly in the text of the draft article, such as, for instance, training of officials which is explicitly provided for in the United Nations Convention against Corruption or United Nations Convention against Torture (article 10) or in the International Convention for the Protection of All Persons from Enforced Disappearance (article 23).

With respect to draft article 4, paragraph 1 (b), according to which the States shall also cooperate, as appropriate, "with other organizations", in our view the obligation to cooperate with non-governmental organizations is not well established in treaties on criminal matters. According to standard treaty provisions related to criminal law States are obliged to cooperate among themselves, sometimes including with intergovernmental organizations. Hence, we believe that more elaboration and explanation on the obligation to cooperate with non-governmental organization is needed, although we recognize that the obligation is not drafted as absolute.

We note the commentary to Article 6, paragraph 5, concerning the non-applicability of mitigating circumstances to person holding official position. Although it seems quite logical and therefore not necessary to explicitly address the question of precluding the invocation of official position as a ground for mitigation or reduction of sentence, in criminal law a legal certainty is of paramount importance and, therefore, we suggest to include it in the text of the draft article, not only in commentary thereto (e.g. by adding the text " ... nor a ground for reduction or mitigation of sentence" at the end of the text of article 6, paragraph 5).

Regarding draft article 6, paragraph 7, we note the analysis with respect to the terminology "appropriate" versus "effective" penalties. We acknowledge that treaties on criminal matters contain mostly terminology of "appropriate" penalties, on the other hand, we believe that we would send a strong dissuasive message to possible perpetrators by including also the adjective "effective", so the text would read "appropriate and effective" penalties. For instance, according to Article 12 of the United Nations Convention against Corruption States shall provide for effective, proportionate and dissuasive penalties. Apparently, it is possible to

add more characteristics without doing any harm to the object of the provision, which is to provide for penalties for the serious crimes committed.

We welcome the inclusion of the provision on the liability of legal persons in draft article 6 , paragraph 8. At the same time we take note of the fact that there is a divergence of views among States on the liability of legal persons in connection with crimes under international law. Some treaties on criminal matters contain provision on liability of legal persons, but neither the Rome Statute, nor the conventions that address crimes that are part of the definition of crimes against humanity, include such provision. We believe that the commentary to this provision would benefit from further clarification on the relation between the liability of legal persons and the organizational policy element which forms part of the definition of crimes against humanity.

The draft article 7 sets forth wide bases for establishing national jurisdiction with respect to the crimes against humanity. Therefore, it is possible that more States might have jurisdiction at the same time regarding the same offence. We suggest to include a provision according to which States shall strive to coordinate their action appropriately, should such situation occur. Similar provision can be found for instance in Article 7, paragraph 5, of the International Convention for the Suppression of the Financing of Terrorism.

On the other hand, we note with satisfaction that the provision on multiple requests for extradition was discussed and that it was left to the discretion of States. There are huge differences among States regarding the criteria for taking decision when more requests for extradition are pending at the same time; however, unlike the above suggested provision of Article 7, in case of conflicting requests for extradition the person would not be subject twice to criminal proceedings for the same offence.

As regards the draft article 10 on the obligation *aut dedere aut iudicare*, we note that the text of the provision is based on the so-called "Hague formula" pursuant to the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft. As stated by the International Court of Justice in Belgium v. Senegal case, cited in the commentary, the provisions of the "Hague formula" create elements of a single conventional mechanism aimed at preventing perpetrators from going unpunished, by ensuring that they cannot find refuge in any State Party, since states parties to any such convention have a „common interest" to ensure that relevant crimes are prevented and prosecuted. In addition, we welcome the inclusion of the word "surrender" in draft article 10 as reflecting the different terminology used in various international instruments. We concur with the statement that it is obvious that the surrender to the international criminal tribunal by a State Party is possible only where such State has recognized its jurisdiction. For the purpose of coherence we would suggest to include it in the text of the draft article as it is provided for in the International Convention for the Protection of All Persons from Enforced Disappearance.

Regarding the draft article 13, paragraph 4 (a), we note that similar provision is contained only in the United Nations Convention against Corruption and United Nations Convention against Transnational Organized Crime. In the commentary to this draft provision, we do not see compelling reasons for the inclusion of such text. In addition, the provision as it stands

differs from those in the above mentioned treaties as it does not provide for time period when such information to the Secretary-General is supposed to be conveyed. Should the text remain in the draft articles, we suggest to include the time limits which usually are time of signature or deposit of instrument of ratification, acceptance, approval or accession.

We propose to include the rule of speciality also in draft article 13, as the rule might apply with respect to the extradited person in a similar way as with respect to the witnesses and experts mentioned in paragraph 15 of the draft annex or to the detained person temporarily transferred to the requested State as mentioned in paragraph 19 of the draft annex. It might be based on the provision of Article 14 of the European Convention on Extradition, but we are open to any suggestions.

Regarding draft article 13, paragraph 9, we wonder whether it is possible to further explain the reason for refusal of extradition that reads the "other grounds that are universally recognized as impermissible under international law" as it is a new concept which is not contained in previous conventions and is not explained in the commentary. We consider this wording to be rather vague. Although we understand that it is drafted in such a way as to provide States with wide discretion, this provision certainly does not contribute to the legal certainty.

We also would like to clarify some information contained in the commentary to the draft article 13. Even though a person may be convicted and sentenced, it does not necessarily mean that it has to escape only from lawful custody. Such person may even flee from the State before starting to serve the sentence of imprisonment in order to trigger the application of the draft article on extradition for the purpose of enforcement of sentence.

Further, we would like to point out that despite the existence of some multilateral and bilateral treaties on extradition, this judicial assistance is often provided also on the basis of the guarantee of reciprocity, whereas according to the national law of some States adherence to the general principles of law is also considered as a legal ground for providing judicial assistance.

On the other hand, with respect to the commentary to draft article 14 we question the statement that the mutual legal assistance (MLA) in criminal matters is typically undertaken on the basis of reciprocity and suggestion that MLA treaties, multilateral and bilateral, are scarce. In Europe, the European Convention on Mutual Assistance in Criminal Matters applies and is widely accepted. Within the Organization of American States the Inter-American Convention on Mutual Assistance in Criminal Matters was adopted. Further, there is a number of bilateral treaties on MLA that might be used as a legal basis for various types of MLA concerning also crimes against humanity.

We appreciate the inclusion of the provisions on the settlement of disputes. In conformity with other conventions on criminal matters we propose to include in draft article 15, paragraph 3, reference to the moment for making the declaration of non-acceptance of the procedure for the settlement of disputes, which is usually the time of signature or deposit of

instrument of ratification, acceptance, approval or accession (see for instance Article 30 paragraph 2 of the United Nations Convention against Torture).

We consider the draft annex as a useful guidance for MLA requests. Although it is important for the designated central authority to have the responsibility to receive requests, in general we believe that it is similarly important that it is endowed with "competence" to receive it (not the "power"). Given that the requests are usually executed by the judiciary which is independent, we suggest that "central authorities encourage speedy and proper execution by the competent authorities and ensure speedy transmission to them" (paragraph 2 of the Annex).

Last but not least, we would like to propose to include in the draft annex the provision regarding transit of persons in custody or extradited persons. It is an important part of the mutual legal assistance in criminal matters as often there are no direct flights and the transferred person has to transit through other States than the requested or requesting State.