

Response of the Republic of Türkiye to the International Law Commission's Request for Comments and Observations on the Draft Articles on Crimes Against Humanity

Türkiye is pleased to respond to the International Law Commission's (ILC) request for comments and observations on the draft articles on crimes against humanity. Without prejudice to the comments and observations made in our previous statements, we would like to kindly bring to the attention of the Commission the following observations on the topic.

Türkiye welcomes the preamble's emphasis on the primary responsibility of States to investigate and prosecute crimes against humanity, yet we believe clarification could be provided on the issue of jurisdiction if we formulate the eight preambular paragraphs as follows:

“Recalling that it is the duty of every State to exercise its criminal jurisdiction with respect to

provision. With regard to draft article 4 (b), we have questions on the scope of the obligation to cooperate with other States and relevant organizations, given that there is no guidance on which organizations are referred in this paragraph or how to address situations where such cooperation might not be possible. Thus we believe, it would be more suitable to apply “where appropriate” to the whole of this provision.

Draft article 5: Principle of “ ”

While acknowledging that “non-refoulement” is one of the fundamental principles of human rights law, Türkiye believes that the draft article is unclear as to how this principle will be applied. We share the concerns of other delegations that the phrase “substantial grounds to believe” can be open to abuse and politicization. Extradition and legal assistance procedures. Thus, we believe further clarification is required on the application of “non-refoulement” principle with regard to crimes against humanity.

Draft Article 6 : Criminalisation under national law

Paragraph 31 of the commentary to draft article 6 states that, the fifth paragraph of the said draft article is without prejudice to the “procedural immunity that a foreign state official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law.” For clarity, Türkiye recommends that this statement should be incorporated into the text of the draft article itself. This would ensure that this draft will be interpreted in accordance with well-established principles of international law.

With regard to draft article 6/6 which stipulates that States have to ensure that statutes of limitations shall not apply to crimes against humanity, we support the suggestion that in order to avoid confusion, it would be helpful to state in the draft articles that States were not obligated to prosecute crimes against humanity that had occurred before such offences had been criminalized in their national law, as mentioned in the ILC in paragraph (33) of its commentary to draft article 6.

We believe that draft article 6/8, which provides that the state shall take measures to establish criminal, civil or administrative liability of legal persons for the offences referred to in the current draft article, does not reflect existing customary international law. As acknowledged by the commentary to this draft article, most tribunals to date did not include a provision on criminal liability of legal persons. There is neither sufficient state practice, nor established rules of customary international law to this effect. Thus, we suggest further discussion would be helpful as to the necessity of this provision.

Draft article 7: Establishment of national jurisdiction

One of the fundamental principles of international criminal law is that States have the primary sovereign prerogative to exercise jurisdiction in their national courts over crimes that have been committed in their territory or by their nationals. This principle is consistent with the notion that the State with territorial or active personality jurisdiction is usually best suited to effectively prosecute crimes. Thus, we believe that it is in the interest of justice that territorial or national jurisdiction should be given primacy over passive nationality jurisdiction. In our view, draft Article 7 falls short of addressing the question of priority of jurisdiction in order to avoid the potential conflicts of jurisdiction and should be amended accordingly.

As some member States pointed out, article 7 of the Rome Statute does not apply to the nationals of non-State parties. Thus, Türkiye strongly supports the view that a similar provision should also be included in the draft articles with regard to the nationals of State parties. In our understanding, draft article 7 only permits States to establish jurisdiction over crimes committed by a national of a State party and does not extend to establishing jurisdiction over nationals of States not parties.

Draft article 8: Investigation

Türkiye considers it a crucial requirement that investigations should be 'prompt, thorough and impartial'. However, some aspects of draft article 8 warrants further consideration. For example, the scope of the "reasonable grounds" needed prior to taking suspects into custody for crimes against humanity is ambiguous and open to abuse. In that regard, we reiterate our view that it would be preferable for crimes to be investigated where they occurred in the interests of justice.

Draft article 9: Preliminary measures when an alleged offender is present

With regard to draft article 9, it is our firm belief that it should be included in the draft articles.

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