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Chair: Mr. Afonso . . . . . (Mozambique)
later: Mr. Leal Matta (Vice-Chair) . . . . . (Guatemala)
later: Ms. Sverrisdóttir (Vice-Chair) . . . . . (Iceland)

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23-06917 (E)

The meeting was called to order at 3.05 p.m.

Agenda item 78: Crimes against humanity (*continued*)

Draft articles 6–10 (*continued*)

1. **The Chair** invited the Committee to resume its exchange of views on the draft articles on prevention and punishment of crimes against humanity adopted by the International Law Commission.

2. **Mr. Erkan** (Türkiye), referring to draft article 6 (Criminalization under national law), said that the criteria governing the responsibility of military commanders and superiors were ambiguous and needed clarification. The Commission stated in paragraph (31) of its commentary that paragraph 5 was had no effect on any "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, that statement should be incorporated into the draft article itself, thereby ensuring that the draft article would be interpreted in accordance with well-established principles of international law. A clause regarding the principle of non-retroactivity also needed to be included in the draft articles, which would be compatible with the applicable rules of international law on treaties.

3. Paragraph 8, which provided that each State should take measures to establish the criminal, civil or administrative liability of legal persons for the offences referred to in the draft article, did not reflect existing customary international law and should be deleted. As the Commission acknowledged in its commentary, "criminal liability of legal persons has not featured significantly to date in international criminal courts and tribunals […] liability of legal persons has also not been included in many treaties addressing crimes at the national level […]". There were also neither sufficient State practice nor established rules of customary international law to that effect.

4. Although the concept of crimes against humanity originated from international law, it had no internationally agreed rules and standards. As the Commission noted in its general commentary to the draft articles, "there is no global convention dedicated to preventing and punishing crimes against humanity and promoting inter-State cooperation in that regard". The proposed rules, concepts and mechanisms should be established with the utmost diligence, in a structured manner and with full clarity. Crimes against humanity were highly political in nature, involved State officials by definition, and could be exploited for political reasons. Such a risk was embedded in draft article 7 in particular.

5. One of the most fundamental principles of international criminal law was that States had the primary sovereign prerogative to exercise jurisdiction in their national courts over crimes against humanity committed in their territory or by their nationals. That principle was consistent with the notion that the State with territorial or active personality jurisdiction was usually best suited to effectively prosecute such crimes. It was therefore in the interest of justice that territorial or national jurisdiction be given primacy. It was his delegation's understanding that universal jurisdiction under draft article 7 could be exercised only in respect of nationals of States parties; in other words, the draft article did not permit States to establish jurisdiction over nationals of non-States parties.

6. **Ms. Popan** (Representative of the European Union, in its capacity as observer), clarifying the comments she had made at the previous meeting concerning the death penalty, said that the intention of the European Union was not to impose its view that the death penalty should not be considered as an appropriate penalty for the purposes of draft article 6. The European Union considered the draft article in the light of its well-known and principled position on the death penalty. It should also be noted that 144 countries had abolished the death penalty in law or in practice, and that in the spirit of cooperation, it had been agreed that all delegations had the right to express their views on any matters covered by the draft articles.

7. **Mr. Silveira Braoios** (Brazil), referring to draft article 6 (Criminalization under national law), said that paragraph 3 should be more specific, in order to ensure legal certainty. It provided that commanders and other superiors were criminally responsible for acts committed by their subordinates if they knew, or had reason to know, of such acts, whereas the perpetrator's knowledge of a systematic or widespread attack was established as a constituent element of a crime against humanity in paragraph 1 of draft article 2. Given that the phrase "had reason to know", contained in paragraph 3, might be too vague for a criminal provision, it could be advisable to follow the example of the Rome Statute of the International Criminal Court, which specified in its article 28 (a) (i) that the reason to know was verified in the light of "the circumstances at the time". Alternatively, wording such as that found in article 86, paragraph 2, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) could be more accurate – namely, "had information which should have enabled them to

conclude in the circumstances at the time". Otherwise, there would be a theoretical risk of strict liability being applied, which would not be in line, in principle, with international jurisprudence.

8. It was his Government's understanding that nothing in the draft articles should be interpreted as affecting the immunity of State officials from foreign criminal jurisdiction, in accordance with international customary law and in line with the case law of the International Court of Justice. A provision to that effect should therefore be included in draft article 6.

9. Brazil welcomed the inclusion of draft article 10, on the *aut dedere aut judicare* principle, which could be an important instrument in combating impunity. That principle was set out in numerous international conventions and created, according to the case law of the International Court of Justice, an *erga omnes partes* obligation. Each State party therefore had an interest in complying with that obligation in any given case. Depending on the legal instrument under consideration, the obligation might be to prosecute rather than to extradite, or vice versa. In the draft articles, the obligation was to prosecute the alleged offender, and the alternative was to extradite or surrender the accused. The text must therefore be read in conjunction with the draft articles on national jurisdiction and extradition.

10. A future convention would benefit from additional safeguards with a view to preventing the abuse of the universality principle. For instance, the obligation under draft article 10 could apply to the cases contemplated in paragraph 1 of draft article 7. In cases in which the custody State had no direct link to the crime, the offender or the victim, consideration could be given to creating the obligation to extradite or surrender the alleged offender to international criminal tribunals or to prosecute the alleged offender, as envisaged in draft article 7, paragraph 2. That would give jurisdictional priority to States with the closest links to the crime, thereby preventing the misuse of the principle of universal jurisdiction.

11. His delegation welcomed the initiative taken by the Commission and suggested by Brazil in 2018 to eliminate the former paragraph 3 of the draft article on the definition of crimes against humanity, which did not incorporate the current human rights definition of the term "gender" and contemporary developments in discussions thereon. In draft article 3 (General obligations), the explicit reference to the obligation of States not to engage in acts that amounted to crimes against humanity was an important corollary to the obligation to prevent such crimes. The provision that no circumstances whatsoever might be invoked as a justification of such crimes was crucial. Draft article 4 (a) could benefit from an express reference to both de jure and de facto jurisdictions, to enhance the legal certainty over the obligation of States to prevent crimes against humanity in territories that they controlled.

12. **Mr. Khng** (Singapore) said that his delegation appreciated the clarification provided by the European Union and fully agreed that any delegation could express its views on any matter covered by the draft articles. However, some delegations seemed to be seeking to shift the debate towards one about the merits of the death penalty, which was not appropriate. While it might be that some countries had abolished the death penalty in law or in practice, the majority of Member States had also reaffirmed the sovereign right of all countries to develop their own legal systems, including determining legal penalties, in accordance with their international law obligations.

13. **Ms. Minale** (Ethiopia) said that existing human rights and humanitarian laws and treaties and national criminal laws provided the necessary legal basis for the prosecution of crimes against humanity. Any legal gaps on the topic should be addressed by national laws and institutional mechanisms, not a treaty.

14. As crimes against humanity were susceptible to political subjectivity, a delicate balance was required in any legislative instruments concerning them. The reference in the draft articles to the Rome Statute, which was not accepted by more than one third of Member States, complicated the discussion and undermined consensus-building efforts. Ethiopia was not a party to the Statute and believed that criminal law and criminal justice policy fell under national jurisdiction. International tribunals should be established on an ad hoc basis and designated for specific cases with the consent of the State or States concerned. Ethiopia had expressed its strong reservation about the Court's violation of State sovereignty and the immunity of State officials, as well as its selectivity, which undermined sovereign equality and the resolution of peace and security challenges. Her delegation therefore believed that the draft articles must be centred on national laws and national investigation, prosecution and judicial processes.

15. Referring to draft article 6 (Criminalization under national law), she said that the provision whereby States were required to take measures to ensure that military officials could be culpable for crimes against humanity committed by their subordinates was unnecessary and counterproductive. Considering that those crimes could be committed outside the context of armed conflict, general principles of attribution needed to be stated and

States should be given leeway in determining culpability.

16. The Ethiopian Constitution had a dedicated provision on crimes against humanity, according to which the criminal liability of persons who had committed such crimes, as defined by the international agreements ratified by Ethiopia and by other laws of the country, should not be subject to any statute of limitation. Such offences could not be commuted by amnesty or pardon of the legislature or any other State institution. Her delegation thus viewed the provision relating to statutes of limitation in a positive light. The Commission should explore prevailing State practices concerning pardons and amnesties and develop an applicable proposal in that regard.

17. Ethiopia welcomed the provisions on efforts by States to try crimes against humanity and cooperate with one another. The Criminal Code of Ethiopia provided for a modified form of universal jurisdiction over international crimes, whereby a person who had committed a crime under international law or an international crime specified in Ethiopian law, or in an international treaty or convention to which Ethiopia was a party, could be tried in Ethiopia. Crimes against humanity fell within that category. The principles of immunity of State officials from foreign jurisdiction and non-interference in the internal affairs of States must be fully respected. A clear provision to that effect should be included in the draft articles.

18. The regular criminal law principle of non-retroactivity which applied for all crimes should be construed differently when it came to crimes against humanity, because such crimes were long-standing criminal acts that warranted punishment at the time of commission. On that basis, non-retroactivity should only apply to any aggravating factors for such crimes. The Commission should work on a clear and well-defined caveat with regard to non-retroactivity, in order to address historically egregious crimes. However, a provision on non-retroactivity must be without any prejudice to accountability and remedy, including reparation, for all international crimes, atrocities and other acts constituting crimes against humanity committed in order to sustain policies of colonization, apartheid, aggression, racial segregation or foreign occupation.

19. **Mr. Jaiteh** (Gambia) said that his delegation welcomed draft articles 6 and 7, which were essential for the investigation and prosecution of crimes against humanity by States, as well as draft articles 8 and 9, which were in line with the other draft articles and with international law. The Gambia also welcomed draft article 10, which set out the principle of *aut dedere aut judicare*, thus ensuring that alleged perpetrators of crimes against humanity would not have a safe sanctuary to hide from prosecution.

20. **Ms. Flores Soto** (El Salvador), referring to draft article 6 (Criminalization under national law), said that her delegation agreed with the provision in paragraph 1 that States had an obligation to ensure that crimes against humanity constituted offences under their national law, as that would effectively ensure the implementation of the draft articles. However, paragraph 3, which aimed to regulate the various modes of participation when it came to criminal responsibility, including direct perpetration and various other modes of participation, did not cover indirect perpetration. The very nature of indirect perpetration presupposed the involvement of at least two people, and that aspect could have been reflected more precisely in the text. Indirect perpetration involved acting through another person and was distinct from other modes of participation, as the perpetrator did not commit the crime directly, but rather used another person as an instrument.

21. With regard to draft article 7 (Establishment of national jurisdiction), and paragraph 2 in particular, the exercise of jurisdiction in the absence of territorial or personal connection appeared to refer to the principle of universal jurisdiction, which was very appropriate, given the nature of the crimes in question. However, there should be a clear distinction between the principle of universal jurisdiction and the obligation to extradite or prosecute. Her delegation therefore suggested reformulating the paragraph to clarify the true scope of the draft article.

22. **Mr. Liu** Yang (China), addressing draft article 6 (Criminalization under national law), said, with regard to paragraph 1, that clarifying exactly what crimes against humanity were and reaching a consensus on their definition constituted a prerequisite and the basis for national criminal laws on such crimes. The acts constituting a crime and the nomenclature of such acts should not be confused. Acts that constituted crimes against humanity should be criminalized under a country's criminal code. As for how such acts were to be punished and the exact nomenclature of such acts, a one-size-fits-all approach should not be applied. For example, while some countries considered acts of piracy as punishable crimes, many others did not have such a crime in their criminal law.

23. With regard to paragraphs 2 to 8, which set out specific requirements for the inclusion of crimes against humanity in national law, countries should be allowed to make their own decisions in accordance with their

national conditions and legal systems. That would allow more countries to adhere to a possible future convention on crimes against humanity. China agreed with the Commission's assertion, in its commentary that "paragraph 5 has no effect on any 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". To facilitate the effective implementation of a future convention, that assertion should be included in the draft article, with a clear statement that paragraph 5 was without prejudice to the immunities enjoyed by foreign State officials under conventional and customary international law.

24. Regarding paragraph 6, given that crimes against humanity covered criminal acts of varying categories, levels of severity, content and applicable penalties, the issue of statutes of limitations for such crimes should be subject to further study and independently determined by each country. The question of liability of legal persons for such crimes and the nature of such liability, covered in paragraph 8, should be decided independently by each country according to its national circumstances. Indeed, the Commission stated in its commentary that "criminal liability of legal persons has not featured significantly to date in international criminal courts and tribunals".

25. Turning to draft article 7, he said that the establishment of national jurisdiction over crimes against humanity should be based on a clear jurisdictional basis: territorial jurisdiction, active personality jurisdiction or passive personality jurisdiction, as indicated in paragraph 1. Paragraph 2 was aimed at creating an additional broad jurisdictional basis for the application of universal jurisdiction over such crimes which required further debate. Considering that draft article 10 provided for the *aut dedere aut judicare* rule, deleting that paragraph would not affect international cooperation concerning such crimes. It was an objective fact that there were differences in the criminal jurisdiction provisions of the national laws of different countries, but it was a basic norm of international relations that the exercise of criminal jurisdiction established by a country under its national law should not undermine the sovereignty of other States or constitute interference in their internal affairs. Those elements should be reflected in paragraph 3.

26. Regarding draft article 9 (Preliminary measures when an alleged offender is present), China shared the view that preliminary measures taken by countries, such as detaining alleged offenders, should satisfy the necessary substantive and procedural requirements and that arbitrary detention should not be allowed. Draft article 10 addressed the *aut dedere aut judicare* rule, which China supported in principle. However, that provision should not be interpreted as recognizing or permitting the exercise of universal jurisdiction over crimes against humanity. The draft article referred to the transfer of jurisdiction between a State and an international criminal court or tribunal, which went beyond the general requirements of the *aut dedere aut judicare* rule. Many international treaties included an *aut dedere aut judicare* clause but only in relation to cooperation between States, without any reference to international courts or tribunals. Cooperation between States and international courts or tribunals should not be regulated by or included in the *aut dedere aut judicare* clause.

27. **Ms. Sayej** (Observer for the State of Palestine) said that the effective criminalization of crimes against humanity was necessary to ensure the protection of peoples and also the efficacy of the draft articles. The obligation to establish national jurisdiction over such crimes in national legal systems followed from various treaties and customary international law. National laws must therefore ensure accountability for the commission of such crimes.

28. Referring to draft article 6 (Criminalization under national law), she said that her delegation joined others in affirming that incitement or threat to commit crimes against humanity, in public or in private, directly or indirectly, was a well-established mode of liability under international criminal law, and should be included in paragraph 2. Regarding paragraph 4, her delegation reiterated its long-standing position that there were no grounds for excluding criminal responsibility, as doing so was incompatible with the prevention and punishment of crimes against humanity. With regard to draft article 7 (Establishment of national jurisdiction), primacy should be given to personal jurisdiction. A State was obliged to investigate crimes against humanity committed by its organs, armed forces and private personnel, wherever they might be committed, including on foreign territory.

29. While her delegation was encouraged by the stipulation in draft article 8 that investigations should be "prompt, thorough and impartial" and that they should be carried out when there was "reasonable ground to believe" that an offence had been committed, those investigations must also be legitimate, available, effective and sufficient. In that context, concerns had been raised about military courts and their impartiality and lack of independence in the administration of justice. The independence of courts was fundamental to the effectiveness of an investigation or remedy. Sham investigations carried out in bad faith only shielded the

perpetrators and legitimized the commission of crimes. In draft article 8, it would be more appropriate to refer to an "act" constituting a crime against humanity rather than "acts constituting crimes against humanity", since a single widespread and systematic act against any civilian population would indeed constitute a crime against humanity.

Draft articles 13–15 and draft annex

30. **Ms. Popan** (Representative of the European Union, in its capacity as observer), speaking also on behalf of the candidate countries Albania, Bosnia and Herzegovina, North Macedonia, the Republic of Moldova, Serbia and Ukraine; the potential candidate country Georgia; and, in addition, Liechtenstein, said that draft article 13 (Extradition) was an important element of inter-State cooperation in the punishment of crimes against humanity. The draft article contained no obligation to extradite the alleged offender; rather, the obligation was to submit the case for prosecution unless the offender was extradited or surrendered to another State. Nonetheless, it stipulated that a requested State should give due consideration to the request, and that before refusing extradition, the requested State must, where appropriate, consult with the requesting State to give it ample opportunity to present its opinions and provide information relevant to its allegation. Such consultations were useful because they allowed the requesting State to clarify its request and, if necessary, to modify it to address the concerns of the requested State.

31. The European Union welcomed the clarification in the draft article that all offences covered by the draft articles were extraditable and that there was no exception for political offences. No one should be prosecuted or punished on account of their gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group or political opinions; requests for extradition should not be used as tools for such purposes.

32. Given that inter-State cooperation was key for the investigation and prosecution of crimes against humanity, the European Union supported draft article 14 (Mutual legal assistance), which together with the draft annex applied only in situations in which no mutual legal assistance treaty was in place. As the Commission indicated in its commentary, if there did exist a mutual legal assistance treaty, then that treaty applied, except if particular paragraphs of the draft article required the provision of a higher level of assistance. The European Union welcomed the fact that the stipulation that the competent authorities of a State might transmit information relating to crimes against humanity was "without prejudice to national law".

33. For the European Union, the draft articles and the mutual legal assistance initiative, which was aimed at enhancing inter-State cooperation to facilitate prosecutions of international crimes before national courts, were not antithetical to one another.

34. Draft article 15 (Settlement of disputes) was particularly important because States were currently under no specific obligation to resolve disputes arising between them on the prevention and punishment of crimes against humanity. The draft article required them to endeavour to settle their disputes through negotiations. Only should such negotiations fail must they submit the dispute to compulsory dispute settlement. However, they had a choice to submit the dispute to the International Court of Justice or to arbitration. The draft article did not provide a time limit for concluding negotiations, nor did it contemplate a monitoring or enforcement mechanism. The European Union welcomed the flexibility built into the draft article, allowed States to build upon or further develop it should they wish to do so.

35. **Mr. Thorvardarson** (Iceland), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that international cooperation was vital in reaching the overall goals of preventing and punishing crimes against humanity. To close the impunity gap, States needed to be able to prosecute at the national level. That required a joint understanding of and clear provisions on inter-State cooperation, without which States ran the risk of unintentionally becoming safe havens for those who committed core international crimes. The draft articles were therefore a strong addition to the international legal framework and contributed to the implementation of the principle of complementarity prescribed by the Rome Statute for States parties thereto. It should be noted that no State would have to become a State party to the Rome Statute in order to join an agreement based on the draft articles. Ultimately, it was the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.

36. The draft articles should be succinct, easily understandable and not unwieldy, so as not to deter States from fulfilling the obligations set out therein. The draft articles struck the right balance in terms of being effective and broadly acceptable to States, as was evident in draft articles 13, 14 and 15, read together with the draft annex. The text built upon treaty provisions that had been previously accepted by States and was not dependent on adherence to any other treaty. Those

particular draft articles should, as the Commission pointed out, be considered in the overall context of the draft articles. The structure of draft articles 13 and 14, complemented by the draft annex, was clear and reflected the nature of extraditions and mutual legal assistance in practice.

37. Given the lack of a special regime in international law for State-to-State cooperation concerning international crimes, the Nordic countries welcomed the mutual legal assistance initiative to promote the adoption of a new convention on international cooperation in the investigation and prosecution of the crime of genocide, crimes against humanity and war crimes, which would complement the draft articles.

38. Regarding draft article 13 (Extradition), the Nordic countries supported paragraph 3, which provided that an offence covered by the draft articles should not be regarded as a political offence and, accordingly, that a request for extradition based on such an offence could not be refused on those grounds alone. The Commission pointed out in its commentary that paragraph 11, strictly speaking, was not necessary for an extradition occurring solely pursuant to the draft articles. The Nordic countries agreed with the Commission that the paragraph enhanced the draft articles in terms of extradition pursuant to extradition treaties or national law, since it would help to prevent extradition requests based on impermissible grounds.

39. Draft article 14, paragraph 8, which addressed the application of the draft annex, helped to close any potential gaps in terms of mutual legal assistance. Notably, paragraph 2 of the draft annex strengthened effective communication between States for speedy and effective cooperation. Draft article 15 (Settlement of disputes) struck a careful balance and should lay a good foundation for universal adherence to an eventual international agreement on crimes against humanity.

40. **Mr. Hasenau** (Germany) said that draft articles 13 and 14 and the draft annex promoted a cooperative relationship among States with regard to crimes against humanity. They addressed a potential legal gap in the prevention and punishment of such crimes and provided a basis for further negotiations, including on their appropriate regulatory depth and structure. Draft article 15, which dealt with the settlement of disputes, constituted the enforcement mechanism of the draft articles. It contained standard wording and required States to resolve their disputes through negotiations and, if that failed, to submit their disputes to the International Court of Justice, unless they agreed instead to submit it to arbitration. A clause giving compulsory jurisdiction to the Court would be the strongest path for promoting accountability for crimes against humanity.

41. *Mr. Leal Matta (Guatemala), Vice-Chair, took the Chair.*

42. **Mr. Ruffer** (Czechia) said that the Commission had prudently decided to model draft articles 13 and 14 mainly on the widely accepted provisions of the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime. Draft article 13 (Extradition) was not overly prescriptive and provided sufficient legal clarity for States to use it as the basis for extradition. The grounds for refusing extradition were dealt with in general terms, with reference to national law or applicable treaties. Whatever the reason for refusing extradition, the obligation of the requested State to submit the case to its own competent authorities for prosecution under draft article 10 remained applicable. His delegation noted with satisfaction that the issue of multiple requests for extradition was not dealt with in detail in the draft articles, notwithstanding draft article 13, paragraph 12, and was left to the discretion of States. There were huge differences in State practice in that area, and the requested State should be able to take into account all relevant criteria in each specific situation.

43. Draft article 14 (Mutual legal assistance) provided a much-needed and generally sufficient legal framework for mutual legal assistance in relation to crimes against humanity. It did not affect States' obligations under other treaties on mutual legal assistance. States were encouraged to enhance their mutual legal assistance by concluding other agreements or arrangements. States should use the instrument that provided for the higher level of assistance in each specific case. The draft annex would provide useful guidance for international cooperation in relation to crimes against humanity and could serve as a model for cooperation or even for the adoption of national legislation.

44. His delegation appreciated the inclusion of draft article 15 (Settlement of disputes), which provided for immediate resort to the International Court of Justice if the negotiations between States failed, unless the States agreed to submit the matter to arbitration. That approach reflected the seriousness of crimes against humanity and was modelled on existing treaties on other crimes under international law. The issue of opting out from the jurisdiction of the Court deserved further analysis, including with regard to other widely accepted criminal treaties. The same applied to possible reservations and the question of whether they should be expressly prohibited in a future convention. Generally, provisions and arrangements that could unnecessarily undermine

the ability of States to ratify the future convention should be avoided.

45. **Ms. Solano Ramirez** (Colombia), referring to draft article 13 (Extradition), said that the obligation to extradite or prosecute and the use of the prospective convention as a sufficient source for extradition procedures were two new developments in extradition that were not found in the conventional rules applicable to all the acts that constituted crimes against humanity and that were not covered by the reference to the peremptory character of the punishment of such acts. The draft article was applicable to and also consistent with the extradition practice of States. It was also consistent with article III of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; resolution No. 1/03 on the prosecution of international crimes of the Inter-American Commission on Human Rights; the Rome Statute; article 8 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; articles 11 and 13 of the Inter-American Convention to Prevent and Punish Torture; and article V of the Inter-American Convention on Forced Disappearance of Persons.

46. The tool of international cooperation established in paragraph 4 was significant, in that it can be used to close institutional and diplomatic gaps, such as the absence of or failure to adhere to bilateral or multilateral extradition treaties, in order to deliver justice in the most serious cases. Nevertheless, paragraph 5 was somewhat confusing. According to practice, where several treaties were applicable for extradition purposes, States could choose which one should govern a specific extradition process. Yet, paragraph 5 (a) created an obligation for States that had extradition treaties in force to provide notification as to whether they intended to use existing treaties or the prospective convention to execute extradition requests. Paragraph 5 (b) also created an obligation for States that did not use the draft articles as the legal basis for cooperation on extradition to seek to conclude extradition treaties with other States in order to implement the draft article. There was no similar obligation for States that had not concluded extradition treaties.

47. The draft article seemed to be based on the rule that a State that made extradition conditional on the existence of a treaty should choose either that treaty or another existing treaty. However, paragraph 5 (b) seemed to undermine the objective of the draft article, because if a State would assume only the obligation "to seek, where appropriate, to conclude treaties on extradition", the direct application of that instrument would not make sense. Her delegation also wondered whether possible negotiations on the link between draft article 13 and draft article 7 would be a good opportunity to discuss the hierarchy of competing requests for extradition and judicial cooperation.

48. Draft article 14, which dealt with mutual legal assistance, arose from the need to have a legal framework governing mutual legal assistance in relation to crimes against humanity, in order to gather information and evidence and to have predictable means of cooperation among States, bearing in mind that there was currently no universal or regional treaty that specifically addressed that type of assistance. The type of clauses contained in the draft articles had proved to be acceptable to the States parties to the Organized Crime Convention and the Convention against Corruption. The draft article was not directed at the cooperation of States with international criminal courts or tribunals, which had a mandate to prosecute alleged offenders. Such cooperation remained governed by the constituent instruments of, and the legal relationship of any given State to, those courts or tribunals.

49. However, the wording of paragraph 2, which concerned offences for which a legal person might be held liable, could give rise to isolationist interpretations with the claim of pointing out distortedly that the international treaty obliged signatory States to incorporate the criminal liability of legal persons into its laws. To prevent faulty hermeneutics, it could be made clear that a legal person could be considered criminally, civilly or administratively liable under national law. Other instruments and initiatives on the matter did not preclude a potential provision to that effect. When executing a request for mutual legal assistance, States could choose which instrument to apply. Of course, if there were several instruments, they should apply the later or special treaty, as was customary under the rules of treaty law.

50. The mechanism provided for in draft article 15 (Settlement of disputes) was relatively standard and had been used in other treaties on international criminal law, such as the Convention against Corruption and the Organized Crime Convention. While the mechanism had been well thought out, paragraph 1 should refer to all the means of dispute settlement contained in the Charter of the United Nations, not only direct negotiations. The draft annex set out the procedures to be followed by requesting States and requested States when executing requests for mutual legal assistance relating to crimes against humanity. Her delegation welcomed the wording of the draft annex, which was generally accepted in the type of instrument under consideration, especially with regard to the designation of central authorities, a mechanism that worked very well for such requests.

51. **Mr. Tombs** (United Kingdom) said that his delegation generally supported draft article 13 (Extradition), which was based on similar provisions in the Convention against Corruption, but would be in favour of amending paragraphs 2 and 3 to more closely reflect that Convention by including a reference to "domestic law provisions" in both paragraphs. His delegation noted that the list of impermissible grounds in paragraph 11 had been expanded to reflect the list of factors in draft article 2 (Definition of crimes against humanity), paragraph 1 (h), and appeared to be longer than those found in the treaties upon which the draft articles were based. His delegation questioned whether a broader scope was necessary, given that it was clear from the Commission's commentary that there was no obligation on the requested State to extradite if it believed that the request was being pursued on grounds that were impermissible under international law.

52. His delegation noted that draft article 14 (Mutual legal assistance) was based on similar provisions of the Organized Crime Convention and the Convention against Corruption, and supported the drafting. Survivors of crimes against humanity, including conflict-related sexual violence, should be placed at the heart of the evidence-gathering process, to avoid the need for multiple testimonies and thereby reduce the risk of retraumatization.

53. Referring to the draft annex, he said that his delegation noted that paragraph 14 was based on article 46, paragraph 20, of the Convention against Corruption. However, it would prefer slightly more detailed wording in the paragraph. With regard to paragraph 16, the use of videoconferencing was an equally valid alternative to appearing in person. The importance of such alternatives had become clear in the light of the global coronavirus disease (COVID-19) pandemic. It would be preferable to include in the draft annex text reflecting article 46, paragraph 22, of the Convention against Corruption, which provided that States parties could not refuse a request for mutual legal assistance on the sole ground that the offence was also considered to involve fiscal matters.

54. In both his third and fourth reports, (A/CN.4/704, A/CN.4/725 and A/CN.4/725/Add.1), the Special Rapporteur had considered the issue of a monitoring mechanism associated with a new convention. In the commentary to draft article 8, the Commission highlighted the effective role that treaty body monitoring mechanisms could have in ensuring oversight of States and their obligations. A monitoring mechanism could assist with prevention by addressing early warning signs of crimes against humanity and could offer an opportunity to share States' best practices. His delegation would support a monitoring mechanism in principle and agreed with the view of the Special Rapporteur that "such mechanisms might help to ensure that States parties fulfil their commitments under the convention, such as with respect to the adoption of national laws, pursuing appropriate preventive measures, engaging in prompt and impartial investigations of alleged offenders and complying with their *aut dedere aut judicare* obligation".

55. **Mr. Ghorbanpour Najafabadi** (Islamic Republic of Iran) said that draft articles 13 and 14 were strikingly similar to the provisions of the Convention against Corruption and the Organized Crime Convention. However, in drafting the prospective convention, the Convention on the Prevention and Punishment of the Crime of Genocide should be followed, and the arrangements should be left to sovereign States. His delegation could not in any way support draft article 14, paragraph 9, because it referred to mechanisms that had not been adopted by consensus and were not legitimate or legal, since they had been established on the basis of political agendas by bodies that lacked the authority and competence to do so. His delegation generally supported draft article 15 (Settlement of disputes), in particular paragraph 3, which served as a safeguard against the non-compulsory jurisdiction of the International Court of Justice.

56. **Mr. Silveira Braoios** (Brazil), referring to draft article 13 (Extradition), which should be read in conjunction with draft article 10 (*Aut dedere aut judicare*), said that his delegation noted with satisfaction that paragraph 11 preserved the right of the requested State not to extradite when there were substantial grounds for believing that the accused could be punished on account of gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group or political opinions. The draft article could, however, benefit from additional safeguards, especially since the draft articles might be considered as the legal basis for extradition if the Committee decided to conclude an agreement based on them. Under Brazilian law, extradition was not permitted, for instance, when the offender was to appear before an extraordinary tribunal or when the accused was to face the death penalty. A paragraph could therefore be added to the draft article to the effect that nothing in a future treaty could be interpreted as imposing an obligation to extradite when the person was to appear before an extraordinary court or when there were substantial grounds for believing that the person might face the death penalty.

57. **Mr. Kowalski** (Portugal) said that draft article 13 (Extradition) was a logical consequence of the *aut*

dedere aut judicare principle enshrined in draft article 10. While there was no obligation to extradite, there was an obligation for each State to ensure that it took the necessary measures to avoid impunity for crimes against humanity. Extradition was thus an important tool to ensure accountability when a State did not prosecute an alleged offender of crimes against humanity found in its territory. His delegation thus welcomed paragraph 4, whereby the draft articles could be considered as the legal basis for extradition in respect of crimes against humanity, which was particularly important for States that required an extradition treaty in order to be able to extradite. Draft article 14 (Mutual legal assistance) and the draft annex were of great practical importance. His delegation welcomed the option to include detailed provisions on cooperation between States in gathering information and evidence to assist investigations or prosecutions being carried out in another State.

58. His delegation was satisfied with the two-step approach proposed in draft article 15 (Settlement of disputes), whereby a dispute should be submitted to the International Court of Justice or to arbitration only if the dispute could not be settled through negotiations. Nevertheless, his delegation did not support paragraph 3, which allowed States to opt out of the jurisdiction of the Court or of arbitration. His delegation understood that the Commission had chosen to follow the example of the Convention against Corruption in that regard. However, given the particular nature of crimes against humanity, the example to be followed should rather be the Genocide Convention, which did not provide any such opt-out clause or any limitation to recourse to the Court.

59. **Mr. Košuth** (Slovakia) said that his delegation took note of the interlinkage between draft article 13 and other draft articles, specifically draft article 7, paragraph 2, draft article 9, paragraph 3, and draft article 10. Draft article 13 (Extradition) was useful in that it facilitated the extradition of an alleged offender to another State or to a competent international court or tribunal and clearly set out the applicable rights, obligations and procedures. The specific paragraphs of the draft article were drawn from the text of the Convention against Corruption, which in turn had been inspired by the Organized Crime Convention. His delegation considered that to be a very successful model.

60. By contrast, draft article 14 (Mutual legal assistance) governed situations in which the State undertook to prosecute crimes against humanity instead of carrying out extradition and sought assistance from another State in one of the envisaged forms. It was thus the core part of the inter-State cooperation element of the draft articles. His delegation welcomed the fact that the inspiration for the draft article had been the Convention against Corruption, with some acceptable modifications. The draft article provided guidance to States mostly in situations in which no mutual legal assistance treaty was in place between the requesting and requested States. However, as further clarified in the commentary, it also applied in cases in which a mutual legal assistance treaty was in place, provided that specific conditions were met.

61. Referring to draft article 15 (Settlement of disputes), he said that his delegation fully supported paragraph 1, which placed emphasis primarily on negotiations between the States concerned. As a State that had recognized as compulsory the jurisdiction of the International Court of Justice, Slovakia naturally supported the Court's jurisdiction in respect of disputes concerning the interpretation or application of the draft articles, as envisaged in paragraph 2. It noted that no specific duration was prescribed for the negotiations; the prerequisites for submitting the dispute to the Court were that a genuine attempt at negotiations had been made, that such negotiations had not resulted in the settlement of the dispute and that the States had not agreed to submit the dispute to arbitration. His delegation would prefer to see the wording from the Genocide Convention providing for disputes to be submitted immediately to the Court used in the draft articles. The opt-out clause in paragraph 3 weakened the fulfilment of the object and purpose of the draft articles. His delegation would be interested to hear from other delegations about the idea of an oversight or monitoring mechanism. A memorandum prepared by the Secretariat during the Commission's work drawing from existing treaty-based monitoring mechanisms could be highly relevant to such a discussion.

62. **Mr. Milano** (Italy), referring to draft article 13 (Extradition), said that his delegation welcomed the fact that it was modelled on article 44 of the Convention against Corruption and article 16 of the Organized Crime Convention, given that both conventions had been almost universally ratified and those two provisions were factitudes of inter-State cooperation, particularly in matters of extradition. His delegation supported the provision excluding the "political offence" exception as grounds for refusing an extradition request. The Italian code of international crimes included a similar provision.

63. His delegation also welcomed the specification in paragraph 7 that extradition "shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including the grounds upon which the requested State may refuse extradition". That provision enhanced legal

certainty, which was one of the central conditions for effective judicial cooperation. His delegation supported the insertion of a paragraph, similar to article 44, paragraph 15, of the Convention against Corruption, that would limit the obligation to extradite if the requested State had substantial grounds to believe that the request could lead to prosecution or punishment on account of a person's gender, race, religion, nationality, ethnic origin, culture, membership in a particular social group, political opinions or other grounds that were universally recognized as impermissible under international law. That limitation was in line with international human rights standards.

64. Turning to draft article 14 (Mutual legal assistance), he said that the non-prejudice clause in paragraph 7, which dealt with the relationship between the draft articles and other bilateral multilateral treaties on mutual legal assistance, was appropriate for the purpose of legal certainty. However, the Commission might create confusion following the statement in its commentary that "if particular paragraphs of draft article 14 require the provision of a higher level of assistance than is provided for under the other mutual legal assistance treaty, then the obligations set forth in those paragraphs shall be applied as well". That seemed to suggest that national authorities would need to compare on a case-by-case basis the level of assistance provided under draft article 14 with the level of assistance provided under the relevant treaty and apply whichever offered the higher level.

65. While his delegation was not yet expressing a position on that issue, it stressed that a future convention would need to establish with precision the relationship with other treaties that provided for mutual legal assistance. The risk of confusion was even more apparent in light of the relationship between the commentaries and the draft articles, as well as the normative value of the commentaries. His delegation generally supported the dispute settlement provisions set out in draft article 15, although it had doubts regarding the need for the opt-out clause in paragraph 3, unless a specific provision was added that prohibited reservations to the future convention.

66. **Mr. Nyanid** (Cameroon) said that his delegation welcomed the spirit of draft article 13, which dealt with extradition, but would like its content to reflect respect for international law by allowing for the conclusion of bilateral or regional agreements or any other instrument by which States would express their consent in the matter. His delegation therefore suggested linking paragraphs 1 and 2, to better reflect the idea of concluding extradition treaties. His delegation did not agree with the content of paragraph 4, which indicated that the draft articles constituted the legal basis for extradition for a State that made extradition conditional on the existence of a treaty, particularly if, as set forth in paragraph 5 (b), the State did not consider the draft articles as the legal basis for cooperation on extradition and derogated from the principle mentioned in paragraph 5 (a), whereby a State had to inform the Secretary-General of the United Nations whether it considered the draft articles as the legal basis for cooperation on extradition with other States.

67. However, his delegation supported paragraph 8, in which the requesting and requested States were asked to ensure that extradition procedures were in keeping with their national law. It also supported the negotiation mechanisms provided for in paragraphs 10, 12 and 13, which concerned the enforcement of penalties and the consultations required before refusing extradition. The content of paragraph 11, which concerned the refusal of extradition, contradicted the provisions of paragraph 3, which was too prescriptive and denied the State the ability to assess the extradition request.

68. His delegation welcomed the inclusion of draft article 14 (Mutual legal assistance), but suggested that sovereign States be given the latitude in paragraphs 1 and 2 to limit the scope thereof. Indeed, the purposes listed in paragraph 3, which fell within the national jurisdiction established in draft article 7, strongly suggested that mutual assistance should be afforded in that spirit. His delegation welcomed the settlement of disputes provisions in draft article 15, but noted that, in the event that negotiations failed, recourse to the International Court of Justice provided for in paragraph 2 was not automatic, but rather subject to recognition of the Court's jurisdiction, considering the opt-out clause concerning the Court's compulsory jurisdiction.

69. Turning to the draft annex, he said that the text established the mechanism for judicial cooperation between parties in the context of prosecution or judgment of alleged perpetrators of crimes against humanity. That meant that the agreement that could result from the draft annex could follow the model of the Organized Crime Convention or the Convention against Corruption which, on the one hand, called on States to take internal measures to criminalize and punish the relevant acts and, on the other hand, lay down the rules for judicial cooperation between the parties for those purposes. That approach was not unusual, particularly since paragraph 8 of draft article 14, on which the draft annex was based, gave precedence to mutual legal assistance agreements that might exist between the parties. It was therefore only necessary to ensure that the rules provided for in the draft articles were compatible with domestic law, or at least general

practice, thus avoiding major disparities between the regimes established under the draft articles, national law and other agreements already binding the State.

70. Paragraph 2 provided for the designation of a central authority for the transmission of requests. That was not the traditional procedure in matters of judicial cooperation, which called for the transmission of requests through the diplomatic channel and left it up to the requested State to refer the request to the competent judicial authority. However, there were precedents in that area. In particular, certain conventions provided that the judicial authorities should take action directly for the sake of expediency. Ultimately, the wording of paragraph 2 was acceptable, especially since it afforded the requested State the right to demand that the request be made through the traditional diplomatic channel.

71. In principle, there was nothing objectionable in paragraph 3, which related to the procedures for making requests. However, his delegation insisted that requests should be made in writing and therefore suggested deleting the last sentence authorizing oral requests, which would imperil the establishment of proof of the request. In criminal proceedings and matters affecting human rights, a shrewd lawyer could easily succeed in having a case dismissed on the basis of such irregularity. Paragraphs 6 to 12, on the obligations of the requested State, did not establish constraints or unusual procedures for States in terms of judicial cooperation, except for paragraph 12 (b), which concerned requests for communication of potentially confidential information and documents. It was worth noting that in such cases, the requested State retained full freedom to respond or not to such specific requests.

72. His delegation supported paragraphs 13 and 14, on the use of information by the requesting State; 15 and 16, on the testimony of person from the requested State; and 17 to 19, on the transfer of the person detained for the purpose of giving testimony, although it noted that paragraph 18 (c) might be confusing, as it referred to extradition, which was a different procedure from a transfer.

73. **Mr. Kanu** (Sierra Leone) said that his delegation welcomed draft articles 13 and 14, as they filled a legal gap. With regard to draft article 13 (Extradition), his delegation appreciated the Commission's conclusion that, although they frequently occurred in political contexts and were sometimes perpetrated for political gain, core international crimes, such as genocide, crimes against humanity and war crimes, were not to be regarded as political offences for the purposes of denying extradition. That principle was enshrined in article VII of the Genocide Convention and, although not included in the 1949 Geneva Conventions, was also consistent with more recent practice of States when concluding multilateral treaties addressing specific international and transnational crimes. Its inclusion in the draft article was helpful to crystallize State practice and consolidate customary international law.

74. The first part of paragraph 2 was somewhat ambiguous; his delegation understood it to mean that, because crimes against humanity implicated certain prohibited acts committed in a certain context, the extradition obligations would not apply when only the individual underlying prohibited acts were at issue. For example, when perpetrated as an ordinary crime under national law, rape would not be an extraditable offence, but when committed as part of a widespread or systematic attack against any civilian population, it would qualify as a crime against humanity and would thus be an extraditable offence. The detailed provisions on rights, obligations and procedures applicable to extradition might serve as a helpful basis for extradition where no extradition treaty existed between two States. His delegation would continue to study the provisions the draft article, in particular their impact on the implementation of the country's Extradition Act and its existing treaty obligations, and ways to ensure consistency between the two instruments.

75. With regard to draft article 14 (Mutual legal assistance), its detailed provisions would be fundamental to the regime established by a future convention on crimes against humanity. Given the experience of Sierra Leone in implementing the Convention against Corruption, the provisions of which served as one of the models for the draft article, his delegation was generally satisfied with the approach taken. From a policy perspective, it welcomed paragraph 1, which mandated States to "afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the present draft articles".

76. With the proliferation of the misuse and abuse of the Internet and social media, inciteful statements had been made by Sierra Leonean nationals residing outside the country, stoking violence and the commission of the prohibited acts listed in draft article 2, including the recent killings of police officers. Setting aside the chapeau requirements of draft article 2, his delegation was concerned by the challenges and double standards in the existing mutual legal assistance framework. It therefore saw merit in ensuring that the mutual legal assistance provisions of a future convention were sufficiently helpful for the convention to achieve its objectives.

77. Draft article 15 (Settlement of disputes), which borrowed heavily from the transnational crimes context, might be unworkable for a convention on crimes against humanity. First, his delegation was not convinced that a three-tier model for dispute settlement was desirable for some of the worst crimes known to international law. Paragraph 1 required States to settle disputes concerning the interpretation or application of the future convention through negotiations. It was questionable whether a State accused of committing crimes against humanity against its own population would be willing to negotiate with another State party, and whether, if it did agree to negotiate, it would do so in good faith.

78. Second, the draft article contemplated an opt-in or opt-out system which might be appropriate only for a convention that was truly reciprocal in nature. The prohibition of crimes against humanity, like that of genocide, was driven by more humanitarian compulsions. Experience suggested that States did not often act against other States solely to preclude the commission of such crimes, all the more so if officials of the other State were implicated in the commission of the crimes. In the seven decades since a dispute settlement clause had been established in the Genocide Convention, only a relatively small number of single or joint cases based on that clause had been initiated by States. That suggested that many States might not invest the political and other capital required to initiate disputes against other States even where crimes against humanity were being committed.

79. Draft article 15 (Settlement of disputes) was narrower in scope than the similar provision in the Genocide Convention. For instance, it failed to address the issue of State responsibility for crimes against humanity. Since a future convention on such crimes would be more comparable to the Genocide Convention, the draft article should at least establish the compulsory jurisdiction of the International Court of Justice, similar to what was provided in article IX of the Genocide Convention. That would put the potential convention on the same plane as the Genocide Convention. His delegation suggested the following wording for such a dispute settlement clause: “Disputes between States relating to the interpretation, application or fulfilment of the present articles, including those relating to the responsibility of a State for crimes against humanity or for any of the other acts enumerated in article 2, shall be submitted to the International Court of Justice at the request of any of the States parties to the dispute.” That phrasing was nearly identical to that of the Genocide Convention, with only necessary stylistic changes.

80. His delegation believed that States should give serious consideration to the establishment of a monitoring body or mechanism for crimes against humanity, which could be modelled on such bodies as the Human Rights Committee and the Committee against Torture. While it might be State-driven, said mechanism could be composed of independent experts serving in their personal capacity. That might better support the proper monitoring and implementation of a future crimes against humanity convention.

81. **Ms. Hutchison** (Australia) said that draft articles 13, 14 and 15 provided an important framework for inter-State cooperation to assist States in assuming their primary responsibility to investigate and prosecute crimes against humanity. Her delegation particularly appreciated the detailed provisions to underpin extradition proceedings and mutual legal assistance requests relating to such crimes. With regard to draft article 13 (Extradition), her delegation considered that the primary responsibility for investigating and prosecuting serious international crimes rested with the State in whose territory the alleged criminal conduct occurred, or the State of nationality of the accused. States with territorial jurisdiction were often best placed to achieve justice, given their access to evidence, witnesses and victims. States with nationality jurisdiction also had significant interests in securing accountability with respect to their nationals. In recognition of those interests, her delegation suggested that paragraph 12 include a requirement that States give due consideration not only to extradition requests from States with jurisdiction over the territory where the alleged offence occurred, but also from States of the nationality of the accused.

82. Turning to draft article 14 (Mutual legal assistance), she said that her delegation supported the Commission’s approach, including the level of specificity therein with respect to situations where no mutual legal assistance treaty existed between the requesting and requested States, even though some delegations would prefer a more succinct approach. The framework for international cooperation envisaged in the draft article would be complementary to any new convention based on the mutual legal assistance initiative on international cooperation in the investigation and prosecution of the crime of genocide, crimes against humanity, war crimes and other international crimes. Her delegation also supported the approach taken concerning the draft annex.

83. With regard to draft article 15 (Settlement of disputes), her delegation understood that the Commission had clearly sought to present a careful balance that would be acceptable to the widest number of States possible. In that regard, it understood the rationale for the inclusion, in paragraphs 3 and 4, of a

means through which States could effectively opt out of the jurisdiction of the International Court of Justice. That provided States with a starting point for consideration, notwithstanding the fact that other treaties addressing serious international crimes of a comparable gravity took a different approach. At a minimum, the draft article should limit the ability for States to make a declaration under paragraph 3 only upon ratification or accession.

84. The key issue of capacity development was missing from the draft articles. Her delegation had listened carefully to delegations that had said that more needed to be done to strengthen national investigative, prosecutorial and judicial capabilities, which were the most effective means of preventing and punishing crimes against humanity. It was thus further considering ways to ensure the draft articles could play a catalytic role in facilitating greater international cooperation in that regard, which would, in turn, strengthen the effectiveness and inclusivity of any future convention on crimes against humanity.

85. **Ms. Lungu** (Romania) said that draft articles 13 and 14 established a comprehensive normative framework to ensure the implementation of the *aut dedere aut judicare* principle, taking as models the Organized Crime Convention and the Convention against Corruption. Drawing inspiration from those two widely ratified international legal instruments offered the benefit that a significant number of States were already familiar with the detailed and technical procedures set out therein. The "political offence" exception to extradition, for example, was in line with the overall approach to heinous crimes that harmed the entire international community.

86. Draft article 15 (Settlement of disputes), which contained standard wording and drew from other international treaties, was of great importance. According to the draft article, States must engage in negotiations with a view to settling potential disputes concerning the interpretation or application of the provisions of the draft articles. If carried out in good faith, that form of peaceful settlement of disputes would offer the parties flexibility, in a less formal context, and the ability to control the process. Her delegation welcomed the Commission's approach to provide for immediate recourse to the International Court of Justice, unless the two States agreed to submit the matter to arbitration, for example, in cases where the negotiation process had been exhausted.

87. Her delegation's general position was to support and encourage the inclusion of compromissory clauses in new bilateral and multilateral treaties to confer jurisdiction to the International Court of Justice over disputes between States parties. Together with a cross-regional group of States, Romania was leading an initiative dedicated to promoting the Court's jurisdiction, in its broad sense, and strengthening its role in the international judicial landscape. Her delegation recognized that paragraph 3, which introduced the possibility of opting out of a compromissory clause, and was based on existing instruments, might have a positive influence on the overall number of ratifications of a future convention.

88. An argument could be made that, given the option to opt out of a compromissory clause, some States might be willing to sign treaties that they otherwise would not have signed, thus increasing the substantive obligations they had assumed, thereby strengthening the international legal framework. However, such an approach would ignore the important role of the International Court of Justice in the legal order created by those obligations. There were many other compelling reasons to accept the Court's jurisdiction as a mechanism for dispute settlement. The Court had vast expertise in dispute settlements and comprehensive jurisprudence on various areas of international law. Its jurisdiction in contentious cases was based on the consent of States, enabling it to settle disputes between States peacefully, through authoritative judgments, thus contributing to building harmonious inter-State relations.

89. Delegations must therefore be very cautious when analysing the opt-out clause in the draft article. Given that the aim of a future instrument would be to deter and end impunity for crimes against humanity, her delegation was concerned that a crucial tool for its effective implementation and the protective shield of State consent could be undermined. The Genocide Convention did not contain such an opt-out clause.

90. *Ms. Sverrisdóttir (Iceland), Vice-Chair, took the Chair.*

91. **Ms. Marubayashi** (Japan), referring to draft article 13 (Extradition), said that it was stated in paragraph 2 that "the offences covered by the present draft articles" were deemed to be extraditable offences. However, the draft article might be more readily accepted by more States if it were clarified that the provision would only apply to offences provided for in national laws on the implementation of a future convention, similar to paragraph 1 of article 44 of the Convention against Corruption, which stated as follows: "This article shall apply to the offences established in accordance with this Convention". Similarly, paragraph 3 should be rethought to make it more acceptable to a

greater number of States, since it contained a provision that precluded an offence covered by the draft articles from being regarded as a political offence, whereas the Organized Crime Convention contained no such provision in respect of the crimes it covered. Additionally, the Convention against Corruption contained a limitation, with the phrase "a State Party whose law so permits". As Japan was a signatory to both conventions, it believed that careful discussion was required.

92. Paragraph 9 should also be discussed carefully, including the specific situations that it envisaged, as such a provision was not contained in either the Organized Crime Convention or the Convention against Corruption. Furthermore, it might be necessary to add the phrase "except in the case of extradition to the International Criminal Court" to the paragraph, in order to acknowledge the cases of extradition to the Court.

93. Draft article 14 (Mutual legal assistance) had provisions similar to those contained in other instruments, including the Organized Crime Convention. However, those other provisions included the phrase "without prejudice to domestic law". Her delegation suggested rewording the start of paragraph 1, to read: "Without prejudice to domestic law, States shall afford one another […]", to match the description used in paragraph 6 of the draft annex, in order to allow States to respond appropriately to requests in accordance with their particular circumstances.

94. Japan would continue to examine the requirements for mutual legal assistance in light of its domestic law and would also be carefully considering the issue of questioning of witnesses by videoconference. In that respect, her delegation suggested that paragraph 16 of the draft annex be reworded to start as follows: "Wherever possible and consistent with fundamental principles of national law, where appropriate", in order to provide States with flexibility based on their varying circumstances.

95. **Mr. Kelly** (United States of America) said that cooperation between States in matters relating to extradition and mutual legal assistance in cases involving crimes against humanity was critical to international efforts to prevent and punish such crimes. As history had shown, such crimes rarely respected international borders. In that regard, draft articles 13 and 14 played an important role in the overall structure of the draft articles. There were widely ratified instruments, such as the Convention against Corruption and the Organized Crime Convention, that addressed extradition and mutual legal assistance with respect to specific crimes. In general, his delegation believed that closely following the relevant provisions in those instruments, with which a large number of States were familiar, was beneficial.

96. With respect to draft article 15, in particular paragraph 2, his delegation recognized the important role that the International Court of Justice could play in settling disputes concerning the interpretation or application of any future convention on the prevention and punishment of crimes against humanity. At the same time, it welcomed the inclusion in paragraph 3 of a process by which States could declare that they did not consider themselves bound by paragraph 2. In that regard, conventions under which States could make reservations to or otherwise opt out of the Court's jurisdiction, such as the Genocide Convention and the Convention against Torture, were more likely to be widely ratified by States.

97. **Ms. Jiménez Alegría** (Mexico) said that draft articles 13, 14 and 15 and the draft annex were important because they referred to measures States could take to cooperate and offer each other legal assistance for the pursuance, investigation and prosecution of perpetrators of crimes against humanity, and would serve to implement the other substantive draft articles.

98. With regard to draft article 13 (Extradition), it was important, as set out in paragraph 8, that for the purposes of extradition, a State could establish its jurisdiction over crimes against humanity not only when they were committed in its territory, but also when the alleged perpetrator or the victims were its nationals. Extradition was a tool for the international community to combat inaction and unwillingness in the prosecution of persons that might have committed acts covered by treaties. In that regard, her delegation agreed that acts covered by the draft articles could not be regarded as political offences.

99. Draft article 14 (Mutual legal assistance) and the draft annex would serve as a solid legal foundation for mutual legal assistance between States. For that reason, it was worth establishing as clearly as possible the terms, obligations and powers of States in cooperating with each other, with the aim of always ensuring "the widest measure of mutual legal assistance in investigations, prosecutions and legal proceedings", in accordance with paragraph 1 of the draft article. In order to ensure appropriate operation of the draft article and the draft annex, and to provide States with the most effective tools in terms of international cooperation, it would be useful if the annex could serve as the legal basis for any future judicial cooperation and extradition processes between two or more States that were not bound by a treaty of mutual legal assistance. In cases

where States were bound by a such a legal instrument, ideally, they would use the legal basis that provided the best and most effective opportunities for mutual legal assistance.

100. Draft article 15 (Settlement of disputes), covered a critical issue related to the operation of a future international convention based on the draft articles. Her delegation found it appropriate that the draft article included a provision that granted the International Court of Justice jurisdiction over disputes between States concerning the interpretation and application of obligations emanating from the draft articles. It believed that the provision should be mandatory and therefore suggested removing paragraphs 3 and 4 from the draft article. The delegations of Sierra Leone and Romania had also touched on some of the reasons why that provision should be deleted.

101. **Mr. Al-thani** (Qatar) said that many States, including Qatar, did not extradite their own nationals. Draft article 13 (Extradition) should not be interpreted as including an undertaking to do so. Indeed, paragraph 10 included a reference to the possibility that a State might refuse extradition because the person sought was a national of the requested State. In draft article 15 (Settlement of disputes), paragraphs 1 and 2 called on States to endeavour to settle disputes first through negotiation, then through arbitration, then by referring the matter to the International Court of Justice. It would be useful to provide greater clarity regarding that point in view of the statement, in paragraph 3, that any State could declare that it did not consider itself bound by paragraph 2.

102. **Mr. Perilleux** (Belgium) said that his delegation welcomed the inclusion in the draft articles of robust provisions on judicial cooperation between States. The effective suppression of crimes against humanity, the prosecution of which often involved international elements, depended on ensuring and strengthening such cooperation. It was therefore important to ensure that judicial cooperation was as broad as possible.

103. Draft article 13 (Extradition) offered a solid foundation for the execution of extradition requests. It was particularly useful for States, like Belgium, that made extradition conditional on the existence of a treaty with the requesting State. A clear and detailed extradition procedure was an essential element of the fight against impunity for perpetrators of crimes against humanity and offered States the tools required to suppress those crimes.

104. Draft article 14 (Mutual legal assistance) and the draft annex constituted a comprehensive framework for the execution of requests for mutual legal assistance that would be applicable in the absence of, or in addition to, a binding mutual legal assistance treaty between the requesting and the requested States. His delegation wished to draw particular attention to the proposal, contained in paragraph 2 of the draft annex, to designate a central authority that would have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. The experience of Belgium at the national level, where the international humanitarian law unit of the Federal Public Service for Justice acted as the “central authority” for processing inter-State mutual legal assistance requests concerning the most serious international crimes, had demonstrated the practical advantages of establishing such an authority in order to facilitate cooperation.

105. Recognizing the importance of ensuring cooperation that was as broad as possible, Argentina, Belgium, the Netherlands, Senegal and Slovenia had launched a mutual legal assistance initiative with the same goal as the draft articles of fighting impunity for the most serious crimes. However, the material scope and approach of the initiative differed greatly from those of the draft articles. Whereas the draft articles embodied a holistic approach and aimed to address a wide range of rules and concepts, dealing exclusively with crimes against humanity, the initiative focused on creating a modern and comprehensive framework for mutual legal assistance and extradition in respect of the crime of genocide, crimes against humanity and war crimes. The two projects were therefore complementary and could coexist and continue to develop in parallel.

106. Draft article 15 (Settlement of disputes) would be useful for addressing any difficulties that might arise in the implementation of the draft articles. It would be appropriate, however, to include a compromissory clause similar to that contained in article IX of the Genocide Convention, which did not provide an option for refusing to accept the jurisdiction of the International Court of Justice, in order to emphasize the importance of the Court’s role in dispute resolution.

107. **Mr. Hernandez Chavez** (Chile) said that, in general, the draft articles were an adequate foundation to begin negotiations with a view to elaborating a general convention. However, improvements or relevant details agreed by States might be added during such negotiations. The phrasing of draft article 13 (Extradition) in principle was appropriate, as it was designed to facilitate and establish uniform rules, but it did not establish an obligation to extradite. His delegation welcomed the new paragraphs added to the draft article during the Commission’s second reading of

the draft articles, in particular paragraph 12, the aim of which was to facilitate the extradition of alleged perpetrators to the State where the crimes were committed. That was clearly desirable, as that was the State that would be most affected by the occurrence of such wrongful acts. However, when the time came to negotiate a multilateral convention based on the draft articles, the wording of paragraph 1 would need to be amended to clarify that the draft article was only applicable between the States parties to the treaty in question.

108. With regard to draft article 15 (Settlement of disputes), his delegation believed that a future convention should establish dispute settlement mechanisms that would facilitate the peaceful settlement of disputes, including recourse to the International Court of Justice. Furthermore, existing universal treaties offered different models for the settlement of disputes that could be considered in future negotiations. The clause set out in paragraph 3 was a valid option that could offer guarantees to some States, although it should be carefully analysed in future negotiations.

109. **Ms. Crockett** (Canada) said that draft articles 13, 14 and 15 were the cornerstone of continued efforts by States, although some provisions required further consideration and related discussions might need to be conducted in the light of the ongoing discussions on the mutual legal assistance initiative on international cooperation in the investigation and prosecution of genocide, crimes against humanity, war crimes and other international crimes. Likewise, discussions on that initiative should be conducted in the light of the draft articles.

110. Regarding draft article 13 (Extradition), it would be relevant to add wording in paragraph 5 indicating that States that made extradition conditional on the existence of a treaty should make that requirement known at the time of deposit of their instrument of ratification, similar to the provision contained in the Organized Crime Convention. While her delegation appreciated the encouragement set out in paragraph 8 for States to expedite and simplify procedures, it noted that differences might arise in the treatment of cases by States. Bearing in mind as well the general principle of international law that national laws could not take precedence over international legal obligations, her delegation recommended further review of the wording used in that paragraph. With regard to paragraph 11, her delegation noted its recognition of the use of the term "gender", and as it had mentioned in relation to draft article 2, it recommended, for the purpose of consistency, that the provision should not imply that only grounds recognized as universally impermissible under international law could lead to a refusal of extradition.

111. Draft articles 13 and 14 played an important role in providing States with the necessary details to facilitate cooperation on extradition and mutual legal assistance for crimes against humanity. In order to ensure a harmonized approach in both cases, there was a need for those provisions to be considered alongside their corresponding provisions of the draft convention on international cooperation in the investigation and prosecution of the crime of genocide, crimes against humanity, war crimes and other international crimes. Nonetheless, with regard to draft article 14 (Mutual legal assistance), paragraph 3 (h) could be clarified with respect to potential "other proceedings". Some interlinkages within the draft article itself could also be reviewed and refined, as needed, such as the use of "investigations, prosecutions, judicial and other proceedings" and "investigations, prosecutions and judicial proceedings", in paragraphs 1, 2 and 6.

112. **Mr. Skachkov** (Russian Federation) said that the use of provisions of existing conventions on corruption and organized crime in draft articles 13 and 14 was not justified. Given the differences in the legal nature of the crimes, different approaches were required. Draft article 14 (Mutual legal assistance) could not address every single issue that could arise in the investigation and prosecution of crimes against humanity. Such a high level of detail could have a negative impact on adherence to the prospective convention. Paragraph 9, according to which States could consider entering into agreements or arrangements with international mechanisms established by the United Nations and intergovernmental bodies and that had a mandate to collect evidence with respect to crimes against humanity, was unacceptable, owing to the existence of illegitimate and politicized bodies established in violation of international law and the Charter of the United Nations. Draft article 15 (Settlement of disputes) was balanced, as drafted. Retaining paragraph 3 thereof was of the utmost importance, as its deletion could have a negative impact on the settlement of disputes.

113. **Mr. Pieris** (Sri Lanka) said that General Assembly resolution 3074 (XXVIII) highlighted the need for extradition of perpetrators of crimes against humanity, to ensure that they were prosecuted and punished. However, with regard to draft article 13 (Extradition), his delegation was convinced that no State would hand over an offender to another State, in particular one of its nationals, when the circumstances were such that the person would not be ensured a fair trial in the territory of the requesting State. Paragraph 3 sought to anticipate

that concern. However, the stipulation that "a request for extradition based on such an offense may not be refused on these grounds alone" still left some room for unjust prosecution. Extradition must be refused on any one of those grounds, because turning a judicial process into a political process would be anathema to the rule of law. Paragraph 4 was equally ambitious, as it sought to put in place a universal treaty that permitted extradition. His delegation doubted whether many States would accept such a sweeping provision to accommodate that process. In addition, such a provision would need to be tested for consistency with national constitutions through judicial review.

114. Paragraph 5 appeared to provide an escape clause by giving States the simple choice of deciding whether or not to adopt the draft articles, with the fall-back position of just informing the Secretary-General, or entering into ad hoc treaties with other States at their pleasure. Paragraph 8 facilitated the expeditious disposal of extradition procedures and apparently the lowering of the evidence threshold. In that regard, it should be recalled that justice should not be sacrificed on the altar of expediency; nor should even the worst offenders be convicted based on flimsy evidence. It would be difficult for Sri Lankan courts to accommodate paragraph 10, because it was difficult to see how a court would proceed to incarcerate a person on the basis of a conviction in a foreign court, unless it was convinced that the conviction had been secured in line with procedures established by law.

115. His delegation generally viewed favourably draft article 14 (Mutual legal assistance), although it was a sweeping provision that would need to be brought in line with national statutes governing mutual legal assistance in the investigation and prosecution of matters covered by the draft articles. With regard to draft article 15 (Settlement of disputes), his delegation believed that the concept of sovereignty, as enshrined in the Charter of the United Nations, must be respected. It did not accept the position that States disagreeing on the interpretation of the draft articles should submit the matter to the International Court of Justice. That was a luxury for most States, which only required a simple, clear and predictable legal system that facilitated the promotion of a dignified life for all citizens.

116. **Mr. Mainero** (Argentina) said that international legal cooperation was critical to fulfilling the obligation to investigate and punish crimes against humanity and protect victims' rights. His delegation therefore fully supported the inclusion of draft articles 13 and 14 and the draft annex. In view of its extensive judicial practice and experience in investigating and prosecuting crimes against humanity, Argentina wished to offer several amendments to those provisions with a view to ensuring more effective international legal cooperation. With regard to draft article 13 (Extradition), it was worth noting that, in Argentina, in cases where the country's judicial authorities requested the extradition of an individual in another State for committing crimes against humanity, they faced legal obstacles concerning double criminality, statutes of limitations for criminal conduct and dual nationality. It was thus essential to ensure that legal tools were available to provide procedural ways of overcoming such obstacles.

117. His delegation suggested including a reference to the channels for the transmission of extradition requests, which would normally be the diplomatic channel or the central authorities. The Commission had indicated in the draft annex, which would be applied in accordance with draft article 14, that a central authority would serve as the channel for transmission. In order to ensure consistency between draft articles 13 and 14, his delegation suggested that the central authority be designated as the channel for transmission in draft article 13 as well.

118. It would also be useful to include in draft article 13 the concept of pretrial detention with a view to extradition and the possibility of pretrial detention based on a Red Notice of the International Criminal Police Organization. Both of those concepts appeared in the majority of extradition treaties as a way of expediting extraditions. In addition, it would be useful to include in draft article 13 the concept of simplified extradition for cases in which the extradited person gave his or her consent. Lastly, it would also be useful to include in draft article 13 the principle of "specialty", which established that an extradited person could only be extradited to face the charge for which extradition was requested. His delegation supported the provision concerning taking evidence by videoconference, set out in draft article 14, paragraph 3, and suggested also including a reference to obtaining digital evidence. It also welcomed the provision concerning the transmission of information by one State to another without prior request, contained in draft article 14, paragraph 6.

119. The designation of the central authority as the channel for transmitting requests for mutual legal assistance in the draft annex was relevant. Central authorities could help expedite requests by serving as a formal and direct channel between the different entities of countries that had the competence and specific knowledge regarding international legal cooperation. Furthermore, central authorities could access mechanisms for collaboration between each other and tools that allowed them to expedite such requests. The

draft annex should include a section exclusively dedicated to extradition, including paragraphs that only covered pretrial detention in cases of extradition, as such matters were generally covered in the annexes rather than in the articles of treaties.

120. **Ms. Chang** Wun-jeung (Republic of Korea) said that draft articles 13 and 14 and the draft annex related to measures to allow States to cooperate in order to effectively investigate and prosecute alleged perpetrators of crimes against humanity. It was essential that each State criminalize such crimes in its national law. In view of the principle of judicial sovereignty and the international nature of such crimes, inter-State cooperation by means of extradition and mutual legal assistance was also required to ensure that the crimes were properly and effectively punished.

121. Draft article 13 (Extradition) provided that crimes against humanity would be deemed an extraditable offence and that an offence covered by the draft articles should not be regarded as a political offence, a qualification which often served as grounds to refuse extradition. However, the draft article did not set out in detail on what grounds extradition could be refused; it only stated that "extradition shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties". In view of those conditions and the judicial sovereignty of States, her delegation believed that each State would need to adapt its domestic law to fully reflect the aims of the draft articles. For example, the granting of amnesty to offenders who committed crimes against humanity might serve as an obstacle to carrying out an extradition request, although in its commentaries the Commission indicated that amnesty granted by one State would not bar prosecution by another State over the offence.

122. While the contents of draft article 14 (Mutual legal assistance) and the draft annex did cover some relatively new elements, such as taking evidence of by videoconference or obtaining forensic evidence, they mostly reflected existing treaties on mutual legal assistance; her delegation therefore did not believe that the draft article threatened the judicial independence of Member States. Once well established, especially among States that did not have relevant bilateral or multilateral treaties in place, the inter-State cooperation framework would contribute to preventing crimes against humanity by making it possible for perpetrators to be punished effectively and isolated diplomatically.

123. With regard to draft article 15 (Settlement of disputes), paragraph 1 only referred to States' obligation to settle disputes concerning the interpretation or application of the draft articles. It was therefore not clear whether the reference to disputes included those relating to the responsibility of a State that had failed to comply with its obligations under the draft articles. Her delegation believed that the opt-out clause in paragraph 3, which provided that "each State may declare that it does not consider itself bound by paragraph 2 of this draft article", was a realistic compromise that would be attractive to States that were not willing to be bound by a mandatory dispute settlement mechanism.

124. **Mr. Liu** Yang (China), referring to draft article 13 (Extradition), said that while his delegation believed that extradition was an effective tool for inter-State cooperation in the fight against impunity and supported the draft article in principle, it emphasized that the provisions thereof should fully reflect the customary practice of States and be based on the successful experience of relevant international treaties. Paragraph 11 provided that a State was not obligated to extradite if it had grounds to believe that the request had been made to punish a person on account of a number of grounds, including race, religion, nationality, which his delegation found acceptable. However, some of the other grounds listed, such as "culture, membership of a particular social group" and "other grounds that are recognized as impermissible under international law", were not based on extensive State practice and did not reflect international consensus. They should therefore be deleted from that paragraph.

125. His delegation generally supported draft article 14 on mutual legal assistance as an effective means of addressing crimes against humanity. However, it had concerns with regard to paragraph 9, which concerned the mandate of the United Nations and other international organizations to establish international mechanisms to collect evidence with respect to crimes against humanity. That provision entailed very complicated issues. Furthermore, the establishment and operations of other international mechanisms had caused great controversy in the past. His delegation found it difficult to accept the current text of paragraph 9, which should be discussed further.

126. With regard to draft article 15 (Settlement of disputes), his delegation supported paragraph 1, which stipulated that States should endeavour to settle disputes through negotiations, and paragraph 2, which offered a balanced framework for compulsory dispute settlement. Paragraph 3, on the other hand, enabled States to declare that they were not bound by paragraph 2. The right of States to choose their own means of dispute settlement should be respected.

127. **Ms. Sayej** (Observer for the State of Palestine) said that her delegation reaffirmed its consistent position on and long-standing adherence to all political, legal and diplomatic means for the peaceful settlement of disputes. It welcomed the inclusion of draft article 15 on the settlement of disputes and the possibility offered to States to turn to the International Court of Justice to resolve their disputes if negotiations should fail. Despite tremendous challenges, the decisions of the Court had proved to be central to the peaceful settlement of disputes. Both the prevention and resolution of conflicts required granting a greater role to the Court in enforcing and promoting international law, not least the prevention and punishment of crimes against humanity.

128. **Mr. Khng** (Singapore) said that his delegation respectfully disagreed with the representative of one State who had suggested that a paragraph be added to draft article 13 to state that nothing in a future treaty could be interpreted as imposing an obligation to extradite when there were substantial grounds to believe that the person might face the death penalty. The conventions on which the draft article was based did not include such a provision. Furthermore, that State had made a reservation to article 2 of the Second Optional Protocol to the International Covenant on Civil and Political Rights, concerning the abolition of the death penalty, which allowed that State to apply the death penalty in times of war pursuant to a conviction for a most serious crime of a military nature committed in times of war. The Constitution of that State also provided for the possibility of applying the death penalty in times of war, and that State had legislation to the effect that the death penalty could be used in the case of certain military offences, including crimes against humanity. All that pointed to the fact that there was no consensus on the use of the death penalty.

129. **Mr. Nyanid** (Cameroon) said that his delegation sought clarification as to whether the resolution referred to by the representative of Sri Lanka that established the obligation to extradite derogated from customary practice. Concerning the suggestion made by the representative of Canada that States that made extradition conditional on the existence of a treaty should provide notification of that requirement at the time of ratification, he wished to know how the practice that allowed States to provide such notification bilaterally at all times would be handled. With regard to the statements by the representatives of Mexico and Sierra Leone, who had suggested removing the provisions for opting out of the jurisdiction of the International Court of Justice, he wondered whether it should be taken that States were obligated to reach an agreement when they negotiated, and if so, what happened in cases where a negotiation process did not lead to an agreement.

130. **Mr. Ndoye** (Senegal) said that the assertion made by the representative of one delegation that extradition was an effective means to fight impunity should be placed in its proper context, in order to avoid misinterpretation. His delegation therefore called on the Commission to clarify what it meant by the phrases “membership of a particular social group”, contained in paragraph 11 of draft article 13, and “restriction of his or her personal liberty”, contained in paragraph 19 of the draft annex.

131. **Ms. Dakwak** (Nigeria) said that draft article 13 was very ambiguous and did not reflect the aims of the international community. In particular, the Commission should clarify what was meant by the phrase “political offences”, used in paragraph 3, since political issues generally referred to issues of national concern and crimes under national jurisdiction should be handled by the State concerned. In addition, the use of the term “gender” in paragraph 11 should be clarified, as it was not included in the constitutions or laws of many States.

The meeting rose at 6 p.m.