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Summary record of the 42nd meeting
Held at Headquarters, New York, on Wednesday, 3 April 2024, at 10 a.m.

Chair: Mr. Milano (Vice-Chair) . . . . . (Italy)
later: Ms. Lungu (Vice-Chair) . . . . . (Romania)
later: Mr. Milano (Vice-Chair) . . . . . (Italy)

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24-06098 (E)

The meeting was called to order at 10.05 a.m.

Agenda item 80: Crimes against humanity (*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.

Draft articles 6–10 (continued)

2. **Mr. Aron** (Indonesia) said that his delegation welcomed the formulation of draft article 6 (Criminalization under national law) and draft article 7 (Establishment of national jurisdiction). It was important to ensure that primary responsibility for the prevention and prosecution of crimes against humanity remained with the States in whose jurisdiction the crimes had allegedly occurred. His country had enacted Law No. 26 of 2000 on the Human Rights Court, which defined crimes against humanity as offences under criminal law in terms similar to those used in the Rome Statute of the International Criminal Court, asserted national jurisdiction over such crimes and provided that the Human Rights Court was competent to hear and rule on cases involving them, including when they had been perpetrated by Indonesian citizens outside the territory of Indonesia. In addition, cooperation among States was important in order to complement efforts deployed under national legal infrastructure. His country had concluded 12 extradition treaties and 11 treaties on mutual legal assistance in criminal matters, including a regional mutual legal assistance treaty among members of the Association of Southeast Asian Nations, and was committed to further cooperation under international criminal law in order to deny safe haven and prevent impunity for crimes against humanity. Article 599 of Law No. 1 of 2023 on the Penal Code specifically criminalized crimes against humanity; it set out their defining characteristics and prescribed stringent punitive measures for offenders.

3. With regard to draft article 10 (*Aut dedere aut judicare*), his delegation was of the view that there was no need to address the issue of amnesties. An amnesty could play a role in national reconciliation and peacebuilding, but its relationship with the obligation to prosecute or extradite was fraught with legal, ethical and political complexities. The challenge lay in finding a path that ensured respect for international obligations while acknowledging the nuanced realities of transitional justice and reconciliation processes. The Commission's approach in not referring to amnesty in the draft article was therefore wise. When the question of amnesty arose, it should be decided upon by States, through their national legal and political processes, in the light of their specific circumstances. Tailored amnesties accompanied by truth-seeking mechanisms, reparations and guarantees of non-recurrence were more likely to be accepted than blanket amnesties that offered unconditional immunity for serious crimes.

4. The national measures referred to in draft articles 6 to 10 were closely related to the issue of individual criminal responsibility. They did not cover State responsibility, particularly in respect of situations where a State was alleged to have aided, assisted, directed, controlled or coerced another State in the commission of crimes against humanity. In that regard, article 9 of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, in particular the phrase "including those relating to the responsibility of a State", could serve as a good starting point for approaching the issue.

5. **Ms. Bhat** (India) said that draft article 6, paragraph 5, on the non-exclusion from criminal responsibility of a person holding an official position, was contrary to the procedural immunity that a foreign State official might enjoy before a national criminal jurisdiction under treaty law and customary international law. Such immunity was an inherent element of the principles of sovereign equality and non-interference in internal affairs.

6. With regard to draft article 7 (Establishment of national jurisdiction), multiple States could have jurisdiction and might wish to exercise it in a given situation. It was not explained in the draft article how such potential conflicts of jurisdiction could be resolved. Paragraph 2, in addition to overriding existing bilateral treaties between States concerning extradition and mutual legal assistance, further complicated the issue of jurisdictional conflict. Primacy should be accorded to the State able to exercise jurisdiction on the basis of at least one of the bases referred to in paragraph 1 (a) to (c). Such a State would clearly have a greater interest than others in prosecuting the offender in question.

7. **Mr. Kowalski** (Portugal) said that his delegation had restated its position on draft articles 6 to 10 at the previous resumed session. Overall, it was satisfied with the wording of those draft articles, which were essential to preventing impunity and ensuring accountability and, as such, rendered operational the draft articles as a whole.

8. Draft article 6 (Criminalization under national law) was a key provision. Primary responsibility for the prevention and punishment of crimes against humanity fell to States, and ensuring that crimes against humanity were criminalized under national criminal law was a

logical and inevitable consequence of that responsibility. Furthermore, the *jus cogens* character of the prohibition of crimes against humanity entailed not only a negative obligation not to commit crimes against humanity, but also a positive obligation to adopt the necessary national laws and take other appropriate measures to enforce the prohibition of crimes against humanity. It also entailed an obligation to cooperate in good faith with other States in the prevention and prosecution of such crimes.

9. Paragraph 5, in which it was stated that holding an official position was not a ground for the exclusion of criminal responsibility, was an important provision, since it ensured that senior officials, whether civilian or military, did not enjoy any type of immunity before their own national courts. As to the immunity of foreign State officials under customary international law, only the so-called "troika" enjoyed such immunity, and only during their term of office. The current work of the Commission on the topic "Immunity of State officials from foreign criminal jurisdiction" offered good guidance on the matter. There was no need to develop the paragraph further.

10. Paragraphs 6 and 7, on statutes of limitations and appropriate penalties, respectively, were also intended to ensure accountability without undue restrictions. Penalties for crimes against humanity must be in line with human rights law. As with other conventions on criminal matters, a convention on crimes against humanity did not need to prescribe specific penalties. Nonetheless, Portugal was strongly and unconditionally opposed to the application of the death penalty in any circumstances. Like many other States, Portugal was barred from transferring a person suspected of having committed crimes against humanity to a State where he or she might be subjected to the death penalty; it would be in violation of the right to life enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and the Portuguese Constitution.

11. Underscoring the importance of draft article 8 (Investigation), he said that States, particularly States in whose territory the crime had been committed, had ab initio priority over the International Criminal Court in the exercise of their jurisdiction over crimes against humanity. However, their willingness to conduct a prompt, thorough and impartial investigation was an important test; if that willingness was not genuine, then the Court should act, where it had the jurisdiction to do so.

12. His delegation welcomed the inclusion of the *aut dedere aut judicare* principle in draft article 10, which would contribute to preventing gaps in accountability. Amnesties and pardons were not compatible with the obligation to ensure the accountability of persons responsible for crimes against humanity.

13. His delegation hoped that the current discussion would lead to the adoption of a convention on the prevention and punishment of crimes against humanity.

14. **Mr. Košuth** (Slovakia) said that his delegation reiterated all the comments it had made at the previous resumed session. It noted with interest the proposal to include a prohibition on granting pardons and amnesties in draft article 6 and was prepared to discuss the possibility further within the context of formal negotiations on a convention.

15. With regard to draft article 7 (Establishment of national jurisdiction), his delegation underscored the importance of paragraph 2, the wording of which reproduced almost verbatim that of article 5 (2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Given that there were currently 174 States parties to that Convention, the jurisdictional basis established in paragraph 2 was neither new nor controversial in international criminal law. Moreover, paragraph 2 did not oblige States to exercise jurisdiction based on the presence of an alleged offender; rather, it simply required them to establish such jurisdiction in their national law or, in other words, to allow for its exercise in cases where the State concerned did not extradite or surrender the alleged offender to another jurisdiction. Together with the subsequent draft articles, that provision was a crucial component of a framework designed to eliminate any possibility of a safe haven for the perpetrators of crimes against humanity.

16. With regard to paragraph 1, Slovakia noted the suggestion by some delegations that a hierarchy be established among jurisdictional bases in favour of territorial jurisdiction, as having the closest link to the crime. While States with territorial jurisdiction were, admittedly, best placed in most cases to investigate crimes against humanity and prosecute the perpetrators of such crimes, it was neither necessary nor beneficial in terms of the object and purpose of the draft articles to give priority to such jurisdiction. Existing treaty law regarding other similar international crimes did not contain any such provisions. Potential jurisdictional conflicts could occur between well-established territorial and active personality jurisdictions, even in relation to non-international crimes, and were not a challenge specific to crimes against humanity.

17. The case for the introduction of a hierarchy was even less compelling when considered in the light of the

draft articles as a whole. States asserting jurisdiction based on the presence of an alleged offender had an obligation to notify States with territorial or personal jurisdiction. Such States, which presumably had a closer link to the crime, could thus assert their jurisdiction and request extradition. In such cases, proper consultations between the requested and requesting States must be conducted and due consideration be given to requests by the State under whose jurisdiction the alleged crime had occurred. Overall, draft article 7, read in conjunction with draft article 9 (Preliminary measures when an alleged offender is present) and draft article 13 (Extradition), provided sufficient guidance in that regard. Furthermore, nothing in the draft articles prevented States from agreeing to specific arrangements on a bilateral basis.

18. **Mr. Mead** (Canada), referring to draft article 6, said that his delegation wished to stress the significance of that provision for the implementation of any future convention's object and purpose. Adding an obligation to criminalize crimes against humanity in national law was key in terms of both prevention and punishment, and establishing such an obligation based on common definitions of the constitutive acts of such crimes was indispensable to avoid potential divergences between national legislation and international law, thus strengthening the international accountability system. As drafted, the draft article criminalized not only the commission of crimes against humanity, but also the acts of attempting, ordering, soliciting, inducing, aiding, abetting or otherwise assisting in the commission of such crimes. In his delegation's view, it provided the minimum framework for a general understanding between States on criminalization. It might be desirable to include an appropriately worded "without prejudice clause", as that would afford States the flexibility to criminalize additional forms of liability related to the commission of crimes against humanity in their domestic law, in line with the goal of adequately addressing the wide range of potential crimes against humanity. Mindful of the concerns expressed by some States regarding the need to preserve the application of conventional or customary international law on immunities, his delegation wished to recall the distinct nature of criminal responsibility as it related to persons who held an official position, as referred to in paragraph 5. The wording of that draft paragraph was sufficiently clear and did not prejudice the existing immunities of State officials under customary international law. Lastly, his delegation welcomed the proposal to include a provision on the prohibition of amnesty for perpetrators of crimes against humanity.

19. Draft articles 7 and 8 were fit for purpose as drafted. On draft article 9, there was a need to better reflect the existence of differences in proceedings and legal systems. Even if read together with draft article 11, it would still benefit from the addition of a general reference to internationally recognized standards of due process, so as to further clarify the alleged offender's rights at the stage of proceedings to which the draft article referred.

20. In his delegation's view, draft article 10 (*Aut dedere aut judicare*) applied not only to criminal proceedings but also to administrative and civil remedies, following the exercise of prosecutorial discretion.

21. **Mr. Kirk** (Ireland), referring to draft article 7, said that it provided for the exercise of what the jurist James Crawford had termed "treaty-based quasi-universal jurisdiction", or territorial jurisdiction over persons present in the forum State, albeit in respect of acts committed outside that State. Its final paragraph, however, provided flexibility allowing for the exercise of other forms of criminal jurisdiction established by a State in accordance with its national law, which could include universal jurisdiction. The establishment of the International Criminal Court had reduced the need for States to assert universal jurisdiction over the most serious crimes of international concern, since the Court could exercise jurisdiction where the State with territorial jurisdiction was unable or unwilling to do so. His delegation would welcome further discussion on the question of the prioritization of jurisdictions as there was insufficient clarity in the draft article on concurrent jurisdiction. Jurisdictional priority should be given to those States with the closest nexus to a crime, for example, a State exercising its jurisdiction on the basis of one of the grounds set out in paragraph 1, ahead of a State seeking to exercise its jurisdiction on the basis of the grounds in paragraph 2.

22. The Committee was now ready to negotiate the precise content of draft articles 6 to 10 in more detail as part of the process of the elaboration of a convention. His delegation was confident that any remaining divergences of opinion on those draft articles could be resolved through such negotiations and hoped to proceed rapidly to that stage.

23. **Mr. Aref** (Islamic Republic of Iran) said that legal difficulties continued to arise in relation to the definition, interpretation and enforcement of the criminal liability of legal persons in the context of crimes against humanity, as referred to in draft article 6, paragraph 8. There were disagreements on various aspects of that issue, including in the light of the

principle of *nullum crimen sine lege* and the non-existence of such liability in certain legal systems. From a practical standpoint, the inclusion of a reference to the liability of legal persons could also give rise to practical difficulties and uncertainties with regard to the implementation of other provisions of the draft articles, including draft article 14 (Mutual legal assistance).

24. There had been a deep divergence of views at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, as reflected in its records, on the advisability of including the criminal responsibility of legal persons in the Rome Statute. Similarly, as highlighted in the commentary to draft article 6, criminal liability of legal persons had not featured significantly to date in international criminal courts and tribunals, and neither the International Tribunal for the Former Yugoslavia nor the International Criminal Tribunal for Rwanda had criminal jurisdiction over legal persons. The International Military Tribunal at Nuremberg had existed in a specific context and set of circumstances, and while it could pronounce an organization as criminal, its purpose had not been to investigate and prosecute legal persons; rather, it constituted a specific procedure to allow for the prosecution and trial of individuals in a specific context. In the commentary, the Commission had indicated that only natural persons had been prosecuted and punished by the Tribunal; it had also mentioned many other relevant frameworks in which jurisdiction over criminal liability was absent, which evinced the persistent disagreements over that concept.

25. Certain other conventions on countering specific crimes, such as the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime, included provisions on legal persons that required States parties to those conventions to adopt such measures as might be necessary, consistent with their legal principles, to establish the liability of legal persons. Those conventions had been referred to in the Commission's commentary as instances of criminal jurisdiction over legal persons. However, his delegation was not convinced by those references; the aforementioned conventions aimed to counter a quite different set of crimes, namely, transnational organized crime and corruption offences, with different elements of *mens rea* and *actus reus*. The gravity and nature of those crimes were also different from those of crimes against humanity. Thus, reference to such conventions was irrelevant to the discussion on the liability of legal persons in respect of crimes against humanity. For those reasons, his delegation was reluctant to support such a substantial change and addition to the well-established principle of individual criminal responsibility established in article 25 of the Rome Statute.

26. In draft article 7 (Establishment of national jurisdiction), the Commission had attempted to establish various bases for national jurisdiction but had failed to address the question of priority of jurisdiction to avoid potential conflicts. Although in paragraph 12 of draft article 13 (Extradition), the Commission had attempted to resolve the issue by referring to "the State in the territory under whose jurisdiction the alleged offence had occurred", there was a need for a dedicated paragraph that addressed the need for an actual connection between a State wishing to exercise jurisdiction and the territory where the alleged crime had occurred, or a connection of nationality between a State and the alleged offender. Such a provision would assist States seeking to resolve a jurisdictional conflict.

27. With respect to draft article 9 (Preliminary measures when an alleged offender is present), any confinement of an alleged offender in the form of custody or through any other measures should be time bound. Furthermore, as already stated, there should be an actual connection between a State intending to prosecute a crime and the territory where the crime was committed, or the alleged offender should have the nationality of that State. While his delegation was still considering various aspects of draft article 9, it was dissatisfied with the final clause of paragraph 3, which left the exercise of jurisdiction up to the intention of the State if the alleged offender was present on its territory, even in the absence of jurisdictional ties to that State based on territoriality or personality. Its concern was supported by paragraph 12 of draft article 13, in which it was indicated that when an extradition request was made before a State where a suspect had been detained, "the State in the territory under whose jurisdiction the alleged offence has occurred" was given priority.

28. **Mr. Alabdali** (Saudi Arabia) said that, as his delegation had stated at the previous resumed session in April 2023 (see A/C.6/77/SR.41), paragraph 3 of draft article 6 enshrined a new legal principle that conflicted with the established rules of customary international law on the immunities of Heads of State and State officials.

29. Draft article 7, paragraph 2, and draft articles 9 and 10 enshrined the principle of universal jurisdiction, which was applied unevenly by States. In order not to expand the principle in a manner that would result in its arbitrary application for political purposes and would create tension in international relations, due account should be taken of the recommendations and criteria which his delegation had proposed during the first

resumed session. It was necessary to consider the differences in the legal proceedings that States had established under their national law to fight impunity. The text of the draft articles should reflect the Committee's discussion on the topic of universal jurisdiction and should not go beyond the principles established in the Charter of the United Nations and international law, especially those of State sovereignty, immunity and equality.

30. With regard to draft article 6 (Criminalization under national law), it was important to ensure legal clarity by stating in the draft article itself, as mentioned in paragraph (31) of the commentary, that paragraph 5 had no effect on any procedural immunity that a State official might enjoy before a foreign criminal jurisdiction, which continued to be governed by conventional and customary international law. As for paragraph 7, on appropriate penalties, States had the sovereign right to determine the appropriate penalties for crimes against humanity in line with their domestic law.

31. **Ms. Arumpac-Marte** (Philippines) said that, with regard to draft article 6 (Criminalization under national law), the Convention against Torture and the Genocide Convention, to which the Philippines was party, contained parallel provisions. The draft article set out various measures to ensure that all crimes against humanity were prosecuted; it also accommodated the diversity of approaches in national legal systems. Crimes against humanity were already an offence under Philippine law; her delegation therefore supported the wording of paragraph 1, in which States were mandated to take necessary measures to ensure that such crimes were criminalized under their national laws. With regard to paragraph 2, it was stated under Philippine law that a person should be held criminally liable as a principal and penalized if he or she, inter alia, committed such a crime; ordered, solicited or induced the commission of such a crime, which in fact occurred or was attempted; or in any other way contributed to the commission or attempted commission of such a crime by a group of persons acting with a common purpose, if such contribution was intentional and made with the aim of further criminal activity or purpose or in the knowledge of the group's intention. Her delegation could work on the basis of the text of paragraph 3, on the responsibility of superiors, which was also covered under Philippine law, but proposed including the element of "effective control", such that superiors would be criminally responsible for crimes against humanity committed by subordinates either under their effective command and control, or under their effective control or authority, as a result of their failure to exercise control over them. That would be premised on the fact that a superior knew or, owing to the circumstances, should have known that subordinates were committing or about to commit such crimes and failed to take all necessary and reasonable measures to prevent and repress their commission, or to submit the matter to the competent authorities for investigation and prosecution.

32. Her delegation could support the wording of paragraph 4, as the principle was in accordance with Philippine law, which provided that the fact that a crime defined and penalized therein had been committed pursuant to an order of a Government or a superior, whether military or civilian, would not relieve the person who committed the crime of criminal responsibility. Orders to commit "other crimes against humanity" were, by default, manifestly unlawful under Philippine law. Her delegation could also work on the basis of paragraph 5, as Philippine law applied equally to all persons without distinction based on official capacity. However, it would be useful to point out in the draft articles that immunities or special procedural rules attached to official capacity would not necessarily bar any court from exercising jurisdiction over a person holding an official position, though such immunities under international law might impose some limitations. Under Philippine law, the crimes penalized, including other crimes against humanity, genocide and war crimes, their prosecution and the execution of sentences, were not subject to any prescription. Her delegation therefore supported paragraph 6 on the non-applicability of any statute of limitations. It also supported the current wording of paragraph 7, as its national law provided for the application of appropriate penalties that took into account the grave nature of the offence in question. In general, under Philippine law, a person guilty of crimes against humanity would suffer the penalty of *reclusion temporal*, for a medium to maximum term, and a fine.

33. Her Government was still constructively considering draft article 7. Its national law provided for the Philippines to exercise jurisdiction over persons, whether military or civilian, suspected or accused of crimes against humanity, regardless of where the crime had been committed, provided that the accused was a citizen of the Philippines or, regardless of his or her citizenship or residence status, was present in the Philippines, or had committed the crime against a Filipino citizen.

34. Her delegation supported the provision in draft article 8 under which States were given a mandate to ensure that their competent authorities proceeded to investigation when there was reasonable ground to believe that acts constituting crimes against humanity had been committed in any territory under their

jurisdiction. As stated by the Commission in its commentary to the draft article, such investigations, which must be serious, effective and unbiased, could be conducted through a variety of modes.

35. In relation to draft article 10, in the interests of justice, the competent Philippine authorities could decide to end an investigation into crimes punishable under national law or the prosecution of their alleged perpetrators if another court or international tribunal was already investigating that offence or prosecuting the perpetrators; they could instead surrender or extradite suspected or accused persons who were present in the Philippines to the appropriate international court or to another State, pursuant to applicable extradition laws and treaties. In that regard, the issue of how States should deal with multiple requests for the extradition or surrender of a person could also be addressed in draft article 10.

36. **Ms. Ma** Yanbo (China), referring to draft article 6, said that, with regard to the obligation under paragraph 1 for States to criminalize crimes against humanity under national law, it was not advisable to compel States to criminalize the specific offence of "crimes against humanity", given the different legal systems and varying national conditions of States; criminalizing the specific acts that constituted crimes against humanity could serve the same purpose of effective prevention and punishment. Regarding the provision in paragraph 5 stipulating that the official position of a person committing an offence was not a ground for excluding criminal responsibility, her delegation wished to recall that the immunity of State officials from foreign criminal jurisdiction was a universally recognized principle of customary international law. It was inherent in the principles of sovereign equality and non-interference in internal affairs and was vital to the maintenance of stable inter-State relations. A new draft article affirming that principle should be added to the draft articles. Concerning paragraph 6, on statutes of limitations, the question of whether it was appropriate to introduce a blanket exemption from the application of statutes of limitations warranted further study, bearing in mind that crimes against humanity covered different offences punishable by different penalties. Paragraph 8, on the criminal liability of legal persons for crimes against humanity, was not supported by customary international law and there was no international consensus on the question. Explicit provisions in that regard should therefore be avoided in the draft articles. It would be more pragmatic to leave it to States to make their own decisions on that matter.

37. Turning to draft article 7, she said it should be made clear that paragraph 2 applied only to the establishment of jurisdiction over nationals of a State party to a future convention based on the draft articles, and that the nationals of any non-State party were not subject to it. The stipulation in paragraph 3 that the draft articles did not exclude the exercise of any criminal jurisdiction established by a State in accordance with its domestic law was open to misinterpretation and could result in the misapplication of the offence of crimes against humanity. The Organized Crime Convention and the Convention against Corruption contained similar provisions, but it was expressly stated in those provisions that the rule set out therein was without prejudice to norms of general international law. That formulation should be reproduced in paragraph 3 in order to prevent the paragraph from being used as a ground for unduly expanding jurisdiction.

38. Draft article 10 placed State jurisdiction on an equal footing with that of an international criminal court or tribunal and was therefore not in line with the widely accepted principle of complementarity, according to which States played the dominant role in exercising jurisdiction.

39. **Mr. Wavrin** (France), referring to draft article 6, said that, with regard to paragraph 7, his delegation wished to reiterate that his Government was opposed to the use of the death penalty or any type of physical punishment tantamount to inhuman or degrading treatment, regardless of the seriousness of the acts committed. Such penalties, including the death penalty, should be explicitly excluded. His delegation welcomed paragraph 8 of the draft article. Although not provided for in the Rome Statute, the question of the liability of legal persons for crimes against humanity was an important one, and it might be appropriate to devote a specific draft article to it. Further clarification could also be provided, based on the relevant provisions of the Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and Other International Crimes.

40. With regard to draft article 7, it was important to maintain the right balance between criminal jurisdiction established in accordance with the domestic law of States and the exercise of universal jurisdiction in the prosecution of crimes against humanity.

41. As for draft article 9, for the sake of consistency and precision, the term "*État*" (State) should be replaced, in all three paragraphs, with the term "*autorités compétentes*" (competent authorities), which was used in draft article 8. Furthermore, the expression "*enquête préliminaire*" (preliminary inquiry) in paragraph 2 referred, in French law, to a specific phase

of legal proceedings, the scope of which was more limited than that covered by the draft article. That might also be the case in other national legal systems. It would therefore seem appropriate to use a more generic term, such as "*investigations*" (investigations) or "*enquête*" (inquiry).

42. His delegation reiterated its support for the elaboration of a convention on the basis of the draft articles and called on all delegations to work towards the opening of negotiations on such a convention, which would also enable the General Assembly to fulfil its mandate with regard to the codification and progressive development of international law, in accordance with Article 13, paragraph 1 (a), of the Charter of the United Nations.

43. **Ms. Solano Ramirez** (Colombia) said that draft article 6 was indispensable to a future convention, in order to avoid discrepancies between the crime defined in the international instrument and the crime as defined in national law, and thereby close potential gaps. The wording of the draft article was the minimum that was necessary in an instrument of that type; however, domestic law could go beyond its provisions, or even those of customary international law, in view of the regulatory power of States in matters such as those referred to in paragraph 2 (c). There was ample precedent for the wording of paragraphs 3, 4 and 5 in conventions and jurisprudence. Article 28 of the Rome Statute went into much greater detail with regard to the responsibility of commanders and other superiors; however, the wording of draft article 6 was more similar to certain provisions of the statutes of the special criminal tribunals and of treaties such as the Convention against Torture or the Inter-American Convention on Forced Disappearance of Persons. During negotiations on a future convention, it would be important to find a balance between simpler wording and a more explicit formulation indicating that superior status would have no impact on a sentence or on its mitigation. In her delegation's view, more explicit wording would provide much greater legal certainty.

44. There was a clear relationship between paragraph 5 and the rules on immunity, as well as the Commission's current work on the immunity of State officials from foreign criminal jurisdiction. A future international convention based on the draft articles should be clear and worded in such a way as to avoid discrepancies between legal regimes, so that the legal officials implementing the convention were not hampered by uncertainty. During the negotiation process, a review of regional legislation and the jurisprudence of regional courts on the matter should be undertaken. Under the Inter-American Convention on Forced Disappearance of Persons, for example, the criminal prosecution and sentencing of perpetrators of enforced disappearance was not subject to any statute of limitations, and States parties were required to criminalize the offence under national law and make it subject to an appropriate penalty that took due account of its extremely serious nature. The obligations of States under those paragraphs of draft article 6 should be interpreted without prejudice to any broader definition contained in another international instrument, international custom or regional or international jurisprudence applicable to a given State. That said, her delegation wished to discuss all the proposals made for adding to or improving those paragraphs and was particularly interested in the ideas put forward by the representatives of Argentina and Brazil. Regarding paragraph 8, in Colombia there was no criminal liability for legal persons. That matter should therefore be left to the discretion of States and regulated under domestic law. However, the financing of crimes against humanity should be criminalized, in view of the decisive role that financing played in enabling such crimes, whether it was provided by States, natural or legal persons or criminal organizations.

45. Draft article 6 highlighted the importance of having a convention on crimes against humanity to facilitate the adaptation of national law to international law and generate legal certainty with regard to the multiple and concurrent domestic, regional and multilateral obligations to which States were subject. It was to be hoped that such an instrument would help to avoid fragmentation, clarify the sometimes contradictory obligations incumbent on States and facilitate cooperation among States to combat such egregious crimes.

46. With regard to draft article 7 (Establishment of national jurisdiction), it was appropriate that the draft article established the State's jurisdiction to prosecute on the basis of territoriality, nationality or place of residence of the perpetrator, and passive personality, With regard to territorial jurisdiction, reference should be made to both de jure and de facto jurisdiction, for example by referring to persons under the jurisdiction or control of a State. Passive personality jurisdiction was of the utmost importance, as it enabled States to exercise national jurisdiction in respect of crimes against humanity in order to protect the fundamental rights of their nationals, ensure that they received reparations when they were victims of such crimes and prevent impunity for the perpetrators. Paragraphs 2 and 3 would be valuable mechanisms to prevent impunity in relation to the commission of crimes against humanity. Their

inclusion as a rule of positive law provided great legal certainty.

47. Draft article 8 was pertinent and appropriately worded, and contributed to the central objective of the instrument. While draft article 9 was essential to a future international convention, it should be clarified that the State with the closest links to the crime should have priority in exercising jurisdiction over it. Lastly, draft article 10 (*Aut dedere aut judicare*) was indispensable to a future international convention, since crimes against humanity were, by their nature, crimes against humanity as a whole, and States had a common interest in preventing them and punishing and prosecuting their perpetrators. Given that other texts, including the Convention against Torture and the International Convention for the Protection of All Persons from Enforced Disappearance, contained similar formulations, there should be few obstacles to reaching consensus on the wording of that provision. Her delegation also noted the explicit reference to the conventional character of the provisions on universal jurisdiction in respect of crimes against humanity, as had been recognized by her country's high courts.

48. **Mr. Heumann** (Israel), speaking on draft article 6, said that, with regard to paragraph 1, his delegation was mindful of the considerations that had brought the Commission to incorporate in draft article 2 the definition of crimes against humanity contained in article 7 of the Rome Statute. However, the current definitions of crimes against humanity contained in draft article 2 did not necessarily overlap with widespread State practice. The terms in which States had criminalized crimes against humanity in their domestic law differed from each other, as noted in the commentaries to the draft articles themselves. Further discussions would therefore be welcome regarding the obligations set out in paragraph 1, and on whether that paragraph should necessarily be understood or interpreted as requiring States to reproduce verbatim the definition contained in draft article 2. The draft articles should allow States some discretion in how they chose to incorporate the crimes into national law, taking into account, inter alia, the customary definitions of the crimes and the State's domestic criminal legal system and principles, insofar as they aligned with the object and purpose of such a future international convention.

49. With regard to paragraph 5, which addressed the issue of the official position of a defendant as a substantive defence from criminal responsibility, his delegation was of the view that the paragraph had no effect on the procedural immunity that foreign State officials might enjoy before national criminal jurisdictions. Given that the Commission was still actively considering the topic of immunity of State officials from foreign criminal jurisdiction, it was important to maintain a consistent approach on the matter. His delegation would continue to follow developments in that regard.

50. Paragraph 8, on the criminal, civil or administrative liability of legal persons, did not necessarily reflect existing customary international law and should be further discussed. As acknowledged in the commentary to the draft article, the statutes of most international criminal tribunals to date did not include a provision on criminal liability of legal persons. The matter was also subject to diverging views within the Committee. In order for a future international convention to be accepted as widely as possible, it was essential that it reflect well-established principles of international law; the issue of the criminal liability of legal persons should therefore not be addressed.

51. With regard to draft article 7 (Establishment of national jurisdiction), the primary responsibility for investigations and prosecutions lay with the State in whose territory the crime had occurred, or with the State of nationality of the accused. The application of the principle of universal jurisdiction, as widely discussed in the Committee under the topic "The scope and application of the principle of universal jurisdiction", should be a measure of last resort. In that regard, his delegation shared the concerns expressed by other Member States with regard to unwarranted assertions of jurisdiction. In its commentary to the draft article, the Commission had clarified that, when taking the "necessary measures" to establish such jurisdiction, States should adopt procedural safeguards to ensure its proper exercise. The Secretary-General had issued several reports on universal jurisdiction, which provided useful and important information on national laws that put such safeguards in place. Given the far-reaching implications of criminal proceedings against foreign nationals, including foreign State officials charged with crimes against humanity, and in the light of the gravity and unique characteristics of such crimes, a determination concerning such proceedings should be made by officials at a sufficiently high level, as was common in the law and practice of various jurisdictions, and such approval should be an essential requirement before a State began an investigation into allegations concerning crimes against humanity. Amending the draft article so as to reflect that principle more accurately might create broader consensus on the topic.

52. With regard to draft article 8 (Investigation) and draft article 9 (Preliminary measures when an alleged offender is present) related to measures taken on the ground, which should be exercised with caution.

Therefore, the necessary evidentiary threshold required for initiating preliminary measures in such cases should reflect thresholds that were generally necessary in each particular criminal jurisdiction. It was stipulated in paragraph 1 of draft article 9 that a State could take a person into custody or take other legal measures on the basis of "information available to it". That phrase could be seen as lowering the required evidentiary threshold in a particular jurisdiction and should be addressed accordingly.

53. **Ms. Lungu** (Romania) said that draft article 6 was at the core of a future convention on crimes against humanity, as it imposed on States concrete obligations to enact criminal legislation allowing for the establishment and exercise of jurisdiction over alleged perpetrators of such crimes, as well as the imposition of appropriate penalties. It was therefore key to holding perpetrators accountable and would also lead to the strengthening and harmonization of national legal frameworks. Her country had already made crimes against humanity offences under its criminal law, following closely the definition provided in article 7 of the Rome Statute. Under its Criminal Code, such crimes were punishable by appropriate penalties that took into account their grave nature. Romania was in favour of the non-applicability of any statute of limitations for such offences and had already made a national policy decision in that regard.

54. With regard to draft article 7, the establishment of a broad range of jurisdictional bases was a key element in the effectiveness of any future instrument, as it would help close the impunity gap by ensuring that States did not become safe havens for the perpetrators of crimes against humanity. Paragraph 1 established three forms of national jurisdiction, based on the principles of territoriality, active personality and passive personality. The third form was, in her delegation's view, optional, considering the wording used. Romanian national law provided for all three of those forms. In view of the gravity of crimes against humanity and the importance of using all tools to tackle them efficiently, her delegation supported paragraph 3, which left open the possibility for a State to establish other jurisdictional grounds upon which to hold an alleged offender accountable, in accordance with national law.

55. Her delegation welcomed draft article 8, which provided for a prompt, thorough and impartial investigation whenever there was reasonable ground to believe that acts constituting crimes against humanity were being committed in any territory under a State's jurisdiction. Such investigations would prevent the continuance of ongoing crimes and their recurrence.

56. With regard to draft article 9, the preliminary measures provided for were commonly used in national proceedings to prevent the risk of flight by the alleged offender and to stop him or her from committing further criminal acts. In the light of the seriousness of crimes against humanity, the inclusion of that provision seemed fully justified. Nonetheless, such preliminary measures must be applied in accordance with the standards governing fair treatment and the full protection of rights set forth in draft article 11.

57. As for draft article 10, her delegation considered it appropriate that the Commission had decided to base the text on the Hague formula, which had already been incorporated into many international treaties. It also welcomed the reference to the "competent international criminal court or tribunal", in view of the significant role such judicial institutions played in the fight against impunity.

58. **Ms. Rathe** (Switzerland) said that, in order to achieve the dual objective of a future convention, namely that of preventing and punishing crimes against humanity, it was essential for the provisions of draft article 6 to be implemented in the domestic systems of all States. Her delegation welcomed the fact that the draft article called on States to define in their domestic law the various forms of participation in crimes against humanity, including attempting to commit or assisting in or contributing to the commission of such crimes. Further, it supported the absence of any statute of limitations in respect of crimes against humanity, which was in line with Swiss law. On the question of appropriate penalties, she wished to reiterate her Government's firm opposition to the use of capital punishment.

59. With regard to draft article 7, her delegation welcomed the wide range of jurisdictional bases presented for the prosecution of crimes against humanity, which would thereby deprive the perpetrators of such crimes of any safe haven. It also welcomed the fact it was specified in paragraph 3 that the draft article did not exclude the exercise of any form of criminal jurisdiction established by a State in accordance with its national law. The establishment of the different types of national jurisdiction provided for in draft article 7 was also important to support the obligation to extradite or prosecute (*aut dedere aut judicare*), as set out in draft article 10. According to that principle, the State in the territory under whose jurisdiction an alleged offender was present had the obligation to submit the case to its competent authorities for the purpose of prosecution, if it did not extradite or surrender the person to another State or to a competent international criminal court or tribunal that was willing and able itself to submit the

case to prosecution. That was a fundamental principle in the fight against impunity and her delegation welcomed its inclusion in the draft articles.

60. **Ms. Janah** (New Zealand) said that draft article 6 was central to the effectiveness of a future convention. By establishing a harmonized minimum standard framework for criminalization under national law, it would help to address the risk of impunity with respect to crimes against humanity and mitigate potential loopholes that could result from diverging definitions under States' national laws. Her delegation welcomed the approach taken by the Commission in paragraph 3 to address the different modes of criminal responsibility for crimes against humanity while maintaining flexibility for the operation of national laws in the context of different legal systems. That approach would facilitate effective domestic implementation. Her delegation also supported the clarification in paragraph 6 that crimes against humanity should not be subject to any statute of limitations.

61. **Mr. Yamashita** (Japan) said that, with regard to draft article 6, in his delegation's view, the criminalization of crimes against humanity would not necessarily require each State to codify each crime in its national law as an independent offence defined exactly as in draft article 2. To achieve the purposes of the draft articles, it would suffice for the acts that constituted crimes against humanity to be criminalized under each State's national law. Furthermore, the measures that States could take under paragraphs 1, 2 and 7 should include the surrender of a perpetrator to the International Criminal Court.

62. It was his delegation's understanding that paragraph 3 did not require States to establish the act referred to as an independent offence. His Government had taken the necessary measures to establish the criminal responsibility of commanders and other superiors through provisions on complicity under its national criminal law, which it considered to be sufficient to meet the obligation established in that paragraph. In addition, his delegation was of the view that, as indicated by the Commission in its commentary to the draft article, the language used in paragraph 3 should not foreclose any State from adopting a more detailed standard in its national law, such as appeared in article 28 of the Rome Statute, should it wish to do so. That point should be clarified in the draft articles. Moreover, Japan applied statutes of limitations for certain crimes, as did other States. It would therefore be necessary to consider carefully whether to abolish statutes of limitations for all the offences that constituted crimes against humanity as defined in the draft articles.

63. The obligations established under draft article 7, paragraph 2, and draft article 10 could be met by ensuring punishment under his country's existing criminal law or through the surrender of a perpetrator to the International Criminal Court. With regard to draft article 10 specifically, his delegation understood that the obligation established was for the State to "'submit the case to its competent authorities for the purpose of prosecution', meaning to submit the matter to police and prosecutorial authorities, who may or may not decide to prosecute in accordance with relevant procedures and policies", as the Commission had pointed out in the commentary to the draft article, and that the decision as to whether to prosecute a perpetrator was left to the reasonable discretion of the prosecutorial authorities.

64. Referring to draft article 9, he said that his delegation agreed with the inclusion of the phrase "the circumstances so warrant" in paragraph 1, in relation to the taking of alleged offenders into custody or the taking of other legal measures intended to ensure his or her presence. As for paragraph 3, depending on the information required, it might not be possible for Japan to immediately notify the States referred to in draft article 7, paragraph 1, of the fact that an alleged offender was in custody and of the circumstances that warranted his or her detention, depending on the information requirement, owing to national legal requirements applicable to the confidentiality of investigations. Flexibility should be ensured in that regard.

65. **Mr. Woodifield** (United Kingdom), referring to draft article 6, said that it was his delegation's position that paragraph 5 had no effect on any procedural immunity that a foreign State official might enjoy, which continued to be governed by general and customary international law. His delegation strongly supported the inclusion of paragraph 6, which required States to ensure that statutes of limitations did not apply to crimes against humanity. That provision would allow survivors to seek judicial remedy when they were ready, which could be many years after the incident. His delegation welcomed the clarification made by the Commission in paragraph (33) of the commentary to the draft article, in which it expressly confirmed that position. However, it would be helpful for it to be stated in the draft articles that the obligation in paragraph 6 did not mean that States were obliged to prosecute crimes against humanity that had taken place before such crimes had been criminalized in their law.

66. Draft article 7 (Establishment of national jurisdiction) provided for extraterritorial jurisdiction over crimes against humanity, in similar terms to the Convention against Torture, reflecting the gravity of the crimes and the interest of the international community

of States in bringing an end to impunity for them and ensuring that perpetrators could not escape justice by moving between States. It was also an important signal to victims and survivors that the international community treated such crimes with appropriate gravity. The United Kingdom would be required to make changes to its domestic legislation to give effect to a provision of that nature. It remained his Government's strong view, however, that it was preferable, where possible, for crimes against humanity to be prosecuted in the State in which they had occurred. That reflected the reality that the authorities of the State in whose territory an offence had been committed were generally best placed to prosecute that offence, not least because of the obvious advantages in securing the evidence and witnesses necessary for a successful prosecution.

67. Several states had flagged the issue of competing or overlapping claims to jurisdiction. His delegation would be open to considering suggestions on how best to prevent future disputes in that regard.

68. Draft article 10 provided for the possibility of extradition to another State or a competent international criminal court or tribunal. His delegation noted that the draft article was structured in such a way as to establish that a State had an obligation to submit a case for the prosecution of a suspect on its territory to the appropriate authorities, which must take their decision in the same manner as they would for other offences of a similarly grave nature, under their national law, thereby preserving prosecutorial discretion and independence. That obligation did not arise where the State agreed to extradite or surrender the individual to another State or international court or tribunal.

69. **Ms. Flores Soto** (El Salvador) said that, with regard to draft article 6, her delegation noted the need to regulate the obligation of States to criminalize crimes against humanity at the national level, since national regulations were a way to ensure the effective application of the guidance in the draft articles. However, with respect to paragraph 2, her delegation did not support the Commission's decision to use a streamlined version of the terms set out in the Rome Statute in relation to the attribution of criminal responsibility. The draft article should clearly distinguish between the different types of participation in crimes against humanity, in accordance with the jurisprudence and norms of international criminal law. The principle of "indirect perpetration", which was recognized in contemporary doctrine and in the jurisprudence of the international criminal system, should be covered; according to that principle, a person who carried out punishable conduct using another person as an instrument was a perpetrator. The principle could therefore be used to address problems related to the determination of criminal responsibility of superiors in a hierarchical or organized structure.

70. Regarding draft article 7 (Establishment of national jurisdiction) and draft article 10 (*Aut dedere aut judicare*), El Salvador had recognized in its constitutional jurisprudence, in particular unconstitutionality ruling No. 44-2013/145-2013, that internal measures, whether legislative or otherwise, could not be applied if they impeded investigations, the clarification of the truth or the independent administration of justice in respect of crimes against humanity, or denied justice and full reparations to the victims of such crimes or resulted in impunity for their perpetrators, who were, in all circumstances, subject to prosecution, extradition, trial and criminal punishment and therefore could not enjoy any amnesty or pardon. In that regard, it was important to retain the current wording of the draft articles. The fact that they did not prescribe a hierarchical relationship between the different criteria for establishing and exercising jurisdiction should be without prejudice to the duty to exercise jurisdiction in order to investigate the most serious crimes of international concern and punish their perpetrators. In the light of the Convention against Torture and the International Convention for the Protection of All Persons from Enforced Disappearance, as well as international and national jurisprudence, the two draft articles should be interpreted as reflecting the duty of States parties to a future convention to investigate crimes against humanity and prosecute the alleged perpetrators, without any conditions, in line with the purpose of the convention, namely to eliminate impunity for the perpetrators of crimes against humanity.

71. **Mr. Skachkov** (Russian Federation) said that the content of draft article 6 should be limited to establishing a general obligation to criminalize crimes against humanity under national law. The excess detail currently provided did not add value and would create problems for national law enforcement. The wording of paragraph 3 was too vague; it would be difficult to prove that commanders "knew, or had reason to know" that their subordinates were about to commit or had committed a crime but had failed to take all necessary and reasonable measures to prevent it. The obligation of States to hold commanders criminally responsible should be based solely on whether the commanders had factual knowledge of the crime. A more detailed examination of standards of command responsibility in national legal systems might also be carried out. With regard to paragraph 4, his delegation believed that compliance with the orders of a superior could be an

acceptable defence, except in cases where the perpetrator knowingly executed an unlawful order or instruction. With regard to situations in which subordinates were forced to commit crimes, for example on threat of injury or death, a more in-depth analysis was required.

72. His delegation wished to emphasize once again that draft article 6 should be without prejudice to the rules of customary international law relating to the immunity of State officials from foreign criminal jurisdiction. A reference to that immunity should therefore be incorporated in paragraph 5. With regard to paragraph 8, it should be noted that the legislation of many States, including that of the Russian Federation, did not provide for legal persons to be held criminally responsible and that, accordingly, legal persons could not be held accountable before the national courts of those States. That situation did not mean that offenders enjoyed impunity but simply that only the natural persons individually responsible could be held to account under criminal law. Paragraph 7 called for "appropriate" penalties for crimes against humanity without specifying what penalties might meet that definition. At the very least, a reference to national legislation should be added.

73. With regard to draft article 7 (Establishment of national jurisdiction) , an array of differing positions on its content had, not for the first time, been expressed within the Committee. That draft article provided grounds for establishing concurrent jurisdiction that could open the door to jurisdictional conflict and legal confusion. It set forth three independent grounds for establishing jurisdiction without offering any order of priority for their application, while also leaving open the possibility for a State to exercise jurisdiction on any other ground established "in accordance with its national law". That lack of precision could lead to jurisdictional disputes and politicization, and might ultimately make it difficult to prosecute the perpetrators of crimes against humanity. The best solution might be to make the basis for jurisdiction the place in which the crime was committed, as provided in the Genocide Convention. Furthermore, the establishment of jurisdiction over crimes committed outside the territory of a State should not result in violations of the sovereignty of other States.

74. In draft article 8, the use of the phrase "prompt, thorough and impartial investigation" might give the erroneous impression that separate standards of speed, thoroughness and impartiality applied to the investigation of crimes against humanity. In addition, the notion of "reasonable ground to believe" was too vague in the context of investigations into crimes against humanity, especially when such investigations might lead to a person being taken into custody – the scenario envisaged in draft article 9. In some States, law enforcement officers would not be familiar with the term "reasonable ground" since their laws, like those of the Russian Federation, did not use or recognize that concept as a standard of evidence. Russian criminal procedure legislation instead used the term "sufficient evidence".

75. With regard to draft article 9 (Preliminary measures when an alleged offender is present), his delegation also had doubts about the notification obligation established in paragraph 3, which failed to reflect the possibility that notification of another State might compromise any investigation under way. The draft article also failed to specify how long a person suspected of having committed a crime against humanity could be held in custody pending prosecution, extradition or surrender – a situation that could result in excessively long periods of pretrial detention without due process. In fact, although the draft article contained excess detail, its provisions failed to create any obligation for States to safeguard the rights of persons detained on such suspicions during the preliminary inquiry. His delegation was also not convinced that the mere presence of a person suspected of having committed a crime against humanity in the territory of a third State constituted grounds for the exercise of jurisdiction by that State. An indisputable link between the crime and the State in question should be a prerequisite.

76. In draft article 10 (*Aut dedere aut judicare*), the reference to a "competent international criminal court or tribunal" should be deleted. Questions of regional or international jurisdiction were governed by special agreements and, in some cases, by decisions of the Security Council. Accordingly, they fell outside the scope of the draft articles. On the other hand, a reference to the *non bis in idem* principle might be added to the draft article.

77. **Mr. Syed** (Pakistan) said that penalizing crimes against humanity was vital in upholding justice and ensuring accountability for the most egregious human rights violations. However, it was imperative to approach the matter with sensitivity and understanding, acknowledging the diverse legislative frameworks of different nations.

78. With regard to draft article 6 (Criminalization under national law), there was no customary rule obligating States to penalize crimes against humanity and, as yet, no agreed definition of such crimes. The draft article should therefore be recommendatory in

nature and use of the word “shall” should be avoided. Due consideration might also be given to the possibility of retaining only paragraph 1, as some delegations had suggested at the previous resumed session, since, as currently drafted, the content of the draft article went beyond the wording of the Genocide Convention.

79. With regard to draft articles 7, 9 and 10, more discussion was clearly needed, as they were based on an expansive interpretation of the doctrine of universal jurisdiction, on which the Committee had been unable to reach consensus even though the item had been on its agenda for over a decade. It was imperative to ensure that States would not be able to misuse those provisions as a basis for exercising jurisdiction for political considerations and that accused persons were not extradited to States that would exercise jurisdiction without grounds. It might also be worth exploring the suggestion that the text of draft article 7 (Establishment of national jurisdiction) be limited to following the wording of the Genocide Convention. As currently worded, the draft article set forth a scenario in which multiple States might assert national jurisdiction over a criminal offence, potentially resulting in jurisdictional conflict. In cases of conflicting jurisdiction, clear priority should be given to the State capable of exercising jurisdiction based on at least one of the criteria outlined in paragraph 1, which would typically have a stronger interest in prosecuting the offence in question, thus ensuring a more effective and just resolution, rather than to a custodial State whose jurisdiction was limited to the circumstances envisaged in paragraph 2.

80. *Ms. Lungu (Romania), Vice-Chair, took the Chair.*

81. **Mr. Roshdy** (Egypt), referring to draft article 6 (Criminalization under national law), said that the wording used in paragraph 3 to refer to the criminal responsibility of commanders and other superiors for crimes against humanity committed by their subordinates in circumstances where the commanders knew, or had reason to know, that the subordinates were about to commit a crime was speculative and general. Clarification regarding the specific rights and duties of superiors established thereunder was therefore required. The reference to “all necessary and reasonable measures” to be taken by commanders and other superiors was a similarly general formulation that failed to define the bounds of the responsibility established. His delegation’s concerns about the lack of precision in those provisions reflected its earlier observations about the general nature of certain other draft articles, including, notably, draft article 2. That lack of precision carried a risk of the draft articles as a whole slipping into non-specific general formulations. With regard to paragraph 7, his delegation wished to emphasize that States had an exclusive sovereign right to determine appropriate penalties in accordance with their national law. Additionally, the lack of clarity in the wording of paragraph 8, concerning the liability of legal persons, continued to raise questions about its meaning.

82. His delegation opposed the approach to universal jurisdiction enshrined in paragraph 2 of draft article 7 (Establishment of national jurisdiction) and in draft article 10 (*Aut dedere aut judicare*). Universal jurisdiction was not a globally agreed principle and there should be a clear link between the State that had jurisdiction and the offence committed. Furthermore, draft article 7, paragraph 3, would be difficult to implement by States parties to any future convention based on the draft articles in the event that their obligations under national law conflicted with their obligations under the convention. States were required to uphold all obligations assumed under a convention to which they were a party in respect of the other parties to that convention unless they had entered reservations to one of its provisions.

83. *Mr. Milano (Italy), Vice-Chair, resumed the Chair.*

84. **Mr. Nyanid** (Cameroon) said that his delegation welcomed draft article 6, which created an obligation for States to criminalize crimes against humanity under national law so that, where necessary, such crimes could be prosecuted at the local level. However, it wished to suggest that the draft article should be reworked in order to describe more precisely the act constituting the crime to be penalized and its exact name, which, under national law, might vary. It was important that the prohibited conduct constituted an offence punishable under national law even if the precise wording used to describe each act differed. The seriousness of the offences in question precluded the application of any statute of limitations and called for appropriate penalties to be established.

85. With regard to draft article 6, paragraph 2, his delegation believed that any person who committed an offence constituting a crime against humanity should be held criminally liable before the national courts of his or her State of origin. With regard to paragraph 2 (c), it noted with interest that “accessorial” criminal responsibility might be incurred by “ordering”, “soliciting”, “inducing”, “instigating”, “inciting”, “aiding and abetting”, “conspiracy to commit”, “planning”, or “joint criminal enterprise”. On the other hand, it noted with concern that the wording thereof opened the door to injustice. It would be advisable to establish means of demonstrating accessorial responsibility in the commission of a crime against

humanity based on irrefutable facts and to show how it could be proved that an individual's stance had been such as to induce the commission of crimes against humanity or that a certain behaviour had aided their commission. His delegation therefore suggested that paragraph 2 should expressly refer to "conspiracy" and "incitement", adopting the terms used in the Genocide Convention and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Incitement was an inchoate offence, and it was regrettable that, on that point, the Commission had aligned itself with the Rome Statute, under which incitement and conspiracy were not punishable in respect of crimes against humanity. Given the grave nature of such crimes, the establishment of a substantial and irrefutable body of evidence that would demonstrate participation in the thinking, planning and logistics involved in the commission of those crimes was highly desirable.

86. His delegation was concerned about the wording of paragraph 3. The reference to "commanders" was inappropriate since it implied that crimes against humanity could be committed only in times of war or only by military officers. It would be more appropriate to refer to "superiors", a term that was more global in scope. To prevent injustice and avoid any undesirable consequences, the paragraph should provide that an individual suspected of committing crimes against humanity or being complicit in their commission would be held criminally responsible only where there was first imputation and then imputability. Given that situations could arise where, when planning and committing an offence, an offender might have been affected by mental health issues that constituted grounds for full or partial exemption from criminal responsibility, it would be advisable to include in paragraph 3 a formulation that took account of the requirement for, first, imputation and, second, imputability, in order to demonstrate that the individual who gave the order or took the initiative to commit the crime, or actually committed the crime, acted according to his or her own free will. In addition, the phrase "if they knew, or had reason to know" implied that the superior should have known of the conduct and should have been able to take action to prevent it, which was a very subjective assumption. It might be difficult to determine whether a commander had knowledge or had taken all necessary measures. The phrase "had reason to know" was also vague for a criminal provision. To avoid any risk of objective liability, his delegation was in favour of adopting the formulation used in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), which required that the persons concerned "had information which should have enabled" the prevention of the crime.

87. In relation to paragraph 4, his delegation did not take a prescriptive position on the criminal responsibility of subordinates who committed an offence referred to in the draft article pursuant to an order of a Government or of a superior, whether military or civilian. It believed that, based on the obligation of obedience, compliance with the order of a superior could be invoked as a defence. However, it saw a need for greater precision in the paragraph, including clarification as to whom in the Government the phrase "an order of a Government" was referring.

88. His delegation noted with interest that, under paragraph 5, the fact that an offence was committed "by a person holding an official position" did not constitute a ground for excluding criminal responsibility. The emphasis placed on crimes against humanity as crimes under international law in no way implied that the principle of complementarity or the rules on immunity could be disregarded. An express reference to the immunities of State officials should therefore be incorporated in the text. It was important to remain in line with the provisions of paragraphs 1, 2, 3 and 4, which established the jurisdiction of States in relation to the prosecution of crimes against humanity.

89. With regard to paragraph 6, his delegation supported the non-application of statutes of limitation to crimes against humanity. Additionally, it wished to suggest that amnesties should be expressly prohibited, since they could prevent the prosecution of such crimes. In the view of his delegation, national military courts were the bodies competent to judge crimes against humanity, given the complexities inherent in their commission, the circumstances and sometimes even the parties. That said, his delegation called for the maxim *contra factum non datur argumentum* (there is no argument against the facts) to be strictly observed and respected. It also suggested that, in the French version of the draft articles, the imprecise and ambiguous phrase "*tout État*" appearing at the start of paragraphs 3, 4, 5, 6 and 7 should be replaced with "*chaque État*", a phrase that clarified and emphasized the singularity of States. Regarding paragraph 7, his delegation believed that the penalties for crimes against humanity should be appropriate, and should be commensurate with the crime, its severity and the context of its commission.

90. As for paragraph 8, his delegation wished to emphasize that there was no universally recognized principle of criminal liability of legal persons and criminal liability was not intended to cover legal

persons, which acted through their representatives. Criminal law covered individual responsibility.

91. Turning to draft article 7, concerning the establishment of national jurisdiction, he said that his delegation was pleased that the Commission had taken account of State sovereignty with respect to criminal jurisdiction, which should be exercised on the basis of a connection between the State and the place of commission of the crime, its perpetrator and its victim. However, paragraphs 2 and 3 of the draft article should not be equated with the exercise of extraterritorial jurisdiction, and his delegation called for those ambiguous paragraphs to be clarified.

92. With regard to draft article 8, while it was important to carry out rigorous investigations at the national level, the obligation to conduct a "prompt" investigation – which meant that the State must open an investigation whenever there were serious grounds to believe that crimes against humanity had been or were being committed – was relative. Time should not be the determining factor in investigations; what was important was that investigations were thorough, meaning that a State must proceed with its investigation in a manner that took all reasonable steps available to that State to secure evidence and that enabled the serious assessment of that evidence, in accordance with article 12 of the International Convention for the Protection of All Persons from Enforced Disappearance, the Declaration on the Protection of All Persons from Enforced Disappearance, comments and communications of the Human Rights Committee and the jurisprudence of regional human rights courts. It was important to take into account the considerable differences that existed between the various national legal frameworks and the disparate practices of States in conducting investigations.

93. Turning to draft article 9, he said that the text, which, in conjunction with draft article 7, laid the bases for execution of the *aut dedere aut judicare* obligation set forth in draft article 10, should emphasize that any preliminary measure must be conditional upon a request having been received from a competent court or the existence of legal proceedings against the alleged offender. The paragraph could also be expanded to provide further detail on the considerations that should inform a State's decision to take an alleged offender into custody, in order to avoid arbitrary arrests and detentions based solely on accusations from informants.

94. His delegation welcomed draft article 10, noting that it was important for the fight against impunity, and that it was linked to, and should be read in conjunction with, paragraph 2 of draft article 7. However, the use of the phrase "competent international criminal court or tribunal" in the draft article should not be interpreted as allowing for the exercise of universal jurisdiction in cases of crimes against humanity. All procedural safeguards should be fully applied, in accordance with the legal maxim *abundans cautela non nocet* (excessive caution does no harm). In particular, the forum State should examine the question of the immunity of officials of another State and, when its competent authorities were aware that an official of another State covered by immunity might be targeted by the exercise of its criminal jurisdiction, it should not bring criminal proceedings until after such immunities had been waived, specifically and exclusively by the authorities of the other State, in accordance with the rule of *nemo dat quod non habet* (no one gives what they do not have) and should immediately cease any criminal proceedings initiated against the official and any related coercive measures, including those that might affect any inviolability that he or she might enjoy under international law. In view of the foregoing, his delegation called for any ambiguity in the wording of draft article 10 to be eliminated; it should establish an absolute obligation to extradite when the State of origin of an official benefiting from immunity did not waive that immunity. Such clarification was essential to avoid enshrining legal uncertainty in the draft article, which, as drafted, ignored the existence of the immunity of State officials and provided for States to establish jurisdiction over foreign officials just as if they were nationals, which was strange, unacceptable and contrary to international law. In his delegation's view, the envisaged cooperation was exclusively horizontal cooperation between States.

95. **Mr. Khng** (Singapore), referring to draft article 6 (Criminalization under national law), said that his delegation agreed with the clarification provided in paragraph (31) of the commentary thereto, in which it was stated that paragraph 5 of the draft article had no effect on any procedural immunity that a foreign State official might enjoy before a national criminal jurisdiction which continued to be governed by conventional and customary international law. However, that paragraph did not preclude immunity of State officials being invoked as a procedural bar to the exercise of foreign criminal jurisdiction over State officials. That clarification should be set forth in the text of the draft article itself, in order to provide legal certainty that the obligation established thereunder addressed only substantive criminal responsibility under national law.

96. In relation to paragraph 7, his delegation agreed that it was the sovereign prerogative of each State to

determine appropriate penalties for offences under national criminal law, in conformity with applicable international law, including due process safeguards. Regarding comments made in connection with the use of capital punishment, it was deeply disappointing that some States continued to use the discussions on the draft articles to impose their views and values on others. Such attempts were inappropriate and unnecessary. His delegation objected to any suggestion that the draft articles should prohibit the application of the death penalty, rejected any insinuation that capital punishment amounted to torture or cruel, inhuman or degrading treatment or punishment and reiterated the principled position of Singapore, which was shared by other States, that international law did not prohibit the use of capital punishment and that there was no international consensus prohibiting its use. The lack of consensus regarding prohibition of the death penalty was reflected by the significant support shown for paragraph 1 of General Assembly resolutions 71/187, 73/175, 75/183 and 77/222, all entitled "Moratorium on the use of the death penalty", in which the Assembly had reaffirmed the sovereign right of all countries to develop their own legal systems, including determining appropriate legal penalties, in accordance with their international law obligations.

97. With regard to draft article 7, his delegation reiterated the need to clarify how potential conflicts of jurisdiction were to be resolved. It believed that, when jurisdictional conflicts arose, primacy should be accorded to the State that could exercise jurisdiction in accordance with the criteria established in paragraph 1, as such a State would have a greater interest in prosecuting the offence in question than a custodial State that could exercise jurisdiction based solely on paragraph 2. Paragraph 2 provided for a treaty-based jurisdictional link that could only be exercised in respect of nationals of the parties to a future treaty, on the sole basis of the alleged offender's presence in the territory when none of the jurisdictional links set forth in paragraph 1 applied. That important understanding, which was affirmed in the Special Rapporteur's fourth report on the topic (A/CN.4/725 and A/CN.4/725/Add.1), should be incorporated into the text of the draft article itself, for legal certainty.

98. **Ms. Jantarasombat** (Thailand) said that, with regard to draft article 6, criminalization under national law might not necessarily require the criminalization of crimes against humanity per se, provided that the acts constituting crimes against humanity, as described in draft article 2, were criminalized and the prosecution and punishment of such acts were commensurate with the gravity of the offence. Giving States a choice as to whether to criminalize crimes against humanity per se or to criminalize their constituent elements would ensure that they had the flexibility to criminalize the offences in the manner best suited to their national legal systems while still ensuring accountability.

99. In relation to paragraph 5, according to which the official position of a person could not be invoked as a substantive defence for the exclusion of liability, the commentary to the draft article made clear that that provision had no effect on any procedural immunity that State officials enjoyed before a national criminal jurisdiction, which must be in accordance with customary international law. Furthermore, paragraph 5 was without prejudice to the Commission's work on immunity of State officials from foreign criminal jurisdiction. It might be beneficial to clarify the relationship between paragraph 5 and the law on immunities. Her delegation would be following that issue closely and looked forward to further discussion on the topic.

100. Her delegation was pleased that paragraph 8 addressed the issue of liability of legal persons, which was considered in various treaties concerning criminal offences, including the Convention against Corruption, the Organized Crime Convention and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, to all of which Thailand was a party. Paragraph 8, as well as the treaties addressing the issue, left the definition of legal persons up to domestic law. While her delegation welcomed the flexibility thus accorded to States, it would appreciate further sharing of views and practices given the various national measures in place to ensure liability of legal persons.

101. With regard to draft article 7, her delegation acknowledged that the heads of jurisdiction enumerated in paragraph 1 – namely jurisdiction based on the territoriality principle and jurisdiction based on the nationality of the offender or the victim – were found in customary international law and that a wide range of jurisdictional bases were needed in order to avoid lacunae with regard to the prescription of crimes of such gravity and the enforcement of measures to combat them. However, to prevent abuse in the establishment of jurisdiction, that breadth of jurisdiction should be tempered by adequate safeguards; her delegation could foresee situations in which competing jurisdictions might be established against an alleged offender. The practical step forward in those discussions would be for States to formulate clear rules on the establishment of jurisdiction and the order of priority to be applied in cases of jurisdictional conflict.

102. Her delegation welcomed draft article 10, concerning the *aut dedere aut judicare* principle. As a mechanism that clearly served to narrow jurisdictional gaps and prevent impunity, the principle was central to any discussion of the prosecution of crimes against humanity. It was enshrined in various forms in existing international instruments dealing with acts criminalized under international law, including the International Convention for the Protection of All Persons from Enforced Disappearance, the Convention Against Torture and the Association of Southeast Asian Nations (ASEAN) Convention on Counter-Terrorism, and was key to the prevention and punishment of such acts. Draft article 10 should be read in the light of draft article 7 (Establishment of national jurisdiction) and draft article 13 (Extradition), and future work on the topic might benefit from discussion as to how the three draft articles complemented each other.

103. **Mr. Uraz** (Türkiye), referring to draft article 6 (Criminalization under national law), said that that the definition of crimes against humanity currently contained in draft article 2 did not necessarily align with customary international law. As highlighted in the commentary, various definitions existed in the domestic laws of States that had criminalized crimes against humanity. For that reason, paragraph 1 of draft article 6 should not be construed as instructing States to adopt verbatim the definition provided in draft article 2. In relation to paragraph 5, further clarification was required regarding the meaning of the somewhat ambiguous term "necessary measures". As stated in the commentary, that paragraph was without prejudice to "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 the sake of the principle of legality, that statement should be incorporated into the text of the draft article itself. With regard to paragraph 6, his delegation welcomed the clarification provided in paragraph (33) of the commentary, in which it was stated that States were not obligated to prosecute crimes against humanity that had taken place before such offences had been criminalized in their national law. That clarification should also be incorporated into the text of the draft articles. Paragraph 8 did not reflect existing customary international law and should be deleted. As the Commission acknowledged in its commentary, the criminal liability of legal persons had not featured in the mandates of most courts and tribunals to date; neither had it 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.

104. In relation to draft article 7, his delegation reiterated the legal principle that States had the primary right, stemming from their sovereignty, to exercise jurisdiction in their national courts over crimes 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 the State best placed to effectively prosecute crimes. A direct reference to that principle should be included in the draft article. Paragraph 1 (a) and paragraph 2 should refer to a State's "territory" rather than to "any territory under its jurisdiction". With regard to paragraph 1 (c), it should be noted that, unlike territorial or active personality jurisdiction, passive nationality jurisdiction had long been a contentious issue in international law. Its inclusion in the draft article raised a clear risk of the provisions thereof being exploited for political purposes and giving rise to conflicts of jurisdiction. That risk had in fact been one of the reasons why passive personality jurisdiction had been excluded from the Rome Statute. His delegation therefore suggested that any reference to such jurisdiction be omitted. Based on his delegation's reading of the provisions, universal jurisdiction could be exercised under draft article 7 only in respect of nationals of State parties to a possible future convention.

105. With regard to draft article 8 (Investigation), the term "reasonable ground" was ambiguous and open to abuse. Furthermore, the effectiveness and promptness of any investigation should be determined not by an objective test, but rather by an assessment of the capacities and factual realities of the State in question. A reference to the safeguards necessary to prevent the misuse of the provision for political purposes was also missing. His delegation was of the view that the draft article should refer to a State's "territory" rather than to "any territory under its jurisdiction". It also firmly believed that giving priority to States with the strongest jurisdictional links was an essential step towards reducing jurisdictional conflicts and ensuring effective investigations. However, since the draft article appeared to establish that the mere commission of any of the acts constituting crimes against humanity might create a duty for States to investigate even if the contextual element necessary for the commission of a crime against humanity per se was not present, an express reference to the contextual element should be added to the draft article, in order to prevent any such confusion and ensure clarity.

106. Regarding draft article 9 (Preliminary measures when an alleged offender is present), safeguards should be introduced to prevent the abuse of the provision for political purposes. However, the introduction of any

such safeguards should not affect the rules of international law on immunity. Given the nature of the draft article, an express reference to the principle of immunity was also necessary. With regard to paragraph 3, the Turkish legal system did not allow for immediate notification of the custodial State in the manner described. Turkish legislation was designed to protect the fundamental rights of alleged offenders by making such notification subject to the offender's request or explicit consent. The confidentiality of the investigation might also constitute a legitimate reason for delaying or omitting to send such notification. In the light of those considerations and in order to provide flexibility, in the first sentence of paragraph 3 the phrase "it shall immediately notify" should be deleted and replaced with "it shall notify, where appropriate". On the question of whether the words "as appropriate", as used in the last sentence of paragraph 3, gave the investigating State too much discretion, his delegation believed that it was necessary to provide flexibility in treaty provisions concerning an issue such as investigations, which was at the core of State sovereignty. The expression "as appropriate" served to provide that flexibility and must therefore be retained.

107. Turning to draft article 10, he said that it was unclear why it was needed, given that the principle of *aut dedere aut judicare* was already recognized in paragraph 2 of draft article 7. Thus, either the need for draft article 10 should be clarified or else that provision should be deleted. Since the strongest jurisdictional link should be accorded priority in the prosecution of crimes against humanity, his delegation was against the notion that the obligation to prosecute should be considered to take precedence over the obligation to extradite as a general rule. His delegation also opposed the inclusion of the reference to "competent international criminal court or tribunal" in draft article 10. Whereas international criminal courts and tribunals had a role that was complementary to that of national courts, the manner in which the draft article was formulated implied that national jurisdictions and international courts and tribunals had equal status. Furthermore, the jurisdiction of international criminal courts and tribunals was not usually accepted by a considerable number of Member States. For those reasons, the reference to "competent international criminal court or tribunal" should either be omitted or addressed in a separate paragraph, in which it was clarified that international courts and tribunals had a complementary role and that the obligation established in the draft article applied only to those States that had accepted the jurisdiction of the court or tribunal in question. Lastly, regarding the question of whether there was a need to explicitly address the question of universal jurisdiction, his delegation wished to emphasize that, while universal jurisdiction was not recognized by all States, those States that did recognize it understood it in various ways. For that reason, the creation of obligations in relation to universal jurisdiction should be avoided.

108. **Mr. Pieris** (Sri Lanka) said that the concept of crimes against humanity was one of the great legal innovations of the post-war world and remained a major pillar of international law. Recognition of the concept served to protect civilian populations during both peacetime and wartime, including from their own Governments. Having given careful consideration to draft articles 6, 7, 8, 9 and 10, his delegation wished to state that Sri Lanka had already enacted national laws addressing crimes against humanity, including the Geneva Conventions Act and a law against torture. Recommendations had been made with a view to giving Sri Lankan courts broader jurisdiction to deal with such crimes appropriately, in the manner best suited to national requirements, and those recommendations were now in the process of consideration.

109. Regarding the *aut dedere aut judicare* principle addressed in draft article 10, Sri Lanka did not give refuge to fugitives from justice. It had a robust and well-established extradition jurisdiction, which was granted exclusively to the High Court and had been invoked frequently. The judicial authorities ensured that all extradition proceedings were consonant with the rule of law; that the constitutional guarantees of fair trial, equality before the law and presumption of innocence and the rights to representation and the equal protection of the law were respected; that all respondents had the opportunity to be heard; and that decisions were based on a thorough and unbiased assessment of the facts.

110. Under the "responsibility to protect" principle, each State had primary responsibility for protecting its population from genocide, war crimes, ethnic cleansing and crimes against humanity. That responsibility was underpinned by well-established legal obligations that were set forth in the Genocide Convention, in international human rights and humanitarian law and in customary international law, and had also been cited by international courts and tribunals.

111. His delegation took note of the legal obligation for States to develop strategies and take measures to protect their populations from atrocity crimes, whether individually or through mutually-supporting networks, and the requirement for them to mainstream an atrocity prevention perspective in national policies, programmes and plans. Sri Lanka was in the process of giving that aspect of the law appropriate consideration. It was important for States to partner with other actors,

including international and regional organizations and civil society, in order to receive support and amplify their efforts to that end.

112. **Mr. Khadour** (Syrian Arab Republic) said that draft articles 9 and 10 contained unprecedented provisions allowing for the exercise of jurisdiction by a State that had no connection to the offence based on the facts of the case or on any of the generally agreed bases of criminal jurisdiction, including, notably, territorial jurisdiction, active personality jurisdiction and passive personality jurisdiction. Those draft articles established the action that a State without any direct connection to the offence might take, in terms of detention, investigation or prosecution, simply because it had grounds to believe that the circumstances so warranted.

113. The commentary to draft article 9 offered no reason, whether jurisprudential, judicial or legal, for the inclusion of that unusual provision, nor did it refer to any previous convention or international instrument with similar content. Rather, the commentary provided only general comments based on hypothetical considerations that failed to take procedural issues and established international trial and litigation principles into account. It appeared that the only criterion that must be met for the application of draft article 9 was the presence of the alleged offender in the territory of the State exercising jurisdiction. No requirement for residency was mentioned, merely that the alleged offender be present, which raised questions as to how exactly the term “presence” should be interpreted. Would a person's transit through a State, for example through an airport or on a plane, constitute sufficient justification to detain that person simply because the State had grounds to believe that he or she might have committed an offence or be facing prosecution, irrespective of the identity of the prosecuting party and its ability to prosecute? The exact meaning of the term “State” in that context, including whether it referred to the executive power, should also be clarified. The provision appeared to be simply an attempt to promote and enshrine the principle of universal jurisdiction – although that principle gave rise to contradictions and controversy at the international level because it legitimized and disguised political extortion. His delegation was surprised by, and totally opposed to, such attempts to codify a controversial principle that was still the subject of extensive debate.

114. Universal criminal jurisdiction had never been implemented by States in such a way as to reflect a serious commitment to combating impunity. Such practices had always been selective, not to mention vindictive, and guided by political considerations and interests rather than a desire to serve justice and provide redress for victims. States seeking to promote the principle of universal criminal jurisdiction should put their credibility to the test and share details of what they had done to address the brutal crimes that had been, and continued to be, committed against the Palestinian people, and what they had done to fight impunity, including through the exercise of active personality jurisdiction, given that a number of Israeli war criminals were nationals of their countries.

115. For the foregoing reasons, his delegation had reservations about draft articles 9 and 10 and saw no justification for their inclusion. The draft articles should include a clear provision on the internationally agreed and accepted hierarchy among the various bases of jurisdiction, according to which territorial jurisdiction took precedence, followed by active personality jurisdiction and then passive personality jurisdiction. They should not, as was currently the case, devote so much space to promoting the exercise of an unacceptable form of jurisdiction by States that had no link to the offence, especially since the discussion of universal jurisdiction within the Committee was still at a preliminary stage and no consensus had been reached.

116. **Ms. Dabo N’Diaye** (Mali), referring to draft article 6, said that her Government had already taken steps to criminalize crimes against humanity under its national law. The distinction between acts constituting crimes against humanity and the crimes against humanity themselves should be clarified. In paragraph 2, her delegation was pleased to see accessorial responsibility taken into account as a form of participation but would like to suggest that other forms of participation, such as the financing of a crime, be included. In paragraph 3, the scope of the term “commanders” was limiting; it might be better to refer to “superiors” to avoid any ambiguity in interpretation. The phrase “had reason to know” – and even the word “knew” – seemed subjective, given the difficulty of establishing whether superiors knew, or had reason to know, about crimes committed by their subordinates. The provisions of Protocol II Additional to the Geneva Conventions of 1949 might be a good source of inspiration for possible alternative language. It might also be judicious to refer to the principle of effective control in paragraph 3.

117. In paragraph 5, it would be advisable to address the issue of immunity of foreign State officials directly. With regard to paragraph 6, her delegation supported the non-application of statutes of limitation to offences already criminalized in national legislation. In paragraph 7, the emphasis should be on the proportionality of penalties, while the text of paragraph 8 should establish a balance between the jurisdiction of

States and universal jurisdiction. In that connection, it would be a good idea to set forth clear rules for the exercise of universal jurisdiction in paragraph 2 of draft article 7, and also in draft article 10. As other delegations had mentioned, it would be a good idea to add a reference to the "competent authorities" in paragraph 2 of draft article 9, for greater precision. Lastly, while her delegation welcomed the decision to address the liability of legal persons in paragraph 8, further reflection was required. The fact that responsibility was primarily individual should not be overlooked.

118. **Mr. Dabesa** (Ethiopia) said that his delegation shared a number of the concerns about draft article 6 that other delegations had raised. In particular, it was inappropriate to require States to define crimes against humanity exactly in accordance with the definition contained in draft article 2; they should have discretion to take national legal systems and customary international law, inter alia, into account. It would be sufficient to establish general principles on attribution, leaving States a margin of appreciation when it came to determining culpability. The Constitution of Ethiopia, like that of many other countries, included specific provisions on crimes against humanity. For example, it established that persons who committed crimes against humanity, as defined in international agreements ratified by Ethiopia and in domestic legislation, could not be excluded from criminal liability on the basis of a statute of limitations and that crimes against humanity could not be commuted by amnesty or pardon of the legislature or any other State organ. Accordingly, his delegation welcomed the bar on the application of statutes of limitations established in the draft articles. Prevailing State practices in the area of pardon and amnesty should also be explored.

119. With regard to jurisdiction, his delegation was in favour of the provisions that set forth the obligation of States to prevent and punish crimes against humanity and cooperate with each other in the investigation of such crimes. The Criminal Code of Ethiopia provided for a modified form of universal jurisdiction over international crimes whereby any person who committed a crime under international law or an international crime specified in Ethiopian legislation or in an international treaty or convention to which Ethiopia had acceded was liable to stand trial in Ethiopia. Crimes against humanity fell within that category.

120. While mutual legal assistance in the field was generally enforced by bilateral, regional and other related international treaties, mutual legal assistance and cooperation on the basis of voluntary undertakings by the States concerned was the most effective and lawful avenue. However, the principles of immunity of State officials from foreign criminal jurisdiction and non-interference in the internal affairs of States must be fully respected. His delegation would like to see a clear provision to that effect in the draft articles. Since universal jurisdiction had been used abusively against African countries to achieve political ends in several instances, his delegation hesitated to formalize or codify any practice as standard in that area. Notwithstanding those doubts, his delegation was following the Committee's discussions closely and with interest. The draft articles should be centred around national laws and investigation, prosecution and judicial processes at the national level.

121. **Mr. Kamara** (Sierra Leone), speaking on draft article 6, said that his delegation was generally supportive of its provisions, especially the obligation contained in paragraph 1 thereof. However, it wished to reiterate its concerns about certain aspects. In paragraph 2, the Commission had been selective in listing the various forms of participation in criminal offences. It had included some inchoate offences such as "attempted commission" but had omitted other forms such as conspiracy and incitement. Incitement as a form of accessorial liability was well established in customary international law. It was relevant to genocide and, given the systemic nature of core international crimes, also to crimes against humanity. It was evident in State practice and in the practice of international criminal courts and tribunals that had prosecuted crimes against humanity. His delegation therefore reiterated its proposal that "inciting", and also possibly "conspiracy", be added to the list of forms of participation mentioned in paragraph 2 (c). The draft article was pivotal in that it required States to integrate crimes against humanity into national legal frameworks, which would address existing gaps and could significantly improve prosecution at the national level, particularly where current laws only covered specific acts such as murder and torture. Despite differences of opinion among delegations, with some States advocating the retention only of paragraph 1 of the draft article, in order to align it with the Genocide Convention, and others calling for flexibility in the naming of criminal offences and recommending that the text should be advisory rather than binding, his delegation saw merit in the notion that differences in national laws should not impede cooperation under a possible future convention. With regard to paragraph 5, his delegation wished to highlight the nexus to the issue of procedural immunities. In that regard, it supported the Committee's ongoing consideration of universal jurisdiction with a view to

preventing its misuse and abuse and ensuring a thorough examination of those crucial issues.

122. His delegation welcomed the provisions of draft article 7 (Establishment of national jurisdiction), and referred the Committee to the written comments it had previously submitted in that regard (see A/CN.4/726). Regarding draft article 8 (Investigation), it agreed that, in the event of allegations or claims that a crime against humanity had occurred, it was the duty of a State and its competent authorities to conduct an investigation that was not only prompt and impartial but also thorough. The clarification provided by the qualifiers "prompt, "thorough" and "impartial" would help to eliminate doubt and close potential gaps in States' investigative processes.

123. The provisions of draft article 9 (Preliminary measures when an alleged offender is present) were similar to those of article 6 of the Convention against Torture. They were therefore appropriate and suitable for the current draft articles.

124. His delegation noted the omission of an explicit clause prohibiting amnesties or pardons for crimes against humanity. The issue of amnesty was addressed only in the commentary to draft article 10 (*Aut dedere aut judicare*), in which the Commission explained that a State's ability to implement an amnesty might not be compatible with its obligation to submit the case to the competent authorities for investigation and possible prosecution. His delegation agreed with that assessment. The granting of amnesties might also undermine or conflict with other provisions of the draft articles, including draft articles 8, 9 and 12. However, an express clause addressing amnesties, in particular blanket amnesties, would be very valuable. Based on its national experience, Sierra Leone appreciated the complexity of the issues involved. However, it saw value in the substantive exchanges that brought the international community closer to ending impunity for the perpetrators of crimes against humanity and preventing such crimes.

125. **Ms. Hutchison** (Australia) said that draft articles 6 to 10 struck the balance required to ensure that any obligations established thereunder were effective and implementable.

126. Her delegation was strongly supportive of draft article 6, which established a framework of minimum common standards for establishing criminal responsibility for crimes against humanity, exercising jurisdiction over such crimes and cooperating internationally to that end. Although some States had suggested that paragraph 3 thereof be more specific or else follow more closely the language used in the Geneva Conventions, the Rome Statute or other international instruments, her delegation considered that it provided an appropriate level of flexibility, allowing States to establish a more detailed standard in their national laws, including, for example, with respect to the *mens rea* requirement, should they wish to do so. It was, however, open to considering possible adjustments to the provision in the course of any treaty negotiations. Her delegation agreed that, as stated in the commentary to the draft article, paragraph 5 had no effect on any procedural immunity that a State official might enjoy before a foreign criminal jurisdiction. Accordingly, it was neither necessary nor desirable for the draft articles to cover the issue of immunities, which were addressed separately under conventional and customary international law. Regarding paragraph 8, despite the considerable differences in the approach to liability of legal persons in different national legal systems, the paragraph was appropriately flexible and able to accommodate diverse legal systems, since it only required each State to take measures "where appropriate" and "subject to the provisions of its national law".

127. Her delegation reaffirmed its support for draft article 7, which required States to establish jurisdiction over crimes against humanity on a number of bases but without requiring them to exercise jurisdiction in any particular manner. Paragraph 2 simply provided for a basis for jurisdiction; it did not imply an obligation to submit a case for prosecution. Her delegation was open to the proposal by the representative of China to clarify, in the draft article, that States could exercise jurisdiction under paragraph 2 only in respect of nationals of State parties to a future convention. It would also be open to considering, in the course of treaty negotiations, an adjustment to paragraph 3 to clarify that it operated without prejudice to the principles of general international law.

128. States with territorial and nationality jurisdiction had a particular interest in ensuring accountability for crimes against humanity. Her delegation's long-standing position was that primary responsibility for investigating and prosecuting serious international crimes lay with those States. However, while some States were of the view that the draft articles should be more prescriptive regarding which States should have priority in the exercise of jurisdiction, the current position of Australia was that the draft articles should not set out a hierarchy of jurisdictional bases. That would be out of step with comparable and widely ratified international treaties such as the Convention against Corruption, the Organized Crime Convention and the Convention against Torture.

129. The draft articles set out an appropriate framework for cooperation between States when there were concurrent jurisdictional bases and her delegation had confidence in States' ability to resolve any given case through consultation. However, paragraph 12 of draft article 13, concerning the consideration of requests for extradition, might be adjusted in order to recognize that the State of nationality of the accused person also had an interest in achieving accountability for crimes against humanity.

130. Her delegation supported the general objectives pursued and the approach taken in draft articles 8 and 9, although there was scope for some minor adjustments, for clarity, in draft article 9, in order to reflect the requirement for States to adhere to standards of due process and fair treatment for alleged offenders taken into custody, in accordance with draft article 11, and their obligation to give due consideration to extradition requests from the territorial State, in accordance with draft article 13.

131. Her delegation also supported draft article 10, which was a well-recognized feature of international crime conventions. It struck the right balance, providing sufficient clarity on the nature of the obligation arising thereunder while preserving an appropriate level of prosecutorial discretion to decide whether sufficient evidence existed to support a prosecution. Nonetheless, if some States considered that the operation of the draft article was insufficiently clear, her delegation would be open to considering minor amendments, in the context of treaty negotiations, in order to reflect more accurately the intended effect of the provision. The draft articles clearly reaffirmed that the primary responsibility for punishing crimes against humanity lay with States. Draft article 10 did not conflict with or undermine the principle of complementarity that might arise in respect of certain international courts and tribunals; under the draft article, surrender to a competent international criminal court or tribunal constituted an additional avenue through which States might satisfy their obligation to prosecute or extradite but no requirement to surrender was established.

132. Her delegation had listened carefully to the views expressed regarding amnesties and could support the approach taken in the draft articles, whereby the issue had not been addressed, in line with the approach taken in the Rome Statute. Nonetheless, any amnesty granted by a State would need to be considered in the light of the object and purpose of any treaty to prevent and punish crimes against humanity, and specifically States' obligations under draft articles 9 and 14. Furthermore, any amnesty granted by a State would not bar prosecution by a competent international criminal tribunal or a foreign State with concurrent prescriptive jurisdiction over that crime.

133. **Ms. Motsepe** (South Africa), referring to draft article 6, said that her delegation supported the content and spirit of the draft article. Crimes against humanity had been criminalized in South Africa in 2002 through the enactment and entry into force of the Implementation of the Rome Statute of the International Criminal Court Act. In addition to establishing a framework for effective implementation of the Rome Statute, that Act provided for the criminalization of genocide, crimes against humanity and war crimes; the prosecution, in South African courts, of persons accused of having committed such crimes in South Africa and, in certain circumstances, beyond its borders; and the arrest of persons accused of such crimes and their surrender to the Court. Her delegation welcomed the inclusion of paragraphs 4 and 5, which provided for accountability irrespective of whether an offence was committed pursuant to an unlawful order or by a person holding an official position. South African law prohibited the execution of unlawful orders and officials who implemented such orders could be held personally liable for their actions. Similarly, article 9, paragraph 1, of the Constitution established that all persons were equal before the law, a provision that essentially excluded any possibility of invoking official position as a means to escape accountability for criminal offences. Her delegation also welcomed the exclusion of the applicability of statutes of limitations established in paragraph 6. It interpreted the formulation "punishable by appropriate penalties that take into account their grave nature" used in paragraph 7 to mean that the death penalty would be excluded from such penalties. The South African Bill of Rights, which was the cornerstone of its Constitution, enshrined the inherent right to life of all persons. As a matter of law and principle, the South African authorities abided by the provisions of the Constitution and would not heed an extradition or surrender request in cases where the non-application of the death penalty could not be guaranteed.

134. Her delegation welcomed and supported the inclusion of draft article 7 (Establishment of national jurisdiction), which would reinforce the principle of complementarity by serving to ensure that States had a priority right to try crimes against humanity in their national courts. It also welcomed the inclusion of draft articles 8 and 9 and supported the provisions of draft article 10 (*Aut dedere aut judicare*). Under its national law, South Africa could exercise universal jurisdiction over crimes against humanity when the perpetrator was present in its territory.

135. **Mr. Nyanid** (Cameroon), noting that the representative of Australia had affirmed that an amnesty granted by a State would not bar prosecution by another State or by a competent international criminal tribunal, said that he wondered whether, in making such affirmations, her delegation was calling into question the principle of complementarity or seeking to surreptitiously establish the possibility of extraterritorial jurisdiction, in other words, the possibility for foreign States to go against the laws that sovereign peoples had adopted. Clarification of its position was needed because it would be wrong for draft article 7, which affirmed State sovereignty, to be followed by a provision establishing that there was nonetheless latitude for certain States to prosecute in a territory other than their own persons found guilty of crimes against humanity who had already been granted amnesty elsewhere.

The meeting rose at 1 p.m.