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Chair: Ms. Romanska (Vice-Chair) (Bulgaria)

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

Agenda item 78: 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 preamble and draft article 1 (continued)

2. **Mr. Khng** (Singapore) said that the Commission had taken into account an array of views and suggestions in making changes to the draft articles and commentaries thereto, which had generally improved the clarity and legal precision of the text, resulting in better guidance for Member States. Delegations should continue engaging in open and constructive dialogue to build on the draft articles in a manner that reflected the divergence of views and the importance of the topic.

3. **Ms. Crockett** (Canada) said that the draft articles should form the basis of an international convention on crimes against humanity, the only serious international crime without a dedicated convention. That convention would help close the gap in the international accountability framework and bring the perpetrators of such crimes to justice. Although there was value in basing the provisions of the draft articles on wording from existing treaties, it would be useful to develop wording that was more inclusive, incorporated a gender perspective, and ensured enhanced prevention and accountability for sexual and gender-based crimes.

4. Her delegation believed that the draft preamble established clearly the context in which the proposed draft convention was being considered. It would be appropriate to strengthen the first preambular paragraph by emphasizing more acutely the seriousness of atrocity crimes and noting that they continued to be perpetrated around the world. Her delegation agreed that, as was stated in the fourth preambular paragraph, the prohibition of crimes against humanity was a norm of general international law (*jus cogens*); such crimes were an outrage against humanity.

5. As to the seventh preambular paragraph, it was worth recalling that while not all Member States were parties to the Rome Statute of the International Criminal Court, that Statute had been elaborated in an attempt to reflect customary international law at the time, taking into account the views of all States, including those that had not signed on to the Statute. Because customary international law evolved with time, it would be useful to include references to such law as it pertained to crimes against humanity.

6. Her delegation welcomed the reference, in the ninth preambular paragraph, to the right to fair treatment for victims, witnesses and others, although it would also welcome the addition of elements to recognize the experiences of victims and survivors as well. In order to better reflect the content of draft article 8, her delegation suggested adding, in the tenth preambular paragraph, a reference to investigation and to the need for effective prosecution, and perhaps to the obligation to extradite or prosecute.

7. It would be appropriate for the draft preamble to include a reference to the judgment of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, where the Court found that the obligation to prevent genocide necessarily implied the prohibition of the commission of genocide. Indeed, that obligation was reflected in draft article 3, paragraph 1. The scope of the draft articles, as provided in draft article 1, was appropriate, as it was consistent with the object and purpose of the proposed convention, namely, to prevent and punish crimes against humanity.

8. **Mr. Skachkov** (Russian Federation) said that preambular paragraph 2, in which it was stated that crimes against humanity threatened the peace, security and well-being of the world, should be counterbalanced with new wording emphasizing that nothing in the draft articles should be interpreted as giving any State the right to interfere in the internal affairs of another State.

9. Preambular paragraph 3 contained a reference to the principles of international law embodied in the Charter of the United Nations. However, there were other principles of international law which were not explicitly mentioned in the Charter but which were applicable in the context of the draft articles. The reference to the Charter in the preambular paragraph should therefore be replaced with a reference to universally recognized principles and norms of international law, including the principles of sovereign equality of States and non-interference in the internal affairs of States.

10. It was not appropriate to refer to the prohibition of crimes against humanity as a peremptory norm of general international law (*jus cogens*), because it was unusual for a norm to be classified as a peremptory norm in the very convention that established that norm. His delegation would welcome any evidence to the contrary. Furthermore, given that draft article 2, paragraph 3, provided for the possibility of a broader definition of crimes against humanity, further consideration should be given to the consequences of conferring peremptory

norm status on the prohibition of crimes against humanity in connection with acts that were not listed in draft article 2, but were included in bilateral or regional treaties or in national laws. It also remained unclear whether the provisions on cooperation contained in the draft articles would be applicable to acts captured by a broader definition.

11. Given that more than 70 Member States were not parties to the Rome Statute, and that the discussion of the draft articles was not limited to the signatories to the Statute, there was no reason to include the reference, in the seventh preambular paragraph, to the Statute or to any other instruments that did not enjoy universal support. Lastly, it would be helpful if an explicit provision indicating that the draft articles had no retroactive effect could be included in draft article 1 (Scope).

12. **Ms. Russell** (New Zealand) said that the draft articles represented an opportunity to address a gap in the international legal framework concerning crimes against humanity, particularly with regard to State responsibility and inter-State cooperation. Her delegation supported the elaboration of a convention based on the draft articles. It was pleased that they had been formulated in such a way as to complement the Rome Statute, something that would ensure coherence across international law. At the same time, it would be useful for the current discussion to be focused primarily on the substance of each draft article, rather than on the Statute. Her delegation agreed with the Commission's persuasive reasoning regarding the peremptory nature of the prohibition of crimes against humanity set out in the draft preamble. It also supported the scope articulated in draft article 1.

13. **Ms. Falconi** (Peru) said that the draft articles could constitute the basis for a future convention on prevention and punishment of crimes against humanity. It was essential for the Commission to have provided explicitly in the draft preamble that the prohibition of crimes against humanity was a norm of general international law (*jus cogens*), and that such crimes were among the most serious crimes of concern to the international community as a whole. It was especially important to have emphasized the need to prevent such crimes, in accordance with international law, and to put an end to impunity for the perpetrators.

14. In order to ensure consistency in international law, the draft articles should be based on the definition of crimes against humanity set forth in article 7 of the Rome Statute. That did not, however, prevent the text from being amended, considering the different purposes of the Statute and the draft articles; the former was the

constitutive instrument of the International Criminal Court, whereas the latter were intended to serve as the basis for a future convention and as guidance for Member States for the adoption of national laws on the topic.

15. It was encouraging that the Commission had explicitly taken into consideration the rights of victims – including the right to obtain reparation and the right to the truth – of witnesses and others, as well as the right of defendants to a fair trial. Consideration of the situation of vulnerable groups, including by incorporating the gender perspective, would also be appropriate.

16. It was noteworthy that draft article 1 stated that the draft articles would apply to both prevention and punishment of crimes against humanity, thus covering the two dimensions which should be addressed in a future convention on the topic.

17. **Mr. Mainero** (Argentina) said that when the Commission had transmitted the draft articles to the General Assembly in 2019, a significant majority of delegations, including his own, had been prepared to take prompt action to ensure the elaboration of a convention based thereon. However, it had not been possible to agree on a road map towards that goal. Crimes against humanity caused untold suffering, and their prohibition was undoubtedly a *jus cogens* rule. The Committee's inaction had therefore been difficult to justify. Accordingly, his delegation had supported the holding of the current discussions as a way to identify convergences and divergences and find a way forward.

18. The draft preamble provided an appropriate conceptual framework for the draft articles. His delegation particularly appreciated the reference to the peremptory nature of the prohibition of crimes against humanity, which justified the codification of said prohibition in a positive law instrument. It also welcomed the sixth preambular paragraph, which referred to the determination to put an end to impunity for the perpetrators of those crimes. That statement was essential, as it set out the object and purpose of the proposed convention.

19. His delegation welcomed the reference in the draft preamble to victims' rights in relation to crimes against humanity. Victims were often denied their rights for various reasons, including their social marginalization, the lack of political will to investigate the crimes, and weak criminal justice systems. His delegation therefore supported the inclusion of the reference to the rights of victims in the draft preamble as well as in the body of the draft articles.

20. His delegation agreed in principle with the current form of draft article 1, as it included both elements that should be present in the instrument. In order to allay some of the concerns raised at the previous meeting (see [A/C.6/77/SR.38](#)) concerning the *jus cogens* nature of the prohibition of crimes against humanity, it might be worth modelling draft article 1 on article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide (1968). The draft article could thus provide that the contracting parties confirmed that crimes against humanity were prohibited under international law, and that they undertook to prevent and punish such crimes.

21. **Mr. Košuth** (Slovakia), addressing the reference to the Rome Statute in the preambular paragraphs, said that the Statute had been subject to one of the most robust and extensive inter-State negotiations in the area of international criminal law and did not reflect only the positions of the States parties. Indeed, the *travaux préparatoires* of the Rome Conference showed that a significant contribution had been made by the Chair of the Drafting Committee of the Conference, whose country had not gone on to ratify the Statute. Even before the Conference, numerous preparatory bodies had been established to follow up on the work of the Commission. The Statute had been adopted as a package, and not every provision had been controversial; the official records of the Rome Conference showed that the preambular paragraphs of the Statute had enjoyed broad support. In addition, the five preambular paragraphs that were based on the Statute were also fully applicable on the horizontal level for inter-State cooperation. Hence, rather than considering the number of ratifications to the Statute, it would be more appropriate to focus on the body of work that had led to its adoption.

22. The draft articles fully allowed for the possibility of bilateral cooperation regimes. In practice, however, it was difficult to imagine such cooperation solely on a bilateral legal basis. A multilateral framework, such as existed in respect of many other international crimes, would complement bilateral arrangements in cases where there was no legal basis for such cooperation.

23. With regard to other initiatives and treaties, his delegation believed that both the Genocide Convention and other current negotiation processes complemented the draft articles but had different objects, purposes and scopes. In particular, those other processes lacked the preventive dimension, which was crucial. The purpose of the proposed convention was not only to create an obligation, but also to guide States. If States aligned their domestic law with the future convention, that did

not make the convention irrelevant; on the contrary, it showed that the convention had been a success.

24. In its initial statement at the current resumed session (see [A/C.6/77/SR.37](#)), his delegation had referred to the Charter of the Nuremberg Tribunal and the first and second Conventions for the Pacific Settlement of Disputes (1899 and 1907) to show that the concept of crimes against humanity was not novel. It remained the case, however, that there was no dedicated instrument on crimes against humanity.

25. **Mr. Nyanid** (Cameroon), replying to the comments made by the representative of Slovakia regarding the Rome Statute, said that the fact that a State participated in the elaboration of a convention did not mean that it was obligated to accept the outcomes of said convention. That was why there were clear mechanisms in international law, including adoption, signature and ratification, for States to express their consent to be bound by an instrument.

26. As to the question of whether there existed a legal gap in respect of crimes against humanity, it should be recalled that the principle of *nullum crimen sine lege, nulla poena sine lege* was well established in law. If numerous international criminal courts or tribunals had been able to hand down convictions for crimes against humanity, it followed that there was no legal gap; indeed, there existed an applicable, *sui generis* body of law in that area.

27. **Ms. Gebrekidan** (Eritrea) said that the international criminal tribunals for Rwanda and the former Yugoslavia were examples of joint efforts to confront widespread crimes against civilians in those countries. However, the two tribunals had taken different approaches to crimes against humanity. The Rome Statute represented an attempt to formulate a definition, but it was not universally accepted and, even under its own terms, it did not purport to represent customary international law. Her delegation therefore shared the concerns of other delegations regarding the reference to the Rome Statute in the seventh preambular paragraph.

28. The provisions of article 7, paragraph 2 (a), of the Statute and article 2, paragraph 1 (a), of the draft articles, concerning widespread or systematic attacks against any civilian population, were controversial and debatable. Moreover, with regard to upholding human dignity and the right to development, her delegation believed that an opportunity had been missed to list other inhumane acts that were part of widespread or systematic attacks directed against a civilian population. One example was unilateral coercive measures, which were illegal and detrimental to the well-being and

development of the civilian population of targeted States. Another was environmental destruction, which caused human harm and arguably fell under the categories of deportation or forcible transfer of populations and persecution, in the sense of the intentional and severe deprivation of fundamental rights contrary to international law. While the Committee should not reinvent the wheel with regard to prohibited acts, it should not limit itself to certain categories of acts and should pursue the progressive development of international law in that regard.

29. Her delegation believed that it was too early to convene a diplomatic conference; notwithstanding the importance of the topic, there was too much legal ambiguity and the divergences between delegations were too great. Instead, delegations should continue to engage constructively in the debate in order to make progress on the topic.

30. **Ms. Dakwak** (Nigeria) said that the draft articles had been formulated as a non-binding recommendation for the Committee's consideration. However, although many delegations had spoken of legal gaps, it was not yet clear which gaps needed to be addressed. Given the divergence of views, it would be useful to know whether a mechanism would be in place for formulating reservations to any future convention.

31. **Mr. Abdelaziz** (Egypt) said that the representative of Nigeria had raised a valid point: the gaps in question had not yet been identified. His delegation understood that the purpose of the Commission's work was to formulate an instrument that was more broadly accepted than the Rome Statute. Another delegation had mentioned that the draft articles could also be useful at the horizontal level for inter-State cooperation, something that was distinct from the object and purpose of the Rome Statute. It would be useful to identify cases in which the lack of international or national legal frameworks had resulted in impunity for crimes against humanity. To the extent that such crimes were being punished through domestic law, there was no problem to be addressed.

32. **Mr. Košuth** (Slovakia), responding to the comment made earlier by one delegation about consent to be bound, said that he had referred to the *travaux préparatoires* of the Rome Conference because they helped to explain the positions taken by States regarding specific provisions of the Statute, irrespective of whether they had accepted the Statute as a whole. The question of consent to be bound was thus a separate matter. In response to the comment by the representative of Cameroon concerning the maxim *nullum crimen sine lege, nulla poena sine lege*, he said that while it was true

that numerous courts had handed down judgments on crimes against humanity, those courts had been convened under specific, ad hoc instruments. As to the comment regarding the existence of a gap, it should be noted that the gap that existed pertained not so much to the definition of crimes against humanity as to horizontal cooperation: there was no treaty obligating States to criminalize crimes against humanity or to prevent such crimes.

33. **Mr. Bamyia** (Observer for the State of Palestine) said that nothing in the current undertaking would obligate any State to become a party to the Rome Statute or accept the jurisdiction of the International Criminal Court. However, in law, all new instruments built on existing instruments; although the Commission was not bound by the provisions of the Statute, it could not ignore them either. Many countries had also ratified the instrument and incorporated it into their law; any conflict in definitions, for example, could thus become extremely complex.

34. **Ms. Flores Soto** (El Salvador) said that the discussion was still at an early stage; the Committee would be better placed to identify gaps, strengthen certain provisions and better define the scope of horizontal cooperation between the possible parties to the proposed convention when came time to discuss the draft articles in detail. El Salvador supported the reference to the Rome Statute, to which it was a party. The current discussion could also be enriched by referring to regional instruments as well. As a procedural point, while the "mini-debates" were useful, it would be helpful if the co-facilitators could, during the informal discussions, formulate guiding questions that would help bring the proceedings into sharper focus.

35. **Ms. Sverrisdóttir** (Iceland), co-facilitator, said that the co-facilitators would discuss ways to ensure a more structured discussion.

36. **Mr. Nyanid** (Cameroon), referring to the comments made by the observer for the State of Palestine, said that definitions were essential because they determined the direction to be taken. The draft articles in their current form included references to an instrument that was not universal. If there was indeed a legal gap – something about which his delegation remained unconvinced – the Committee should make the intellectual effort to develop a definition that worked in the specific context of crimes against humanity, rather than lift one from elsewhere and from a different context.

37. **Mr. Amaral Alves De Carvalho** (Portugal), addressing the issue of gaps, said that a convention on

crimes against humanity was necessary and would add value, because, of the three prominent categories of serious crimes that were raised before international criminal courts and tribunals, only crimes against humanity lacked a dedicated global instrument.

38. **Mr. Arrocha Olabuenaga** (Mexico), in response to the question of gaps, said that in paragraph (1) of its general commentary to the draft articles, the Commission itself had identified a gap by indicating that there was no global convention dedicated to preventing and punishing crimes against humanity and promoting inter-State cooperation in that regard. The discussion regarding the Rome Statute would be best set aside. The crimes of genocide and war crimes were addressed in dedicated instruments, and those instruments, rather than the relevant provisions of the Rome Statute, set the terms of reference for those crimes under international law. Moreover, the Rome Statute had been elaborated to establish a court, while the draft articles had a much broader scope, including domestic fulfilment of the obligation to prevent and punish crimes against humanity.

39. As to the comments made by the representative of Cameroon concerning definitions, his delegation believed that the issue would be discussed in more detail during the consideration of the second cluster, which contained draft article 2 (Definition of crimes against humanity).

40. **Ms. Chanda** (Switzerland), addressing the question of gaps, said that the proposed convention would complement core instruments on international crimes. It would help States to fulfil their primary responsibility to investigate crimes against humanity, and would promote international cooperation in the investigation and punishment of such crimes.

41. **Mr. Jaiteh** (Gambia), addressing the issue of gaps and the rationale for a stand-alone convention on crimes against humanity, said that the proposed convention would not merely complement existing instruments, but would also act as a deterrent to the commission of crimes against humanity. References were being made to instruments such as the Genocide Convention and the Rome Statute because any legal discussion should be based on an established point of reference, which those instruments represented. The references were not intended to induce Member States to accept them, but to recognize that they existed and could be relied upon.

42. **Mr. Nyanid** (Cameroon), responding to the comments made by the representative of Mexico, said that the question of definitions could not be set aside until the consideration of the second cluster, because a definition of crimes against humanity was referred to in

the draft preamble. It was the definition of article 7 of the Rome Statute, which appeared in the draft preamble, that would prevail over any definition given in draft article 2. It could not be dismissed as a mere formality; if it were just a formality, it would not have been invoked in the draft preamble, which set the tone for the rest of the draft articles. The fact that a reference to the Rome Statute had been included in the draft preamble was thus not gratuitous.

43. **Mr. Abdelaziz** (Egypt) said that the overwhelming majority of Member States supported the goals of preventing and punishing crimes against humanity and strengthening inter-State cooperation in that area. However, the draft articles in their current form included references to such contentious issues as immunities and universality of jurisdiction. There was ample scope to develop an output that would mark a meaningful step towards fighting impunity, even if it were not as forward-leaning as some delegations might like.

44. **Mr. Bamy** (Observer for the State of Palestine) said that the current draft preamble did not entail adopting the Rome Statute; the aim was to build on existing instruments, rather than taking them as a given. The same could be said for the instruments on genocide and war crimes, which informed the Committee's work despite having a different scope. The importance of the Rome Statute lay in the fact that it clearly addressed crimes against humanity.

45. **Ms. Sverrisdóttir** (Iceland), co-facilitator, responding to the concern expressed earlier by the representative of El Salvador, said that even though the current session was not intended for the negotiation of the convention as such, the co-facilitators had no issue with the ongoing debate, provided the Committee found it productive.

46. **Mr. Bamy** (Observer for the State of Palestine) said that his delegation supported the interactive approach to the deliberations on the draft articles, which would further inform the General Assembly's process to find consensus on a path forward. The State of Palestine generally agreed with the proposed draft articles. His delegation welcomed the recognition, in the second preambular paragraph, that crimes against humanity threatened peace, security and well-being of the world. That provision rightly stressed the necessary link between the pursuit of justice and the maintenance of peace and security, thus echoing the purposes and principles of the Charter.

47. His delegation believed that, given the distinct nature of the draft articles and of crimes against humanity, the principles of justice should be singled out in the third preambular paragraph, in which the

Commission recalled the principles of international law embodied in the Charter.

48. His delegation found it important that, in the fourth preambular paragraph, the Commission recalled that the prohibition of crimes against humanity was a norm of general international law (*jus cogens*). While it was encouraging that the Commission recalled, in the fifth preambular paragraph, that crimes against humanity were among the most serious crimes of concern to the international community as a whole and must be prevented, it should also include the obligation to punish such crimes in that same preambular paragraph. Similarly, the sixth preambular paragraph should provide that the purpose of ending impunity was not only to deter or prevent the commission of such crimes, but also to hold perpetrators accountable.

49. There was relatively limited State practice distinct from the Rome Statute concerning the investigation and prosecution of crimes against humanity at the national level. The reference, in the seventh preambular paragraph, to the consideration of the definition of such crimes set forth in article 7 of the Rome Statute was therefore valuable and without prejudice to each State's position on the Statute. Consistency in that respect would reinforce the international regime to deter and prosecute those responsible for crimes against humanity.

50. Because the State of Palestine was a strong supporter of a victim-oriented approach, it welcomed the reference to victims and witnesses, in the ninth preambular paragraph. The right of victims to justice and reparation was one of the purposes of criminal justice and should be referred to in the draft articles. Reparations were due not only to those directly affected by crimes against humanity, but also to others, including subsequent generations, who lived with the consequences of those crimes. While his delegation supported a reference to fair treatment and fair trial in principle, it did not believe that the issue should be addressed in the same paragraph as the rights of victims and witnesses.

51. In order to help strengthen national responses and international cooperation, it was important to ensure that the proposed draft articles supplemented and complemented existing instruments. From a conventional law perspective, the obligation to extradite or prosecute was already enshrined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention for the Protection of All Persons from Enforced Disappearance and the International Convention on the Suppression and Punishment of the Crime of Apartheid, all of which related to acts listed as crimes against

humanity in draft article 2. A reference to those conventions in the tenth preambular paragraph would further consolidate the international regime on crimes against humanity.

52. The draft articles were a harmonious part of the global regime for the international protection of human rights. Indeed, crimes against humanity were, in essence, systematic and widespread violations of human rights. It would therefore be useful to include, in the draft preamble, the standard reference to the Universal Declaration of Human Rights, which reflected international consensus.

53. His delegation remained convinced of the legal value of draft article 1 and the importance of its inclusion.

Draft articles 2–4

54. **Ms. Popan** (Representative of the European Union, in its capacity as observer), speaking also on behalf of the candidate countries Albania, North Macedonia, the Republic of Moldova, and Ukraine; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Georgia and Liechtenstein, said that the definition of crimes against humanity contained in draft article 2 was not new to the vast majority of delegations, as it largely reproduced article 7 of the Rome Statute. The two notable differences were the removal of the phrase “any crime within the jurisdiction of the Court”, which was only logical, and the omission of the definition of the term “gender”, contained in article 7, paragraph 3, of the Rome Statute. The European Union supported the decision not to include the definition of “gender”, especially since it had also been omitted in several domestic laws implementing the Rome Statute.

55. Referring to draft article 2, she said that crimes against humanity were described therein as certain acts when committed as part of a widespread or systematic attack directed against any civilian population. As the aim was to protect civilians, the attack must therefore be directed against a civilian population. Even if that civilian population included combatants, the attack would still be considered to be directed against a civilian population. According to the definition, the attack must also be widespread or systematic. However, as clarified by the well-established practice of international tribunals, such as the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, “widespread” and “systematic” were disjunctive rather than cumulative requirements. Moreover, a “widespread” attack did not necessarily

involve a large geographical area; the term referred rather to a large-scale attack as opposed to isolated acts of violence. Similarly, isolated or unconnected acts of violence were not considered to be part of a “systematic” attack.

56. It should be noted that State officials or State agents were not the only possible perpetrators of crimes against humanity. Such crimes could be committed by organizations or groups with the capacity and resources to plan and carry out a widespread or systematic attack as part of an organizational policy. The draft article left open the possibility for States to provide for broader definitions of crimes against humanity in their national laws. It was also without prejudice to any broader definitions provided for in other international instruments or in customary international law.

57. Turning to draft article 3 (General obligations), she said that the obligation of States not to engage in acts that constituted crimes against humanity comprised two elements: an obligation not to engage in such acts through the organs of the State, and an obligation not to engage in them through persons over whom the State had such firm control that their conduct was attributable to the State. Conduct amounting to crimes against humanity could entail both State responsibility and individual criminal responsibility. While States did not commit crimes, “acts” could be attributable to them under the rules of State responsibility. The words “undertake to”, which were also used in the Genocide Convention, imposed clear obligations to prevent and to punish crimes against humanity. Those were two distinct but connected obligations.

58. Under customary international law, crimes against humanity did not need to be linked to an armed conflict and could occur in peacetime. The European Union therefore welcomed the inclusion of the phrase “whether or not committed in time of armed conflict”, in the draft article, as it settled the long-standing dispute as to whether a nexus to an armed conflict was needed. State practice since the Nuremberg trials and jurisprudence supported that approach. In that respect, crimes against humanity were like genocide, which could occur in peacetime, but were unlike war crimes, which were always committed in times of armed conflict. It was a dire reality that crimes against humanity had frequently been perpetrated outside of situations of armed conflict. The European Union welcomed the clarification in that draft article that no exceptional circumstances whatsoever could be invoked as a justification of crimes against humanity.

59. With regard to draft article 4, she said that the inclusion of the obligation of prevention was based on

previous treaty practice, as it had been included in a number of international conventions, such as the Genocide Convention, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United Nations Convention against Transnational Organized Crime and the International Convention for the Protection of All Persons from Enforced Disappearance. It had also been included in a number of regional conventions, such as the Inter-American Convention on Forced Disappearance of Persons. States had a diverse set of tools at their disposal to fulfil that obligation, as preventive measures included not only effective legislative, administrative and judicial measures, but also cooperation with other States, and with relevant intergovernmental and other organizations.

60. The European Union welcomed the underlying intention of the draft articles to foster international cooperation.

61. **Ms. Fielding** (Sweden), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) and referring to draft article 2, said that those countries strongly supported the Commission’s decision to use the definition of crimes against humanity set forth in the Rome Statute as the material basis for the definition in the draft article. They also welcomed the decision not to retain the definition of the term “gender” that appeared in the Rome Statute, since that definition did not reflect the current realities or the content of international law.

62. While those delegations supported the draft article overall, they acknowledged that some aspects might merit further consideration. For instance, while the principle of legality in criminal law did not permit the expansion of the definition of a crime by analogy, to the detriment of a person being prosecuted, paragraph 1 (k) of the draft article appeared to permit analogy by providing that “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” could constitute crimes against humanity. Further reflection was required to determine how to ensure that the interpretation of that provision remained reasonably narrow. Furthermore, the mental element was taken into account only in relation to an attack directed against a civilian population. That element could be regulated in more detail and should be limited to intent and knowledge.

63. The Nordic countries welcomed the sharper focus on the obligation of prevention in draft article 4, as

international efforts to eliminate crimes against humanity could be successful only if sufficient attention were devoted to prevention in a future convention. Those delegations would support more explicit wording on the nature and content of the obligation of prevention, in order to make it more precise and effective.

64. The Nordic countries supported robust obligations regarding cooperation between States in relation to prevention more broadly, while also underlining that such obligations could not be construed so as to limit existing obligations in respect of other crimes.

65. **Ms. Cupika-Mavrina** (Latvia), speaking also on behalf of Estonia and Lithuania, said that the definition of crimes against humanity in draft article 2 was clear and comprehensive. Those delegations welcomed the inclusive and diverse nature of the identified circumstances in which crimes against humanity could occur. Importantly, the provision was victim-centred, which ensured that the emphasis remained on the prevention and punishment of crimes that had a significant impact on civilians. The establishment of a clear definition of crimes against humanity in the draft articles would ensure that such crimes were properly identified and addressed and that perpetrators were held accountable. If adopted and implemented, the draft articles would promote respect for human rights and the rule of law and ensure justice for victims and survivors of crimes against humanity.

66. With regard to draft article 3, the inclusion of a general obligation to prevent crimes against humanity was a positive and much-needed development in international criminal law. Prevention was key to combating such heinous crimes, and a general obligation in that regard would encourage States to take proactive measures to that end. Furthermore, the adoption of a general obligation to prevent and to punish crimes against humanity would send a strong message that such crimes would not be tolerated; it would also reflect the commitment of the international community to upholding human rights and ensuring that those who committed such crimes were held accountable.

67. **Mr. Abdelaziz** (Egypt) said that draft article 2 (Definition of crimes against humanity), paragraph 1 (k), which referred to “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”, was too broad and should be revised to reflect the principle of *nullum crimen sine lege*. Even if the list of crimes in paragraph 1 was not meant to be exhaustive, an overly broad categorization of crimes against humanity was not appropriate, as it could result in

misinterpretation or even politicization, which would violate the principle of legitimacy and undermine the proper administration of criminal justice.

68. The affirmation in draft article 2, paragraph 3, that the draft article was without prejudice to any broader definition provided for in any international instrument, in customary international law or in national law could cause confusion when it came to the application of the draft articles. The definition of crimes against humanity in the draft text might not be ideal, as it was not accepted by all States, including those that rejected definitions based on the Rome Statute as a matter of principle. Nevertheless, a broad definition drawn from other international instruments or national law was not a good solution. When States decided to accede to international or multilateral conventions, they were normally aware of the obligations and responsibilities that accession would entail. Most States would not agree to accede to a convention based on the draft articles if they could not know or anticipate the obligations that would arise from it. In short, the current wording of the paragraph undermined the legal stability that international conventions were supposed to foster.

69. Turning to draft article 3 (General obligations), he said that the obligation to prevent and punish crimes against humanity should be limited to cases where a link had been established between the crime and the State intending to exercise jurisdiction.

70. His delegation had strong reservations regarding the Commission’s approach to the issue of gender as set out in paragraphs (41) and (42) of the commentary to draft article 2. The Commission’s decision to take it upon itself to address the issue of gender was unnecessary and went beyond its mandate. It also impinged upon the competencies of other international forums. Crimes against humanity were unacceptable and the perpetrators must always be held to account, regardless of the gender of the victim. Gender considerations were of no relevance in the context of crimes against humanity.

71. **Mr. Hasenau** (Germany) said that the definition of crimes against humanity in draft article 2 was based verbatim on article 7 of the Rome Statute, with technical adjustments only. It appeared to be a solid, contemporary proposal and had received the most support. The definition was balanced, as it did not go into too much detail and allowed for more prescriptive national laws that might exist or be considered appropriate in the future. It was made clear in paragraph 3 of draft article 2 that States could adopt broader definitions than the one contained in the draft article.

72. Draft article 3 (General obligations) was the most important provision of the text. The obligations of States not to engage in acts constituting crimes against humanity and to prevent and to punish such crimes applied to acts committed through the State's own organs or persons under its control. Importantly, the draft article prohibited crimes against humanity as crimes under international law and whether or not they were committed in time of armed conflict.

73. Draft article 4 (Obligation of prevention) set out the obligation of States to exhaust their legal means to prevent crimes against humanity. The provision promoted a web of prevention and multilateral cooperation to address mass crimes, thereby adding real value to the existing international criminal law framework.

74. **Ms. Bhat** (India) said that there was no reason not to include terrorism-related acts and the use of nuclear weapons in the list of crimes in draft article 2 (Definition of crimes against humanity), unless the assumption was that such acts were not serious enough to be referred to as crimes against humanity. The concept of terrorism might have been alien at the time of the Nuremberg trials, but over the past four decades, the world had witnessed the devastation caused by terrorism-related activities. There was also evidence that many States had actively conspired in such activities or provided support to terrorist groups. It was difficult to imagine that the Commission did not recognize that such crimes were a danger to important contemporary values and the peace, security and well-being of the world.

75. **Mr. Ruffer** (Czechia) said that draft article 2 addressed the need for a harmonized definition of crimes against humanity under the national laws of States. It was appropriate to use the definition found in the Rome Statute as a basis for the definition in the draft articles, as the Rome Statute contained the first widely recognized and accepted comprehensive treaty definition of crimes against humanity. The expansion or narrowing of that definition could blur the lines of the definition under treaty law. Moreover, flexibility was sufficiently guaranteed by the "without prejudice" clause in paragraph 3. States that were not parties to the Rome Statute would still regard the stability and consistency of the definition of crimes against humanity in treaty law as reasonable and valuable. That said, in the light of the concerns regarding the interpretation of the definition in the draft articles, and in the interest of achieving a consensus, the definition must be construed strictly and narrowly, taking into account that crimes against humanity required conduct that was impermissible under generally applicable international

law, as recognized by the principal legal systems of the world.

76. Concerning draft article 3 (General obligations), the explicit reference in paragraph 1 to the obligation of States not to commit acts constituting crimes against humanity was an endorsement of the finding of the International Court of Justice in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* that a State's obligation of prevention also entailed a prohibition on commission. Accordingly, States must not engage in crimes against humanity and must ensure that persons or entities under their jurisdiction and control – including armed forces, rebel groups and other non-State actors – did not commit such crimes. His delegation supported the emphasis in paragraph 2 on the obligation to punish crimes against humanity and the statement in paragraph 3 that "no exceptional circumstances whatsoever" could be invoked as a justification of crimes against humanity.

77. Draft article 4 (Obligation of prevention), which required States to establish normative and administrative infrastructure to prevent the commission of crimes against humanity, was indispensable. The obligations set out in the draft article were familiar, as they were similar to those contained in the Convention against Torture and other widely ratified international treaties. The generic terminology used was desirable, as it covered any conceivable preventive measure. Nevertheless, it might be useful to include some specific examples of preventive measures, as had been done in the Convention against Torture and in the International Convention for the Protection of All Persons from Enforced Disappearance. The draft article rightly incorporated the requirement that States act in conformity with international law when taking action to prevent crimes against humanity. That requirement meant that the draft article could not be invoked to justify the use of force without the consent of the relevant State or the authorization of the Security Council.

78. **Ms. Flores Soto** (El Salvador), referring to the Commission's commentary to paragraph 2 of draft article 2, where it stated that it had decided not to include the definition of "gender" found in article 7, paragraph 3, of the Rome Statute, thereby allowing the term to be applied for the purposes of the draft articles based on an evolving understanding as to its meaning, said that the fact that the participants at the Rome Conference had had difficulties in defining that term should not be a justification for failing to provide any guidance concerning the progressive character of

international human rights law by establishing or broadening the meaning of the term.

79. It was important to make sexual violence a crime in international law under the category of crimes against humanity, including genocide. More specifically, it was important to consider the impact that the concept of “gender” might have on procedural matters and the presentation of evidence in relation to victims and witnesses of sexual violence. Above all, it was important to reaffirm that the presentation of evidence regarding the prior or subsequent sexual conduct of a victim of a sexual violence-related crime against humanity was prohibited, or that such evidence was not required.

80. With regard to draft article 2, paragraph 2 (i), concerning the definition of “enforced disappearance of persons”, her delegation reiterated that the provision should provide stronger protection for victims by following the International Convention for the Protection of All Persons from Enforced Disappearance in referring not only to States and political organizations but also to persons or groups of persons acting with the authorization, support or acquiescence of the State.

81. A binding instrument on crimes against humanity would help Member States strengthen their national legal frameworks with a view to increasing mutual legal assistance in the investigation of such crimes, and thereby reduce impunity. Specific situations relating to the crimes against humanity listed in draft article 2 should be taken into consideration in discussions on potential international judicial cooperation mechanisms. In that connection, her delegation suggested that attention be given to the prevention, investigation and punishment of acts and omissions relating to the wrongful removal of children subjected to enforced disappearance, children whose father, mother or legal guardian was subjected to enforced disappearance, or children born during the captivity of a mother subjected to enforced disappearance. It might also be worth discussing the prevention, investigation and punishment of acts and omissions concerning the falsification, concealment or destruction of documents attesting to the true identity of such children.

82. **Ms. Abu-ali** (Saudi Arabia), referring to draft article 2 (Definition of crimes against humanity), paragraph 1 (k), said that the phrase “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” covered a wide variety of acts and raised the possibility that any of those acts could be characterized as a crime against humanity, notwithstanding the definition of such crimes that was set out in the preceding paragraphs. The current wording

of that paragraph could thus open the door to the uncontrolled expansion of the acts in respect of which the draft articles could be applied.

83. Turning to draft article 3 (General obligations), she said that the phrase “which are crimes under international law”, used in paragraph 2, did not need to be included, since the draft articles already clearly defined and identified crimes against humanity.

84. **Mr. Wickremasinghe** (United Kingdom) said that his delegation supported the definition of crimes against humanity contained in draft article 2. That definition had a history that went back to the Charter of the International Military Tribunal established at Nuremberg in 1945 and had been carefully developed since then by the Commission and the Security Council, and in United Nations practice more generally. It had been explicitly accepted by the 123 States parties to the Rome Statute, following negotiations open to all States, and had subsequently been consolidated by the jurisprudence of national and international tribunals. Many experts considered that the definition amounted to the codification of customary international law. Nevertheless, it was appropriate to take the opportunity presented by the elaboration of a new convention to reflect on that definition. His delegation was not necessarily opposed to making changes thereto, but considered that any modifications should be approached cautiously, taking into account the impact that they could have on international accountability.

85. Concerning paragraph 1 (h), his delegation noted that persecution was considered a crime against humanity only if it was carried out in connection with another act listed in paragraph 1. That approach was narrower than the one taken in the Rome Statute and elsewhere. The United Kingdom remained open-minded in respect of the development of the provision and would be open to considering alternative wording. The document entitled “Policy on the Crime of Gender Persecution”, recently published by the International Criminal Court, could be a helpful interpretive tool in that regard.

86. With regard to draft article 2, paragraph 1 (k), concerning “other inhumane acts”, his delegation suggested that forced marriage be specifically listed as a crime against humanity in the draft articles, since it was recognized as such in international criminal jurisprudence. Notably, in *The Prosecutor v. Dominic Ongwen*, the International Criminal Court had held that forced marriage fell within the category of other inhumane acts.

87. In the light of the lessons learned from the application of the Rome Statute, and taking into account

the repugnance of forcible interference with reproductive rights to the values protected under international criminal law, his delegation would be in favour of exploring ways to strengthen the definition of “forced pregnancy” in draft article 2, paragraph 2 (f).

88. His delegation welcomed the decision not to include in the draft articles the definition of “gender” found in the Rome Statute. That definition was no longer appropriate, as it would mean that persecution of persons who did not consider themselves as male or female in connection with another crime referred to in draft article 2, paragraph 1, would potentially fall outside the scope of crimes against humanity.

89. The United Kingdom considered that draft article 3 (General obligations) and draft article 4 (Obligation of prevention) were of vital importance for tackling the scourge of crimes against humanity. With regard to draft article 3, his delegation particularly welcomed the stipulation in paragraph 1 that each State had the obligation not to engage in acts that constituted crimes against humanity. That provision clarified the first general obligation under the draft article and made it clear that such acts could be attributable to the State under the rules on responsibility of States for internationally wrongful acts. The structure of the two draft articles – whereby the two general obligations of States were set out in draft article 3 and then specific obligations related to prevention were set forth in draft article 4 – provided States with clarity as to their obligations. It was clear from the commentary to the draft articles that the Commission considered the obligation to prevent crimes against humanity as an obligation of conduct rather than one of result.

90. Turning to draft article 4, he said that his delegation welcomed the additional guidance on specific preventive measures provided by the Commission in paragraphs (6) to (11) of the commentary. It reiterated its view that the phrase “any territory under its jurisdiction”, used in draft article 4 (a) and elsewhere in the draft articles, should be amended to “in its territory”. That proposed wording would provide greater certainty as to where the obligations set out in the draft articles applied, as it would not always be clear whether territory was under the de facto jurisdiction of the State. Moreover, the de facto control exercised by a State might not be sufficient to establish the legislative, judicial and administrative jurisdiction required for compliance with the provision.

91. The United Kingdom could see the benefit of international cooperation for the effective prevention of crimes against humanity, as provided for in draft article 4 (b). However, there were no direct parallels for such a

provision in international treaties on the suppression of other serious international crimes. His delegation suggested that the phrase “as appropriate”, which referred only to cooperation with organizations other than intergovernmental organizations, be replaced with a phrase such as “where appropriate”, which would qualify the entire provision.

92. **Mr. Ghorbanpour Najafabadi** (Islamic Republic of Iran), referring to draft article 2, said that the definition of crimes against humanity in the draft article was too broad. It also failed to encompass all acts that could be considered crimes against humanity, such as the imposition of unilateral coercive measures against civilians with the intention of inflicting suffering upon them for political purposes, and also acts of instigation, provocation and incitement that caused peaceful protests to descend into violence and vandalism. In addition, the list of crimes should be set out in a separate draft article entitled “Elements of crime”. Since crimes against humanity were considered one of the most egregious categories of crimes under international law, the threshold for their identification should be higher than for other, less serious crimes. Accordingly, the acts listed in paragraph 1 should be considered crimes against humanity if they were committed as part of a widespread “and” systematic attack against civilians, as opposed to a widespread “or” systematic attack as currently stipulated.

93. Turning to draft article 3 (General obligations) and draft article 4 (Obligation of prevention), he said that it was generally understood that crimes against humanity committed in peacetime were crimes committed against ordinary people by internal actors, such as a Government or incumbent authority. However, the invisible yet critical role of external actors, in particular foreign States, in committing or in paving the way for the commission of such crimes must not be overlooked. Accordingly, draft article 4 should include the obligation of States to refrain from intervening in the internal affairs of other States through acts that amounted to crimes against humanity.

94. While draft article 3, paragraph 1, outlined the general obligation of States not to engage in acts that constituted crimes against humanity, draft article 4 was silent as to the obligation not to organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interference in civil strife in another State. It was incumbent upon States to prevent, in their territories and any territories under their control, acts of provocation, incitement or instigation that led to insurgency and disruption in other sovereign States and thus fostered the commission of crimes against

humanity. In the past, disastrous practices in international relations had led to the commission of various heinous crimes and to foreign military intervention in other territories. Instigation, provocation and incitement carried out against or among the general public by means of foreign-based mass media or the organization, financing and dispatch of terrorist or armed groups to other States could lead to civil wars or, at the very least, internal political upheaval and, eventually, the commission of crimes against humanity.

95. In the light of the foregoing, his delegation proposed that a second paragraph, modelled on paragraph 2 of the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, be added to draft article 4. The proposed paragraph would read: “No State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State and their populations.”

96. **Mr. Boerma** (Netherlands) said that it was right for the definition of crimes against humanity in draft article 2 to be based largely on the definition contained in the Rome Statute, because the definition of such crimes should be consistent in international law, in order to ensure legal certainty at the international level and in national implementation. In addition, challenging the definition in the Rome Statute could undermine certain achievements, and that definition was consistent with the practice of other international tribunals, including those established by the Security Council.

97. The definitions contained in the draft articles should reflect the evolving jurisprudence of international and national legal bodies. His delegation therefore welcomed the Commission’s decision not to define the word “gender” in the draft articles.

98. Draft articles 3 and 4 should be seen as two distinct provisions. The obligation to prevent, provided for in draft article 3 (General obligations), was dependent on the ability of States to influence the potential perpetrators of crimes against humanity, in line with the Genocide Convention and international jurisprudence, which could be applied analogously to the draft article. That approach was consistent with the ruling of the International Criminal Court in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. The obligation of prevention was an obligation of conduct, not of result, meaning that States must employ all means reasonably available to them so as to prevent crimes against humanity so far as possible.

99. Concerning draft article 4 (Obligation of prevention), the jurisprudence of the International Court of Justice provided useful legal criteria for assessing a State’s capacity to influence potential perpetrators of crimes against humanity. The draft article clearly defined the scope of the State’s obligation of prevention, stipulating that it was limited to territory under its jurisdiction. The level of due diligence required was higher when the State had the ability to influence individuals who were in its territory, under its jurisdiction.

100. **Ms. Chanda** (Switzerland) said that her delegation was pleased that the Committee was finally able to hold a discussion on the draft articles, four years after the text had been finalized by the Commission. The present discussions came in response to a need expressed by certain delegations that had concerns about the draft articles and had requested additional time to consider them. The discussions should therefore be seen as a complement to the consultations that had been conducted by the Commission since 2015.

101. Her delegation fully supported the elaboration of a convention on the basis of the draft articles. Such a convention would complement treaty law on other core international crimes and have universal value across legal systems and cultures. It would also help States to discharge their primary responsibility to investigate crimes against humanity and would promote cooperation between States in the investigation, prosecution and punishment of those crimes. Ultimately, it would be an essential tool for ensuring accountability and bringing perpetrators to justice.

102. The definition of crimes against humanity in draft article 2 must be consistent with the one found in the Rome Statute of the International Criminal Court, given the Court’s central role in the prosecution of such crimes. Her delegation considered it essential to ensure that the draft articles did not conflict with any existing treaties. It therefore welcomed the stipulation in draft article 2, paragraph 3, that the draft article was without prejudice to any broader definition provided for in any international instrument, in customary international law or in national law.

103. Her delegation considered that the prevention of crimes against humanity was as important as their punishment. It therefore welcomed the inclusion of draft article 4, which was dedicated to the obligation of prevention, and the stipulation in draft article 3, paragraph 3, that no exceptional circumstances whatsoever could be invoked as a justification of such crimes.

104. **Ms. Carral Castelo** (Cuba), referring to draft article 2 (Definition of crimes against humanity), said that it was not clear from the wording of paragraph 2 (a) what constituted an attack directed against a civilian population. The paragraph also provided that such an attack could be committed in furtherance of a State or organizational policy, but it was not clear what type of organizations were meant. The definition of “forced pregnancy” in paragraph 2 (f) should be amended to reflect international practices in relation to sexual and reproductive health. The concept of “persecution” was not clearly defined in paragraph 2 (g). Similarly, the definition of “enforced disappearance of persons” in paragraph 2 (i) seemed incomplete.

105. **Mr. Marschik** (Austria) said that, in the light of the horrible crimes against humanity currently being committed around the world, the elaboration of a convention that would ensure that perpetrators of such crimes were held accountable and that victims received justice was more important than ever. While accountability should be addressed primarily through the exercise of national jurisdiction and the enhancement of international cooperation, a convention establishing complementary international norms would provide an additional layer of protection. Furthermore, the codification of the customary international law regarding the criminalization of widespread or systematic attacks directed against any civilian population would complement the Genocide Convention and the Geneva Conventions of 1949, filling a gap in international treaty law. His delegation therefore supported the early convening of a diplomatic conference to finalize and adopt an international convention based on the draft articles.

106. The definition of crimes against humanity in draft article 2 codified the understanding of the term under customary international law. Thus, from the legal perspective, the definition was not “based” on article 7 of the Rome Statute. The Statute and the proposed convention were two individual and separate legal instruments, with different purposes and potentially also different parties. Their only point in common was that they both set forth the customary international law definition of crimes against humanity. Such consistency was important in order to avoid fragmentation in the international legal system.

107. Turning to draft article 3 (General obligations), he said that while earlier conventions, such as the Genocide Convention, did not expressly provide for an obligation not to engage in specific acts, his delegation saw merit in the explicit reference to the obligation of States not to engage in acts that constituted crimes against humanity in paragraph 1. That obligation was twofold,

applying both to State organs and to persons acting on the instructions or under the direction or control of the State. His delegation also welcomed the reference to the obligation to prevent crimes against humanity in paragraph 2, a similar obligation having been set forth in the Genocide Convention.

108. His delegation noted that the reference to “effective legislative, administrative, judicial or other appropriate preventive measures” in draft article 4 (Obligation of prevention) had been inspired by wording in the Convention against Torture. Since torture was one of the acts listed in the definition of crimes against humanity in the draft articles, it was logical to take a similar approach in relation to the prevention of crimes against humanity. The requirement that preventive measures be in conformity with international law was consistent with the jurisprudence of the International Court of Justice and might alleviate the concerns of some delegations.

109. His delegation invited all delegations to keep constructively engaging in the debate in order to make meaningful progress towards the goal of adopting the future convention at a diplomatic conference, to be held possibly in Vienna.

110. **Mr. Amaral Alves De Carvalho** (Portugal) said that the definition of crimes against humanity contained in the Rome Statute was a logical starting point for the definition in draft article 2. A great deal of effort had gone into the development of the definition in the Rome Statute. It largely reflected customary international law and was widely supported by State practice. It also incorporated many elements from other international treaties, which was important for ensuring consistency and avoiding fragmentation in international law. That definition was therefore a good basis for developing a future definition for the proposed convention. However, that did not mean that it should be replicated verbatim in the draft article. The Commission had itself made some adjustments to the provision. In that regard, his delegation supported the decision not to include a definition of the term “gender” in the draft article, which allowed for greater flexibility and protection and better reflected current realities. It might be worth considering additional changes to the draft article, such as broadening the definitions of “enforced disappearance of persons” and “persecution”, and better aligning them with definitions found elsewhere.

111. Ultimately, Member States must decide how and to what extent the draft articles should be adjusted and what level of progressive development might be warranted. A delicate balance must be found between

progressive development and legal certainty and consistency, which had implications for accountability.

112. His delegation considered that the “without prejudice” clause in draft article 2 (Definition of crimes against humanity), paragraph 3, offered a good balance in terms of promoting the harmonization of national laws, in order to facilitate inter-State cooperation, while respecting the right of States to adopt or retain broader definitions. It was appropriate for the definition of crimes against humanity in the draft articles to be a floor rather than a ceiling. However, his delegation understood the concerns that had been raised about the provision by the delegation of Egypt and others and remained open to further discussion.

113. Draft article 3 (General obligations) was a fundamental element of the draft articles, insofar as it clearly set out the obligations of States not to engage in and to prevent and punish crimes against humanity. In that regard, it might be worth adding a specific reference to “States” in draft article 1 (Scope).

114. Turning to draft article 4 (Obligation of prevention), he said that, as indicated in the commentary to the draft article, the obligation to prevent the commission of crimes was not unique to the draft articles; it had also been set forth in many multilateral treaties, including the Genocide Convention, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention against Torture and the United Nations Convention against Transnational Organized Crime. The obligation to prevent and the obligation to punish went hand in hand and were mutually supportive.

115. The phrase “in conformity with international law”, contained in the chapeau, was consistent with the finding of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* that “every State may only act within the limits permitted by international law”. His delegation fully supported the inclusion of the phrase, which it understood to mean that measures undertaken by a State to fulfil its obligation to prevent crimes against humanity must be consistent with the rules of international law, including those on the use of force established in the Charter, international humanitarian law and international human rights law.

116. The draft article provided a combination of guidance and flexibility to assist States in fulfilling their obligation to prevent crimes against humanity. The commentaries to the draft articles offered further guidance in that respect. The reference to cooperation between States in draft article 4 (b) was one of the main

tenets of the draft articles and reflected the duty to cooperate set forth in the Charter and other instruments of international law.

117. **Mr. Klanduch** (Slovakia), referring to draft article 2, said that his delegation was pleased that the definition of crimes against humanity contained therein largely reflected the definition contained in the Rome Statute. While the definition in the Statute had been designed specifically for the purposes of the exercise of the jurisdiction of the International Criminal Court, and the authors might have therefore taken a somewhat cautious approach, it should be borne in mind that the definition had been based on earlier substantive work by the Commission and a series of inclusive meetings and negotiations leading up to the adoption of the Statute. Using the Statute definition as a point of reference for the draft article was thus legitimate and reasonable. It did not affect the rights and obligations of non-States parties to the Statute in any way, as the definition largely reflected customary international law. His delegation fully supported the Commission’s approach and the current wording of the draft article, although it remained open to discussing the inclusion of additional elements in the definition.

118. His delegation understood that the requirements of “widespread” and “systematic” were disjunctive and excluded isolated or unrelated acts. “Widespread” referred to the number of victims (without setting any specific threshold), while “systematic” indicated that the act was part of a pattern. Such attacks must be directed against a civilian population, regardless of any distinctive features of its members. His delegation shared the Commission’s view that it was the intention of the attack, rather than its physical result, that was most relevant. However, the requirement set forth in paragraph 2 (a) for attacks to be carried out pursuant to or in furtherance of a State or organizational policy in order to be considered crimes against humanity might warrant further discussion.

119. His delegation supported the decision not to include a requirement of a nexus to armed conflict, as the recognition that crimes against humanity could occur in peacetime reflected the current status of international law and its development since the Nuremberg trials. The “without prejudice” clause in paragraph 3 followed the model of earlier instruments by providing the necessary flexibility for States that wished to include broader definitions in their domestic laws.

120. Turning to draft article 3 (General obligations), he said that his delegation noted with satisfaction that the first two paragraphs were aligned with the relevant case

law of the International Court of Justice. The passive obligation not to engage in acts constituting crime against humanity reaffirmed the well-established rule that even if States could not commit crimes under international law, the conduct of organs or persons over whom a State had control could be attributable to the State and thus trigger the State's responsibility. Importantly, that obligation involved not only the actual commission of such crimes, but also aiding, directing or coercing the perpetrators thereof. His delegation was open to further considering whether the draft article also covered abetting or incitement, even though they were not specifically mentioned in the commentaries.

121. The active obligation of States to prevent and punish crimes against humanity was just as important as the obligation not to commit acts constituting such crimes. The obligation set out in draft article 3, paragraph 2, was directly linked to the two streams of the obligation of prevention set forth in draft article 4. The obligation of prevention was an obligation of conduct, as defined in article 14, paragraph 3, of the articles on responsibility of States for internationally wrongful acts and further confirmed by the jurisprudence of the International Court of Justice. The obligation could only be breached if a crime against humanity was actually committed. Concerning draft article 3, paragraph 3, his delegation was pleased to note that the text did not limit the applicability of the provision to the conduct of States alone.

122. Draft article 4 concerned a due diligence obligation to prevent crimes against humanity *ab initio*. His delegation strongly approved the Commission's approach of taking inspiration for that provision from relevant treaties. The phrase "in conformity with international law" came from relevant jurisprudence and followed the logic of the draft preamble. Slovakia would be interested to know whether other States considered that more detailed or prescriptive wording was needed in respect of the obligation of prevention. His delegation felt that the broader and more flexible wording proposed by the Commission was more appropriate.

123. Useful examples of and clarifications regarding preventive measures were contained in the commentary to draft article 4. In that regard, his delegation welcomed the fact that the Commission referred not only to regulatory and legislative frameworks, but also to training programmes. The international cooperation element of the obligation of prevention was well grounded in similar multilateral treaties, and also in the Charter. The provision for cooperation with organizations other than intergovernmental organizations was welcome, as such organizations often

possessed extremely valuable knowledge, experience and data.

124. **Mr. Milano** (Italy), referring to draft article 2, said that the substance of the definition of crimes against humanity contained therein should be aligned with the definition provided in the Rome Statute, in order to avoid inconsistencies in customary international law and between legal instruments developed within the United Nations system. His delegation therefore supported the draft article in its current form. With regard to the relationship between the draft articles and the Statute, his delegation concurred with the comments made by the representatives of Austria, Portugal, Sierra Leone, Slovenia and the United Kingdom and the Observer for the State of Palestine. However, it remained open to hearing different perspectives, including those of non-States parties to the Statute.

125. The key requirement under the draft article that an attack be carried out pursuant to or in furtherance of a State or organizational policy in order to be considered a crime against humanity was consistent with the case law of international courts and tribunals. As noted in the commentary to the draft article, the offender need not be a State official or agent. Crimes against humanity could be committed by non-State entities and organizations, such as *de facto* political groups, rebel groups or even criminal organizations.

126. Paragraph 3 was important because it made it clear that the draft article was a minimum standard and that it was without prejudice to broader definitions provided for in other international instruments, in customary international law or in national law. States might therefore agree to apply a broader definition, as was the case in the International Convention for the Protection of All Persons from Enforced Disappearance, which did not require that an act be part of a State or organizational policy or continue for a prolonged period of time for it to be considered a crime of enforced disappearance.

127. Turning to draft article 3 (General obligations), he said that his delegation could support the provision as currently formulated. Paragraph 1 provided a clear legal standard from the perspective of the law on State responsibility, in that it excluded acts attributable to a State under the secondary rules of attribution. Paragraph 2 provided for an obligation of due diligence, in that the State was required to use the means at its disposal to prevent the commission of crimes against humanity. The fulfilment of that obligation required a case-by-case evaluation, taking into account all relevant factors, including the capacity of the State to exert control and influence over a group of persons that were likely to commit or were already committing crimes against

humanity. The paragraph also contained the important clarification that crimes against humanity were not necessarily committed in the context of armed conflict.

128. The obligation of prevention provided for in draft article 4 involved positive action, not only in the form of legislative, administrative or judicial measures in the territory under the jurisdiction of the State, but also through international cooperation with other States, international organizations and, as appropriate, other organizations, such as the International Red Cross and Red Crescent Movement. The requirement that such actions be conducted “in conformity with international law” was important. At the domestic level, it was crucial that the prevention of crimes against humanity did not involve the violation of fundamental human rights. At the international level, prevention could not justify measures in violation of international law, including with regard to the use of military force.

129. **Mr. Abdelaziz** (Egypt), responding to the comments made by the representative of Portugal concerning the “without prejudice” clause in draft article 2, paragraph 3, said that it was unclear to his delegation how Member States could be expected to undertake or fulfil an obligation to prevent and criminalize a set of acts that was fluid, non-existent or subject to other instruments, or that could change depending on developments in international law.

130. **Ms. Dakwak** (Nigeria) said that her delegation shared the position of Egypt with respect to draft article 2, paragraph 3. More generally, it appeared that some delegations were considering the Commission’s report as a legal document, when in fact it was a working document for the Committee. With regard to the Commission’s decision not to include a definition of the term “gender” in draft article 2, her delegation did not agree with delegations that claimed that there was no agreed definition of the term. Indeed, the term had already been defined in the Rome Statute and accepted by all the 123 States parties thereto, a point which should have been acknowledged by the Commission. The draft articles should not deviate from the definition set forth in the Rome Statute, as that would create confusion.

131. Draft article 4 (Obligation of prevention) set out the obligation for States to take legislative, administrative, judicial or other measures to prevent crimes against humanity. The Committee should proceed with caution, because many States already had laws to prevent crimes against humanity, with their own definitions of such crimes, and many of them had also accepted the Rome Statute with its definition. The challenge for the Committee was not so much how to

adopt a new convention, but rather how to help States strengthen their legal systems in order to address crimes against humanity, most notably through enhanced international cooperation.

The meeting rose at 1.15 p.m.