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Chair: Mr. Afonso . . . . . (Mozambique)

Contents

23-06916 (E)

The meeting was called to order at 10.00 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 articles 6–10

2. **Ms. Popan** (Representative of the European Union, in its capacity as observer), speaking also on behalf of the candidate countries Albania, Bosnia and Herzegovina, North Macedonia, the Republic of Moldova and Ukraine; the potential candidate country Georgia; and, in addition, Liechtenstein, said that, while many States had already criminalized crimes against humanity in their domestic law, others had not done so. Therefore, draft article 6 (Criminalization under national law) was critical, as it created obligations for States to take measures to ensure that crimes against humanity constituted offences under national criminal law, thus closing a lacuna that might prevent the prosecution and punishment of such crimes. The European Union and its member States welcomed the clarification, in paragraph 5 of draft article 6, that the official position of the person committing an offence was not a ground for excluding criminal responsibility. It noted, however, that the paragraph 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. It also noted that draft article 7 of the draft articles on immunity of State officials from foreign criminal jurisdiction, adopted by the Commission on first reading, stated that immunity *ratione materiae* should not apply in respect of crimes against humanity. With regard to the reference to "appropriate penalties" in draft article 6, paragraph 7, she recalled that the European Union and its member States opposed capital punishment in all cases and under any circumstances. The States parties to the Rome Statute of the International Criminal Court had dealt with the issue by providing for imprisonment for a number of years not exceeding 30 years, or a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. That approach reflected the fact that the large majority of States had abolished the death penalty or no longer practised it.

3. With regard to draft article 7 (Establishment of national jurisdiction), the European Union welcomed the fact that, in order to close gaps in the prosecution of crimes against humanity, the Commission had provided for a relatively wide range of jurisdictional bases, namely, territorial jurisdiction, nationality or active personality jurisdiction, and passive personality jurisdiction. It noted that the draft article did not exclude the exercise of a broader jurisdictional basis if it was provided for under relevant national law. The European Union encouraged States to effectively close jurisdictional gaps in order to prevent impunity for such heinous crimes.

4. Turning to draft article 8, she said that the investigation of crimes against humanity was key to their effective prosecution and punishment. Although it was not specifically mentioned in the draft article, such investigations must be conducted in good faith, which excluded the conduct of sham, unduly delayed or misleading investigations, or investigations carried out to shield an individual from criminal responsibility. As the Commission had indicated in its commentary, the duty to investigate was activated when the threshold of "reasonable ground" was met, a threshold that had also been used with respect to other types of crimes, such as torture. The European Union noted that the obligation to conduct an investigation did not necessarily require the victims to have filed complaints.

5. The European Union understood that the preliminary measures to be taken when an alleged offender was present, as provided for in draft article 9, were to be taken in accordance with international human rights law and fair trial standards. For instance, persons in police custody had the right not to incriminate themselves and to remain silent, and the right to be assisted by a lawyer whenever they were questioned. Some States, in their submissions to the Commission, had expressed concerns regarding the obligation to "immediately notify". However, in its commentary to draft article 9, the Commission had recognized that some situations required flexibility and were not straightforward, and the obligation to immediately notify must, therefore, be understood against that background.

6. Turning to draft article 10, she said that the *aut dedere aut judicare* rule obliged a State with jurisdiction over the territory in which an alleged offender was present either to exercise jurisdiction or to extradite the individual to a State that was able and willing to exercise jurisdiction. The European Union welcomed the inclusion of that principle, which was based on "the Hague formula" and had been included in a number of treaties. Its main purpose was to prevent States from providing a safe haven for persons suspected of committing crimes against humanity. As international courts and tribunals played a significant role in the fight

against impunity, the European Union welcomed the reference to "surrendering" an accused person to such court or tribunal. It believed that the term "tribunal" should be understood to include hybrid courts. Surrender was only possible when the international criminal court or tribunal had jurisdiction over the offence and the offender, and when the State concerned had recognized its jurisdiction. The European Union noted that the Rome Statute, like the draft articles, did not include a provision on amnesties. However, an International Criminal Court Pre-Trial Chamber had found that granting amnesties and pardons for serious acts such as murder constituting crimes against humanity was incompatible with internationally recognized human rights.

7. **Ms. Fielding** (Sweden), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the Nordic countries remained of the view that draft articles 6–10 constituted a good basis for a possible future convention.

8. With regard to draft article 6, the Nordic countries supported the obligation for States to criminalize crimes against humanity under their national law, and specifically welcomed the inclusion of paragraph 5, obliging each State to take the necessary measures to ensure that the official position of an alleged offender was not a ground for excluding individual criminal responsibility. They noted, however, that, as clarified by the Commission in its commentary, paragraph 5 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 law. They also noted that draft article 7 of the draft articles on immunity of State officials from foreign criminal jurisdiction, adopted by the Commission on first reading, stated that immunity *ratione materiae* should not apply in respect of crimes against humanity. The Nordic countries attached great importance to due process and were opposed to the use of capital punishment. In that connection, the obligation to ensure that crimes against humanity were punishable by appropriate penalties, set out in draft article 6, paragraph 7, should under no circumstances entail the inclusion of the death penalty as an applicable penalty.

9. With regard to the obligation for States to take the necessary measures to establish jurisdiction over crimes against humanity, the Nordic countries considered that States should establish a relatively wide range of jurisdictional bases under their national laws in order to prevent impunity. They therefore welcomed draft article 7 (Establishment of national jurisdiction), which, in addition to requiring States to establish territorial jurisdiction, obliged them to establish active personality jurisdiction over their nationals and provided for the establishment of jurisdiction over stateless persons residing in their territories, as well as passive personality jurisdiction, if considered appropriate. The Nordic countries also welcomed the fact that the exercise of jurisdiction on a broader basis was not excluded, if such a basis was provided for in national law. Furthermore, in order to effectively support the obligation to extradite or prosecute, as set out in draft article 7 and draft article 10, national courts might sometimes be required to resort to a jurisdictional basis other than territorial or active personality jurisdiction in order to try an offender who was not extradited or surrendered. The establishment of a relatively broad range of jurisdictional bases was therefore crucial in closing impunity gaps.

10. **Mr. Abdelaziz** (Egypt) said that his delegation recognized in principle that, when the necessary conditions were met, leaders bore responsibility for crimes against humanity committed by their subordinates. At the same time, it believed that the wording of draft article 6 (Criminalization under national law) was extremely broad and could jeopardize the rights of defendants and the rule of law, in view of the special nature of crimes against humanity and the broad nature of the constitutive elements thereof. In paragraph 3 of that draft article, it was stated that commanders were criminally responsible if they had reason to know about crimes committed by their subordinates; but that provision was not specific enough. Moreover, the statement that commanders should take "necessary and reasonable measures" to prevent crimes against humanity could allow for interpretations that would be prejudicial to the defendants and disregarded factors that might make such measures impossible in practice. Some of those provisions were drawn from instruments and statutes of international tribunals pertaining to other international crimes. Because crimes against humanity were broader in nature, the wording of the draft article should be made more specific.

11. With regard to draft article 7 (Establishment of national jurisdiction), paragraph 2 provided that each State should take the necessary measures to establish its jurisdiction over the offences covered by the draft articles in cases where the alleged offender was present in any territory under its jurisdiction. His delegation continued to object to that provision, as it enshrined the principle of universal criminal jurisdiction, which not all States accepted. A clear nexus must be maintained between the State exercising jurisdiction and the crime in question. For that purpose, priority should always be given to the State on whose territory the crime had

occurred. In no event should relevant provisions be used to impose the exercise of jurisdiction for political reasons or to avoid extraditing a suspect to a State that had a firm basis for exercising jurisdiction. Accordingly, his delegation did not support paragraph 3, which provided that the draft articles did not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law. When a State chose to become a party to a treaty, it undertook to apply the treaty in its relations with other parties and to harmonize its national law with the treaty. In its current form, the paragraph would therefore cause chaos.

12. **Ms. Beriana** (Philippines) said that the Philippine Act on Crimes against International Humanitarian Law, Genocide and Other Crimes Against Humanity (the Republic Act) continued to provide the legal and policy context for her delegation's comments on the draft articles. With regard to draft article 6 (Criminalization under national law), 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 in the Republic Act 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 were 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.

13. Her delegation could support the wording of paragraph 4, as the principle was in accordance with the Republic Act, 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. Under the Act, orders to commit "other crimes against humanity" were, by default, manifestly unlawful. Philippine law, which applied equally to all persons without distinction based on official capacity, also provided a legal basis for paragraph 5, the wording of which was therefore acceptable to her delegation. However, it would be useful to point out in the draft articles, as in the Republic Act, 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 national 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 offences 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.

14. Her Government was still constructively considering draft article 7. Its national law provided for the Philippines to exercise jurisdiction over persons suspected or accused of crimes against humanity, regardless of where the crimes were committed, provided that the accused was a citizen of the Philippines, or, regardless of citizenship or residence, was present in the Philippines, or had committed a crime against a Filipino citizen. Her delegation supported the current text of draft article 8 (Investigation). It reserved the right to revisit paragraph 8 of draft article 6, on the liability of legal persons, draft article 9 (Preliminary measures when an alleged offender is present) and draft article 10 (*Aut dedere aut judicare*).

15. **Mr. Hasenau** (Germany) said that draft article 6 (Criminalization under national law), which set out a number of elements to make sure that crimes against humanity could be successfully prosecuted, was key to holding perpetrators accountable and thus reinforced the principle of complementarity. Draft article 7 (Establishment of national jurisdiction), in which the Commission had established the jurisdictional basis for domestic investigations and prosecutions, served to further reduce the impunity gap by ensuring that States

did not become safe havens for perpetrators of crimes against humanity, while paragraph 3 provided flexibility for the establishment of jurisdiction with a wider scope. The provisions of draft articles 6–10, taken together, were key to effective prevention and deterrence. They provided a good basis for further negotiations, during which Member States should address the depth of regulation intended.

16. **Mr. Ruffer** (Czechia) said that, with regard to draft article 6 (Criminalization under national law), the neutral and generic wording used by the Commission was appropriate for a draft convention, allowing States to specify in their national law the criminalization of conduct associated with crimes against humanity. The draft article was therefore indispensable for the implementation of the future convention. The broad phrasing of paragraph 2 also allowed States to specify modes of participation while retaining the terminology in their existing laws. Czechia welcomed the fact that the text was not overly prescriptive. The Commission had also taken a generic approach to the wording of paragraphs 3 and 4, on the responsibility of superiors and orders given by superiors, respectively, and both those provisions were adequate and reasonable.

17. Czechia welcomed the inclusion of paragraph 5, on the irrelevance of a person's official position in the context of prosecuting crimes against humanity. It noted that the Commission had not found it necessary to specify, in the draft article itself, that one's official position could not be raised as a ground for mitigation or reduction of sentence, because the issue of punishment was addressed in draft article 6, paragraph 7. However, in view of the importance of legal certainty in criminal law, it might be appropriate to expressly exclude official position as a ground for mitigation or reduction of sentence in the text of the draft article. Czechia agreed with the Commission's interpretation, as set out in its commentary, that paragraph 5 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. That conclusion applied equally to other conventions against so-called official crimes, such as enforced disappearance or torture, and therefore did not need to be stated in the text of the draft articles. Crimes against humanity were, by definition, committed pursuant to the policy of the government of a State, making immunity *ratione materiae* inapplicable. However, that did not apply to the immunity *ratione personae* enjoyed under customary international law by incumbent Heads of State, Heads of Government and Ministers for Foreign Affairs, which would remain in place.

18. Czechia supported paragraph 6, on the prohibition on statutes of limitations, because a significant amount of time would often elapse before it was possible to investigate crimes against humanity and prosecute and punish those responsible. It likewise welcomed the inclusion of the provision on the liability of legal persons, in paragraph 8. Although States held different views on the issue and there was no uniform approach in relevant treaties, the provision was very flexible and allowed States to respect their domestic legal principles when establishing the criminal, civil or administrative liability of legal persons.

19. Draft article 7 (Establishment of national jurisdiction), together with draft article 9 (Preliminary measures when an alleged offender is present), were prerequisites for the fulfilment of the obligation *aut dedere aut judicare*, contained in draft article 10. That principle was necessary to ensure that States did not become safe havens for the perpetrators of crimes against humanity. Czechia welcomed the inclusion of the word "surrender" in draft article 10, which was a reflection of the terminology used in various international instruments. Surrendering an alleged offender to an international criminal tribunal would obviously only be possible if the relevant State had recognized said tribunal's jurisdiction. As a whole, the draft articles were well conceived and their adoption as part of a convention on crimes against humanity would constitute a substantive development in the prosecution of such crimes.

20. **Ms. Solano** (Colombia) said that draft article 6 (Criminalization under national law) would serve to prevent discrepancies between definitions of crimes against humanity under international and national law, thereby closing potential gaps. Importantly, the draft article required States to criminalize different modes of participation in the commission of such crimes. In that regard, her delegation considered that States could, in their national laws, by exercising their regulatory authority, go beyond customary international law with regard to the modes of participation set out in paragraph 2 (c).

21. Draft article 6 also required States to take measures to ensure the criminal responsibility of commanders or other superiors, subordinates acting on the order of a Government or superior, and persons holding an official position. Her delegation noted that the command responsibility provided for therein was based, inter alia, on that established in Additional Protocol I to the 1949 Geneva Conventions, the Statute of the International Criminal Tribunal for the Former Yugoslavia and the Statute of the International Criminal Tribunal for Rwanda. While article 28 of the Rome

Statute contained a more detailed standard by which criminal responsibility applied to a military commander with regard to the acts of others, many instruments provided for the exclusion of superior orders as a defence, including those regulating the ad hoc courts and tribunals, as well as treaties such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Inter-American Convention on Forced Disappearance of Persons and the International Convention for the Protection of All Persons from Enforced Disappearance. In order to provide greater legal certainty, it might be appropriate to include a more explicit statement clarifying that superior status could not be raised as a ground for mitigation or reduction of sentence. There was clearly a relationship between paragraph 5 on official position and the rules on immunity, as well as the Commission's current work on the immunity of State officials from foreign criminal jurisdiction; paragraph 5 was also related to draft article 7 (Establishment of national jurisdiction). It would therefore be important to focus on clarifying all those provisions in a holistic manner, avoiding discrepancies that would create uncertainty.

22. Her delegation supported paragraph 6, on measures under national law to ensure the non-applicability of statutes of limitations, and paragraph 7, on appropriate penalties that took into account the grave nature of such offences. Colombia was already obliged to take similar measures under, for instance, articles III and VII of the Inter-American Convention on Forced Disappearance of Persons. However, her delegation wondered whether the grave nature of a crime was the only relevant criterion when determining appropriate penalties or whether a reference to the nature of the crime committed should also be included. The establishment of liability of legal persons, provided for in paragraph 8, should be left to the discretion of each State and regulated in accordance with domestic law.

23. In order to implement all the provisions contained in draft article 6, Colombia would need to reform its Criminal Code to criminalize certain crimes against humanity that were not currently set out therein. At present, in order to be able to declare an offence to be a crime against humanity, the public prosecutor had, first, to verify the presence of the contextual elements mentioned in the definition of such crimes under customary international law and, second, to determine whether the underlying conduct met the required characteristics of crimes against humanity. The adoption of a treaty on crimes against humanity would be beneficial for her country's judicial authorities, as it would make it easier to adapt the relevant domestic rules to international law, in the context of both ordinary and transitional justice, and would generate legal certainty in relation to the declarations of crimes against humanity made by the public prosecutor. The obligations on States set out in draft article 6 must be understood to be without prejudice to any broader definition contained in another international instrument, customary international law or applicable regional or international case law. In addition, it might be worth including the financing of crimes against humanity among the acts that should be criminalized, in view of the critical role played by those who financed such crimes, whether individuals, legal entities or criminal organizations.

24. With respect to draft article 7 (Establishment of national jurisdiction), Colombia agreed that it was appropriate to provide for territorial jurisdiction, jurisdiction based on the nationality or residence of the alleged offender and passive personality jurisdiction. With regard to territorial jurisdiction, it might be appropriate to refer 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 important 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. The requirement for States to establish their jurisdiction in cases where the alleged offender was present in any territory under their jurisdiction if they did not extradite or surrender said person, as set out in paragraph 2, was a valuable mechanism to prevent impunity. Its inclusion in a potential future treaty would create a high degree of legal certainty. Colombia also welcomed paragraph 3, which provided for the exercise of any other criminal jurisdiction established by a State in accordance with its national law.

25. With regard to draft article 8, the obligation for a State to conduct a prompt, thorough and impartial investigation was related to each State's role as a guarantor of human rights in its territory, and to the adoption of domestic measures aimed at preventing and punishing crimes against humanity. As for draft article 9 (Preliminary measures when an alleged offender is present), inasmuch as States would normally apply their domestic law, with the degree of urgency required, to prevent the flight of an alleged offender or any tampering with evidence, and to duly establish jurisdiction over the case, it was only natural that such a provision should form part of a potential future instrument on crimes against humanity. There were, for

example, similar provisions in article 6 of the Convention against Torture.

26. With regard to draft article 10 (*Aut dedere aut judicare*), the obligation for a State to prosecute if it did not extradite an alleged offender was based on the shared interest in prosecuting and punishing crimes against humanity, which were crimes against humankind as a whole. Her delegation noted that the Convention against Torture and the International Convention for the Protection of All Persons from Enforced Disappearance contained similar provisions. It also noted the reference to the conventional character of the provisions on universal jurisdiction or its equivalent in respect of crimes against humanity, as had already been recognized by her country's high courts.

27. **Mr. Al-edwan** (Jordan) said that the criminalization of crimes against humanity under national law was a key obligation without which the perpetrators of such crimes would not be brought to justice and inter-State cooperation would be limited, especially in respect of requests for extradition. Therefore, Jordan fully supported draft article 6, the wording of which was consistent with other international instruments on international and transnational crimes. Paragraphs 3 and 4 of that draft article, on the responsibility of commanders and subordinates respectively, reflected customary international law and developments in international criminal jurisprudence. The criteria for establishing a commander's responsibility were balanced, but the Committee might wish to discuss whether the phrase "had reason to know" was sufficiently clear, and whether an objective or a subjective test should be used to determine whether that criterion had been met.

28. With regard to draft article 7 (Establishment of national jurisdiction), Jordan welcomed the inclusion in paragraph 2 of the obligation for States to establish jurisdiction over an alleged offender who was present in their territory if they did not extradite or surrender that person. That obligation was an effective tool for ensuring that those who committed crimes against humanity were brought to justice. The same was true of draft article 10 (*Aut dedere aut judicare*). It was important to note that a State's implementation of the obligation set forth thereunder should be consistent with its other obligations under international law.

29. **Mr. Tombs** (United Kingdom) said that draft article 6 (Criminalization under national law) was at the heart of the legal regime that the Commission was seeking to establish by means of the draft articles. Although prevention required far more than criminalization, criminalization made it clear that individuals who committed such crimes would face justice, and showed survivors that the world recognized the harm they had suffered and considered that harm to be punishable. The United Kingdom had already criminalized crimes against humanity under its national law and considered it right that, under paragraph 7 of the draft article, States were required to punish such offences by appropriate penalties that took into account their grave nature. In view of the complexity of crimes against humanity, it was also appropriate that various modes of responsibility were set out in paragraph 2, which also reflected the practice of international courts. While the United Kingdom was conscious that the Commission had sought to allow national legal systems to approach such accessorial responsibility in a manner consistent with their criminal laws, there might be arguments for including other modes of responsibility, such as conspiracy or incitement. The United Kingdom supported paragraphs 3 and 4, on command responsibility and superior orders respectively. Such provisions had long been part of the body of international criminal law and were entirely appropriate in relation to crimes committed pursuant to, or in furtherance of, a State or organizational policy. His delegation noted that the effect of paragraph 5, as stated in the commentary, was that, where an offence was committed by a person holding an official position, that fact alone did not exclude substantive criminal responsibility. The Commission had cited some analogous provisions in other relevant conventions in that regard. However, importantly, it had gone on to say that paragraph 5 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. The United Kingdom did not take issue with either of those statements, but was considering whether the text was adequate as it stood or whether further clarifications might be useful or necessary. The United Kingdom strongly supported the inclusion of paragraph 6, requiring 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. However, it might be helpful to state in the draft articles that States were not obligated to prosecute crimes against humanity that had occurred before such offences had been criminalized in their national law, as clarified by the Commission in paragraph (33) of its commentary to draft article 6.

30. Draft article 7 (Establishment of national jurisdiction), which provided for extraterritorial jurisdiction over crimes against humanity in similar terms to those of the Convention against Torture,

reflected the interest of the international community in bringing an end to impunity for such grave crimes and ensuring that perpetrators could not escape justice by moving between States. It also gave an important signal to victims and survivors that the international community treated those crimes with appropriate gravity. Draft article 7, taken alongside the obligation to extradite or prosecute contained in draft article 10, provided for quasi-universal jurisdiction based on the presence of a suspect in the territory of a relevant State. However, it was preferable for crimes to be prosecuted in the State in which they had occurred because the authorities of that State were generally best placed to prosecute, not least because of the obvious advantages in securing the evidence and witnesses necessary. The United Kingdom wished to reiterate that draft article 7, paragraph 1 (a), should refer to offences committed in a State's "territory" as opposed to any "territory under its jurisdiction". It also noted that, as reflected in the recent arbitral award in *The "Enrica Lexie" Incident (Italy v. India)*, the basis of jurisdiction over ships was not part of the principle of territoriality.

31. The United Kingdom welcomed the inclusion of draft article 8 (Investigation) and, in particular, the clarification in the commentary that it did not relate to criminal investigation as such. The broader investigative obligation when there was reasonable ground to believe that crimes against humanity were occurring on a State's territory was a critical part of the prevention mechanisms envisaged under the draft articles.

32. With regard to draft article 10 (*Aut dedere aut judicare*), the United Kingdom noted that the provision included the possibility of extradition to another State or a competent international criminal court or tribunal, and that a State was obligated to prosecute a subject in its territory unless it agreed to extradite that individual to another State or international court. Therefore, draft article 10 allowed a State to recognize an extradition or transfer request from an international tribunal, but did not require it to accede to such a request. Lastly, in the commentary to draft article 10, the Commission had discussed the potential impact of an amnesty granted by one State on proceedings before the courts of another State, although the text did not deal with those questions expressly.

33. **Mr. Ghorbanpour Najafabadi** (Islamic Republic of Iran) said it was his delegation's understanding that the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime and the Protocols thereto were the primary sources of inspiration for the draft articles, including draft article 6 (Criminalization under national law). However, crimes against humanity were very different in nature from the crimes regulated by those Conventions. The Convention on the Prevention and Punishment of the Crime of Genocide contained no equivalent to draft article 6, which was unnecessarily detailed. His delegation suggested deleting the entire draft article, apart from paragraph 1 ("Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law"), and leaving it to States to define crimes against humanity in greater detail if they so desired. In addition, and without prejudice to that position, his delegation considered paragraph 6 of the draft article, which prohibited statutes of limitations in relation to crimes against humanity, to be an infringement on States' national laws. Although the Islamic Republic of Iran had no statute of limitations for such crimes, that provision ran counter to States' sovereign right to enact their own laws and exceeded the Commission's mandate. With regard to paragraph 8 of the same draft article, his delegation wished to recall the well-established principle of individual criminal responsibility and to clarify that the liability of legal persons was not recognized under Iranian law.

34. 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 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 by means of the dispute resolution mechanism outlined in draft article 15 (Settlement of disputes).

35. With respect to draft article 9 (Preliminary measures when an alleged offender is present), any confinement of a suspect, through custody or any other measures, should be time-bound, in accordance with States' human rights obligations. Moreover, as already stated, there should be an actual connection between a State wishing to prosecute a crime and the territory where the crime was committed, or the suspect should have the nationality of that State. In his delegation's view, the State in whose territory a suspect was present should, in the absence of actual connections such as territoriality or personality jurisdiction, take least priority

in terms of competence to prosecute that person. In that connection, his delegation was dissatisfied with the final clause of paragraph 3, where the exercise of jurisdiction was left to the "intention" of the State where the suspect was present, even in the absence of ties of territoriality or personality jurisdiction, and notwithstanding the provisions of draft article 13, paragraph 12.

36. **Mr. Marschik** (Austria) said that, while his delegation welcomed the fact that, in paragraph 6 of draft article 6 (Criminalization under national law), the Commission had provided that crimes against humanity should not be subject to any statute of limitations, it would prefer a clear prohibition that did not require States to take necessary measures. Austria had already made crimes against humanity punishable by appropriate penalties, in line with paragraph 7 of the same draft article. The emphasis in the draft articles on criminalization under national law was useful; existing national laws on the subject did not preclude States from acceding to a future convention.

37. The bases for national jurisdiction set out in draft article 7 were well established under customary and treaty law and could be found in many international conventions aimed at combating international crimes. As the Commission had pointed out in its commentary, draft article 7 only required States to establish jurisdiction by adopting the necessary national laws; it did not require them to exercise such jurisdiction, unless the alleged offender was present in the territory under the State's jurisdiction. Draft articles 8–10 also provided for States to exercise jurisdiction only when the alleged perpetrator was present in their territory, meaning that the draft articles did not require States to exercise universal jurisdiction; there must be a connection between the perpetrator and the forum State that was based on the territoriality principle.

38. His delegation welcomed the inclusion in draft article 8 of the duty to investigate, which was comparable to the obligations featuring in other treaties such as the Convention against Torture. A broader obligation for a State to investigate outside the territory under its jurisdiction in the case of a ship flying its flag, or an aircraft having the nationality of the State in which it was registered, could be discussed. With reference to draft article 10 (*Aut dedere aut judicare*), his delegation understood that the reference to a competent international criminal court or tribunal encompassed hybrid courts or tribunals combining both national and international elements. Lastly, should any international court or tribunal not have jurisdiction, the State in whose territory an alleged offender was present would remain bound by the obligations set out in draft article 10.

39. **Mr. Kowalski** (Portugal) said that the in-depth, interactive and constructive discussions of the past two days had been refreshing; perhaps the Committee could use the current model when considering other topics on its agenda. Overall, his delegation was satisfied with the wording of draft articles 6–10. With regard to draft article 6 (Criminalization under national law), paragraph 5 was important as it would serve to ensure that senior officials, whether civilian or military, did not have any type of immunity before their own courts. 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. In that regard, Portugal strongly opposed the application of the death penalty in any circumstances.

40. Draft article 8 not only required the State with jurisdiction to act promptly whenever there was reasonable ground to believe that acts constituting crimes against humanity had been or were being committed but also ensured that investigations would be conducted with respect for the fundamental guarantees owed to alleged offenders. States had ab initio priority over the International Criminal Court in the exercise of jurisdiction over crimes against humanity, but their readiness to conduct a prompt, thorough and impartial investigation was an important test of their willingness to exercise such jurisdiction.

41. His delegation welcomed the inclusion of the *aut dedere aut judicare* obligation in draft article 10, pursuant to which States had three alternatives: to prosecute an alleged offender in their own courts, extradite the person to another State or surrender that person to an international court or tribunal. That obligation was essential to prevent loopholes and ensure accountability. Lastly, his delegation understood that amnesties and pardons were not compatible with the obligation to hold accountable those responsible for crimes against humanity.

42. **Mr. Košuth** (Slovakia) said that, with regard to draft article 6, the obligation of States to criminalize crimes against humanity under their national laws was a key provision that served as a point of reference for the subsequent draft articles, including on inter-State cooperation. Although, in paragraph 1, the Commission had not referred explicitly to the definition of crimes against humanity contained in draft article 2, his delegation shared its view that any deviations from the wording of that definition in national laws should not result in qualifications or alterations that significantly departed from that meaning. While it noted that the Commission had eventually decided not to include

"incitement" or "conspiracy" in paragraph 2, his delegation believed that the inclusion of those modes of accessorial criminal responsibility would further strengthen the preventive aspect of the draft articles, and it looked forward to hearing the views of other delegations on whether those actions were sufficiently covered by the phrase "otherwise assisting in or contributing to the commission or attempted commission of such a crime", in paragraph 2 (c). With respect to paragraph 3, his delegation would prefer a more detailed regulation on command responsibility, comparable to the relevant standard in the Rome Statute. Nevertheless, it understood the Commission's intention not to be overly prescriptive and to allow States to implement the provision in line with their national laws, practice and jurisprudence. His delegation agreed that an individual's official position did not relieve that person of responsibility under international law, and it therefore welcomed the clarification of that point in paragraph 5. It noted, however, that paragraph 5 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. With respect to paragraph 6, Slovakia was a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and had incorporated its obligations thereunder into national law. With respect to paragraph 4, on superior orders, his country's laws prescribed that no order from a Government or superior could constitute a ground for excluding criminal responsibility for crimes against humanity. With regard to paragraph 7, on appropriate penalties, such crimes were punishable under Slovak law by imprisonment for a term of 12 to 25 years, or life imprisonment. As for paragraph 8, although Slovakia had not recognized the criminal liability of legal persons for crimes against humanity in 2016, when the Commission had been working on the topic, it had subsequently amended its national law to recognize such liability. The paragraph was carefully drafted and based on widely accepted wording; it contained multiple safeguards that allowed States a high degree of flexibility in implementation.

43. With regard to draft article 7 (Establishment of national jurisdiction), Slovakia recognized the territorial and personality-based jurisdictions provided for in paragraph 1. Under the Slovak Penal Code, passive personality jurisdiction could be exercised only when a conduct was criminalized in *locus delicti*, or when it occurred in a territory under no national jurisdiction. With regard to jurisdiction over stateless persons, his delegation noted that the formulation of paragraph 1 (b) was based on the International Convention against the Taking of Hostages; however it considered that States should seriously consider establishing such jurisdiction whenever there was a reasonable risk of an impunity gap. It welcomed the inclusion of paragraph 2, as it would help to prevent offenders from seeking refuge in a State that would otherwise have no direct connection with the offence in question and was essential for the full implementation of the *aut dedere aut judicare* principle set forth in draft article 10.

44. Draft article 8 (Investigation) applied, in principle, to the State having territorial jurisdiction, although it did not preclude States with other jurisdictional bases from conducting investigations. His delegation noted that the wording of the draft article was drawn from other comparable treaty provisions. Draft article 9 (Preliminary measures when an alleged offender is present) was applicable to the State in which an alleged offender was present and which had jurisdiction in line with paragraph 2 of draft article 7. Its wording provided various safeguards, allowing States to make assessments and, if the circumstances so warranted, to take alleged offenders into custody or take other legal measures to ensure their presence, and to make preliminary inquiries into the facts. Its ultimate purpose was to enable the prosecution, extradition or surrender of alleged offenders, with a view to preventing impunity.

45. The *aut dedere aut judicare* principle, as set out in draft article 10, was contained in many widely ratified multilateral treaties. Should a State not extradite or surrender an alleged offender, it was obligated to bring the case to its competent authorities for prosecution. However, the obligation to prosecute should be interpreted with full respect for prosecutorial discretion: a State was required only to submit the case to the competent authority for prosecution; furthermore, it should not refrain from pursuing prosecution or conduct sham proceedings solely to shield an alleged offender.

46. **Mr. Milano** (Italy) said that, with regard to draft article 6, his delegation generally supported the text as drafted. The obligation set forth therein for States to criminalize conduct associated with crimes against humanity, which was in line with the provisions of the Genocide Convention, the Convention against Torture and the International Convention for the Protection of All Persons from Enforced Disappearance, would be instrumental in limiting legal gaps in national laws that might result in impunity for the most heinous crimes. In line with the jurisprudence of international criminal courts and tribunals, his delegation endorsed the provisions related to the responsibility of commanders and superiors, and the fact that superior orders did not constitute a ground for excluding criminal responsibility. However, it noted that superior orders

might be a ground for mitigation of punishment. With respect to paragraph 5, his delegation supported the non-applicability of functional immunities to State officials who committed crimes against humanity in the exercise of official functions, which was in line with the legal solution provided by the Commission in the context of its work on the immunity *ratione materiae* of State officials. It was, however, important to support the application of personal immunities of incumbent Heads of State, Heads of Government and Ministers for Foreign Affairs, without prejudice to the obligations arising from mechanisms for cooperation with international courts, such those set out in the Rome Statute. Given the gravity of crimes against humanity, his delegation also supported the non-applicability of statutes of limitations to such crimes, in accordance with paragraph 6. With respect to paragraph 7, penalties for crimes against humanity must be determined on the basis of an evaluation of the specific crime committed, the severity of the conduct and the context. While it would be unrealistic to expect a future international convention to determine such penalties with the same degree of precision as was used in the statutes of international courts and tribunals, Italy maintained its principled opposition to the death penalty, irrespective of the gravity of the criminal conduct to be punished. His delegation supported paragraph 8 as drafted, noting that it would be for States to determine the liability of legal persons in accordance with their laws and that such liability might be criminal, civil or administrative.

47. His delegation broadly supported draft article 7 (Establishment of national jurisdiction) as drafted, noting that the Commission had sought to minimize the risk of jurisdictional loopholes while also ensuring that there was a connection between the State exercising jurisdiction and either the alleged offender or the offence itself. Italy also supported draft article 10 and the inclusion of the principle of *aut dedere aut judicare* in a future convention, in line with many multilateral treaties addressing crimes. It noted that the obligation to extradite might also apply in respect of international criminal courts and tribunals exercising their jurisdiction to prosecute crimes against humanity in cases where a country's national authorities were not in a position to investigate or prosecute.

48. **Mr. Abdelaziz** (Egypt) said that his delegation welcomed the apparent convergence of opinion that primacy of jurisdiction should always be given to the country where a crime was committed and that a State establishing jurisdiction solely on the basis of an alleged offender's presence in its territory should extradite to the country that had stronger grounds for jurisdiction. His delegation had reservations about paragraph 2 of draft article 7, the provisions of which might be misused. For instance, taking the hypothetical case of two countries, X and Y – both of which were parties to an international treaty based on the present draft articles and both of which had criminalized crimes against humanity under their national law – and assuming that crimes against humanity had been committed in country X, where the evidence and witnesses were also to be found, country Y, whose only link to the crime was that the alleged offender was present in its territory, might, on the grounds that country X applied the death penalty, as was its right under international law, decide to prosecute the alleged offender instead of surrendering the individual to country X. In his delegation's view, such a scenario would be problematic.

49. **Ms. Bhat** (India) said that her delegation wished to express its own concerns with regard to draft article 7. According to its understanding, multiple States might have – and wish to exercise – jurisdiction in a given situation, and the draft articles did not contain an explanation of how such a potential conflict of jurisdiction could be resolved. India proposed adding the word "or" to subparagraphs (a) and (b) of paragraph 1 of draft article 7. Similarly, paragraph 2, in addition to overriding existing bilateral treaties between States on extradition and mutual legal assistance, would further complicate the issue of jurisdictional conflict. Primacy should be accorded to the State which could exercise jurisdiction on the basis of at least one of the subparagraphs of paragraph 1. It went without saying that such a State would be more interested than others in prosecuting the offender in question.

50. **Mr. Kowalski** (Portugal), responding to the hypothetical case described by the representative of Egypt, said that Portugal, both under its own Constitution, and also under international law, including the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), would be unable to extradite an alleged offender to a country that would apply the death penalty for crimes against humanity. The alternative would be to ask the requesting State for adequate assurances that it would not apply the death penalty. However, that solution raised the practical issue of which national authority would be competent to provide such assurances.

51. **Mr. Khng** (Singapore), responding to the comments on the use of capital punishment made by the representative of the European Union and other delegations in connection with draft article 6, said that those delegations were seeking to unilaterally impose their own agenda on the entire membership of the United Nations. Singapore had consistently opposed

such attempts, both in the Sixth Committee and in other forums. The European Union and other like-minded delegations knew that there was no international consensus against the death penalty and its use was not prohibited under international law. The lack of a consensus against the death penalty was reflected in the significant support 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 that paragraph, the General Assembly had repeatedly 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.

52. **Mr. Kanu** (Sierra Leone) said that his delegation generally supported the provisions of draft article 6 (Criminalization under national law), especially the obligation contained in paragraph 1 thereof. Nonetheless, it did have concerns about some aspects of the draft article, as mentioned in its written comments. With regard to paragraph 2, it noted as a general matter that the Commission appeared to have been selective in listing the various forms of criminal participation established in State practice at the national and international levels. It had included some inchoate crimes, such as attempts, 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 an important form of criminal participation in relation to the crime of genocide and, given the systemic nature of such core crimes, also in relation to crimes against humanity. It was reflected in State practice and in the practice of international criminal courts and tribunals that had prosecuted crimes against humanity. Sierra Leone therefore proposed that "inciting", as well as possibly the element of "conspiracy", be added to the list of forms of participation mentioned in paragraph 2 (c). His delegation noted the nexus between paragraph 5 and the issue of procedural immunities. In that regard, the work of the Commission on immunity and the Committee's continuing consideration of universal jurisdiction, which had been subjected to misuse and abuse, should be followed closely to ensure that those important issues were comprehensively examined.

53. His delegation welcomed the provisions of draft article 7 (Establishment of national jurisdiction), noting the importance of paragraph 3, according to which the draft articles did not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law. That provision safeguarded the application of the domestic law of the State concerned, consistent with the sovereign exercise of adjudicative, prescriptive and enforcement jurisdiction on national territory.

54. With regard to draft article 8, his delegation agreed that, when crimes against humanity were committed, it was the duty of a State and its competent authorities to proceed to an investigation that was not only prompt and impartial but also thorough. The reference to a "prompt, thorough and impartial investigation" would help address potential loopholes whereby a State might carry out a sham investigation, thereby undermining the essence of its obligations under that provision.

55. His delegation, noting that the three interrelated obligations set out in draft article 9 (Preliminary measures when an alleged offender is present) were based on article 6 of the Convention against Torture, deemed their inclusion in the present draft articles to be appropriate. Furthermore, it considered that the authoritative interpretation of the equivalent provision of the Convention against Torture, rendered by the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, also applied to draft article 9.

56. While his delegation understood the Commission's decision to refer to the duty set out in draft article 10 using its more common description (*aut dedere aut judicare*), the actual obligation on States was for them to submit the relevant case to their competent authorities for the conduct of credible investigations, and then, if sufficient evidence were uncovered, to submit the case for prosecution thereafter, if deemed appropriate. The submission of a case to a State's competent authorities did not mean that their discretion to decide whether or not to proceed with formal charges or a trial was taken away. Such decisions would necessarily have to be made on the basis of the available evidence and the assessment of all relevant factors, including the interests of justice and the likelihood of securing a conviction, as in the normal course of any criminal proceedings. To address concerns of effectiveness, it would be worth considering a monitoring system.

57. The Commission had not included an explicit clause precluding the granting of amnesties or pardons for crimes against humanity but had addressed the issue of amnesty only in the commentary to draft article 10, in which it had explained that the ability of a State to implement an amnesty might not be compatible with the 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. Based on its national experience, Sierra Leone appreciated the complexity of the issues involved and understood that there were no easy answers or "one-size-fits-all" solutions. However, an express clause addressing amnesties, in particular blanket amnesties, might be of great value, given that the purpose of the draft articles included the goal of putting an end to impunity for the perpetrators of crimes against humanity and thus contributing to the prevention of such crimes.

58. **Mr. Boerma** (Kingdom of the Netherlands) said that draft article 6 was an important provision obligating States to criminalize crimes against humanity in domestic law. His delegation recognized a general development in both national and international criminal law aimed at strengthening the legal position of victims of serious crimes. It supported the non-applicability of statutory limitations in criminal proceedings, as reflected in its national law. With regard to draft article 10, his delegation welcomed the provision on *aut dedere aut judicare*, which contributed to the fight against impunity, and also welcomed the role of international courts and tribunals in combating impunity, as acknowledged in the draft article.

59. **Mr. Nyanid** (Cameroon) said that, while his delegation welcomed the emphasis on the establishment of national jurisdiction, it noted with concern a number of errors and inaccuracies in the draft articles under consideration. In particular, the role of judges had been addressed in over-general terms, which could lead to misunderstandings and slapdash procedures in contexts where legal proceedings were not sufficiently structured or roles might get confused. The role of the judge should be sufficiently highlighted, since judges had a unique role in assessing criminal responsibility, especially in the case of such serious crimes, by establishing whether all elements constituting the offence were present. In order to ensure that the characterization of the offence was done by qualified and competent individuals, it was not enough to mention the "necessary measures" that each State should take.

60. With regard to draft article 6 (Criminalization under national law), his delegation noted with concern that the imprecise wording of paragraph 2 (c) opened the door to injustice. It would be important to establish the means of demonstrating that an order had been given to commit 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. The same applied to the attempted commission of such a crime. Given the grave nature of crimes against humanity, they deserved particular attention and should be treated with the appropriate degree of seriousness, by establishing a substantial and irrefutable body of evidence that would demonstrate participation in the thinking, planning and logistics involved in the commission of those crimes. The wording of paragraph 3 was also a matter for concern as it seemed to suggest that the commission of crimes against humanity was the preserve of the military or that such crimes were committed only during armed conflicts. Such an assumption was clearly incorrect, bearing in mind the growing complexity and changing nature of those crimes, which could be committed by unarmed individuals, crooked businessmen, those who with *mens rea* (guilty intent) pillaged natural resources or those who destroyed cultural environments and sacred places of fundamental importance to humanity.

61. In order to ensure justice and correctness, and to avoid any undesirable consequences, the draft articles should also take account of the fact that, in order for an individual suspected of committing crimes against humanity or being complicit in their commission to be held criminally responsible, there must be first imputation and then imputability. In the first case, the judge needed to assure him or herself that the crime could be attributed to an individual or group of individuals based on the material facts. In the second case, the judge needed to evaluate the free will and the mental capacities of the presumed perpetrator of or accomplice to the crime. Based on that intellectual, scientific and subjective assessment, the person to whom the crime was imputed would, in some cases, not be held criminally responsible owing to a lack of imputability. In certain circumstances, the person, when planning and committing the crime, might have been affected by mental health issues that would constitute grounds for full or partial exemption from criminal responsibility. It would therefore be advisable if a formulation could be found to take account of the requirement for both imputation and imputability, so as to demonstrate that the individual who gave the order or took the initiative to commit, or committed, the crime acted according to his or her own free will.

62. More precise wording should also be used in paragraphs 4 and 5. As drafted, they contained inaccurate catch-all terms that gave rise to legal uncertainty. With regard to paragraph 4, it was unclear how a State would take the necessary measures to ensure that the fact that an offence was committed pursuant to an order of a Government was not a ground for excluding the criminal responsibility of the person who carried out the crime. His delegation wondered to what, or to whom, the concept of "a Government" referred. Similarly, with regard to paragraph 5, it was unclear how

a person holding an official position could objectively commit crimes on such a scale. For his delegation, it was the instigation or planning of crimes against humanity that was important in that regard, and such acts should not be identified solely on the basis of an individual's hierarchical and strategic position, but on the basis of a body of material evidence. Clearly, at times of political uncertainty, any kind of measure could be used to settle scores or neutralize political enemies. The Latin maxim *contra factum non datur argumentum* (there is no argument against the facts) should therefore be strictly observed. His delegation proposed joining paragraphs 4 and 5 to read as follows:

> Each State shall also take relevant, necessary and sufficient measures to ensure that any persons, whatever their capacity or position, who have inextricably and irrevocably planned the crimes against humanity referred to in articles 1 and 2 or who have provided the related logistics and ordered, through verifiable channels, the commission of such crimes by persons over whom they have authority or influence, shall be held responsible in the same way as the person or persons who carry out their orders.

Paragraphs 1 and 2 could also be joined together in a single paragraph that would read: "Each State shall take relevant, necessary and sufficient measures to ensure that crimes against humanity constitute offences under its criminal law, with regard to the following acts:". His delegation also suggested replacing the words "tout État" with "chaque État" in the French version of paragraphs 3, 4, 5, 6 and 7.

63. With regard to subparagraph (a) of paragraph 2, his delegation suggested that reference should be made to draft articles 1 and 2, to avoid duplication. The drafting of subparagraph (b) should also be improved to clarify its scope and avoid politicizing certain aspects of the offence or creating offences that might cover everyone. It could be revised to read: "(b) attempting to commit such a crime by physically making dangerous preparations to that end." His delegation suggested deleting paragraphs 4 and 6, which basically said the same thing and might be better reflected in draft article 2, paragraph 3, and draft article 4. As for paragraph 8, his delegation noted underlying confusion regarding the liability of legal persons, given that criminal responsibility was individual and could therefore not be applied to a legal person, which was an abstract entity. Damages should also be related by an irrefutable link of causality to the prejudice suffered by victims, given that prejudice was a consequence of the damages.

64. Turning to draft article 7 (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, his delegation suggested that, in the French version of the draft article, the phrase "chaque État" would be more appropriate than "tout État" in paragraphs 1, 2 and 3, since it would be more in line with the idea of the jurisdiction of the forum State that underpinned the draft article.

65. With regard to draft article 8, his delegation considered that national investigations should be rigorous and conducted in a measured way; it therefore did not agree with the idea of a "prompt" investigation. 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. It would therefore be useful to clarify the various forms they could take and the principles and standards applicable to them; identify the points that existed in common across legal systems; and establish guidelines to provide practical assistance by defining a general framework for investigations into crimes against humanity. For example, guidance could be provided on the measures to be taken at crime scenes, notification of the alleged offender, receipt of external allegations, independence and impartiality, rigour, due diligence, transparency and guarantees of fair legal procedure. Draft article 8 could thus be revised to read as follows:

> Each State shall ensure that its competent authorities, after notifying the alleged offender, as appropriate, proceed to a measured, thorough and impartial investigation that guarantees a fair legal procedure, whenever there is reasonable ground to believe that acts constituting crimes against humanity have been committed or are being planned in any territory under its jurisdiction. It may, if required, request the technical, logistical or financial support of one or more States in order to expedite the process.

66. Draft article 9, with the exception of paragraph 3 thereof, which did not respect the appropriate procedural guarantees, was acceptable to his delegation, provided that, under paragraph 1, custody or pretrial detention measures were taken only in the event of an express request by a competent court or the existence of legal proceedings.

67. With regard to draft article 10, procedural guarantees should be fully integrated and observed, 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. His delegation therefore strongly suggested removing any ambiguity in the draft article by including the absolute obligation to extradite when the State of origin of the official benefiting from immunity had not waived it. 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. His delegation suggested that draft article 10 be redrafted as follows:

> The State in the territory under whose jurisdiction the alleged offender is present, shall, before exercising its jurisdiction, take the following measures:
>
> (a) Request, without delay, and obtain a waiver of the immunity of the State official covered by the same;
>
> (b) The State of the official shall, with the utmost responsibility, determine its response with regard to its official's immunity;
>
> (c) The notification sent by the forum State to the authorities of the State of the official of its intention to bring proceedings against the latter State's national shall entail the suspension of the exercise of criminal proceedings for a reasonable time period in order to allow the State of origin to determine the scope of protection of its official;
>
> (d) If immunity is not waived, the forum State shall, on the basis of an express request made within a legal framework, extradite the State official suspected of committing the offence;
>
> (e) When immunity is waived by the State of origin, if the forum State does not extradite the person to another State or surrender him or her to a competent international criminal court or tribunal, it shall submit the case to its competent judicial authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

68. **Ms. Hutchison** (Australia) said that her delegation supported the approach taken in draft article 6 to set forth a framework of minimum common standards among States for establishing criminal responsibility in respect of crimes against humanity and providing for the punishment of such crimes under national law. In that context, the obligation in paragraph 1 – namely that States should ensure that crimes against humanity, as defined in draft article 2, constituted offences under national law – was particularly important. Without that provision, there would be a risk of States relying on existing provisions in their domestic criminal law, which would result in continued divergences across national systems that might provide opportunities for impunity. Australia also strongly supported the inclusion of paragraph 5 to preclude the use of official capacity as a substantive defence against criminal responsibility. That matter was separate from the issue of immunities of State officials and did not affect the application of such immunities, which were regulated through customary international law and treaty law on immunities for particular classes of officials. Australia supported the Commission's decision not to address that issue in the scope of the draft articles. Her delegation also welcomed the fact that the Commission had made provision in paragraph 8 for the liability of legal persons for crimes against humanity in domestic legal systems where such personality was recognized. Notwithstanding the differences in national approaches to the liability of legal persons for crimes, paragraph 8 was, in her delegation's view, sufficiently flexible to accommodate diverse legal systems.

69. With regard to draft article 7, Australia supported the Commission's approach in requiring States to establish jurisdiction over crimes against humanity on a number of grounds, without being unduly prescriptive as to how that jurisdiction was exercised. It thereby provided the flexibility needed to accommodate different circumstances and to support the obligations set out in draft article 10 (*Aut dedere aut judicare*). Her delegation supported paragraph 2 of draft article 7, which required States to establish jurisdiction over crimes against humanity allegedly perpetrated by a person present in their territory. By requiring the

territorial presence of the alleged offender, it constituted a form of territorial jurisdiction and, taken as a whole with the rest of draft article 7, it established sufficient jurisdictional bases for States to meet the objective of ensuring accountability for crimes against humanity.

70. With regard to draft article 8, her delegation strongly supported the requirement that investigations should be prompt, thorough and impartial. It also agreed that investigations should be conducted whenever a State had reason to believe that crimes against humanity were being, or had been, committed in its territory, and not only when formal allegations had been made.

71. Turning to draft article 9 (Preliminary measures when an alleged offender is present), she said that paragraph 1 provided States with an appropriate measure of discretion to assess whether the circumstances warranted taking a person into custody. Given the general nature of that obligation, the paragraph could be strengthened by providing further detail on the considerations that should inform a State's decision to take an alleged offender into custody – including, inter alia, whether the relevant authorities were satisfied to a reasonable standard that the person had committed crimes against humanity, whether international law with respect to immunity might be applicable, and whether the State had received a request from another State to take the alleged offender into custody so as to ensure that person's presence at extradition hearings – so as to ensure that such decisions were in accordance with procedural safeguards and other rules of international law. Her delegation also suggested the inclusion in paragraph 1 of a reference to the fair treatment obligations owed to alleged offenders in accordance with draft article 11. Lastly, draft article 10 (*Aut dedere aut judicare*) appropriately preserved prosecutorial discretion to decide whether sufficient evidence existed to support a prosecution.

72. **Ms. Abu-ali** (Saudi Arabia) said that paragraph 3 of draft article 6 (Criminalization under national law) enshrined a new legal principle that conflicted with the established rules of customary international law concerning the immunities of Heads of State and State officials. Similarly, paragraph 2 of draft article 7 (Establishment of national jurisdiction) and draft articles 9 (Preliminary measures when an alleged offender is present) and 10 (*Aut dedere aut judicare*), enshrined the principle of universal criminal 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, those provisions should apply only where certain criteria were met. There should be decisive evidence that the individual had committed one of the crimes listed in the draft articles. The forum State should first endeavour to extradite the person to his or her country of nationality for prosecution, transmitting the decisive evidence at its disposal. It could exercise jurisdiction if the individual had not already been prosecuted in his or her State of origin, if that State had declined to receive and prosecute the individual, if the act referred to in the draft articles had not been criminalized in the domestic law of the State of origin, and if the State of origin was not a party to the future convention.

73. Her delegation agreed with the representative of Singapore that there was no international consensus concerning capital punishment, and no international law prohibiting it. Every State had the sovereign right to determine its own criminal justice system and national law.

74. **Ms. Lungu** (Romania) said that draft article 6 was of paramount significance, as it imposed on States concrete obligations to enact the appropriate criminal laws to allow for the establishment and exercise of jurisdiction over alleged offenders, and the provision of appropriate penalties, taking into consideration the grave nature of crimes against humanity. The definition of crimes against humanity in the Romanian Criminal Code followed closely that provided in article 7 of the Rome Statute of the International Criminal Court. Such crimes were punishable under the Code by penalties appropriate to their grave nature, namely, either life imprisonment or imprisonment for 15 to 25 years and a ban on exercising certain rights. Her delegation strongly supported the non-application of any statute of limitations for crimes against humanity. Romania had already taken such a policy decision, having provided in article 153, paragraph 2 (a), of its Criminal Code that genocide, crimes against humanity and war crimes were not subject to any statute of limitations. Romania was also a party to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

75. The establishment of a jurisdictional basis was a key element in the effectiveness of a future instrument. In that regard, paragraph 1 of draft article 7 established three forms of national jurisdiction, based on the principles of territoriality, active personality and passive personality. In her delegation's view, the third form of jurisdiction was optional, given the wording used. All three forms were recognized in Romanian law. In view of the gravity of the offences in question and the importance of using all tools to tackle them efficiently, Romania also supported paragraph 3, which left open the possibility of a State establishing other jurisdictional

grounds upon which to hold an alleged offender accountable, in accordance with its national law.

76. With regard to draft article 8, her delegation welcomed the inclusion of a provision relating to the requirement for a prompt, thorough and impartial investigation whenever there was reasonable ground to believe that crimes against humanity were being, or had been, committed in any territory under a State's jurisdiction. Such an investigation would not only allow the identification of alleged offenders but would also prevent the continuation and recurrence of crimes.

77. The preliminary measures provided for in draft article 9 were quite common in national proceedings, with the aim of avoiding the risk of flight by the alleged offender and the commission of further criminal acts. Given the seriousness of crimes against humanity, the inclusion of such a provision seemed fully justified. Such preliminary measures must, however, also meet the standards of fair treatment and full protection of rights set out in draft article 11.

78. Romania shared the Commission's view that the Hague formula, which had already been incorporated into many international treaties, seemed to be the most appropriate basis for shaping the text of draft article 10 (*Aut dedere aut judicare*). It also welcomed the reference to a "competent international criminal court or tribunal", in view of the significant role played by such judicial institutions in the fight against impunity.

79. Her delegation's full statement would be made available to the Secretariat for posting on the Committee's website.

80. **Ms. Marubayashi** (Japan) said that her delegation wished to reiterate that appropriate consideration should be given to each country's circumstances in order to accommodate the views of a greater number of countries. With regard to draft article 6, the opinion had been expressed during the Commission's discussions that there was no customary international law under which States were obliged to penalize crimes; the text should therefore be drafted in an advisory manner. The wording of article 16, paragraph 2, of the United Nations Convention against Corruption, to which there were 189 parties, might be helpful in that regard. Some Governments might also wish for the text to clarify that it was sufficient to ensure the criminalization of acts under the laws of each country, rather than requiring each crime to be defined as an independent crime in the laws of the country where it was committed. Her delegation therefore suggested that each country consider adopting the necessary legislative or other measures to criminalize acts that constituted crimes against humanity or, rather, "to end impunity" for such crimes; the necessary measures should include steps to ensure that a wide range of alternatives to criminalization were recognized in each State. For example, even if acts that constituted crimes against humanity were not criminalized under domestic criminal law, the "necessary measures" would still have been taken if such acts were punishable by extradition to the International Criminal Court. Furthermore, Japan considered that the meaning of "under its criminal law" was not limited to a country's penal code but referred to criminal law with a broad range of penal provisions. With regard to paragraph 2, consideration should be given to the acceptability of the multifaceted wording used. Japan would like to hear from any countries that had specific proposals in that regard. As for paragraph 3, a cause-and-effect relationship must exist between an individual's actions or omissions and the crime committed in order for criminal responsibility to be established. Her delegation suggested adding "as a result of" before "did not take all necessary and reasonable measures" in order to clarify that requirement. Furthermore, "where appropriate" should be added after "to punish the persons responsible" in order to allow for appropriate measures to be taken, in accordance with each country's circumstances. However, the wording of the paragraph might be acceptable if reference were to be made to "ending impunity", instead of to "[ensuring] that commanders and other superiors are criminally responsible". In that context too, the necessary measures should include a wide range of alternatives to criminalization in each country, including, for example, extradition to the International Criminal Court. Paragraph 6, on the non-applicability of statutes of limitations, should be amended in light of the relevant provisions of the International Convention for the Protection of All Persons from Enforced Disappearance and the United Nations Convention against Transnational Organized Crime.

81. With regard to draft articles 7 and 10, a variety of views might exist as to whether extradition or prosecution was obligatory under customary international law. For that reason, a uniform provision requiring the establishment of jurisdiction in the event of non-extradition should be carefully considered, with a view of gaining the acceptance of a greater number of countries.

82. In conclusion, the draft articles would be more palatable to States parties to the Rome Statute if they were to provide for the adoption of a wide range of measures to end impunity, rather than requiring the establishment of national jurisdiction in each country, and if they were to clarify that extradition to the

International Criminal Court constituted one such acceptable measure.

83. **Mr. Jenks** (United States of America) said that, with regard to draft article 6, the obligation to take the necessary measures to ensure that crimes against humanity constituted offences under each State's criminal law, as set out in paragraph 1, would be key to efforts to prevent and punish crimes against humanity more effectively and to combat impunity through national efforts. Although crimes against humanity were not criminalized as such under the law of the United States, many existing United States laws could be used to punish conduct constituting crimes against humanity, such as laws on the domestic crimes of murder, sexual violence and human trafficking. A proposed statute that would make crimes against humanity offences under United States criminal law, for which the current Administration had expressed its support, was under discussion in the United States Congress.

84. The other paragraphs of draft article 6 reflected important principles recognized by the International Military Tribunal at Nuremberg, such as the principle that any person who committed, ordered or otherwise was complicit in crimes against humanity was liable to punishment, and the principle that acting pursuant to an order of a Government or superior was not a ground for relieving the perpetrator from responsibility. Such principles would be critical to the effectiveness of any future convention on the prevention and punishment of crimes against humanity. With regard to paragraph 2 (c), it would be vital for any future convention to address both direct and indirect modes of liability. However, bearing in mind that domestic criminal systems varied and States might take different approaches to the question of complicity – it might, for example, be viewed primarily through the lens of accomplice liability, conspiracy, participation in a joint criminal enterprise, common purpose or another mode of responsibility – any future convention should allow for flexibility in how States implemented their obligations in that regard. With respect to paragraph 3, his delegation recognized the importance of the doctrine of command responsibility, which, since the Second World War, had played an integral role in holding military commanders and other superiors with the requisite culpability accountable for serious international crimes committed by their subordinates. However, given that States might approach the concept, including its precise elements and its applicability to both military commanders and other superiors, in different ways, the United States would be particularly interested in hearing the views of other delegations on that issue. His delegation noted that there was no universally recognized concept of criminal responsibility for legal persons in international criminal law. Paragraph 8 acknowledged as much by expressly providing that national laws and "appropriateness" might dictate whether and how States established the liability of legal persons. Nonetheless, further discussion of the concept might be worthwhile.

85. Turning to draft article 8, he said that his delegation supported the inclusion of a provision requiring States to conduct investigations of crimes against humanity. The duty of States to undertake such investigations was critical if crimes against humanity were to be effectively prevented and punished. However, some aspects of the draft article might warrant further discussion; for example, it was important for States to investigate allegations that their officials had committed crimes against humanity abroad.

86. While draft article 9 (Preliminary measures when an alleged offender is present) was aimed at addressing important practical issues in securing custody of alleged offenders, it warranted further consideration in light of other obligations that a State might have, such as under a status of forces agreement with regard to an alleged offender in its territory.

87. Regarding draft article 10 (*Aut dedere aut judicare*), the United States welcomed the inclusion of a provision in the draft articles that would require States, if they did not extradite or surrender an offender in their territory, to submit the case to competent authorities for the purpose of prosecution. Similar provisions in other instruments had played an important role in helping States to prevent and punish other acts prohibited under international law, such as torture. Such a provision would be critical for any future convention on crimes against humanity to be effective.

88. With regard to draft articles 8, 9 and 10, it would be useful to clarify the situation of alleged offenders who had already been the subject of genuine investigation or other proceedings by their State of nationality. It could be a source of international tension if persons who had already been genuinely investigated or even prosecuted by their State for alleged crimes against humanity were the subject of duplicative or conflicting proceedings in another State.

89. **Mr. Mainero** (Argentina) said that the provisions contained in draft article 6 were of key importance, since they determined the minimum standards that States should adopt in their domestic law for the investigation and prosecution of crimes against humanity. In that regard, his delegation agreed with the standards proposed by the Commission. However, the draft article should also include an explicit provision

establishing an obligation for States to take the necessary measures to ensure that their national laws provided for crimes against humanity to be investigated and prosecuted by civilian courts, in order to prevent military tribunals from assuming jurisdiction over such crimes. The international trend was to prohibit military jurisdiction over ordinary crimes, crimes under international law and human rights violations. Only civilian courts were in a position to guarantee the right to a fair trial and due process. Draft article 6 should also contain a provision prohibiting amnesties for those responsible for the commission of crimes against humanity, as such amnesties were inconsistent with the obligation of States to investigate and prosecute, and with the right of victims to an effective legal remedy.

90. His delegation agreed with the approach taken by the Commission in draft article 7, in not only establishing the traditional principles for the exercise of jurisdiction, namely those of territoriality and personality, but also leaving open the possibility for States to determine other jurisdictional bases for the investigation and prosecution of crimes against humanity. In that regard, his delegation fully supported the inclusion of paragraph 3, given that both conventional and customary international law offered States different rules and types of jurisdiction for the investigation and prosecution of international crimes, including crimes against humanity.

91. **Mr. Arrocha Olabuenaga** (Mexico) said that draft article 6 set out the general obligations of States to take measures at the national level to criminalize, prosecute and punish crimes against humanity. With regard to the criminalization of the acts set out in draft article 2, it should be noted that some States had already criminalized similar acts when committed on an isolated basis, such as torture, murder, slavery, illegal deprivation of liberty, injury, offences against liberty and normal psychosexual development, discrimination, forced disappearance, kidnapping and aggravated kidnapping. Furthermore, the law of some States required compliance with international law obligations without incorporation or transformation into domestic law. It was important to recognize the normative progress made by those States that already recognized such acts in their national law, in one form or another, and were thus able to comply with their obligations to prevent and punish them. His delegation noted that, in paragraph 2 of draft article 6, the Commission had listed the different acts that might be carried out, as generally recognized, in order to establish the various degrees of responsibility and participation in the commission of crimes against humanity. It was important to continue analysing interpretations of incitement in cases where the crime was not consummated. In his delegation's view, paragraphs 3 to 6, on the responsibility of superiors, offences committed pursuant to the orders of a superior or when holding an official position, non-applicability of statutes of limitations, and appropriate punishment, reflected generally recognized developments. His delegation joined other States in expressing its total rejection of the death penalty in all circumstances. Mexico did not extradite any person to another State if it could not be sure that the death penalty would not be applied.

92. With regard to draft article 7, Mexico recognized that the bases for the establishment of jurisdiction by States set out in paragraph 1 were in line with those generally recognized in both the domestic law of States and numerous international treaties, namely territorial and nationality jurisdiction. His delegation considered it relevant to review the question of active personality jurisdiction in the case of stateless persons habitually resident in a State's territory and also the possibility of including that category of person in relation to passive personality jurisdiction.

93. It was necessary for the draft articles to include the obligation to extradite or prosecute, as referred to both in draft article 7, paragraph 2, and draft article 10, bearing in mind the gravity of crimes against humanity, as well as the fact that the principle was already included in the Convention against Torture and other instruments relating to forced disappearance. The Commission's work on the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)" should also be taken into account.

94. Lastly, his delegation considered that the wording of draft article 8 (Investigation) and draft article 9 (Preliminary measures when an alleged offender is present) was sufficiently broad and gave States a wide range of options.

95. **Mr. Al-thani** (Qatar) said that it was essential to ensure that the provisions of international instruments were incorporated into domestic law. With regard to draft article 6 (Criminalization under national law), however, his delegation wished to reaffirm the immunity of State officials from foreign criminal jurisdiction and to emphasize the body of customary international law concerning the immunities of specific categories of officials. Draft articles 6–10 appeared to conflict with the established principles and norms deriving from instruments and State practice pertaining to the immunity of State officials when fulfilling their duties. Those norms were connected with the principle of national sovereignty. Greater clarity was therefore needed, particularly in draft article 6. In order to avoid

inconsistencies, it was important to ensure that the draft articles were consistent with the principle of the immunity of State officials from foreign criminal jurisdiction.

96. **Mr. Perilleux** (Belgium) said that responsibility for the prosecution of crimes against humanity lay primarily with States. In order to assume that responsibility, they should adopt an appropriate legal framework, criminalizing such acts in their domestic law and recognizing the jurisdiction of national courts over such crimes. The obligation for States to adopt the necessary measures to ensure that crimes against humanity constituted offences under their criminal law, as established by draft article 6, was therefore essential and, in his delegation's view, reflected a customary obligation. In that regard, like many States, Belgium had already incorporated crimes against humanity into its domestic law. His delegation also welcomed the clarifications provided in draft article 6 regarding, in particular, the responsibility of commanders and other superiors, the irrelevance of an official position as a ground for excluding criminal responsibility, without prejudice to any applicable international immunities, and the non-applicability of statutes of limitations to crimes against humanity. It considered that the phrase "appropriate penalties" in paragraph 7 thereof should be understood to exclude the death penalty. Since crimes against humanity were among the most serious international crimes, affecting the entire international community, they were punishable under the Belgian Penal Code by life imprisonment.

97. In order to ensure effective prosecution of alleged offenders, national courts should be given the broadest possible jurisdiction over crimes against humanity. His delegation therefore underscored the importance of all the jurisdictional bases envisaged in draft article 7, namely territorial jurisdiction, active personality jurisdiction, passive personality jurisdiction and the jurisdiction resulting from the presence of the alleged offender in the State's territory. Belgium had established all those jurisdictional bases under its national law.

98. With regard to draft article 8, the obligation for all States to proceed to an investigation whenever there was reasonable ground to believe that acts constituting crimes against humanity had been or were being committed was essential for combating impunity for such crimes.

99. Draft article 9 (Preliminary measures when an alleged offender is present) should be interpreted in the same way as all similar provisions contained in international criminal law conventions, in particular the 1984 Convention against Torture. It also went without saying that the provision could not impede the application of the rules of international law with regard to immunity. His delegation considered that the draft articles on prevention and punishment of crimes against humanity were without prejudice to the Commission's ongoing work on immunity of State officials from foreign criminal jurisdiction.

100. The rule set out in draft article 10, read together with draft article 7, paragraph 2, was a fundamental provision for combating impunity and preventing a person suspected of having committed a crime against humanity from obtaining safe haven in a State that, other than the presence of the alleged offender in its territory, had no other connection with the crime. The text of draft article 10 (*Aut dedere aut judicare*) reproduced a formula used in other multilateral treaties of international criminal law, including the Convention against Torture. It should be interpreted in light of the jurisprudence of the International Court of Justice, in particular its judgment of 20 July 2012 in *Questions Concerning the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. As paragraph 2 of draft article 7 correctly provided, a State should prosecute the alleged perpetrator of a crime against humanity "in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles". Prosecution, in that case, was therefore not dependent on a prior extradition request; the State had the obligation to prosecute proprio motu, as also provided in draft article 9 of the draft Code of Crimes against the Peace and Security of Mankind. The rule was thus *judicare* or, failing that, *dedere*. The maxim *aut dedere aut judicare* should therefore be replaced with *judicare aut dedere* or *judicare vel dedere*, as those phrases more precisely reflected the obligation to prosecute crimes against humanity, as was also the case for war crimes, the crime of torture and enforced disappearance.

101. **Mr. Hernandez Chavez** (Chile) said it was of great importance that draft article 6 established the obligation to criminalize crimes against humanity in national law, offering an appropriate summary of the measures that States should take to ensure that the various forms of participation in the commission of such crimes were duly punished. His delegation was generally satisfied with the wording of the draft article, which was vital for ensuring the effectiveness of a future convention in combating impunity, and considered that Chilean Act No. 20.357 of 2009 contained provisions that satisfied the obligations set out therein. The Commission had, on second reading, simplified the wording of paragraph 3, on the accountability of superiors. Although at first sight the elimination of the

reference to effective control might seem problematic, it should not give rise to problems since the paragraph clearly provided that, in order to avoid responsibility, superiors should take "all necessary and reasonable measures in their power". However, if negotiations on the text were to be opened, it might be advisable to revise paragraph 3 to make it clear that, in the event that subordinates had committed crimes, their superiors were also responsible if they had not taken all necessary and reasonable measures in their power to punish the perpetrators. Moreover, if the draft articles were to become a convention, it should be expressly stated in draft article 6, paragraph 6, which referred to the obligation to establish appropriate penalties for crimes against humanity, that, for the purposes of complying with that obligation, States should not impose the death penalty.

102. Draft article 9 correctly listed the preliminary measures that a State should take once it became aware that a person alleged to have committed a crime against humanity was present in its territory. With regard to paragraph 3, regarding the obligation for a State to report the findings of its preliminary inquiry to other States, it would be worth considering, in any future negotiations, whether the inclusion of the phrase "as appropriate" was suitable or whether it gave too much discretion to the State that had made a preliminary inquiry. As an alternative, consideration could be given to setting out the general rule as a requirement and adding one or more exceptions such as those mentioned in paragraph (3) of the commentary to draft article 9, which referred to the need to protect the identities of victims or witnesses and the need to protect an ongoing investigation.

103. His delegation considered draft article 10 (*Aut dedere aut judicare*) as essential for preventing impunity for the commission of crimes against humanity. The wording of the draft article was fairly satisfactory but should be adjusted slightly to clarify that the obligation would not be deemed to have been met if a person was extradited for a wrongful act other than a crime against humanity.

104. **Mr. Khng** (Singapore) said that his delegation agreed with the Commission, as clarified in paragraph (31) of the commentary to draft article 6, that paragraph 5 thereof 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. Singapore would interpret draft article 6, paragraph 5, accordingly. That important clarification, which also reflected the views expressed by other delegations, should be incorporated into the text of the draft article itself, for legal certainty.

105. His delegation, and others, had observed that multiple States might have jurisdiction over an offence under draft article 7. It was therefore necessary to clarify how potential conflicts of jurisdiction should be resolved. Singapore considered that, where such conflicts arose, the draft articles should accord primacy to the State that could exercise jurisdiction under draft article 7, paragraph 1. Such a State would have greater interest in prosecuting the offence in question than a custodial State that could only exercise jurisdiction based on paragraph 2. His delegation noted with interest the suggestions of other delegations – such as the proposed inclusion in the draft article of a provision requiring States claiming jurisdiction to coordinate their actions appropriately and the proposed elaboration in the commentary of relevant factors that should be considered in resolving conflicts of jurisdiction – and would be happy to further explore those ideas with other delegations. It was his delegation's understanding that paragraph 2 was intended to provide an additional treaty-based jurisdictional link on the basis of an alleged offender's presence in a State's territory when none of the jurisdictional links provided in paragraph 1 existed, and that jurisdiction under paragraph 2 could therefore be exercised only in respect of nationals of States parties to a future treaty. It noted that the Special Rapporteur had indicated, in his fourth report (A/CN.4/725 and A/CN.4/725/Add.1), that he also understood the paragraph in the same way. For legal certainty, however, his delegation continued to believe that the text of the draft article should reflect that important understanding.

106. With regard to capital punishment, it should be noted that the European Convention on Human Rights, which had been cited by one delegation, did not constitute international law binding on all States and certainly did not reflect any customary international law prohibition on the use of the death penalty.

107. **Ms. Crockett** (Canada) said that her delegation appreciated the flexibility presented by draft articles 6–10. With regard to draft article 6, it wished to highlight the importance of creating an obligation for States to include crimes against humanity as criminal offences in their domestic law, as a means of helping to ensure a harmonized approach in efforts to combat impunity for those crimes and limiting the potential shortcomings that might arise at the national level. It was of the view that language similar to that provided for in the "without prejudice" clause contained in draft article 2, paragraph 3, should be added to draft article 6, so as not to limit the scope for States to include additional acts that might constitute offences under their national law

or to define the crimes in accordance with specific elements of criminal responsibility thereunder. Her delegation also proposed broadening the scope of the responsibility of commanders and superiors, as provided for in draft article 6, paragraph 3, to include the criminal responsibility of persons who might effectively be acting as superiors or commanders. With reference to paragraph 5, her delegation noted that the recognition of criminal responsibility of persons holding an official position was distinct from the application of procedural immunity in foreign jurisdictions. As other delegations had noted, the paragraph raised the question of whether that distinction was sufficiently clear. In her delegation's view, the draft article did not affect the application of conventional or customary international law with respect to immunities. Her delegation noted the inclusion of the liability of legal persons in paragraph 8, and the flexibility granted to States in that regard. It might be appropriate to move that paragraph into a separate draft article, as the concept of liability extended beyond that of criminalization.

108. Canada agreed with the conclusion set out in the commentaries to the effect that draft article 9 (Preliminary measures when an alleged offender is present) should be read in conjunction with draft article 11 (Fair treatment of the alleged offender). However, since clearer reference could be made to the human rights of detainees, her delegation suggested including a reference in draft article 11 to a person's right to liberty and security. Furthermore, notwithstanding the fact that the wording of draft article 9 mirrored that of other conventions, it seemed more appropriate for an inquisitorial system of criminal justice than what was typically in place in common law systems. Consideration should therefore be given to reframing the provision so as to set out more simply the obligations of States when conducting a preliminary inquiry.

109. **Mr. Skachkov** (Russian Federation) said that, with regard to draft article 6, the text should be limited to setting out the general obligation to criminalize crimes against humanity under national law. The excessive level of detail was inappropriate and would only create problems for national law enforcement. The current provisions on criminal liability of legal persons, set out in paragraph 8, might not be acceptable to States where legal persons did not possess legal personality under national criminal law. In the Russian Federation, as in a number of other countries, legal persons were not subject to criminal liability under national law.

110. Some of the wording used in the draft article was imprecise, making it difficult to implement. For example, it might be difficult to determine when a commander "knew, or had reason to know" that the subordinates were about to commit or were committing crimes against humanity and did not take all necessary and reasonable measures to prevent their commission or to punish the persons responsible. The draft article should refer only to actual knowledge of such actions. Furthermore, it was stated in the draft article that the fact that an offence was committed pursuant to an order of a Government or of a superior was not a ground for excluding criminal responsibility of a subordinate. However, the draft article was silent with regard to situations in which the offences were committed under the threat of harm or death. Although the draft article called for crimes against humanity to be punishable by "appropriate penalties", it did not specify what was meant, which could lead to penalties that were not proportionate with the grave nature of the crimes. In view of the current wording of paragraph 5, it should be made clear that the draft articles were without prejudice to norms related to the immunity of State officials from foreign criminal jurisdiction. Failure to do so would encourage certain States to engage in a practice that was not based on international customary law, had not been upheld by the International Court of Justice, notably in its judgment in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, and constituted blatant interference in the internal affairs of other States and a violation of the principle of the sovereign equality of States.

111. Turning to draft article 7 (Establishment of national jurisdiction), his delegation noted that the draft article set out three separate cases in which a State was expected to establish jurisdiction over the offences covered by the draft articles. In addition, it followed from paragraph 3 of the draft article that a State could also establish jurisdiction for any other reason, provided that it was in accordance with its national law. The draft article was sure to sow confusion and cause numerous disputes over jurisdiction and lead to interference in the internal affairs of States. The draft article did not establish an order of priority among the cases or make clear how to proceed when several States claimed jurisdiction over the same crime. That, too, might lead to disputes over jurisdiction and politicization, and might complicate the prosecution of persons responsible for crimes against humanity. The draft article could be simplified, for example, by following the example of the Genocide Convention under which jurisdiction could be exercised only by the State in the territory of which the act was committed. The draft article should also make it clear that establishing jurisdiction over crimes committed outside the territory of the State did not justify violating the sovereignty of other States.

112. Turning to draft article 8 (Investigation), his delegation noted that using the phrase "a prompt, thorough and impartial investigation" in the context of crimes against humanity could give the false impression that investigations of such crimes were held to some different standards of promptness, thoroughness and impartiality. The fact that the effectiveness of an investigation depended not only on willingness but also on national capacity, international cooperation and mutual legal assistance needed to be reflected in the draft article. It was unclear what constituted "reasonable ground" to believe that acts constituting crimes against humanity had been or were being committed, in particular when taking a person alleged to have committed such acts into custody, as provided for in draft article 9. The term might be understood differently by different national courts, which might apply different thresholds for what constituted "reasonable ground". The term was open to potential misuse or misinterpretation. The standard of reasonable ground did not exist under Russian law and its law enforcement authorities were unfamiliar with the concept. The term "sufficient evidence" was used instead.

113. Despite being extremely detailed, draft article 9 (Preliminary measures when an alleged offender is present) did not specify how a person alleged to have committed an offence covered in the draft articles could be kept in custody until criminal, extradition or surrender proceedings were instituted. That omission could result in protracted detentions that did not comply with established due process. Unfortunate examples of such detentions abounded in the practice of international courts and tribunals. The draft article also did not set out the requirement that a State should protect the rights of the alleged offender during the pretrial investigation. The aforementioned shortcomings could be addressed by making the draft article as general as possible. His delegation also questioned whether it was possible for a State to exercise jurisdiction solely based on the presence in its territory of a person alleged to have committed a crime against humanity. A credible link should be established before the State could exercise jurisdiction in such cases.

114. The phrase "competent international criminal court or tribunal" should be deleted in draft article 10 (*Aut dedere aut judicare*). The purpose of the draft articles was to facilitate horizontal cooperation among States. Cooperation with international tribunals was governed by special agreements and, in some instances, by decisions of the Security Council. Such cooperation thus lay outside the scope of the draft articles. It should also be made clear that the draft article was without prejudice to the immunity of State officials from foreign criminal jurisdiction under customary international law.

115. **Mr. Pieris** (Sri Lanka) said that the draft articles did not seem to be overly prescriptive or to preclude States from having more detailed provisions if they so wished. The Commission appeared to have struck a reasonable balance by enabling States to implement the draft articles in a way that took account of their legal systems and practice. Consistent with its settled practice, the Commission had not indicated clearly which elements of the draft articles represented the codification of international law and which represented its progressive development.

116. His delegation welcomed draft article 7, regarding the establishment of a competent national jurisdiction, which would perhaps lighten the burden of a centralized court. With regard to draft article 8, it emphasized the importance of ensuring the competence of the mechanisms put in place by States for the purposes of carrying out investigations, and it noted that when there was reasonable ground to believe that acts constituting crimes against humanity had been or were being committed in a territory under a State's jurisdiction, the State should commence an investigation to determine whether crimes had in fact occurred and, if so, whether governmental forces under its control, forces under the control of another State or members of a non-State organization had committed them. In that regard, his delegation agreed with the representative of the Russian Federation that "reasonable ground" meant "sufficient evidence". It would do violence to jurisprudence if a different threshold were to be established. There was no need to wait for a watertight case, since the burden on a State to conduct an investigation in such circumstances was no different from the responsibility of any democratic State with established criminal procedures to investigate an act giving rise to reasonable suspicion that an offence had been committed.

117. His delegation welcomed the inclusion of draft article 9 (Preliminary measures when an alleged offender is present), which sought to ensure that persons suspected of having committed crimes against humanity did not obtain safe haven in the State in whose territory they were present. It also addressed the risk of flight and the possibility of further criminal acts being committed, and helped to prevent any interference with the investigation.

118. With regard to draft article 10 (*Aut dedere aut judicare*), his delegation presumed that the procedures set out therein were subject to those established by local laws and that it was recognized that none of the procedures in question might bear fruit in a given case.

It was important to give local jurisdiction a chance to work and acknowledge that there was no one-size-fits-all approach for the whole of humankind.

119. **Mr. Abdelaziz** (Egypt) said that his delegation associated itself with the position and reasoning set out by the representative of Singapore with regard to capital punishment.

The meeting rose at 1.10 p.m.