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Chair: Mr. Afonso (Mozambique)

Contents

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

Completion of the Committee's work for the resumed part of the session

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The meeting was called to order at 3.15 p.m.

Agenda item 78: Crimes against humanity
(continued)

Oral report of the co-facilitators

1. **Mr. Leal Matta** (Guatemala), co-facilitator, said that the oral report of the co-facilitators sought to capture the main issues and themes raised during the Committee's deliberations during formal and informal meetings on the draft articles on prevention and punishment of crimes against humanity adopted by the International Law Commission.

2. During the discussions of the draft preamble and draft article 1 (Scope), a number of delegations had recalled their support for a future international convention based on the draft articles. Several delegations had expressed the view that a comprehensive convention on crimes against humanity would fill a gap in the existing international legal framework, given that there were similar conventions relating to genocide and war crimes but that none existed on crimes against humanity. Some delegations had noted the potential for a convention to facilitate inter-State cooperation with respect to crimes against humanity, including the provision of technical assistance, which would distinguish such a convention from existing instruments. Other delegations had requested further substantiation of that claim because they did not believe there was a gap in the legal framework, given the existence of various instruments and tribunals. In addition, several delegations had stated that it would be premature to elaborate a convention.

3. A number of delegations had recalled that, as decided in General Assembly resolution [77/249](#), the purpose of the Committee's discussion during the resumed session was not to prejudge the final decision on the recommendation of the Commission that a convention be elaborated on the basis of the draft articles, but rather to exchange substantive views on the draft articles and to consider further the Commission's recommendation. A number of delegations had emphasized the need to reassure Member States that a future convention would not undermine the principles of State sovereignty and non-intervention, and also the need to provide assurances regarding the relationship between a convention on crimes against humanity and the Rome Statute of the International Criminal Court.

4. During the discussion of the draft preamble, delegations had recalled the role of the preamble in the interpretation of a treaty, as reflected in article 31 of the 1969 Vienna Convention on the Law of Treaties. Several delegations had welcomed the draft preamble and had

expressed the view that it appropriately reflected the context and objectives of the draft articles. Delegations had noted that several of the preambular paragraphs drew inspiration from the preamble to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the preamble to the Rome Statute. The importance of a streamlined and coherent preamble had been noted. Some delegations had called generally for the reformulation of the draft preamble.

5. Delegations had expressed support for the reference to the shocking nature of crimes against humanity in the first preambular paragraph. It had been proposed that the text be strengthened by including recognition of the persistence of the commission of such atrocities. The emphasis in the second preambular paragraph on the relationship between justice and accountability for crimes against humanity and peace and security had been welcomed. It had been suggested that the first preambular paragraph could be made more inclusive by referring to "people" rather than "children, women and men".

6. The reference in the third preambular paragraph to the principles of international law embodied in the Charter of the United Nations contained had been welcomed. A number of delegations had stated that the paragraph could be improved by specifying individual principles of international law. In that regard, the prohibition of the threat or use of force and the principles of sovereign equality and non-intervention in the internal affairs of other States had been raised. It had also been proposed that a reference to the interests of justice be included. Several delegations had highlighted the importance of avoiding political abuse of the concept of crimes against humanity and double standards. It had been noted that, since certain principles such as the immunities of States and State officials were not included in the Charter, the specific reference to the Charter should be removed. It had also been suggested that the best way to avoid politicization would be to maintain the current, general text of the paragraph.

7. A number of delegations had welcomed the recognition in the fourth preambular paragraph of the peremptory nature of the prohibition of crimes against humanity. Some had recalled that the Commission, in its work on peremptory norms of international law (*jus cogens*), had characterized the prohibition of crimes against humanity as such a norm. The reservations that had been expressed by some States regarding that work had also been noted. A number of delegations had recalled that norms characterized as being peremptory in nature must meet the criteria for the identification of such norms, and some delegations had expressed the view that further study was necessary in that respect. It

had been noted that the paragraph did not imply that all provisions of the draft articles reflected peremptory norms of international law.

8. Delegations had generally expressed agreement with the statement in the fifth preambular paragraph that crimes against humanity were among the most serious crimes of concern to the international community as a whole. The emphasis on the prevention of such crimes had been welcomed. Delegations had also expressed support for the emphasis in the sixth preambular paragraph on ending impunity for crimes against humanity. The need for a balance between prevention and punishment had been emphasized.

9. Several delegations had welcomed the reference in the seventh preambular paragraph to the definition of crimes against humanity set forth in article 7 of the Rome Statute and had highlighted the importance of consistency between a possible convention on crimes against humanity and the Statute, to avoid fragmentation of international law. A number of delegations had indicated that they did not support the inclusion of a reference to the Statute, as it was not a universal instrument; such a reference could therefore impair universal acceptance of a future convention. In that respect, it had been proposed that the word “considering” be replaced with the word “noting”. Some delegations had recalled the differences of views concerning the definition of crimes against humanity at the time of the negotiation of the Rome Statute, while others had recalled the work of the Commission and the extensive negotiations that had led to the adoption of the Statute. It had been proposed that the paragraph expressly refer to that history. A number of delegations had emphasized that the draft articles concerned all States, whether or not they were parties to the Statute. It had been suggested that it might also be appropriate to refer to the work of previous tribunals, including the international military tribunals at Nuremberg and Tokyo.

10. Several delegations had welcomed the fact that the eighth preambular paragraph reflected the primary responsibility of the State to prevent and punish crimes against humanity. It had been suggested that the paragraph could express that point more clearly. Several delegations had affirmed that States had an obligation to exercise their criminal jurisdiction over crimes against humanity. A number of delegations had indicated that the duty to exercise criminal jurisdiction should be limited to cases where there was a clear nexus between the forum State and the crime. The importance of the complementarity principle had been highlighted. The need for States to have the necessary legislative,

administrative and judicial tools to fulfil their responsibility had also been emphasized.

11. Delegations had expressed appreciation for the focus in the ninth preambular paragraph on the rights of victims and witnesses. A number of delegations had expressed interest in expanding the text to reflect a survivor-centred approach. Some had also suggested the inclusion of references to the right to redress, including material and moral damages, and the right to truth. It had been suggested that the rights of alleged offenders be understood in the light of the International Covenant on Civil and Political Rights. It had also been proposed that the rights of victims and witnesses and those of alleged offenders would be better addressed in separate paragraphs.

12. Delegations had welcomed the emphasis in the tenth preambular paragraph on horizontal cooperation between States in the implementation of measures at the national level. It had been suggested that the paragraph use stronger phrasing referring to a requirement to cooperate, drawing from the Genocide Convention. A reference to investigations had also been proposed. The role of intergovernmental organizations in the fight against impunity had been noted. Delegations had raised other considerations with respect to the draft preamble, including the need to integrate a gender perspective and the importance of taking into account the perspectives of Indigenous Peoples.

13. Turning to draft article 1, he said that delegations had generally welcomed its dual focus on the prevention and punishment of crimes against humanity. Several delegations had expressed the view that the draft article was acceptable in its current form. A number of delegations had noted that the draft article was similar to article 1 of the Genocide Convention, and it had been proposed that draft article 1 could be reformulated to state explicitly that crimes against humanity were prohibited. Some delegations had noted that matters not falling within the scope of a possible convention would continue to be regulated by customary international law. Others had requested examples of such matters. The importance of ensuring that a future instrument did not affect the law concerning the prohibition of genocide and war crimes, as well as international humanitarian law more generally, had been noted.

14. A number of suggestions had been made with respect to the draft article, including the addition of the phrase “by States”, so that the provision would read “the present draft articles apply to the prevention and punishment by States of crimes against humanity”. That change would enhance the legal precision of the provision and emphasize that the draft articles were

concerned with horizontal cooperation between States. It had also been suggested that the provision be phrased in such a way as either to focus on prevention and punishment specifically or to refer to crimes against humanity more broadly. The question had been raised as to whether the provision should also refer explicitly to the prohibition of crimes against humanity.

15. Delegations had called for a clear statement that the draft articles could not be construed as authorizing an act of aggression or the resort to the use of force inconsistent with the Charter of the United Nations, as well as for a reference to sovereignty and non-intervention similar to that provided in article 3 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). It had also been proposed that references to capacity-building and the transfer of proceedings to an international jurisdiction in accordance with the complementarity principle be included. The inclusion of a reference to the non-retroactivity of the draft articles, in line with general international law, had been suggested. The need to clarify whether and what reservations to a future convention would be permitted had also been highlighted.

16. **Ms. Sverrisdóttir** (Iceland), co-facilitator, said that the deliberations on draft article 2 (Definition of crimes against humanity) had centred on the fact that the draft article was modelled on article 7 of the Rome Statute. A number of delegations had reiterated the importance of avoiding fragmentation of international law and ensuring consistency with the Statute in the interests of legal certainty. Other delegations had reiterated their concerns about that approach, noting that many States were not parties to the Statute and expressing the view that the definition of crimes against humanity in draft article 2 was too broad. It had been stated that using article 7 of the Statute as a starting point for draft article 2 was reasonable and that the draft article did not in any way affect the obligations of States that were not parties to the Statute. Several delegations had stated that article 7 of the Statute, and consequently draft article 2, reflected customary international law and thus any changes to the definition provided in draft article 2 should be approached with caution. Other delegations had expressed the view that article 7 of the Statute did not reflect customary international law because it was not representative of the practice of States. Delegations had reiterated the historical evolution of the definition of crimes against humanity. A suggestion had been made to incorporate certain aspects of the International Criminal Court's publication *Elements of Crimes* into draft article 2 for the sake of

clarity. Delegations had also given examples of national laws and regional treaties regarding crimes against humanity.

17. Delegations had presented their own interpretations of several of the terms contained in draft article 2 and had raised questions for consideration by the Committee. A discussion had taken place regarding the use of the word "or" in the phrase "widespread or systematic attack" in the chapeau of paragraph 1 and whether the attack should instead be defined as "widespread and systematic". It had also been suggested that the reference to "civilian population" ought to be further discussed. Delegations had exchanged views regarding whether crimes against humanity required a nexus with an armed conflict. It had been stated that the phrase "civilian population" implied that crimes against humanity could be committed only in the context of an armed conflict. Regarding the reference to "knowledge" in the chapeau, a number of delegations had expressed the view that intention should be one of the elements of the *mens rea*. The view had been expressed that further discussion was needed regarding the mental element of the crime.

18. Regarding paragraph 1 (c) of the draft article, several delegations had stressed that the term "enslavement" merited further analysis and discussion, and it had been proposed that the slave trade be considered a crime against humanity. A number of delegations had expressed support for the omission from the provision of a definition of the term "gender", which was used in paragraph 1 (h), noting that the definition contained in the Rome Statute had become obsolete. Other delegations had stated that it was preferable to retain the definition of gender provided in the Statute, as it was unambiguous and constituted agreed language. It had been stressed that guidance on how to define the term was still needed. Regarding paragraph 1 (k), several delegations had expressed concern about the potential misuse of the phrase "other inhumane acts of a similar character", highlighting that it should be interpreted narrowly and might conflict with the principle of *nullum crimen sine lege*. Other delegations had expressed support for the provision, noting that it could be useful for the implementation of a future convention at the national level.

19. A number of suggestions had been made to refine the definitions of some of the terms contained in paragraph 2, such as "enslavement", "forced pregnancy", "persecution" and "enforced disappearance of persons", to ensure their consistency with treaties and recent jurisprudence. It had also been suggested that the reference to "policy" in the definition of the term "attack

directed against any civilian population” in paragraph 2 (a) merited further analysis and discussion.

20. A number of delegations had expressed support for the “without prejudice” clause contained in paragraph 3. It had been noted that it afforded States the flexibility to provide in their own laws a definition of crimes against humanity that was broader than that contained in the draft article. In that connection, the commentary to the draft article, which explained the scope of paragraph 3, had been recalled. Other delegations had stated that the “without prejudice” clause could result in confusion and legal uncertainty and had expressed a preference to omit it from the provision. Delegations had also discussed the normative value of the commentaries adopted by the Commission. It had been suggested that other underlying acts, such as “forced marriage”, “unilateral coercive measures against civilians”, “terrorism” and “economic and mineral exploitation and environmental degradation”, be added to the draft article.

21. A number of delegations had expressed general support for draft article 3 (General obligations). Several delegations had highlighted that the obligations of States not to engage in crimes against humanity and to prevent and punish such crimes, as provided for in the draft article, were in line with the jurisprudence of the International Court of Justice. It had been stated that paragraph 1 implied an obligation for States not to engage in acts that constituted crimes against humanity through their own organs, or persons over whom they had control or whose conduct was attributable to them. Differing views had been expressed as to whether the paragraph was necessary.

22. Delegations had welcomed the fact that paragraph 2 covered both the obligation to prevent and the obligation to punish conduct that constituted a crime against humanity. It had been stated that the obligation to prevent crimes against humanity reflected customary international law. It had been questioned whether the qualifying phrase “which are crimes under international law” was needed. Several delegations had emphasized that the obligation of prevention was one of conduct rather than of result and that it required States to employ all means reasonably available to them to prevent crimes against humanity. It had been emphasized that the primary responsibility to prevent such crimes rested with the State in which the acts had been committed. Moreover, it had been stressed that a breach of the obligation occurred only where crimes against humanity had been committed. The view had been expressed that the obligation of prevention should be considered one of due diligence. A number of delegations had expressed support for the application of the general obligations contained in the draft article both in times of armed

conflict and during peacetime. It had been suggested that further discussion was needed with regard to the guidance on how armed conflict affected the constituent elements of the obligations of prevention and punishment. With regard to paragraph 3, several delegations had welcomed the statement that no exceptional circumstances whatsoever might be invoked as a justification for crimes against humanity. In that connection, some delegations had emphasized the application of international humanitarian law as *lex specialis*.

23. A number of delegations had affirmed that draft article 4 (Obligation of prevention) was inspired by similar or analogous provisions in several treaties, such as the Genocide Convention, the International Convention for the Protection of All Persons from Enforced Disappearance and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and that the obligation set out in the draft article had been recognized in international jurisprudence. In that connection, the judgment of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* had been recalled. Several delegations had expressed support for the reference to international law in the chapeau.

24. A number of delegations had raised questions regarding the scope of the obligation of prevention. Regarding draft article 4 (a), some delegations had suggested the inclusion of concrete examples of preventive measures, based on the precedent established in existing conventions with similar provisions, such as the Convention against Torture and the International Convention for the Protection of All Persons from Enforced Disappearance. Other delegations had suggested changes to the text to narrow the material and territorial scope of the obligation. The view had been expressed that the ways and means to prevent international crimes fell within the national jurisdiction of States, and that broad phrasing such as “or other appropriate preventive measures” imposed too great an obligation on States. It had been suggested that the applicability of the obligation set out in draft article 4 (a) in a situation of de facto control merited further analysis. Lastly, several delegations had welcomed the intention to foster international cooperation reflected in draft article 4 (b), and some delegations had expressed support for the reference to international organizations. However, concerns had been raised as to whether the provision was too broad, and suggestions had been made to narrow its scope of application. It had also been suggested that the

relationship between draft article 4 (b) and draft articles 9 and 14 be further discussed.

25. **Ms. Ruhama** (Malaysia), co-facilitator, said that delegations had exchanged views on draft article 6, which concerned the criminalization of crimes against humanity under national law. Various delegations had expressed the view that the draft article was a key provision that established the obligation of States to include crimes against humanity in their domestic law, and that the provision could help to fill existing lacunae. The view had been expressed that the draft article could help States whose existing laws covered isolated acts, such as murder or torture, but required additional steps for the incorporation of international standards therein. Establishing the duty to incorporate such conduct into domestic law could assist the prosecution of crimes against humanity at the local level. It had also been noted that domestic laws could go beyond customary rules in the regulation of crimes against humanity.

26. Some delegations had expressed the view that only paragraph 1 of the draft article should be retained, as the other paragraphs went beyond what was provided in the Genocide Convention with respect to criminalization under national law. The view had also been expressed that the act that constituted a crime and the name of the crime should not be confused. While the acts should be criminalized, the exact names used by States for the crimes in question need not be uniform, so as to allow States flexibility. Other delegations had expressed the view that there was no customary rule that obliged States to criminalize crimes against humanity, and that the draft article should be phrased as a recommendation. One delegation had also noted that divergences in national laws did not preclude States from becoming parties to a future convention.

27. A number of delegations had noted that the laws of States addressed the various forms of participation in the perpetration of crimes against humanity, which were covered in paragraph 2, in different ways. Some delegations had proposed that a future convention refer to direct and indirect forms of liability, noting that States might take different approaches to the prosecution of conspiracy, common purpose or other forms of criminal responsibility, and that States be given flexibility. Several delegations had proposed that other forms of responsibility, including incitement, conspiracy, planning and financing, be taken into account.

28. Several delegations had expressed support for the inclusion of command responsibility for crimes against humanity in paragraph 3 of the draft article. There had been a suggestion to introduce the element of effective control of the superior, and to broaden the scope of the

text to cover persons effectively acting as superiors or commanders. The view had been expressed that the phrase “if they knew, or had reason to know” indicated that the superior should have known of the conduct and should have been able to take action to prevent it. It had been mentioned that it could be difficult to determine whether a commander had had knowledge of the commission of crimes against humanity or had taken all necessary measures to prevent it. The view had also been expressed that the phrase “had reason to know” in the case of a commander was vague for the purposes of a criminal provision. In order to avoid a risk of objective liability, a suggestion had been made to use the formulation set out in the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), which provided that the superiors were responsible if they “had information which should have enabled” the prevention of the crime.

29. With regard to paragraphs 4 and 5, delegations had generally concurred that, while holding an official position was not a ground for excluding criminal responsibility, paragraph 5 should have no effect on the procedural immunity of foreign State officials, namely, Heads of State, Heads of Government and Ministers for Foreign Affairs, which was regulated by treaty and customary international law. Delegations had exchanged views in relation to the possibility of incorporating an express provision referring to the immunities of State officials; some delegations had expressed support for such a provision, while others had expressed the view that such immunities were regulated under another body of law. Other delegations had emphasized that paragraph 5 concerned immunities at the domestic level that could create procedural barriers for the prosecution of State officials. One delegation had noted that such immunities of State officials should be without prejudice to the obligation to cooperate with international tribunals such as the International Criminal Court. Reference had been made to the need to maintain consistency between the Commission’s work on immunity of State officials and the draft articles. It had been mentioned that the draft articles did not contemplate a situation where persons had been coerced to perpetrate crimes against humanity.

30. In relation to paragraph 6, delegations had expressed support for the non-application of the statute of limitations to the prosecution of crimes against humanity. The view had been expressed that the text should include an explicit provision requiring States to take the necessary measures in their laws to ensure that crimes against humanity would be tried by civil tribunals and excluded from the jurisdiction of domestic

military tribunals, as only civil courts could safeguard the right to an impartial judgment and due process. Several delegations had noted a need to include an express prohibition on the granting of amnesties that could prevent the prosecution of crimes against humanity. The view had been expressed that the draft article should not require States to amend their laws to include the non-application of statutes of limitations.

31. Regarding paragraph 7, which concerned the appropriate penalties for crimes against humanity, several delegations had expressed the view that the death penalty should never be applied. Other delegations had noted that there was no universal prohibition of the death penalty under customary international law. Some delegations had mentioned that some States had put procedural safeguards in place in their laws to prevent the transfer of individuals to jurisdictions where they could be subject to the death penalty. It had been suggested that a specific provision could be included indicating that commander status would have no impact on the sentencing or penalties handed down for crimes against humanity. It had also been noted that, when determining the penalties for the perpetration of crimes against humanity, the crime, the severity of the crime and the context of the commission of the crime should be evaluated.

32. With respect to paragraph 8, it had been noted that there was no universally recognized principle of criminal liability of legal persons. Some delegations had stated that criminal liability was not intended to cover legal persons. The view had been expressed that the inclusion of criminal liability of legal entities might make it difficult for some States to become parties to a future convention. Other delegations had stated that the paragraph reflected a key principle and that the text of a possible convention should delineate liability more broadly, taking into consideration administrative, criminal and civil liability.

33. Various delegations had welcomed the fact that draft article 7 (Establishment of national jurisdiction) provided for a wide range of jurisdictional bases to limit gaps in the prosecution of crimes against humanity. Some delegations had welcomed the inclusion of additional bases for jurisdiction in paragraphs 2 and 3, noting that the text of the draft article would not exclude broader jurisdictional bases under national law. The view had also been expressed that only paragraph 1 related to existing law, while paragraphs 2 and 3 related to universal jurisdiction, which was still being discussed by the Committee. Other delegations had indicated that they considered passive personality jurisdiction to be optional, as reflected in paragraph 3.

34. It had been noted that the draft article only required States to establish a jurisdictional basis and did not actually oblige them to exercise jurisdiction. The view had also been expressed that paragraph 3 was unclear and would be worth rephrasing. Reference had also been made to the need for a link between the State exercising jurisdiction and the alleged crimes committed by the accused. Some delegations had indicated that the draft article could apply only to the nationals of States parties to a future convention. The view had been expressed that the draft article should not be misused by States to exercise jurisdiction on the basis of political considerations or to avoid extraditing the accused to States that would have a basis to exercise jurisdiction for the alleged crimes committed. Another proposal had been to limit the text of the draft article to follow the wording of the Genocide Convention. Another delegation had proposed including a reference to a conference of the parties or a body that would serve as a forum for States to discuss issues relating to procedural safeguards and concurrent jurisdiction.

35. Delegations had referred to the need for investigations of crimes against humanity under draft article 8 to be conducted in good faith and had noted that sham, delayed or misleading investigations should not qualify as investigations. Some delegations had welcomed the inclusion of the draft article because the investigation described therein was not a standard criminal investigation but was focused only on the possible commission of crimes against humanity. It had been mentioned that the effectiveness of the investigation depended on the capacity of the State, as well as cooperation with other States. Various delegations had voiced the need to engage in a more detailed discussion of the potential for the jurisdictions of two States to overlap where each was conducting an investigation against the same accused. The view had been expressed that it would be preferable for crimes to be investigated in the State where they had occurred, because that State's authorities might have better opportunities to collect and preserve evidence. Delegations had also called for further discussion of the application of immunities and of the use of certain terms, such as "reasonable ground".

36. Several delegations had noted the importance of draft article 9 (Preliminary measures when an alleged offender is present) in facilitating the prosecution of the alleged offender and combating impunity. It had been noted that, together, draft article 9 and draft article 7 set out the prerequisites for the implementation of the obligation to prosecute or extradite (*aut dedere aut judicare*), which was established in draft article 10. Some delegations welcomed the text of draft article 9

and recalled that it was based on similar provisions contained in other international instruments, in particular the Convention against Torture.

37. Several general proposals had been made with a view to refining the text of draft article 9. The need to introduce safeguards that would prevent abuse of the provision for political purposes had been emphasized. One delegation had noted that the risk of political abuse of prosecution existed irrespective of the existence of a future convention. In the absence of a convention, States could theoretically make broad jurisdictional claims over crimes against humanity with a view to exercising such jurisdiction. The possibility of such a situation justified incorporating uniform standards and procedural safeguards in a future convention.

38. The view had been expressed that the draft article could be reformulated in order to make it more appropriate for criminal justice systems in common law States, which applied the adversarial approach. It had also been proposed that the text be further considered in the light of other obligations that States might have under various international agreements. In particular, some delegations had expressed the view that the provision should not affect the implementation of the rules of international law on immunity. Delegations had reiterated that any legal measures directed against an alleged offender should not be arbitrary and would need to comply with internationally recognized fair trial standards. It had also been noted that any provisional detention measure imposed in accordance with the draft article should be of a fixed and reasonable duration.

39. A proposal had been made to include in paragraph 1 a reference to the obligations relating to the fair treatment of alleged offenders, as provided for in draft article 11. A proposal had also been made to emphasize in the paragraph that any provisional measure should be conditional on a request from a competent jurisdiction or the existence of judicial proceedings against the alleged offender. It had further been suggested that the paragraph be expanded by providing additional detail on the considerations that should inform a State's decision to take an alleged offender into custody. With regard to paragraph 3, it had been questioned whether the phrase "as appropriate" should be used, as it appeared to give excessive discretion to the investigating State. It had further been recalled that some States had previously expressed concerns regarding the obligation to "immediately notify" the States referred to in draft article 7, paragraph 1, that a person had been taken into custody, and that that obligation should be interpreted in the light of the particular circumstances. In view of the proposal raised in connection with draft article 8 to give

jurisdictional priority to the State where a crime had taken place or to the State of nationality of the alleged offender, the wording of the final sentence of paragraph 3 of draft article 9 had been deemed unsatisfactory, since it tied the exercise of jurisdiction to the intention of a State where a suspect was present, even in the absence of any territorial or personal jurisdictional link.

40. Several delegations had welcomed draft article 10 and had recalled the importance of the principle of *aut dedere aut judicare* in combating impunity. The view had been expressed that the draft article established *erga omnes* obligations. Several delegations had recalled that similar provisions were contained in a large number of widely ratified international instruments, as well as in national laws. It had been noted that the "Hague formula", also used in various international instruments, could be used as a source of inspiration for the text of the draft article. Some delegations had noted that the draft article was linked to and should be read together with paragraph 2 of draft article 7. However, the view had also been expressed that draft article 10 rendered paragraph 2 of draft article 7 unnecessary, and the removal of the latter provision had been proposed. A view had been expressed that the obligation to prosecute should be interpreted in a way that would respect prosecutorial discretion. At the same time, some delegations had expressed the view that it was unacceptable for a State to stall proceedings or conduct sham proceedings with the sole aim of shielding the alleged offender. According to another view, draft article 10 should be interpreted in the light of the jurisprudence of the International Court of Justice, in particular its 2012 judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. It had been noted that, with respect to crimes against humanity, the obligation to prosecute should be considered the primary obligation as compared to the obligation to extradite the alleged offender. At the same time, it had been noted that the obligation to extradite could become the primary obligation where there was a stronger jurisdictional link, in particular a territorial link, in a third State.

41. It had been noted that the implementation of the draft article should be consistent with the other relevant international obligations of the State concerned. In particular, it had been noted that the obligation set out in the draft article should have no effect on the procedural immunity of foreign State officials. Accordingly, it had been proposed that the draft article be amended to include an absolute obligation to extradite an alleged offender who was a foreign State official, where his or her immunity had not been waived.

The view had been expressed that the draft article should not be interpreted as allowing for the exercise of universal jurisdiction over crimes against humanity. It had also been proposed that the text of the draft article be adjusted to reflect the fact that the obligation contained therein should not be considered fulfilled in the event of the extradition of the alleged offender for an unlawful act other than a crime against humanity.

42. Some delegations had welcomed the reference to competent international criminal courts and tribunals in the draft article. It had been proposed that the word “tribunals” be understood as encompassing hybrid criminal courts. It had also been noted that the surrender of the alleged offender to an international tribunal was recognized but not required and should be dependent on the recognition of the jurisdiction of such tribunal by the State concerned. Other delegations had proposed removing the reference to international criminal courts and tribunals. It had been noted that the draft articles dealt with horizontal cooperation among States, whereas relations between States and international tribunals went beyond the scope of the principle of *aut dedere aut judicare* and should be addressed separately. It had also been recalled that the Commission, in its commentary to the draft article, discussed the potential impact of an amnesty granted by one State in respect of proceedings before the courts of another State, but that the draft article itself was silent on the issue. Several delegations had observed that amnesty was incompatible with the prevention and prohibition of crimes against humanity. A request had been made, in relation with draft articles 8, 9 and 10, to clarify the situation of alleged offenders who had already been the subject of a genuine investigation or other proceedings by their State of nationality.

43. With regard to draft article 13, delegations had recalled that extradition was an important legal tool in the fight against impunity and had emphasized the importance of the draft article for inter-State cooperation in the punishment of crimes against humanity. A link between the draft article and draft articles 7, 9, 10 and 11 had been noted.

44. Some delegations had welcomed the fact that the text of draft article 13 was derived from widely accepted provisions of the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime. At the same time, the view had been expressed that those instruments should not be used as a basis for the draft articles, since crimes against humanity were of a different nature from corruption and transnational organized crime and required a more specific approach. A proposal had been made to follow the pattern of a similar provision of the

Genocide Convention that gave more discretion to States in specifying extradition arrangements.

45. The need to reflect States’ obligations to respect bilateral and regional agreements had been noted. It had also been recalled that the draft article should not be interpreted as requiring States to extradite their own nationals. Delegations welcomed the fact that the issue of multiple requests for extradition was not dealt with in detail in the draft articles and was left to the discretion of States.

46. Several delegations had proposed the inclusion of new paragraphs in draft article 13. A proposal had been made to introduce additional safeguards, in particular with regard to the possibility of extradition to a State where the alleged offender could be tried by an extraordinary tribunal or could face capital punishment. It had also been proposed that the draft article specify that no extradition could take place to a State where the alleged offender would face an unfair trial. Furthermore, a proposal had been made to introduce a reference to the channels used for extradition requests, in particular the central authorities of a State. It had also been proposed that consideration be given to including a reference to preventive detention, and to a simplified extradition procedure on the basis of the consent of the alleged offender.

47. A proposal had been made to merge paragraphs 1 and 2 of the draft article. In addition, a request had been made to clarify that the phrase “the offences covered by the present draft articles” in paragraph 2 implied only offences under national law, so as to bring the paragraph into line with the equivalent provision of the United Nations Convention against Corruption. A proposal had also been made to rework both paragraphs 2 and 3 so as to reflect the relevant provisions of the Convention against Corruption more closely.

48. Several delegations had welcomed the clarification that all the offences listed in the draft articles were extraditable and the fact that, under paragraph 3, the “political offence” exception to extradition was excluded. At the same time, the view had been expressed that paragraph 3 was excessively prescriptive and hampered the ability of States to examine an extradition request. Furthermore, a call had been made for more careful consideration of the paragraph, as there was no similar provision in either the Convention against Corruption or the Organized Crime Convention.

49. The view had been expressed that paragraph 4 established a significant tool for international cooperation. However, in accordance with another view, the paragraph did not correspond to existing

international law standards or national legislation. With regard to paragraph 5, the view had been expressed that additional clarifications were necessary. In addition, the view had been expressed that paragraph 5 (b) went beyond existing rules. It had also been emphasized that the information indicated in paragraph 5 should be provided upon the deposit of a ratification instrument.

50. A request had been made to revisit paragraph 8 on the grounds that provisions of national law should not be used to alter existing international obligations of States. It had also been noted that the paragraph could be seen as lowering evidentiary standards and prioritizing urgency over the quality of the investigation. It had been recalled that there was no provision comparable to paragraph 9 in either the Convention against Corruption or the Organized Crime Convention. The view had been expressed that more careful consideration of the paragraph was therefore necessary.

51. Several delegations had expressed their support for paragraph 11 and had reiterated that no one should be prosecuted or punished on any of the grounds referred to in the paragraph. At the same time, it had been noted that the list of impermissible grounds was broader than that found in the comparable provisions of the Convention against Corruption and the Organized Crime Convention. Accordingly, a question had been raised as to whether the list should be so broad. It had been further argued that the list should be limited and exclude grounds that were not universally recognized as impermissible. According to one view, the paragraph contradicted paragraph 3. With regard to paragraph 12, a proposal had been made to introduce a reference to the State of nationality of the accused.

52. Several delegations had noted that there was no obligation to extradite the alleged offender under the draft article. At the same time, it had been recalled that, pursuant to paragraphs 12 and 13, the requested State was required to give due consideration to an extradition request and, where appropriate, consult with the requesting State. It had further been observed that, if a State refused to extradite the alleged offender, it had an obligation to submit the case to its own competent authorities, as set out in draft article 10.

53. Several delegations had expressed the view that draft article 14 established a comprehensive framework relating to matters of mutual legal assistance. A number of delegations had expressed support for the Commission's approach of drawing inspiration from the mutual legal assistance framework established in the Convention against Corruption and the Organized Crime Convention. Some delegations had expressed the

view that the draft article should not seek to encompass all mutual legal assistance issues that might arise during the investigation and prosecution of crimes against humanity. In that connection, the view had been expressed that the mutual legal assistance provision in the Genocide Convention was a better model for the draft article. It had been stated that a high level of detail might have an adverse impact on States' ability to accede to a potential convention.

54. A number of delegations had observed that the provision did not affect the obligations of States under existing treaties on mutual legal assistance and had recalled the Commission's commentary in that respect. Other delegations had raised questions regarding the commentary and had noted that aspects thereof required further clarification. Several delegations had indicated that they would provide textual proposals in writing at a later date.

55. A suggestion had been made to add the phrase "without prejudice to domestic law" at the beginning of paragraph 1 of the draft article, before the word "States". On paragraph 2, it had been stated that the approach taken regarding legal persons could be misleading and implied that a future convention based on the draft articles would oblige States parties to adopt national laws on the criminal liability of legal persons. A suggestion had been made to clarify that a legal person could be held responsible under national criminal, civil or administrative law. Regarding paragraph 3 of draft article 14, the importance of the testimony of survivors in the process of building cases against alleged offenders had been emphasized. It had been stressed that the questioning of witnesses by videoconference merited further consideration.

56. On paragraph 7, regarding the relationship between the draft article and other legal instruments, the insertion of a "without prejudice" clause concerning the applicability of national law had been suggested. On paragraph 9, a number of delegations had expressed concern about the reference to agreements or arrangements with international mechanisms that were established by the United Nations or by other international organizations with a mandate to collect evidence with respect to crimes against humanity. Concerns had also been expressed with regard to the Commission's commentary on the paragraph.

57. It had been stated that the annex to the draft articles could be used both as a model law and as a cooperation framework. Some delegations had expressed the view that a more detailed text was warranted, and that more clarity in the relevant commentary was also warranted. In particular, the view

had been expressed that further discussion was needed regarding the designation of a central authority, the establishment of a monitoring mechanism, technical guidance and capacity-building, and related fiscal matters. Lastly, several delegations had emphasized that the material scope of draft article 14 and the annex differed significantly from that of the mutual legal assistance initiative, and that the draft articles and the mutual legal assistance initiative complemented each other.

58. A number of delegations had welcomed the inclusion of draft article 15 (Settlement of disputes), with some highlighting the approach of submitting a dispute to the International Court of Justice or to arbitration if negotiations had failed. It had been noted that the draft article did not include a time limit on negotiations and that there was no enforcement mechanism. Some delegations had expressed the view that such a structure afforded States flexibility.

59. Some delegations had expressed the view that the compulsory jurisdiction of the International Court of Justice would be the strongest way to promote accountability for crimes against humanity and resolve disputes concerning the interpretation of a future convention. Another view had been that the draft article was a standard dispute settlement clause, similar to that contained in the Convention against Corruption or the Organized Crime Convention.

60. Some delegations had stated that they did not support paragraph 3, which allowed States to opt out of the dispute settlement mechanism, as it weakened the provision. It had been mentioned that, while the text was based on the Convention against Corruption, the gravity of crimes against humanity merited a stronger dispute settlement mechanism along the lines of that provided for in the Genocide Convention, under which disputes had to be submitted to the International Court of Justice.

61. It had been noted that the provision had to be considered in conjunction with the discussion on whether reservations to a future convention would be allowed. A suggestion had been made to omit paragraphs 3 and 4 of the draft article. A suggestion had also been made to include in paragraph 2 a reference to any other means of dispute settlement, such as those listed in Article 33 of the Charter of the United Nations. Other delegations had stated that the draft article reflected a careful balance. A view had been expressed that the draft article ensured the right of the parties to choose the means of settling their disputes and could have a positive impact in terms of accessions to and ratifications of a future convention.

62. Various delegations had expressed the view that a monitoring mechanism for a future convention would be desirable, and reference had been made to examples analysed in the memorandum by the Secretariat entitled "Information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission" (A/CN.4/698). A proposal had been made to discuss a possible monitoring mechanism in the light of lessons learned from the Human Rights Committee and the Committee against Torture.

63. **Mr. Leal Matta** (Guatemala), co-facilitator, said that delegations had expressed support for the inclusion of the safeguards provisions contained in draft articles 5, 11 and 12. Several delegations had indicated that the safeguards constituted minimum standards and had suggested that additional safeguards based on well-established international and regional legal mechanisms be included. Other delegations had highlighted the need to balance the desire for detail with the need for a convention that could be universally accepted.

64. With regard to draft article 5, a number of delegations had expressed support for the explicit reference to the principle of non-refoulement. In support of the principle, reference had been made to several international conventions on refugee law, international humanitarian law and international human rights law, concluded at both the global and the regional levels, and also the applicable rules of customary international law. The observation had been made that the draft article reflected an understanding widely shared by the international community and was thus suitable for inclusion in a future convention on crimes against humanity. The view had also been expressed that the draft article reflected a peremptory norm of international law (*jus cogens*).

65. However, several delegations, while recognizing the principle of non-refoulement, had expressed reservations regarding the inclusion of the draft article. It had been stated that the principle was, strictly speaking, not part of international criminal law, but related mainly to international human rights law, and that there was no consensus or clear State practice as to whether it applied equally to crimes against humanity. Several delegations had also maintained that the application of the principle would soften national measures aimed at preventing and punishing crimes against humanity and could pave the way for abuses and politicization of extradition and mutual legal assistance by States. Some delegations had therefore suggested that more discussion was needed as to whether the draft article should be redrafted or deleted.

66. Other concerns had been raised that the use of the term “non-refoulement” in the title of the draft article and of the formulation used in the Convention relating to the Status of Refugees could lead to a misunderstanding that the draft article applied only to refugees or asylum-seekers. The lack of clarity regarding the relationship between the draft article and paragraph 11 of draft article 13 (Extradition) had also been raised.

67. With regard to paragraph 1 of draft article 5, the concern had been expressed that it was unclear how the existence of “substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity” would be determined. It had been suggested that the standard established by human rights treaty bodies and international courts would apply. Delegations had also indicated that the use of the term “surrender” in paragraph 1 should be re-examined, as it referred to the act of delivering a person to an international court or tribunal, which went beyond inter-State cooperation. It had also been suggested that the risk of genocide, war crimes and torture be included as grounds for applying the principle of non-refoulement.

68. With regard to paragraph 2 of the draft article, it had been pointed out that it was necessary to clarify the reference to “a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law”, in particular with regard to the expression “consistent pattern”. It had also been suggested that the expression “according to international standards” be added at the end of the sentence or that alternative wording be drafted. It had also been suggested that the expression “as appropriate” be added.

69. Delegations had expressed support for draft article 11 (Fair treatment of the alleged offender) and had underscored that it reflected important principles recognized in international and regional human rights instruments. It had been indicated that references to fair trial guarantees would be an important element of any future convention on crimes against humanity and that the right to a fair trial was an essential component of the implementation of the obligation to punish crimes against humanity. A number of delegations had welcomed the inclusion of the phrases “at all stages of the proceedings” and “fair trial” and had emphasized that the rights of the persons concerned should be protected in accordance with the highest international standards.

70. Although some delegations had maintained that the draft article struck the right balance, others had proposed strengthening it by providing for greater

guarantees that would be closer to the fair trial guarantees provided for in the Rome Statute. It had also been suggested that the draft article would be clearer and more effective if it specified which rights were to be protected under applicable national or international law. A more specific proposal in that regard had been to include a reference to protection against arbitrary arrest or detention and a reference to the rights to liberty and security of the accused and the detained. One of the concerns raised had been that the draft article did not indicate the consequences of failing to ensure fair treatment of the persons concerned, nor did it set a time frame for ensuring the realization of the rights provided for in paragraph 2. The view had also been expressed that it should be stated clearly that the draft article in no way modified international humanitarian law.

71. The view had been expressed that paragraph 1 of the draft article could be made more precise by using wording from the Rome Statute. It had also been suggested that the paragraph be given the broadest possible interpretation so that the guarantees provided for in the draft article would cover all stages of proceedings. Some delegations had noted that paragraph 2 was consistent with the 1963 Vienna Convention on Consular Relations. However, it had also been suggested that the paragraph be amended to reflect the fact that it was the right of States, rather than of individuals, to exercise their right to visit their nationals.

72. A question had been raised regarding how the process indicated in the paragraph would work in practice. Paragraph 3 stated that the rights referred to in paragraph 2 were to be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person was present. It had been suggested that the paragraph also state that those rights were to be exercised in conformity with the Vienna Convention on Consular Relations. In addition, concerns had been raised about the clarity of paragraph 3, including with regard to the terms of enjoyment of the guarantees provided for in paragraph 2.

73. Turning to draft article 12, he said that several delegations had noted the growing prominence accorded to the rights of victims, witnesses and others in international criminal law. Delegations had also noted that the reports and testimony of victims and witnesses were necessary for the success of prosecutions. It had been emphasized that the protection of victims’ rights was central to the legitimacy of prosecutions. Accordingly, a number of delegations had welcomed the inclusion of the draft article. Several delegations had expressed appreciation for the breadth of the draft article, including the breadth of categories of persons

protected under it. Other delegations had questioned the need for the provision and had expressed a preference for leaving the matter to national law.

74. Several delegations had highlighted the importance of allowing States a degree of flexibility in the protection of the rights of victims, witnesses and others, thus allowing for effective implementation in their national legal systems. Some delegations had expressed the view that the draft article was sufficiently broad to accommodate such concerns. The desire for international minimum standards with respect to such rights had been expressed.

75. Delegations had discussed whether the provision should include a definition of “victim” or whether the question should be left to national law. The definitions of “victim” in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law annexed to General Assembly resolution [60/147](#) and in rule 85 of the Rules of Procedure and Evidence of the International Criminal Court had been put forward as potential models. Calls had been made for the adoption of a definition that included witnesses of atrocities and children born of sexual violence.

76. The right of any person to make a complaint that crimes against humanity were being or had been committed, reflected in paragraph 1 (a), had been welcomed. It had been noted that the Commission had explained in the commentary that the term “any person” included legal persons such as religious groups or non-governmental organizations. A proposal had been made to clarify that the scope of a State’s obligation under the provision was limited to the scope of its jurisdiction.

77. With respect to paragraph 1 (b), a proposal had been made to specify that the term “ill-treatment” related to physical and psychological well-being, dignity and privacy. It had also been suggested that adding the words “as appropriate” would clarify the scope of actions envisaged. Delegations had emphasized the importance of taking the age, gender and health of victims into account, in particular in the context of sexual and gender-based violence and violence against children. It had also been highlighted that it was important for legal aid to be made available to victims.

78. With regard to paragraph 2, a number of delegations had stressed the importance of ensuring that the voices of victims and survivors were heard. The need to address practical issues related to witnesses, including the cooperation of third States where witnesses might be located, had also been raised.

79. A number of delegations had welcomed the fact that paragraph 3 provided for the rights of victims of crimes against humanity to reparation for material and moral damages. Several delegations had noted that the list of forms of reparation in the provision was non-exhaustive, allowing for reparations to be tailored to the circumstances of each individual case. Some delegations had suggested that it be specified in the text that the availability of reparations in civil proceedings could meet the requirements of the paragraph. Some delegations had expressed doubt as to the inclusion of the reference to moral damages, preferring to leave the question of the scope of available damages to national law. Several delegations had also emphasized the need to ensure respect for the immunities of States and their property.

80. It had been requested that a greater distinction be made between the obligations of States and offenders to make reparations, and some delegations had called for clarification of the scope of the obligation in the case of a State exercising universal jurisdiction on the basis of the passive personality principle. The view had been expressed that only the State in whose territory a crime had occurred had jurisdiction to consider compensation. A number of delegations had recalled the importance of reparations to restorative justice and the prevention of future crimes. The importance of victims’ rights to information and to the truth had also been emphasized. Several delegations had welcomed the recognition of reparations on a collective basis. The absence of reparations to date for the transatlantic slave trade and other crimes against humanity related to colonialism had been decried. Lastly, the addition of a fourth paragraph, based on article 4, paragraph 1, of the International Covenant on Civil and Political Rights, had been suggested.

81. Overall, several delegations had expressed interest in continuing the discussion of draft article 12 and making improvements to the text. A number of delegations had expressed support for a victim-centred approach to accountability for crimes against humanity. The importance of including the gender perspective and a reference to Indigenous Peoples had also been recalled, and a suggestion had been made that a specific reference to the rights of children be included.

82. **Ms. Sverrisdóttir** (Iceland), co-facilitator, recalled the recommendation of the Commission, contained in paragraph 42 of its report on the work of its seventy-first session ([A/74/10](#)), that a convention be elaborated by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles. She said that, in accordance with the programme of work adopted at the beginning

of the current resumed session, the Committee had decided to request a briefing by the Secretariat on the Commission's recommendation, in lieu of a debate, which would instead be held at the resumed seventy-eighth session. The Secretariat had provided the requested briefing at the Committee's forty-third meeting (see [A/C.6/77/SR.43](#)), during which it had made general remarks on the Commission's authority to make recommendations and had discussed the recommendation pertaining to the draft articles in particular. It had also sought to place the recommendation within the context of the history of the Commission's recommendations since its establishment. The briefing had been followed by a question-and-answer segment at the forty-third and forty-fourth meetings (see [A/C.6/77/SR.43](#) and [A/C.6/77/SR.44](#)). The text of the briefing had been made available to all delegations, both by email and on the Committee's website, and would be reflected in an official document of the Committee.

83. The written version of the oral report would be circulated to all delegations and made available on the Committee's website.

84. **Mr. Khng** (Singapore) said that his delegation welcomed the oral report of the co-facilitators but noted that it had not reflected his delegation's objection to the proposal that safeguards be added to draft article 13 to protect against extradition to a State where an alleged offender might be tried by an extraordinary tribunal and could face capital punishment. His delegation hoped that the final version of the report and the records of the Committee's deliberations would reflect all views in a balanced manner.

85. **Mr. Nyanid** (Cameroon) said that the report had been acceptable but had not fully reflected all the views expressed during the Committee's deliberations; rather, it had constituted a summary of the debate based on the co-facilitators' understanding of the points made. That did not mean that the other views expressed were any less valid.

86. His delegation was grateful to other delegations for their readiness to engage constructively in the deliberations, which would ultimately strengthen the international legal framework for punishing crimes against humanity. His delegation would not be distracted or intimidated by any particular attitudes or manoeuvres and would work steadfastly alongside other delegations to fulfil the Committee's mandate to identify a mechanism for combating impunity.

87. **Mr. Abdelaziz** (Egypt) said that the Committee's work during the resumed session had set a good precedent for how it should approach other matters

before it. His delegation agreed with the views expressed by the representative of Singapore with regard to capital punishment. While his delegation welcomed the oral report of the co-facilitators, it believed that it was important to give sufficient coverage in the final report to the sticking points identified during the resumed session, such as politicization, capital punishment, the issue of gender and the assessment of human rights situations in Member States in relation to decisions on extradition and non-refoulement.

88. **Mr. Jaiteh** (Gambia) said that the constructive way in which delegations had engaged in the discussion of the draft articles, including by proposing specific changes to the wording of certain provisions, had given his delegation hope that the differences separating them were progressively narrowing and that negotiations on a convention aimed at ending crimes against humanity could begin soon. Such a convention would serve to uphold human dignity and defend fellow human beings who were not in a position to defend themselves.

89. **The Chair** said that he took it that the Committee wished to take note of the oral report of the co-facilitators.

90. *It was so decided.*

Completion of the Committee's work for the resumed part of the session

91. After the customary exchange of courtesies, **the Chair** declared that the Sixth Committee had completed its work for the resumed part of the seventy-seventh session.

The meeting rose at 5.15 p.m.