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Crimes against humanity

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Report of the Secretary-General

Summary

The present report has been prepared pursuant to General Assembly resolution 77/249, in which the Assembly requested the Secretary-General to prepare a report on the basis of written comments and observations received from Member States on the draft articles on prevention and punishment of crimes against humanity and on the recommendation of the International Law Commission contained in chapter IV of the report of the Commission on the work of its seventy-first session (A/74/10).

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I. Introduction

1. At its seventy-first session, in 2019, the International Law Commission adopted, on second reading, the draft articles on prevention and punishment of crimes against humanity, together with commentaries thereto (see A/74/10, chap. IV). The Commission decided to recommend the draft articles to the General Assembly and to recommend the elaboration of a convention by the Assembly or by an international conference of plenipotentiaries on the basis of the draft articles.[1] By its resolution 77/249 of 30 December 2022, the Assembly, inter alia: (a) decided that the Sixth Committee would resume its session from 10 to 14 April 2023 and from 1 to 5 April and 11 April 2024, in order to exchange substantive views, including in an interactive format, on all aspects of the draft articles, and to consider further the recommendation of the Commission; and (b) invited States to submit written comments and observations on the draft articles and on the recommendation of the Commission for consideration during the second resumed session of the Sixth Committee, to be held in 2024.

2. Comments and observations have been received from Afghanistan, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, China, Colombia, Czechia, Germany, Iran (Islamic Republic of), Israel, Japan, Liechtenstein, Malta, Mexico, Morocco, Netherlands (Kingdom of the), New Zealand, Portugal, Saudi Arabia, Singapore, Spain, Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden), Türkiye, the United Kingdom of Great Britain and Northern Ireland and the United States of America. Given the number of contributions received, as well as their length, the comments and observations had to be summarized for the present report.[2]

II. General comments and observations and the recommendation of the International Law Commission

3. Delegations highlighted their commitment to pursuing accountability for serious international crimes and the importance of accountability for ensuring peace and justice.[3] It was stated that efforts to combat crimes against humanity should be consistent with the Charter of the United Nations and the universally recognized

[1] At its seventy-fourth session, the General Assembly, under the item entitled “Report of the International Law Commission on the work of its seventy-first session”, took note of the draft articles and decided to include in the provisional agenda of its seventy-fifth session an item entitled “Crimes against humanity” and to continue to examine the recommendation of the Commission (see Assembly resolution 74/187). The Assembly has had the item entitled “Crimes against humanity” on its agenda annually since its seventy-fifth session (see resolutions 75/136, 76/114 and 77/249). No resolution on the item was adopted at the seventy-eighth session because resolution 77/249 already established the pattern of work for the seventy-eighth and seventy-ninth sessions and provided for the inclusion of the agenda item in the provisional agenda of the seventy-ninth session.

[2] See A/C.6/77/L.23, para. 4. The submissions of Governments, which contain detailed and intricate textual proposals and legal analyses, have been summarized owing to space constraints. The summaries in the present report are without prejudice to States’ full comments and observations, as well as positions States might have taken previously and may take in the future. The full texts of the submissions are available on the Sixth Committee website: https://www.un.org/en/ga/sixth/78/cah.shtml. For the views of the European Union, see A/78/677, also available on the Sixth Committee website.

[3] See, for example, the comments and observations submitted by Australia, Austria, Belgium, Canada, Colombia, Germany, Iran (Islamic Republic of), Israel, Portugal and the United States of America.

principles and rules of international law.[4] Some delegations emphasized that a convention should accurately reflect well-established principles of international law so as to attract wide acceptance and make the most effective contribution.[5] A suggestion was made to include the principles of sovereign equality, the territorial integrity of States and non-intervention in domestic affairs in the draft articles; the importance of upholding the principle of the immunity of State officials from foreign criminal jurisdiction in accordance with international law was mentioned.[6] It was stated that any proposed convention must contain provisions agreed upon by the international community as a whole and should not contain anything that affected the sovereignty of States or relations between them in a manner that might be harmful to international peace and security.[7] The need for a future convention to contain safeguards against its potential politically motivated abuse was mentioned; it was suggested that, in the absence of such safeguards, the convention could give rise to tensions between States and undermine rather than strengthen efforts to promote justice.[8]

4. It was emphasized that the draft articles represented a clear continuation of international standards embraced by the global community to address the most egregious acts committed in various international contexts.[9] Some delegations noted and welcomed the fact that the draft articles were modelled after, or grounded in, existing provisions of international law; for some delegations, this could facilitate adherence to a future convention on the basis of the draft articles.[10] The view was expressed that the widespread adherence of States to certain existing instruments did not justify modelling the draft articles after them, since they dealt with matters that were distinct in nature.[11] Moreover, it was suggested that improvements to the substance of the draft articles that were grounded in established international legal rules and principles would bring Member States closer to consensus.[12]

5. The importance of ensuring that the draft articles were consistent with existing international instruments, such as the Rome Statute of the International Criminal Court and the Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and Other International Crimes, was emphasized.[13] It was stated that a future convention would be complementary to the Rome Statute framework.[14] Some delegations submitted detailed comments regarding the Rome Statute and their national legislation on the International Criminal Court and crimes against

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[4] See, for example, the comments and observations submitted by China. See also the comments and observations submitted by Iran (Islamic Republic of) and the United States.

[5] See, for example, the comments and observations submitted by Israel and Türkiye.

[6] See, for example, the comments and observations submitted by China.

[7] See, for example, the comments and observations submitted by Saudi Arabia.

[8] See, for example, the comments and observations submitted by Türkiye.

[9] See, for example, the comments and observations submitted by Colombia.

[10] See, for example, the comments and observations submitted by Czechia, Netherlands (Kingdom of the), New Zealand and Portugal. New Zealand stated that a convention on the subject would complement and supplement existing international law, in addition to codifying existing customary international law. See also the comments and observations submitted by Morocco.

[11] See, for example, the comments and observations submitted by the Islamic Republic of Iran.

[12] See, for example, the comments and observations submitted by Singapore.

[13] See, for example, the comments and observations submitted by Australia, Brazil, Canada, Colombia, Germany, Netherlands (Kingdom of the), Sweden (on behalf of the Nordic countries) and Spain. See also the comments and observations submitted by New Zealand.

[14] See, for example, the comments and observations submitted by Canada, Colombia and New Zealand. Colombia submitted detailed comments regarding the differences between the draft articles and the Rome Statute. See also the comments and observations submitted by Japan.

humanity.[15] Other delegations set out in detail their views on the relationship between a convention on crimes against humanity and the Rome Statute.[16]

6. A number of delegations expressed support for the elaboration of a convention on prevention and punishment of crimes against humanity; it was stated that the draft articles provided a strong basis for negotiation of a future convention on the topic[17] and that such a convention would fill an existing gap in the international legal framework,[18] and support was expressed for the recommendation of the Commission that a convention be elaborated by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles.[19] Some delegations specifically expressed a preference as to whether the convention should be elaborated by an international conference of plenipotentiaries or by the General Assembly.[20] It was stated that opening treaty negotiations would be welcomed.[21] Support was expressed for the process of elaborating a convention that could secure wide acceptance.[22]

7. For some delegations, a future convention should focus exclusively on crimes against humanity.[23] It was stated that, notwithstanding the existence in customary international law of the obligation to prevent and punish crimes against humanity, a multilateral instrument that defined the content and scope of that obligation was required.[24] According to another view, codification should be based on a thorough review of State practice and little reference had been made to practice and *opinio juris* in the draft articles.[25] A number of delegations emphasized that a convention on the topic would provide an additional tool to fight impunity and strengthen the international criminal justice system.[26] Several delegations mentioned the importance of fighting impunity, highlighting justice for victims, or a victim-centred approach, as well as sexual and gender-based crimes.[27] The view was expressed that any future convention would benefit from a gender mainstreaming approach to the text as a whole.[28] It was stated that a convention was needed for humanitarian and systematic

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[15] See, for example, the comments and observations submitted by Argentina and Japan.

[16] See, for example, the comments and observations submitted by Australia, Brazil, Canada and Japan.

[17] See, for example, the comments and observations submitted by Argentina, Australia, Austria, Belgium, Brazil, Czechia, Germany, Malta, Mexico, New Zealand, Portugal, Spain and the United Kingdom of Great Britain and Northern Ireland.

[18] See, for example, the comments and observations submitted by Argentina, Australia, Austria, Belgium, Brazil, Canada, Colombia, Germany, Netherlands (Kingdom of the), Liechtenstein, Malta, Mexico, New Zealand, Portugal, Sweden (on behalf of the Nordic countries) and the United Kingdom.

[19] See, for example, the comments and observations submitted by Australia, Colombia, Malta, Portugal and Sweden (on behalf of the Nordic countries). See also the comments and observations submitted by Germany.

[20] See, for example, the comments and observations submitted by Malta and Portugal.

[21] See, for example, the comments and observations submitted by the Kingdom of the Netherlands.

[22] See, for example, the comments and observations submitted by Israel.

[23] See, for example, the comments and observations submitted by Austria and Brazil. See also the comments and observations submitted by Belgium.

[24] See, for example, the comments and observations submitted by Argentina.

[25] See, for example, the comments and observations submitted by the Islamic Republic of Iran.

[26] See, for example, the comments and observations submitted by Argentina, Australia, Austria, Canada, Colombia, Netherlands (Kingdom of the), Malta, Portugal, Spain and the United States. See also the comments and observations submitted by Germany.

[27] See, for example, the comments and observations submitted by Australia, Belgium, Colombia, Germany, Netherlands (Kingdom of the), Malta, Portugal, the United Kingdom and the United States. See also the comments and observations submitted by New Zealand.

[28] See the comments and observations submitted by Australia. See also the comments and observations submitted by Mexico and Spain.

reasons.[29] Several delegations noted that, while conventions on genocide and war crimes already existed, a specific convention on crimes against humanity was lacking; for several delegations, this was an unwelcome omission.[30] It was stated that a convention could play a role in facilitating international cooperation and strengthening national investigative, prosecutorial and judicial capabilities, which were considered essential for preventing and punishing crimes against humanity.[31]

8. In terms of another view, it was stated that a new convention on the topic was premature and would not add value to the international legal framework, would not fill any gap, and would not, in and of itself, contribute to strengthening international law, but might rather lead to its fragmentation.[32] It was also stated that the vast majority of States had criminalized crimes against humanity, or specific elements thereof, in their domestic law and that, pending the elaboration of a convention, States could continue to contribute jointly to the prevention and punishment of crimes against humanity by strengthening international cooperation and the implementation of domestic law in accordance with existing international law and domestic circumstances.[33] The view was expressed that, considering the divergence of views among States, a set of draft guidelines, rather than draft articles, would be the proper form for the outcome of the work.[34] It was also stated that the conditions were not yet ripe for the elaboration of a convention based on the draft articles and that it was necessary to make a cautious decision on whether to launch the process of elaborating a convention.[35]

9. The vital role of the Sixth Committee in the negotiation of legal instruments on the most important and pressing issues confronting humanity was mentioned.[36] With respect to the matters currently under discussion by the Sixth Committee, including at the resumed sessions, differing views were expressed. Member States stated, inter alia, that:[37] it was crucial to facilitate a substantive and meaningful discussion in order to move forward towards a convention; all parties should enhance international mutual trust and strengthen practical cooperation, fostering candid and effective dialogue and communication on crimes against humanity; the current discussions would offer an opportunity to move closer towards a comprehensive and concrete solution; negotiations on a future convention would provide the opportunity to resolve differences of views and refine the text in order to garner the broadest support from the international community; that consensus within the Sixth Committee was a crucial element for preserving the unity and consistency of international law; they supported a consensus-based decision on the question of further steps to be taken with respect to the draft articles; and they hoped that the current discussions would facilitate negotiations and advance discussions, as well as strengthen the prospects for consensus.

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[29] See, for example, the comments and observations submitted by Austria.

[30] See, for example, the comments and observations submitted by Argentina, Australia, Brazil, Canada, Germany, Malta, New Zealand, Portugal, Spain, Sweden (on behalf of the Nordic countries) and the United Kingdom.

[31] See, for example, the comments and observations submitted by Australia, Germany and New Zealand. See also the comments and observations submitted by the Kingdom of the Netherlands.

[32] See, for example, the comments and observations submitted by the Islamic Republic of Iran. See the comments submitted by the Islamic Republic of Iran for a detailed explanation of the matter.

[33] See, for example, the comments and observations submitted by China.

[34] See, for example, the comments and observations submitted by the Islamic Republic of Iran.

[35] See, for example, the comments and observations submitted by China.

[36] See, for example, the comments and observations submitted by Australia.

[37] See, for example, the comments and observations submitted by Australia, Canada, China, Czechia, Germany, Iran (Islamic Republic of), Israel, Liechtenstein, Netherlands (Kingdom of the), Singapore, Türkiye and the United States.

10. The view was expressed that the broad interest of delegations in the draft articles underscored the need to move to a negotiation stage and that a space for negotiation would provide the opportunity to fulfil the mandate of the General Assembly regarding the progressive development of international law and its codification, in accordance with Article 13, paragraph 1 (a), of the Charter of the United Nations;[38] that the General Assembly should thus take a decision on the next steps with regard to the deliberative process and the Commission's recommendation; and that that decision should allow negotiations to begin with a view to the elaboration of a convention on the prevention and punishment of crimes against humanity.[39]

11. Other delegations indicated that they remained supportive of the efforts to foster consensus on the recommendation of the Commission but that, given the divergent views within the Sixth Committee, consensus was still a long way away; that all parties should take stock of State practice and solidify the basis for consensus, as divergence among States on core issues remained; that there was still a long way to go, given the divergent views among Member States on the content of the draft articles; and that a pragmatic approach should be adopted and the process should be advanced based on the draft articles.[40] It was stated that the process established by resolution 77/249 was not intended to be a negotiation or to prejudge the decision the Sixth Committee would make regarding the Commission's recommendation.[41] The Sixth Committee was encouraged to focus on legal issues and continue its deliberations on the topic, including moving forward with a holistic approach on all existing Commission products before it; dissatisfaction was expressed regarding the selectivity of the Commission's products, as a number of them had been before the Committee for years.[42] The importance of an inclusive, structured and clear discussion was stressed,[43] and it was stated that the process specified in resolution 77/249 allowed for an inclusive and robust discussion.[44] It was suggested that legitimate concerns of States must be taken into account and that there should be no attempt to impose legal definitions derived from international instruments that did not enjoy universal acceptance.[45] It was stated that an instrument on the topic should be the product of an inclusive intergovernmental and Member State-driven process and that the work of the Commission could be considered as a valuable source in a well-defined process that could be shaped under the auspices of the Sixth Committee.[46]

III. Thematic cluster 1: draft preamble and draft article 1

Draft preamble

12. According to Argentina, Australia, Czechia, Mexico, Portugal and Sweden (on behalf of the Nordic countries), the preamble provided an essential conceptual framework for the draft articles and defined their main purposes. The United States recognized the important role the introductory provisions played in the overall

[38] See, for example, the comments and observations submitted by Mexico.
[39] See, for example, the comments and observations submitted by Mexico.
[40] See, for example, the comments and observations submitted by China, Germany, Israel and Türkiye.
[41] See, for example, the comments and observations submitted by the United States. See also the comments and observations submitted by Israel.
[42] See, for example, the comments and observations submitted by the Islamic Republic of Iran.
[43] See, for example, the comments and observations submitted by Iran (Islamic Republic of) and Türkiye. See also the comments and observations submitted by Germany.
[44] See, for example, the comments and observations submitted by Israel.
[45] See, for example, the comments and observations submitted by Türkiye. See also the comments and observations submitted by China.
[46] See, for example, the comments and observations submitted by the Islamic Republic of Iran.

structure of the draft articles, and Australia emphasized the legal value of a preamble in the context of treaty interpretation.

13. Mexico, Portugal and the United States highlighted that the preamble drew inspiration from the preambles of international treaties relating to the most serious crimes. Mexico suggested considering the preambles of other instruments, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance.

14. Argentina considered the preamble to be consistent and complementary to existing conventional regimes applicable to crimes against humanity. Belgium highlighted that the first three preambular paragraphs established a connection between combating impunity for crimes against humanity and maintaining international peace and security, reflecting the purposes and principles of the United Nations. The United Kingdom asserted that the preamble rightly recognized the horror caused by crimes against humanity and the threat such crimes posed to all; it also highlighted mentions of impunity, prevention of crimes against humanity, protection of the rights of victims, witnesses and offenders, and effective prosecution, in the preamble.

First preambular paragraph

15. Canada suggested phrasing the paragraph in the present tense to reflect the ongoing occurrence of crimes against humanity and replacing the word “mindful” with a word that better conveyed the persistent commission of such crimes.

16. Canada and the United Kingdom proposed replacing the reference to “children, women and men” with “people”, as the latter term was more inclusive.

Third preambular paragraph

17. Canada reiterated its preference for a general reference to the principles of international law embodied in the Charter of the United Nations rather than the highlighting of specific principles. China stated that the paragraph should highlight the foundational status of the principles of sovereign equality, the territorial integrity of States and non-intervention in domestic affairs, drawing inspiration from other conventions that enjoyed broad participation of States.

Fourth preambular paragraph

18. Argentina, Australia, Austria, Belgium, Brazil, Canada, Colombia, Czechia, Mexico, Netherlands (Kingdom of the), New Zealand and Sweden (on behalf of the Nordic countries) welcomed the reference to the prohibition of crimes against humanity as a peremptory norm of general international law (*jus cogens*). Brazil highlighted that this was in line with the jurisprudence of several international, regional and national tribunals, and Czechia, New Zealand and Sweden (on behalf of the Nordic countries) emphasized that the prohibition was accepted and recognized as a peremptory norm. Argentina, recalling paragraph 3 of General Assembly resolution 3074 (XXVIII), pointed out that that peremptory norm entailed obligations *erga omnes* for States to prevent, prosecute and, as appropriate, extradite. According to the Islamic Republic of Iran, there was no consensus on peremptory norms of general international law (*jus cogens*) in international law or in the practice and *opinio juris* of States. China stated that the Commission had not demonstrated that the prohibition of crimes against humanity was a *jus cogens* norm, as it had failed to meet the criterion of acceptance and recognition by the international community as a whole, and emphasized disagreements on the matter within the Commission and the Sixth Committee.

Seventh preambular paragraph

19. Brazil, Canada, Sweden (on behalf of the Nordic countries) and Portugal welcomed the reference to article 7 of the Rome Statute. Brazil and Canada viewed that reference as a means to avoid fragmentation of international law. Brazil, underscoring the importance of promoting coherence in the prosecution of crimes against humanity at both the national and international levels, stated that the Rome Statute definition largely reflected customary international law. It also emphasized that the provision played a crucial role in ensuring that the implementation of any future convention remained consistent with the principles of complementarity and *non bis in idem*. The United Kingdom proposed stating that the definition contained in the Rome Statute was based on the work of the Commission and State practice at the time the Rome Statute was negotiated.

20. Canada recognized that the Rome Statute applied only to those States that were parties to it, unlike customary international law, which was binding on all States and served as the primary source of the definition of crimes against humanity. It suggested adding a reference to customary international law in the paragraph to acknowledge that, as well as the evolving nature of the definition. Canada also considered simply "noting" the reference to the Rome Statute. Sweden (on behalf of the Nordic countries) clarified that becoming a party to a convention on crimes against humanity would not require becoming a party to the Rome Statute; the envisaged convention would address horizontal relations between States, while the Rome Statute dealt with vertical relations between the International Criminal Court and its States parties.

21. China, Saudi Arabia and Türkiye expressed concerns about the inclusion of the reference to the Rome Statute, questioning its appropriateness and proposing further deliberations on the provision. Australia, Saudi Arabia and Türkiye acknowledged that the reference might deter non-States parties to the Rome Statute from joining a future convention, or lead to hesitation by States not parties to the Rome Statute.

Eighth preambular paragraph

22. Australia and Belgium expressed their appreciation for two crucial aspects highlighted in the paragraph: the primary responsibility of States in investigating and prosecuting crimes against humanity and the emphasis on the importance of prevention and punishment.

23. Türkiye welcomed the emphasis on the primary responsibility of States to investigate and prosecute crimes against humanity, while proposing that the jurisdictional scope be clarified by adding the phrase "and affirming that priority should be given to the territorial jurisdiction" at the end of the paragraph.

24. For Canada, while the paragraph indicated that it was the duty of States to exercise criminal jurisdiction, it was important to acknowledge that States might also exercise other forms of jurisdiction over crimes against humanity.

Ninth preambular paragraph

25. Belgium, Colombia and Sweden (on behalf of the Nordic countries) welcomed the paragraph.

26. Canada suggested adding the term "survivors" to promote respect for the self-identification of persons who have endured crimes against humanity. The United Kingdom expressed openness to including text emphasizing a survivor-centred approach. The United Kingdom proposed: (a) adding the phrase "and noting the vital part they play in the judicial process" after "Considering the rights of victims, witnesses and others in relation to crimes against humanity"; and (b) replacing the

phrase “as well as the right of alleged offenders to fair treatment” with “recognizing also the right of alleged offenders to fair treatment at all stages of proceedings”.

Tenth preambular paragraph

27. Sweden (on behalf of the Nordic countries) expressed support for the paragraph. Canada proposed adding: (a) a reference to the investigation component outlined in draft article 8; and (b) a mention of the *aut dedere aut judicare* principle found in draft article 10.

28. For Belgium, fighting impunity for crimes against humanity was the responsibility of the entire international community, including intergovernmental organizations; the duty to prosecute those crimes imposed an obligation on international organizations to collaborate in their punishment, and failure to do so could amount to a breach of their duty to engage in international cooperation, potentially incurring international responsibility owing to the gravity of those crimes.

Other comments regarding the preamble

29. Australia, Brazil, Canada, Morocco, Türkiye, the United Kingdom and the United States expressed openness to considering additional preambular text.

30. Australia suggested reaffirming the purposes and principles of the Charter of the United Nations and the rights of Indigenous Peoples, while stressing the importance of mainstreaming Indigenous perspectives throughout the entire text of the draft articles. Brazil and the United States suggested specifying that nothing in the draft articles should be construed as authorizing any act of aggression or use of force inconsistent with the Charter. Brazil suggested mentioning the prohibition of the use of force and the principle of non-intervention in the internal affairs of States, as reiterating principles of the Charter in the preamble to the draft articles could contribute to universal adherence to a future convention. The United States stressed that no provision in the draft articles, properly interpreted in good faith, would explicitly or implicitly authorize a State, acting on the pretext of preventing or punishing crimes against humanity, to commit aggression; it was noted that inspiration for language in that regard could be drawn from other international instruments, such as the preamble to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

31. Canada, Morocco, Türkiye and the United States proposed clarifying in the draft preamble the interplay between the draft articles and international humanitarian law, which they considered as *lex specialis* in armed conflict. Canada suggested including the clarification in draft articles 3 and 11.

32. Morocco suggested clarifying the scope of States’ obligations in terms of: (a) the relationship between the draft articles and international instruments, including international humanitarian law and human rights law; and (b) the limitations on the obligations of States, as outlined in instruments related to international human rights and humanitarian law, particularly concerning provisions containing the terms “protection” or “responsibility”. It highlighted the key role of national institutions, such as national committees on international humanitarian law, in combating crimes against humanity.

33. Morocco also proposed including safeguards for the protection of children, women, prisoners and refugees. The United Kingdom proposed adding the following reference to the rights of the child: “Bearing in mind that, as indicated in the Declaration of the Rights of the Child and the Convention on the Rights of the Child,

'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'".

34. In connection with comments made on the ninth preambular paragraph, the United Kingdom suggested adding a new paragraph reading: "Considering that those who have experienced harm, such as those who have witnessed crimes against humanity and children born of sexual violence, may also suffer as a result of crimes against humanity".

Draft article 1
Scope

35. Brazil, Colombia, Czechia, Türkiye and the United Kingdom supported draft article 1. Colombia, Czechia, Sweden (on behalf of the Nordic countries), Portugal, Türkiye and the United Kingdom underlined that the provision effectively emphasized the objectives of the draft articles. Brazil and Sweden (on behalf of the Nordic countries) noted that draft article 1 contributed to enhancing legal clarity and certainty regarding the scope of the draft articles, while Austria pointed out that matters that might not be covered by a future convention would still be regulated by customary international law.

36. Saudi Arabia proposed replacing the text of draft article 1 with either (a) "The present draft articles apply to crimes against humanity" or (b) "The aim of the present draft articles is the prevention and punishment of crimes against humanity". Saudi Arabia underscored that the title of the provision would also be changed to "Objective" if the latter formulation was chosen.

37. Canada proposed replacing the current formulation with a clear statement of the object and purpose of a potential convention.

38. Japan stated that draft article 1 should provide for a temporal scope of application of the draft articles, to clarify that the draft articles would not apply retroactively. Brazil noted that, in the absence of a temporal scope provision, the draft articles should be interpreted in accordance with article 28 of the Vienna Convention on the Law of Treaties. Türkiye emphasized the need to explicitly stipulate the prohibition of retroactive application.

39. Liechtenstein proposed the following new provision, based on the Vienna Convention on the Law of Treaties, clarifying the territorial scope of the draft articles, as it could be helpful for federal States:

> **Territorial scope of ~~treaties~~ *the Convention***
>
> Unless a different intention ~~appears from the treaty or~~ is ~~otherwise~~ established, ~~a treaty~~ *this Convention* is binding upon each party in respect of its entire territory.

IV. Thematic cluster 2: draft articles 2, 3 and 4

Draft article 2
Definition of crimes against humanity

40. Argentina, Czechia, New Zealand, Portugal, Spain, Sweden (on behalf of the Nordic countries) and the United Kingdom generally supported the definition. Argentina, Australia, Austria, Belgium, Canada, Colombia, Czechia, Iran (Islamic Republic of), Mexico, Netherlands (Kingdom of the), New Zealand, Portugal, Spain, Sweden (on behalf of the Nordic countries), the United Kingdom and the United

States supported modelling draft article 2 after the definition of crimes against humanity contained in the Rome Statute.

41. The Islamic Republic of Iran was of the view that reproducing article 7 of the Rome Statute in draft article 2 should be exclusively confined to crimes against humanity and not be mixed or connected with other crimes under the jurisdiction of the International Criminal Court. For Portugal and the United States, the Rome Statute's definition largely reflected customary international law. The broad acceptance of that definition was highlighted by Australia, Czechia, Colombia, New Zealand, Portugal, Sweden (on behalf of the Nordic countries) and the United Kingdom, and Austria stated that draft article 2 codified customary international law. Austria, Brazil, Portugal and Spain emphasized the need to avoid fragmentation of international law and ensure consistency in the international legal system, and Czechia and Netherlands (Kingdom of the) highlighted the importance of legal certainty. Czechia stated that the definition had to be construed strictly and narrowly. According to China and Israel, however, such definition did not necessarily reflect customary international law, and China and Türkiye expressed concerns about using the definition contained in the Rome Statute, since it was not universally accepted. According to Türkiye, such an approach could jeopardize consensus, and some of the definition's key requirements lacked clarity. China offered detailed information on inconsistencies in the definition of crimes against humanity across 11 existing international treaties and instruments on aspects such as: (a) applicability in peacetime; (b) the expression "with knowledge of the attack"; (c) the definition of perpetrators; and (d) the inclusion of certain acts, such as apartheid and enforced disappearance of persons. China deemed the draft article too broad and suggested reconsidering the inclusion of acts such as "torture", "enforced disappearance" and "apartheid".

42. Argentina, Australia, Brazil, New Zealand, Portugal, Spain, Sweden (on behalf of the Nordic countries), the United Kingdom and the United States indicated a willingness to discuss adjustments and legal developments regarding the definition of crimes against humanity contained in the Rome Statute. Morocco considered that the definition did not encompass various practices that could constitute contemporary forms of crimes against humanity. The United States suggested considering the Elements of Crimes of the International Criminal Court to help clarify the definition. Canada suggested further reflection on the definition pursuant to customary international law, and Colombia affirmed that if other international treaties or rules of customary international law contained broader definitions of crimes against humanity, it would be preferable to use those, given that a future convention would not confer jurisdiction on a court but would instead contain obligations for States, to be implemented in their own national courts and systems.

Paragraph 1

43. The United States stated that the provision was fundamentally consistent with international humanitarian law.

44. Regarding the term "widespread or systematic attack", Australia emphasized that the word "or" indicated disjunctive rather than cumulative requirements, while Türkiye suggested that the requirements of "widespread" and "systematic" should be accepted as two distinct elements, both of which must be met, rather than being alternatives to one another.

45. Regarding the term "civilian population", Australia considered that its purpose was to generally exclude non-civilians (i.e. combatants) from the category of victims. It stated that acts constituting crimes against humanity against combatants in an armed

conflict would instead be categorized as war crimes or violations of international humanitarian law.

46. Regarding the term “with the knowledge of”, Brazil suggested replacing it with the phrase “with knowledge of the attack or the intent for the acts to be part of the attack”.

Subparagraph 1 (g)

47. Canada proposed expanding the scope of the paragraph to include acts that violated a person’s sexual integrity, referring to the Elements of Crimes of the International Criminal Court, and considering adding the words “reproductive violence” to address other comparable serious violations. For Brazil, reproductive violence of similar gravity to forced pregnancy and enforced sterilization should be considered a crime against humanity.

Subparagraphs 1 (h) and 2 (g)

48. Colombia and Portugal suggested considering a broader definition of “persecution” and aligning it with customary international law, existing international instruments, and the jurisprudence of regional courts and tribunals, while Sweden (on behalf of the Nordic countries) suggested clarifying the definition.

49. Australia stated that it was contemplating addressing “persecution” as a stand-alone crime. Brazil and Malta suggested that “persecution” should be a stand-alone crime; for Brazil, the text could draw inspiration from the Commission’s commentaries, while Malta proposed deleting the phrase “in connection with any act referred to in this paragraph” from subparagraph 1 (h). Canada suggested focusing subparagraph 1 (h) solely on acts of persecution, without including parts of its definition, which should be added to subparagraph 2 (g), together with a reference to “sexual orientation”.

50. Liechtenstein stated that the Rome Statute should be reflected accurately and fully and thus suggested aligning subparagraph 1 (h) with article 7 (1) (h) of the Rome Statute by adding a reference to the crime of aggression, so that the last part of the provision would read “in connection with any act referred to in this paragraph or with the crime of genocide, war crimes or the crime of aggression”.

51. Regarding the term “gender” in subparagraph 1 (h), Bulgaria suggested adding a definition inspired by article 7 (3) of the Rome Statute. It stressed that such a definition would enhance legal certainty and that its absence would constitute an obstacle to accession to a future convention.

52. Argentina, Australia, Belgium, Brazil, Canada, Colombia, Malta, Mexico, Netherlands (Kingdom of the), New Zealand, Portugal, Spain, Sweden (on behalf of the Nordic countries), the United Kingdom and the United States supported the absence of a definition of the term “gender” and provided detailed comments on the issue and their respective stances.

Subparagraph 1 (k)

53. Brazil suggested clarifying the term “inhumane acts” and expressly criminalizing “inhumane acts” committed in the context of an institutionalized regime of deliberate, systematic and complete subjugation of an entire social group based on gender, depriving it of fundamental rights, including the possibility of partaking in the public sphere free from oppression, in a manner contrary to international law.

54. China, Saudi Arabia and Türkiye expressed concerns about the scope of the term “other inhumane acts” being too broad and subject to misuse. Türkiye highlighted

that the term had to be interpreted narrowly, as it might be in contradiction with the principle of *nullum crimen sine lege*. Colombia found the provision to be useful, but raised the concern that the provision might be too broad; it therefore suggested a restrictive approach to interpretation and the addition of a reference to the principles of *nullum crimen sine lege* and *in dubio pro reo*.

55. Morocco stated that the acts in subparagraph 1 (k) were expressed in general terms and were inconsistent, as crimes against humanity were also considered to be "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".

Paragraph 2

56. Canada suggested bringing the definitions into closer alignment with customary international law.

Subparagraph 2 (e)

57. Morocco suggested aligning the definition of "torture" with that in article 1 of the Convention against Torture to avoid duplication and discrepancies in practice. According to Morocco and China, the Convention against Torture required the act to be intentionally inflicted, whereas subparagraph 2 (e) of the draft articles did not. China suggested reconsidering the inclusion of "torture" because the definition contained in the subparagraph did not reflect international consensus.

Subparagraph 2 (f)

58. Sweden (on behalf of the Nordic countries) and Türkiye suggested clarifying the definition of "forced pregnancy". According to Türkiye, the expression "with the intent of … carrying out other grave violations of international law", in particular, merited clarification.

59. Canada suggested replacing the term "woman" with a more gender-neutral one, to broaden the protection provided by the provision. Furthermore, Canada suggested removing the last part of the subparagraph referring to national laws, as it considered it to be irrelevant in the context of a future horizontal convention. The United Kingdom proposed strengthening the provision by: (a) replacing the expression "the unlawful confinement of a woman forcibly made pregnant" with "forcibly making a person pregnant, without their free and full consent"; (b) deleting the phrase "this definition shall not in any way be interpreted as affecting national laws relating to pregnancy"; and (c) adding at the end of the subparagraph "for the purposes of this paragraph, children and those lacking capacity cannot give free and full consent".

Subparagraph 2 (h)

60. Afghanistan, Australia, Malta and Mexico suggested expanding the definition of "apartheid" to include "gender apartheid". Afghanistan proposed the following text, highlighting that including gender apartheid would offer a framework for international accountability and work as a deterrent against the perpetration of that act: "gender apartheid … involves practices and/or incitement to them where one or more gender groups (most commonly women and girls) are systematically segregated, discriminated against, and denied fundamental human rights, including the right to education, work, freedom of movement, to the right to participate in social, political, and economic life, by another gender group ". Malta proposed the following: "'the crime of apartheid' means … in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups, *or by one gender group over another gender group or groups*, and committed with the intention of maintaining that regime".

Subparagraph 2 (i)

61. Argentina, Brazil, Colombia and Portugal proposed broadening the definition of "enforced disappearance" and aligning it with existing instruments, while Sweden (on behalf of the Nordic countries) suggested clarifying it. Argentina and Brazil proposed deleting the intent and time requirements contained in the definition.

Paragraph 3

62. Australia, Canada, Czechia, New Zealand and Mexico supported the "without prejudice" clause in the paragraph; Australia stressed that the clause would confirm that States may reflect broader crimes against humanity in their national law and would complement and support existing or developing rules of international law. Colombia highlighted that definitions in national law must be fully compatible with the generic definition contained in draft article 2. Morocco found the paragraph to be broad and ambiguous, and Türkiye cautioned against adopting a broad definition, as the majority of States would not accede to a convention whose application could not be foreseen. The Islamic Republic of Iran questioned whether the paragraph paved the way for fragmentation of international law; it also noted that references to customary international law and international instruments challenged the non-hierarchical order between the main sources of international law and called into question the defined scope of the proposed text.

Suggested new acts

63. Australia, Brazil, Canada, Mexico, Morocco and the United Kingdom suggested discussing other acts to be added to the list of crimes against humanity in draft article 2. Brazil and New Zealand suggested discussing text regarding prevention and accountability measures for sexual and gender-based crimes. For the United States, closing the impunity gap for crimes involving sexual violence should be a goal for any future convention on crimes against humanity.

64. Canada and the United Kingdom suggested including "forced marriage" as a stand-alone act, while Australia, Brazil and Mexico suggested "slave trade", "slave trafficking" and "forced marriage". Brazil suggested that slave trade meant the abduction, kidnapping, acquisition or disposal of any person, regardless of, inter alia, age, race, gender, and migration, refugee or statelessness status, for the purpose of reducing them to or maintaining them in any form of enslavement. Brazil, Canada and the United Kingdom recalled the definition of "forced marriage" from the case of *The Prosecutor v. Dominic Ongwen* heard by the International Criminal Court.

65. Morocco suggested that "illegal medical experiments", "environmental violations" and "the targeting of the cultural identity of different communities" be added to the list.

Draft article 3
General obligations

66. Australia, Colombia, Mexico, Portugal, the United Kingdom and the United States expressed their general appreciation for draft article 3. Portugal and the United Kingdom stressed that draft article 3 was of vital importance in the context of the draft articles. Mexico underscored that it was essential to examine the obligations to prevent and punish in the light of the articles on the responsibility of States for internationally wrongful acts, since the commission of crimes against humanity was a violation of a peremptory norm of general international law (*jus cogens*), as stated in the preamble.

Paragraph 1

67. Austria, Brazil, Colombia, Czechia, Mexico, Sweden (on behalf of the Nordic countries) and the United Kingdom welcomed the explicit reference to the obligation of States not to engage in acts that constitute crimes against humanity. Czechia noted that the paragraph explicitly endorsed 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)*.

68. For Australia, Sweden (on behalf of the Nordic countries) and the United Kingdom, the provision created obligations for States; that is, the obligations engaged the responsibility of States. Australia, Austria and Czechia emphasized that paragraph 1 created an obligation for States through their organs and through any other bases for attribution under the law of State responsibility.

69. Türkiye stressed that States could not be considered perpetrators of international crimes, as their role was limited to preventing and punishing such crimes; the international legal responsibility of States arising from their failures to meet international obligations fell outside the realm of international criminal law. It also stated that one of the main purposes of a future convention was to bridge a gap, but adopting an approach whereby States were considered perpetrators would create a rift.

Paragraph 2

70. Sweden (on behalf of the Nordic countries) stressed that crimes against humanity were crimes under international law that must be prevented and punished, regardless of whether or not they were criminalized under national law. Austria, Czechia, Netherlands (Kingdom of the) and Sweden (on behalf of the Nordic countries) supported the explicit reference to the obligation of prevention. Austria, Canada and Netherlands (Kingdom of the) noted that the paragraph drew inspiration from the Convention on the Prevention and Punishment of the Crime of Genocide. Belgium and Netherlands (Kingdom of the) underscored the alignment of the paragraph with 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)*.

71. Belgium and Netherlands (Kingdom of the) emphasized that prevention and punishment constituted two distinct obligations, and Portugal stated that the obligations to prevent and to punish were mutually supportive. For Belgium, prosecuting crimes against humanity had a deterrent effect. The Kingdom of the Netherlands highlighted that draft articles 3 (2) and 4 constituted separate obligations, each with its unique purpose and scope; paragraph 2 contained an obligation of conduct, which depended on States' ability to influence potential perpetrators. It also highlighted that territorial States held the primary responsibility for protecting their populations from grave international crimes.

72. Australia, Belgium, Brazil, Canada, Czechia, Mexico, New Zealand, Sweden (on behalf of the Nordic countries) and the United States supported the assertion that crimes against humanity could occur in both peacetime and armed conflict. New Zealand emphasized that such an approach was aligned with State practice and jurisprudence. Canada stressed that it was necessary to clarify that the draft articles would not modify international humanitarian law as *lex specialis* during armed conflict. China highlighted that existing international treaties and instruments differed on whether crimes against humanity could be committed during peacetime.

73. Canada proposed structuring it in a manner akin to the corresponding provision in the Genocide Convention and adding a clarification that the general obligations

must be taken in accordance with the provisions contained in any future convention. Colombia proposed: (a) placing the phrase indicating that crimes against humanity were international crimes, whether or not criminalized in national law, in a separate sentence to highlight its significance; (b) clarifying that the provision imposed an obligation of conduct measured by a standard of due diligence; and (c) incorporating all elements from the articles on the responsibility of States for internationally wrongful acts related to the prevention of violations of peremptory norms. The United States proposed explicitly stating that crimes against humanity could be committed by both State and non-State actors. It further suggested replacing the phrase "in time of armed conflict" with "in the context of armed conflict".

74. The Islamic Republic of Iran found the phrase "which are crimes under international law" confusing and inconsistent with the fourth preambular paragraph. Saudi Arabia considered it unnecessary, as crimes against humanity had already been defined and identified in the draft articles.

Paragraph 3

75. Argentina, Austria, Belgium, Brazil, Colombia, Czechia, Mexico, Sweden (on behalf of the Nordic countries) and the United States supported the explicit statement in paragraph 3 that no exceptional circumstances might be invoked as a justification of crimes against humanity. The United States highlighted that paragraph 3 was of critical importance to States' efforts to prevent and punish crimes against humanity, noting that it was inspired by article 2 of the Convention against Torture. For Colombia, paragraph 3 referred to the conduct of both State and non-State actors.

Draft article 4
Obligation of prevention

76. Draft article 4 received support from Australia, Czechia, Sweden (on behalf of the Nordic countries) and the United Kingdom. Australia appreciated that draft article 4 provided non-exhaustive guidance on the scope of the obligation of States to prevent crimes against humanity. Australia and Singapore noted that the obligations under the provision were to be fulfilled through appropriate measures to be determined by each State. Singapore, Netherlands (Kingdom of the) and the United Kingdom emphasized that draft article 4 contained an obligation of conduct. Argentina stated that the Commission's explanation in the commentary to draft article 3 regarding the extraterritorial applicability of the obligation of prevention also applied to draft article 4.

77. Czechia supported the generic terminology, to cover any conceivable preventive measure, and proposed including examples of preventive measures. Austria, Czechia and Portugal stressed that the obligation of prevention was not specific to the draft articles and that similar references could be found in existing treaties.

78. Australia, Canada, Colombia, Türkiye and the United States noted that the draft article could be clarified. For example, Canada suggested better aligning the text with the Convention against Torture, and Colombia suggested discussing the jurisdictional scope of States' obligations, especially in connection with draft article 7. For the United States, it would be helpful to elucidate the relationship between draft articles 3 and 4. Iran (Islamic Republic of) and Türkiye raised concerns regarding the broadness of the provision and suggested that a more detailed approach be taken.

Chapeau

79. Regarding the requirement for States to prevent crimes against humanity "in conformity with international law", Australia, Czechia, Mexico, Portugal and the United States supported the confirmation that States must act within international law

when implementing obligations of prevention. Austria, Mexico and Portugal noted that the requirement was in line with the jurisprudence of the International Court of Justice. Czechia emphasized that the phrase excluded the possibility of invoking the provision to support the use of force without the required State consent or authorization by the Security Council. The United States would welcome similar language elsewhere in the draft articles confirming that efforts to punish crimes against humanity must be undertaken in conformity with applicable international law. Colombia stated that the obligations in draft article 4 could benefit from greater specificity, since the phrase "in conformity with international law" lacked clarity.

Subparagraph (a)

80. Australia supported the phrase "any territory under its jurisdiction". For Australia, in addition to the measures set out in subparagraph (a), institutional and political measures also played critical roles in national prevention efforts. The Kingdom of the Netherlands stated that subparagraph (a) contained a clear delineation of scope and that the level of due diligence required to prevent crimes against humanity was higher where a State had influence over individuals that were in a territory under its jurisdiction. Brazil suggested including references to de jure and de facto jurisdictions for legal certainty on the obligation of prevention in any territory the State controlled. The United States suggested clarifying that States should also take measures to prevent crimes against humanity committed by their personnel outside their territory. Türkiye suggested that the phrase "any territory under its jurisdiction" be replaced by "in its territory" and that that approach be considered throughout the draft articles. Türkiye emphasized that de facto control exercised by a State might not be sufficient to establish the legislative, judicial and administrative jurisdiction required under the provision.

Subparagraph (b)

81. Belgium, Portugal and the United States emphasized the role that international cooperation played in efforts to prevent crimes against humanity. Belgium stated that intergovernmental organizations had a role to play in prevention and significant responsibilities in terms of punishing crimes against humanity. Portugal stated that cooperation among States reflected the duty to cooperate enshrined in the Charter of the United Nations and other instruments of international law.

82. Canada suggested including a reference to cooperation with international courts and tribunals after "as appropriate". The reference would act as an encouragement and would apply to any State party, should a convention be adopted.

83. Iran (Islamic Republic of), Singapore, Türkiye and the United States suggested further discussions and clarification regarding the scope of subparagraph (b), in particular detailing acts of cooperation and cooperation with organizations. Türkiye suggested that the phrase "where appropriate" should apply to the whole provision, while the Islamic Republic of Iran pointed out that there was no legal basis for an obligation to cooperate with non-governmental organizations.

V. Thematic cluster 3: draft articles 6, 7, 8, 9 and 10

Draft article 6
Criminalization under national law

84. Belgium, Czechia, Japan, New Zealand, Portugal, Sweden (on behalf of the Nordic countries), the United Kingdom and the United States stressed that draft article 6 was essential to the effectiveness of the draft articles. Germany stated that

consensus on the criminalization of crimes against humanity at the national level had already been reached, while Belgium stated that draft article 6 reflected customary international law. Colombia and New Zealand stated that the provision could close potential gaps between national and international definitions of crimes against humanity. Colombia noted that the draft article should be understood to be without prejudice to any broader definition contained in international instruments, customary international law or regional or international case law applicable to a State. The United States emphasized that it was important for any future convention to allow flexibility in how States implemented their obligations under draft article 6.

Paragraph 1

85. Austria, Belgium, New Zealand and the United Kingdom stated that they had already criminalized crimes against humanity, while the United States signalled that many of its national laws could be used to punish conduct that, depending on the circumstance, might constitute a crime against humanity. Austria pointed out that having national laws criminalizing crimes against humanity did not preclude a State from participating in a future convention.

86. China and Israel submitted detailed comments on why it would be inappropriate to require States to criminalize crimes against humanity in accordance with the exact definition contained in draft article 2, highlighting that States had discretion on the matter to take into account, inter alia, their national legal systems and customary international law. China, Japan and Mexico were of the view that it would suffice, and be preferable, to criminalize the acts constituting crimes against humanity. According to Czechia, paragraph 1 afforded States flexibility to choose the manner in which to criminalize crimes against humanity at the national level.

87. Japan suggested the following change to paragraph 1:

> Each State shall take the necessary *legislative or other* measures to ~~ensure that~~ *avoid impunity of perpetrators of the acts that constitute* crimes against humanity ~~constitute offences under its criminal law~~.

Paragraph 2

88. Czechia and the United Kingdom stated that paragraph 2 was appropriate; Czechia stressed that it was not overly prescriptive. Canada, Czechia and the United Kingdom acknowledged the flexibility of the provision.

89. Japan suggested the following changes:

> Each State shall take the necessary *legislative or other* measures to ~~ensure that~~ *avoid impunity of perpetrators of* the following acts ~~are offences under its criminal law~~:

90. Japan stated that the word “measures” in paragraphs 2 and 7 encompassed surrender of an alleged offender to the International Criminal Court, and provided detailed comments in that regard.

91. Colombia noted that national laws might go beyond customary international law and suggested adding “financing” as a mode of liability. The United States stated that it would be vital for any future convention to address both direct and indirect modes of liability, for example by adding the following at the end of subparagraph 2 (c): “including acting in concert with a group pursuant to a shared common purpose”. The United Kingdom suggested including other modes of liability, such as “conspiracy” and “incitement”.

Paragraphs 3 and 4

92. Czechia considered the text of the paragraphs adequate and reasonable, while New Zealand welcomed the flexible approach adopted in the paragraphs.

93. Japan stated that paragraph 3 did not require each State to establish the criminal responsibility of military commanders and other superiors as independent offences. Japan suggested clarifying that States were not prevented from adopting in their national laws more detailed standards than those in paragraphs 3 and 4. The United States recognized the importance of the doctrine of command responsibility to holding accountable those superiors who were responsible for serious international crimes.

94. Brazil and Colombia suggested a more detailed approach to the paragraph for legal certainty. Brazil stated that the mens rea element should be elaborated in more detail, which could be achieved, for example, by: (a) using the same terms as those in article 28 (a) (i) of the Rome Statute, which specified that the reason-to-know element must be verified in the light of the circumstances of the time; or (b) using a formulation such as the one found in article 86, paragraph 2, of Protocol I Additional to the Geneva Conventions of 1949.

95. For Morocco, paragraph 3 was broadly worded, which was inappropriate for a criminal rule. It suggested that the provision should be more precise and clearer.

96. For Saudi Arabia, paragraph 3 conflicted with established rules of customary international law concerning the immunities of Heads of State and State officials.

Paragraph 5

97. Canada stated that criminal responsibility of persons holding an official position was distinct from the application of procedural immunity in foreign jurisdictions and that the provision was sufficiently clear that it did not affect the application of conventional or customary international law with respect to the application of procedural immunity. Czechia, Singapore, Sweden (on behalf of the Nordic countries) and the United Kingdom emphasized that paragraph 5 had no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction; Czechia stressed that the definition and the draft articles as a whole led to the inapplicability of immunity *ratione materiae*, but that that did not apply to the immunities *ratione personae* enjoyed under customary international law by incumbent Heads of State, Heads of Government and foreign ministers, while Singapore, Sweden (on behalf of the Nordic countries) and the United Kingdom underscored that procedural immunity continued to be governed by conventional and customary international law. China pointed out that immunity of State officials from foreign criminal jurisdiction had been generally recognized as customary international law and an inherent part of the principles of sovereign equality and non-interference in internal affairs. China, Singapore and Türkiye stated that it was necessary to clarify in the provision itself the inapplicability of paragraph 5 to procedural immunity. Israel, highlighting that immunity *ratione materiae* could also apply to a former State official, stated that the paragraph might be wrongly perceived as affecting immunity from the exercise of foreign criminal jurisdiction.

98. Colombia highlighted the importance of clarifying the relationship between this provision and draft article 7 of the draft articles on immunity of State officials from foreign criminal jurisdiction, while Sweden (on behalf of the Nordic countries) noted that the latter provided that immunity *ratione materiae* did not apply in respect of crimes against humanity. Portugal underscored the importance of having a provision stating that the holding of an official position was not a ground for the exclusion of substantive criminal responsibility.

99. Lichtenstein suggested reproducing articles 27 (1) and 27 (2) of the Rome Statute in the provision to ensure that States waived, limited or excluded the inviolability of immunity from jurisdiction accorded to their own Head of State, Head of Government or ministers for foreign affairs before foreign jurisdictions.

Paragraph 6

100. Austria, Brazil, Colombia, Czechia, Netherlands (Kingdom of the), Portugal, Sweden (on behalf of the Nordic countries) and the United Kingdom agreed that crimes against humanity should not be subject to any statute of limitations; Austria and Brazil suggested that it be clearly prohibited in paragraph 6, without States having to take respective measures.

101. Brazil suggested that civil proceedings seeking redress and reparations for crimes against humanity should not be subject to any statute of limitations. Liechtenstein suggested adding text to make the provision more self-executing and to reflect current case law according to which, in certain circumstances, it was unreasonable for a State to invoke statutory limitations in civil litigation.

102. China and Japan called for further study and careful consideration to determine whether statutes of limitations should not apply to any offences constituting crimes against humanity. Morocco stated that the paragraph should provide specific controls on the application of a statute of limitations in respect of the crime of enforced disappearance.

103. Türkiye and the United Kingdom suggested stipulating in the paragraph itself that it did not obligate a State to prosecute offences referred to in the draft article that had taken place before such offences had been criminalized in the State's national law.

Paragraph 7

104. Austria and the United Kingdom stated that the emphasis on national criminal laws providing for appropriate penalties in the draft articles was useful.

105. Czechia and Colombia recommended excluding the official position of a person as a ground for mitigation or reduction of a sentence expressly in the text of the draft article. Colombia suggested adding a reference to the nature of the offence committed.

106. According to Belgium, Portugal and Sweden (on behalf of the Nordic countries), "appropriate" punishment excluded the death penalty. Saudi Arabia and Singapore stated that States had the sovereign right to determine appropriate punishment in accordance with their national regulations and laws, in conformity with applicable international law, including safeguards ensuring due legal process. Singapore further stated that international law did not prohibit the use of capital punishment and that there was no international consensus prohibiting its use.

Paragraph 8

107. Canada and Czechia welcomed the inclusion of the concept of liability of legal persons, while the United States noted that there was no universally recognized concept of criminal responsibility for legal persons in international criminal law. Türkiye and the United States recommended further discussion on the paragraph, and the Islamic Republic of Iran expressed reluctance towards it. China, Israel and Türkiye pointed out that the concept was unsupported by customary international law, international legal consensus or the past practice of international criminal tribunals; China, Colombia and Iran (Islamic Republic of) suggested that the matter was better left to the discretion of States. China and Israel stated that the issue should not be

addressed in the draft articles. Czechia was of the view that the provision was flexible and allowed States to respect their national law with respect to the issue.

108. The Islamic Republic of Iran stated that paragraph 8 could create obstacles in implementing draft article 14.

109. Canada suggested reformulating the provision to reflect the hierarchy of norms between international and national laws, as well as carving out paragraph 8 to form a separate draft article, or broaden its scope.

Suggested new provisions

110. Canada stated that States had the flexibility to address the forms of participation in the perpetration of crimes against humanity in additional ways, suggesting a "without prejudice" clause to ensure that the paragraph did not unduly restrict a State's ability to include additional acts which may constitute offences under their national laws, or to define crimes in accordance with specific elements of criminal responsibility under their national laws.

111. Colombia suggested adding the criminalization of "financing" of crimes against humanity.

112. Argentina suggested adding a provision prohibiting amnesties and another establishing an obligation for States to take the necessary measures to ensure that their national laws provide for crimes against humanity to be investigated and prosecuted in accordance with procedural rules and in ordinary courts. According to Portugal, amnesties and pardons were not compatible with the obligation to hold accountable those responsible for crimes against humanity.

Draft article 7
Establishment of national jurisdiction

113. Colombia, Sweden (on behalf of the Nordic countries) and the United Kingdom expressed their support for draft article 7 as an effective mechanism to prevent impunity for crimes against humanity.

114. Austria stated that well-established bases for criminal jurisdiction under customary and treaty law were set out in draft article 7, and Colombia agreed with the grounds for jurisdiction contained in the provision. Belgium stressed the importance of the grounds for jurisdiction set out in the provision, which it had already incorporated into its national law. Mexico stated that the grounds for jurisdiction in draft article 7, paragraph 1, were in line with domestic and international law on the matter. Australia supported the approach of not being overly prescriptive as to how jurisdiction would be exercised. The United States acknowledged that the provision could support efforts to improve international cooperation to hold accountable individuals responsible for crimes against humanity, while emphasizing the importance of providing flexibility for domestic implementation. It highlighted that the establishment of jurisdiction should not be used to facilitate inappropriate prosecutions. Brazil suggested explicitly mentioning in the draft article that the provision did not affect the immunities of State officials from foreign criminal prosecution.

115. Australia acknowledged that multiple States might have an interest in exercising jurisdiction over crimes against humanity but that the primary responsibility for investigation and prosecution rested with the State in whose territory the criminal conduct occurred or with the State of nationality of the accused. It stressed that draft articles 9 and 13, in particular, provided a structured framework to support inter-State consultation to determine which State was best placed to exercise jurisdiction. Singapore and the United States suggested clarifying how potential conflicts of

jurisdiction were to be resolved; for Singapore, in the event of competing assertions of jurisdiction, primacy should be granted to the State able to exercise jurisdiction under paragraph 1, as such a State would have a greater interest in prosecuting the offence. According to Türkiye, it was in the interest of justice that territorial or national jurisdiction should be given primacy over passive nationality jurisdiction in order to avoid potential conflicts of jurisdiction. Israel stressed that States had the primary sovereign prerogative to exercise jurisdiction through their own courts over crimes against humanity that had been committed either in their territory or by their nationals. The United Kingdom stated that it was preferable for crimes to be prosecuted in the State in which they occurred, as the authorities of that State were best placed to prosecute the offence. The United States expressed concerns regarding unwarranted assertions of jurisdiction.

116. Colombia, with regard to territorial jurisdiction, suggested making a reference to de jure and de facto jurisdictions by mentioning persons under the jurisdiction or control of a State. The United Kingdom suggested replacing "territory under its jurisdiction" in subparagraph 1 (a) with "territory". Canada suggested replacing "habitually resident" with "usually resident" in subparagraph 1 (b), in line with the Convention against Torture. Mexico called for a review of the question of active personality jurisdiction in the case of stateless persons habitually resident in the territory of a State, and the possibility of applying passive personality jurisdiction in such cases.

117. Austria submitted that a future convention would not require States to exercise universal jurisdiction, since draft articles 8, 9 and 10 provided for the exercise of jurisdiction when there was a territorial link between the State and the alleged perpetrator. Sweden (on behalf of the Nordic countries) stated that crimes against humanity gave rise to the application of universal jurisdiction. Israel stated that universal jurisdiction should be a measure of last resort, in accordance with the principles of subsidiarity and complementarity, and applicable only when States were unable or unwilling to exercise jurisdiction. For Argentina, not excluding the exercise of any other jurisdiction provided for in national law might restrict the applicability of universal jurisdiction. Brazil stated that the establishment of national jurisdiction, especially by means of the principle of universality, might not serve interests other than those of justice. Saudi Arabia stated that draft articles 7 (2), 9 and 10 consolidated the application of the principle of universal criminal jurisdiction, which was unevenly applied by States. To avoid expansion of the principle and its arbitrary application, Saudi Arabia made detailed comments on criteria that should be met for those provisions to apply.

118. Japan stated that the obligation in draft article 7, paragraph 2, could be fulfilled by surrendering a perpetrator to the International Criminal Court.

119. China, Singapore and Türkiye stated that paragraph 2 applied exclusively to nationals of a State party to a future convention; Singapore and Türkiye suggested explicitly stating that in the paragraph. Israel observed that there was a need for procedural safeguards to ensure the proper exercise of foreign criminal jurisdiction and prevent its misuse. For Australia, paragraph 2 did not, in and of itself, imply the existence of an obligation to submit a case for prosecution.

120. Sweden (on behalf of the Nordic countries) welcomed the flexibility provided for in paragraph 3 and possible wider jurisdiction afforded by national laws. China offered detailed comments and suggested adding a "without prejudice" clause to paragraph 3 in order to prevent the improper expansion of jurisdiction. According to the United States, paragraph 3 was overly broad; it suggested adding fair trial guarantees and other applicable legal protections in order to limit criminal jurisdiction that was not in conformity with international law.

Draft article 8
Investigation

121. With regard to draft articles 8, 9 and 10, the United States stated that it would be useful to consider and develop safeguards to prevent any future convention on crimes against humanity from providing a pretext for prosecutions inappropriately targeting officials of foreign States.

122. Australia, Austria and Belgium considered the provision key to combating impunity for crimes against humanity. Sweden (on behalf of the Nordic countries) stressed the importance of conducting investigations in good faith. For Australia, the provision required States to undertake an examination if the State had reason to believe that crimes against humanity were being committed or had been committed in any territory under its jurisdiction. Brazil offered detailed comments regarding its interpretation of the provision and the obligation contained therein. Austria suggested discussing a broader obligation for States to investigate acts committed outside their territory but in places still under their jurisdiction, such as on ships or aircraft. Portugal stated that States had ab initio priority over the International Criminal Court in the exercise of jurisdiction and that their willingness to conduct a prompt, thorough and impartial investigation was an important test of their willingness to exercise their jurisdiction.

123. The United Kingdom emphasized that "investigation" in draft article 8 meant a preliminary inquiry, not a criminal investigation. Australia suggested clarifying the meaning of "investigation" in draft article 8 and of "examination of information" and "preliminary inquiry" in draft article 9, and offered to share its domestic expertise in that regard. The United States suggested clarifying the relationship between "investigation" in draft article 8 and "preliminary inquiry" in draft article 9.

124. According to Türkiye, the scope of the term "reasonable ground" was ambiguous and open to abuse. Türkiye stated that it would be preferable for crimes to be investigated where they occurred, in the interests of justice.

125. The United States suggested adding an obligation for States to investigate allegations that their officials had committed crimes against humanity abroad.

126. Israel stated that a decision to initiate an investigation or criminal proceedings, or to take coercive measures, should be made by sufficiently high-level State officials.

Draft article 9
Preliminary measures when an alleged offender is present

127. The United States stated that draft article 9 raised important, practical issues related to securing custody of alleged offenders. Australia supported the objective of the provision, while Colombia stated that the provision would be necessary in a future convention. Belgium explained that the provision should be interpreted in the same way as similar provisions of conventions on international criminal law. Sweden (on behalf of the Nordic countries) stressed that alleged offenders should be guaranteed fair treatment and full protection of their rights under applicable national and international law at all stages of the proceedings. Canada suggested adding a reference to internationally recognized due process standards. Türkiye suggested including safeguards for alleged offenders in order to prevent abuse of the provision for political purposes, while highlighting that draft article 9 should not affect the rules of international law on immunity. Belgium also stated that the provision could not impede the application of the rules of international law regarding immunity. According to the United States, the provision merited further consideration by States; it noted that a State might have relevant obligations under a status-of-forces agreement with regard to an alleged offender in its territory. For Australia,

paragraphs 1 and 2 were aimed at granting States the flexibility to determine whether taking an alleged offender into custody was appropriate in the circumstances, consistent with domestic law and processes.

Paragraph 1

128. Australia suggested, inter alia, specifying that authorities would need to be satisfied, in accordance with their relevant domestic law threshold, that a person had committed crimes against humanity prior to taking the person into custody; adding safeguards, in particular related to the detention of suspects; and requiring States to guarantee fair treatment to the alleged offender taken into custody. Canada suggested bringing the text of paragraph 1 closer to the text of the Convention against Torture. Japan suggested clarifying the meaning of the condition "the circumstances so warrant". The United Kingdom stressed the importance of swift action when circumstances so warranted.

Paragraph 2

129. Australia suggested clarifying the meaning of "preliminary inquiry into the facts" and offered detailed domestic expertise in that regard. According to Canada, paragraph 2 was more appropriate for inquisitorial criminal justice systems than for the criminal justice systems typically in place in common law countries. If appropriate changes to that effect could not be made to paragraph 2, changes could be made to the preamble to reflect the diversity of legal systems. Canada also suggested clarifying the rights of the alleged offender.

Paragraph 3

130. According to Brazil, the State with the closest links to the crime must have priority in exercising jurisdiction over it. Japan suggested the following amendment to accommodate national laws on the confidentiality of investigations: "notify, *where appropriate*, the State …". Canada suggested clarifying how paragraph 3 interacted with draft article 13, paragraph 12.

Draft article 10
Aut dedere aut judicare

131. Australia, Brazil, Czechia, Portugal, Sweden (on behalf of the Nordic countries), Türkiye and the United States welcomed the inclusion of draft article 10. Argentina, Belgium, Brazil, Colombia, Czechia, Portugal and Sweden (on behalf of the Nordic countries) stated that the provision was aimed at preventing impunity when the suspect was in a State's territory and the State did not grant extradition. The United States considered the draft article to be critical for the effectiveness of a future convention, and Mexico considered it to be a useful tool in the punishment and prevention of crimes against humanity. According to the Islamic Republic of Iran, domestic criminalization of crimes against humanity by several States provided a solid basis for prosecution, and the *aut dedere aut judicare* clauses contained in existing conventions provided a sufficient legal basis for the prevention and punishment of crimes against humanity. Saudi Arabia stated that the primary obligation ought to be to extradite alleged offenders to their State of nationality. Türkiye emphasized that the responsibility under draft article 10 must be read in conjunction with other responsibilities of States under international and domestic law.

132. For Czechia, the provision allowed surrender to an international criminal court or tribunal by a State having custody of the alleged perpetrator only if said State recognized the jurisdiction of any international courts or tribunals. For the United Kingdom, the provision allowed a State to recognize an extradition or transfer request

from an international tribunal but did not require it to agree to such a request. Austria considered the provision to also cover hybrid tribunals; it stated that, should no international court or tribunal have jurisdiction, the obligations of draft article 10 would remain binding on the State in whose territory the alleged offender was present. Japan stated that, by surrendering a person to the International Criminal Court, States would be able to discharge their obligations under draft article 10. For Czechia, the word "surrender" reflected terminology used in various international instruments. China stated that draft article 10 was inconsistent with the principle of complementarity, since it placed national jurisdiction and the jurisdiction of international criminal courts or tribunals on the same level.

133. According to Australia, Canada and Japan, the provision was in line with the principle of prosecutorial independence and discretion. Canada considered the draft article not to be limited to criminal proceedings but to apply also to administrative or civil remedies following the exercise of prosecutorial discretion.

134. Australia, Belgium and Colombia acknowledged that the draft article was in line with the Convention against Torture and the International Convention for the Protection of All Persons from Enforced Disappearance. Belgium stated that the draft article should be interpreted in the light of the jurisprudence of the International Court of Justice, in particular in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, while Brazil stated that, according to the jurisprudence of the Court, the *aut dedere aut judicare* principle created *erga omnes partes* obligations. Australia noted that the obligation under draft article 10 was wider than the obligation to prosecute under the United Nations Convention against Transnational Organized Crime, but considered that to be appropriate given the serious nature of the crimes involved.

135. Sweden (on behalf of the Nordic countries) stressed that draft article 10 had to be read together with draft article 7, paragraph 2. Belgium stated that, under draft articles 7 (2) and 10, the State had the obligation to prosecute proprio motu and prosecution was not dependent on a prior extradition request; the phrases *judicare aut dedere* and *judicare vel dedere* reflected the obligation to punish crimes against humanity more precisely than the maxim *aut dedere aut judicare*. Brazil stated that draft article 10 should be read in conjunction with draft articles 7 and 13 and suggested adding two paragraphs to draft article 10: one would set out the obligation to prosecute when the custody State had a direct link to the crime, the suspect or the victim, unless it decided to extradite or surrender; and the other, applicable when the custody State had no direct link to the crime, the offender or the victim, would provide for extradition as the primary obligation, and surrender to international tribunals, as appropriate, or prosecution, in accordance with draft article 7, as the alternatives. It emphasized that universal jurisdiction should be complementary to the criminal jurisdiction of States with direct links to the crime and applied only when the States referred to in draft article 7, paragraph 1, were unwilling or unable to investigate or prosecute. Colombia stated that it accepted the explicit reference to the conventional character of universal jurisdiction in respect of crimes against humanity, which had already been recognized in the jurisprudence of its high courts. Morocco suggested moving the draft article after draft article 13, as it considered the two draft articles to be interrelated.

VI. Thematic cluster 4: draft articles 13, 14 and 15 and annex

Draft article 13
Extradition

136. Belgium and Czechia stated that the draft article offered a solid foundation for executing extradition; Belgium found it to be particularly useful for States which required a treaty in order to extradite. Mexico found it to be an important basis for any future negotiation on judicial cooperation and highlighted the difference between draft articles 10 and 13. Portugal stated that extradition was an important tool for ensuring accountability for crimes against humanity when a State did not prosecute the alleged offender in its territory, and that it should always be in line with human rights law. Canada suggested clarifying that the provision applied only to States parties to a future convention, including when referring to any extradition treaty, existing or future, between States. Colombia found the draft article to be consistent with State practice on extradition. Colombia and the United Kingdom stated that the provision was consistent with similar provisions in existing instruments. For Japan, draft article 13 should be consistent with article 90 of the Rome Statute, and a new provision specifying that parties to the Rome Statute were to give priority to requests for surrender issued by the Court should be added. The Islamic Republic of Iran expressed its dissatisfaction with the exclusion of double criminality from the provision.

137. For Czechia, even if a request for extradition was refused, the obligation to prosecute set out in draft article 10 remained in force. Türkiye stated that draft article 13 should not be interpreted as requiring States to extradite their own nationals. While Czechia stated that, other than in paragraph 12, 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, Colombia suggested that there was a need to address the issue of the hierarchy of competing requests arising from the establishment of jurisdiction on different grounds based on draft article 7, paragraph 1.

Paragraph 1

138. The Kingdom of the Netherlands suggested deleting “under the jurisdiction” in paragraph 1 in order to align the paragraph with article 49 of the Ljubljana-The Hague Convention.

Paragraphs 2, 3 and 6

139. Japan suggested adding “without prejudice to its national law” to paragraphs 2 and 6 to make them acceptable to more States, and the United Kingdom suggested adding “subject to their domestic law provisions” to paragraph 2 and “and based on their domestic law provisions” to paragraph 3.

140. Sweden (on behalf of the Nordic countries) expressed support for paragraph 3, while for Japan it merited further consideration, as it would require States to assess on a case-by-case basis whether an offence was a political offence. Türkiye expressed concerns regarding paragraph 3, suggesting that it created a loophole and could allow States to circumvent due process in extradition cases by claiming that crimes against humanity had been committed. Türkiye suggested considering whether it was appropriate to leave no room for discretion by States.

Paragraph 4

141. Portugal welcomed paragraph 4 and stressed its importance, and Colombia expressed the view that the paragraph closed institutional and diplomatic gaps.

Paragraph 5

142. Canada recommended stipulating that a State should inform the Secretary-General of the United Nations of whether it intended to use the draft articles as the legal basis for cooperation on extradition at the time of the deposit of its instrument of ratification, acceptance or approval of, or accession to, a future convention.

143. Colombia found paragraph 5 confusing, as, according to practice in extradition matters, where several treaties were applicable to extradition, it was possible to choose which one should govern a specific extradition process.

Paragraph 8

144. Argentina suggested including the concept of simplified extradition for cases in which the extraditable person gave consent.

Paragraph 9

145. Canada suggested clarifying how paragraph 9 would apply in practice and, in particular, under what circumstances a State would treat offences as if they had been committed in the territory of States that had established jurisdiction, and the meaning of "if necessary".

Paragraph 10

146. Argentina suggested including the concept of extradition *ficta*.

Paragraph 11

147. Sweden (on behalf of the Nordic countries) stated that paragraph 11 enhanced the draft articles, since it helped to prevent extradition requests made on impermissible grounds. The United Kingdom questioned whether it was necessary to list, in paragraph 11, all the impermissible grounds that were listed in draft article 2 (1) (h), as there was no obligation for the requested State to extradite if it was believed that the request was being pursued on grounds that were impermissible under international law. For China, "impermissible under international law" was unclear and might lead to diverging interpretations.

148. Canada suggested adding "sexual orientation" to the provision, and Brazil stated that the provision protected the accused from extradition if prosecuted or punished on account of their sexual orientation or gender identity.

149. The Kingdom of the Netherlands suggested aligning the grounds for refusal with those set out in article 51 (1) of the Ljubljana-The Hague Convention.

150. China stated that referring to the International Convention for the Protection of All Persons from Enforced Disappearance to justify the reference to "a particular social group" was inappropriate, since that Convention was not sufficiently representative; it suggested replacing "culture, membership of a particular social group, political opinions or other grounds that are universally recognized as impermissible under international law" with "political opinion". The Islamic Republic of Iran suggested deleting "membership of a particular social group" in order to preclude a wide range of divergent interpretations that would impede cooperation on extradition.

Paragraph 12

151. For Australia, paragraph 12 was intended to recognize the strong interest of States with territorial jurisdiction in the investigation and prosecution of serious

international crimes; the paragraph would benefit from also requiring States to give due consideration to an extradition request from the State of nationality of the accused.

Paragraph 13

152. Canada suggested clarifying that paragraph 13 was intended to give the requesting State a reasonable opportunity to adapt its request to make it compliant with the requirements for extradition under the laws and procedure of the requested State. According to Canada, the paragraph did not provide for instances when consultation might not be engaged, with refusal to extradite being based on other grounds.

153. Sweden (on behalf of the Nordic countries) suggested replacing "as appropriate" with "where appropriate".

Suggested new provisions

154. Brazil suggested adding that nothing in a future convention could be interpreted as imposing an obligation to extradite if the person to be extradited would have to appear before extraordinary courts or could face a punishment inconsistent with the most fundamental human rights, including capital punishment. Morocco suggested revising the draft article to take into account national laws that provided for non-extradition to States where the alleged offender might be judged by a special court or face the death penalty.

155. Morocco suggested adding a provision reading: "if the request for extradition includes offences other than those covered by these draft articles, the requested State may apply this article also in respect of those offences".

156. Argentina proposed including a reference to the channels for the transmission of extradition requests, the concept of pretrial detention with a view to extradition and the possibility of pretrial detention based on a Red Notice posted in the bulletins of the International Criminal Police Organization (INTERPOL) or transmitted by means of the diplomatic channel. Argentina also suggested adding the principle of speciality in order to establish that an extradited person could not be prosecuted by the requesting State for acts committed prior to, and that were different from, those constituting the crime for which extradition was granted. It further suggested envisaging the possibility that the scope of the draft articles might go beyond legal qualification.

Draft articles 13 and 14

157. For Australia, the two draft articles strengthened States' capacity to implement draft article 10, provided an inter-State cooperation framework and assisted States in discharging their obligations to investigate and prosecute crimes against humanity. Australia also stated that they struck the right balance in terms of being effective and broadly acceptable to States.

158. The United States stated that cooperation between States for the purpose of extradition and mutual legal assistance in cases involving crimes against humanity was critical to international efforts to prevent and punish such crimes. The United States noted that similar provisions could be found in existing instruments and suggested including clauses on mutual legal assistance and extradition with which States were already familiar.

159. For Sweden (on behalf of the Nordic countries), draft articles 13 and 14 and the annex constituted a strong addition to international law, should be considered within the context of a future convention and contributed to the implementation of the

principle of complementarity for States parties to the Rome Statute. A future convention would not depend on adherence to any other treaty regarding extradition and mutual legal assistance.

Draft article 14
Mutual legal assistance

160. Belgium, Czechia and Mexico stated that the provision formed a comprehensive framework for the execution of requests for mutual legal assistance, judicial assistance and extradition, and Portugal considered it to be of great practical importance. Colombia pointed out that the provision was not aimed at ensuring that States cooperated with international criminal courts or tribunals.

161. Brazil, Colombia, Czechia and the United Kingdom stated that the draft article was consistent with analogous provisions found in existing international instruments. Brazil welcomed the fact that mutual legal assistance would be subject to the conditions provided for in the national law of the requested State. The United Kingdom stressed the need to put survivors at the heart of the evidence-gathering process to avoid retraumatization. Czechia stated that the provision allowed the necessary flexibility on the issue, encouraging States to enhance their mutual legal assistance by concluding other agreements or arrangements. Türkiye stated that the provision need not encompass all mutual legal assistance issues that might arise during the investigation and prosecution of crimes against humanity, and called for more clarity in the text. According to Colombia and Czechia, existing mutual legal assistance treaty obligations were unaffected by draft article 14.

Paragraph 2

162. Colombia stated that paragraph 2 could give rise to isolationist and erroneous interpretations, and hence suggested clarifying that a legal person could be considered criminally, civilly or administratively liable under national law. The United Kingdom suggested aligning paragraph 2, which referred to “investigations, prosecutions, judicial and other proceedings”, with the annex, which referred only to “investigations, prosecutions and judicial proceedings”.

Paragraph 3

163. Argentina suggested adding a reference to obtaining digital evidence, while Portugal welcomed the option to include detailed provisions on cooperation between States in gathering information and evidence to assist with investigations or prosecutions being carried out in another State.

Subparagraph 3 (a)

164. The United Kingdom questioned whether subparagraph 3 (a) was needed, considering that subparagraph 3 (j) appeared to have the same scope, while Canada stated that greater flexibility should be afforded in the subparagraph.

Subparagraph 3 (b)

165. Canada and Japan suggested careful consideration and further discussion with regard to subparagraph 3 (b) and questioning witnesses by videoconference. Argentina reiterated that the provision for taking statements by videoconference was useful, and Morocco suggested adding “to the extent permitted under national law” at the end of the subparagraph.

Subparagraph 3 (c)

166. Canada suggested not limiting the service of documents to "judicial documents", which was more appropriate to civil law than common law systems.

Subparagraph 3 (h)

167. Canada stated that the meaning of "other purposes" should be clarified.

Paragraph 6

168. Canada suggested clarifying which type of request States might formulate on the basis of the information transmitted.

Paragraph 8

169. According to Sweden (on behalf of the Nordic countries), paragraph 8 helped to close any potential gaps in mutual legal assistance.

Paragraph 9

170. Argentina suggested adding details on the structure and implementation of agreements or arrangements with the international mechanisms mentioned in paragraph 9. China questioned whether the paragraph was necessary and called for further study in the light of, inter alia, the politically sensitive nature of crimes against humanity. The Islamic Republic of Iran stated that formulating a linkage between a possible convention on crimes against humanity and mechanisms that might have been established through politicized decisions of the United Nations or other international organizations would increase the politicization of the overall process and did not seem necessary. The Islamic Republic of Iran also stated that the qualification of acts as crimes against humanity was best carried out by an international judicial organ and that judicial decisions were relevant only when rendered by a competent judicial organ.

Draft article 15
Settlement of disputes

171. Colombia and Czechia stated that the provision was relatively standard in treaties on crimes under international law. Australia noted that the provision was in line with existing treaties on cooperation to combat crime but seemed out of step with other treaties addressing serious international crimes of comparable gravity. Canada suggested aligning draft article 15 with the Convention against Torture. For Belgium, draft article 15 was useful, as it would serve to address any difficulties that might arise in the implementation of the draft articles. Sweden (on behalf of the Nordic countries) stated that a careful balance had been achieved in the draft article, which opened up the possibility of universal membership of a future convention. Portugal supported the two-step approach contained in the provision. For China, draft article 15 was in line with the principle that the settlement of disputes between States should be based on the consent of the States concerned, and was of particular importance owing to the sensitivity of the issue.

172. Colombia suggested referring, in paragraph 1, to all the means of dispute settlement provided for in the Charter of the United Nations, and not only to negotiations. The United States acknowledged the important role that the International Court of Justice could play in the settlement of disputes relating to a future convention, while Belgium suggested adding to paragraph 2 a compromissory clause which would not allow parties to refuse to accept the jurisdiction of the Court. The Kingdom of the Netherlands suggested adding a six-month limit to paragraph 2,

in line with article 86 of the Ljubljana-The Hague Convention. Canada, Mexico and Portugal stated that reservations to paragraph 2 should not be allowed; Canada and Mexico proposed deleting paragraphs 3 and 4. Czechia maintained its position on the issue of reservations. Türkiye and the United States welcomed paragraph 3 as having a positive influence on accession to and the ratification of any future convention.

173. The need to discuss a new clause on reservations was highlighted by Australia, Liechtenstein, Morocco and the United States. Australia stressed that, during negotiations, States needed to strike a balance between drafting a treaty that was acceptable to the largest possible number of States and facilitating compliance with the treaty by States parties. Czechia emphasized the need to avoid provisions and arrangements that could unnecessarily undermine States' willingness to ratify a future convention. Liechtenstein stated that reservations should be prohibited under a future convention in order to, inter alia, ensure that States parties assumed the same obligations, ensure that the convention was consistent with the Rome Statute, protect the integrity and effectiveness of the convention and address the shortcomings resulting from the absence of a treaty monitoring mechanism. Liechtenstein proposed a new draft article, modelled on article 120 of the Rome Statute, reading, "No reservations may be made to this convention". Morocco proposed adding final and transitional clauses addressing the validity of treaty provisions and the means of acceding to or withdrawing from a future convention, including reservations and declarations. The United States noted that conventions under which States were allowed to make reservations to or refuse to accept the jurisdiction of the International Court of Justice were more likely to be widely ratified by States.

174. The possibility of including a monitoring mechanism in a future convention was mentioned by Australia, Iran (Islamic Republic of), Sweden (on behalf of the Nordic countries) and the United States. For Australia, a monitoring mechanism would have to be sustainable and non-interventionist, and proposals for such a mechanism should be considered in the light of whether existing institutions and mechanisms could be leveraged to fulfil monitoring functions. The United States pointed out the valuable role played by treaty bodies in monitoring the compliance of States parties with their obligations under human rights treaties.

Annex

175. Canada suggested considering adding extradition to the annex, in the light of comments by States to the effect that the annex could serve as a model law. Czechia considered the annex to contain useful guidance, and that it could serve as a model for cooperation or be implemented through national legislation. For Mexico, the annex might serve as the legal basis for any judicial cooperation and extradition processes between two or more States that were not bound by a treaty on mutual legal assistance. Brazil welcomed the flexible approach taken in the annex to cases where a State was bound by one or more treaties on mutual legal assistance, which had the potential to facilitate wide adherence to a future convention by States bound by other treaties.

176. Argentina explained in detail why central authorities were useful, while suggesting the addition of more information on the role of INTERPOL in processing mutual legal assistance requests. Belgium and Sweden (on behalf of the Nordic countries) stated that establishing a central authority facilitated cooperation. The United States suggested streamlining paragraph 2, including by deleting the reference to INTERPOL.

177. Argentina suggested adding to paragraph 3 the possibility of transmitting a request by electronic means and stipulating that requests should include the legal

classification of the offence and the applicable penalty. It also suggested including an explicit reference to exemption from legalization and other similar formalities.

178. Canada suggested adding further details to paragraph 4, such as the factual context regarding the service of documents, replacing “relevant facts” with “alleged facts” and specifying that “any person concerned” referred to subjects, witnesses or experts. Canada also suggested clarifying, in paragraph 7, what constituted “reasonable requests” and specifying, in paragraph 10, that interference was in relation to an ongoing investigation of the domestic State, that is, the requested State.

179. Canada suggested detailing, in paragraph 14, what would happen in the event that a State was not able to comply with the requirements of confidentiality. The United Kingdom proposed more detailed wording for paragraph 14.

180. The United Kingdom suggested deleting “if it is not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State” from paragraph 16.

181. Canada suggested clarifying, in paragraph 17, that the person being detained or serving a sentence should freely give informed and written consent to be transferred, and requested clarification of the meaning of the word “credit” in paragraph 18 (d).

182. In paragraph 20, Japan suggested that the requesting State should bear the costs of executing a request, while Canada suggested further elaboration of the provision. The United Kingdom suggested adding a paragraph on fiscal matters, using the phrasing of article 22 of the United Nations Convention against Corruption.

VII. Thematic cluster 5: draft articles 5, 11 and 12

Draft article 5
Non-refoulement

183. Belgium, Brazil, Czechia, Mexico, Portugal, Sweden (on behalf of the Nordic countries) and the United States welcomed the inclusion of the principle of non-refoulement in the draft articles. They noted the important role that the principle played in safeguarding individuals. Belgium, Brazil, Canada, Colombia, Czechia, Sweden (on behalf of the Nordic countries) and the United States recalled international and regional conventions that contained references to the principle of non-refoulement. Mexico affirmed that the principle was consistent with various existing treaties, while Japan raised a concern as to whether draft article 5 was identical to the equivalent article in existing treaties or expanded on the principle of non-refoulement in those treaties. Brazil provided detailed information on its interpretation of the principle and stated that it recognized its *jus cogens* character. For China, draft article 5 did not reflect customary international law; rather, it reflected a proposal for the development of new rules. The restrictions under the provision went beyond those contained in existing international treaties and beyond international consensus. For Colombia, there was a lack of clarity with regard to the relationship between draft articles 5 and 13 (11), while Australia underscored the principle’s close relationship with draft article 4.

184. Australia, Canada, Japan, Türkiye and the United States called for further discussion on the scope of States’ obligations to uphold the principle of non-refoulement. The United States noted that non-refoulement obligations were framed in different ways in widely ratified conventions. According to Colombia and Sweden (on behalf of the Nordic countries), the draft article was to be understood to be without prejudice to other obligations arising from treaties or customary

international law. The Islamic Republic of Iran stated that the current formulation of draft article 5 would lead to impunity or the arbitrary service of justice.

185. Canada suggested adding to the title of the draft article "expulsion" and "extradition" in order to reflect the text of paragraph 1 of the draft article and prevent any misunderstanding that the provision was limited to asylum-seekers and refugees. Canada emphasized that the draft article pertained exclusively to inter-State cooperation. Canada also noted that the need to take into account the broader situation within a country was already included in paragraph 1, since the definition of crimes against humanity required the existence of a "widespread or systematic attack directed against any civilian population", in addition to the constituent acts listed in the draft articles.

186. With regard to the term "substantial grounds", Iran (Islamic Republic of) and Türkiye expressed concerns about the potential abuse and politicization of the term, while Australia called for greater clarity that the "substantial grounds" threshold would apply in respect of non-refoulement arising in relation to a crime against humanity. Sweden (on behalf of the Nordic countries) suggested using the words "serious risk", in line with the Charter of Fundamental Rights of the European Union and the jurisprudence of the European Court of Human Rights. Japan suggested discussing how a Government considering an expulsion, return, surrender or extradition of a person should apply the following requirements: "substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity" in another country; and "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". Australia stated that, for there to be threat of danger, there must be a personal, present, foreseeable and real risk to the person. Canada acknowledged that the assessment of "danger" by competent authorities would be inherently more extensive and potentially more challenging to ascertain in the context of crimes against humanity. Canada expressed willingness to consider whether draft article 5 should incorporate exceptions, given the broad nature of the definition of crimes against humanity.

Draft article 11
Fair treatment of the alleged offender

187. Australia, Belgium, Colombia, Czechia, Mexico, New Zealand, Portugal, Singapore, Sweden (on behalf of the Nordic countries), the United Kingdom and the United States supported draft article 11, emphasizing that it embodied important principles recognized in international and regional human rights instruments. New Zealand and Singapore noted that draft article 11 was aligned with practices in existing multilateral conventions addressing crimes. Belgium, Mexico, Portugal and Sweden (on behalf of the Nordic countries) welcomed the scope of application of the provision, emphasizing that the guarantees in paragraph 1 must be interpreted broadly and upheld at all stages of the proceedings.

Paragraph 1

188. For Singapore, paragraph 1 clarified that States must accord the legal protections to which an accused person is entitled under national and international law. For Portugal, the expression "fair treatment at all stages of the proceedings" was intended to incorporate all guarantees generally recognized under international law. Portugal appreciated the reference to "fair trial", stressing that fair trials entailed an independent judiciary to investigate and judge crimes, the access of defendants to lawyers of their choosing and the opportunity for the defendant to confront evidence, which would appear to be incompatible with investigations and judgments of military courts.

189. Israel stated that a determination concerning criminal proceedings against foreign nationals, including foreign State officials, charged with crimes against humanity should be made by sufficiently high-level officials, in view of the far-reaching implications of criminal proceedings and in the light of the gravity and unique characteristics of such crimes.

190. Canada questioned whether there was a difference between guaranteeing "full protection" of the rights of alleged perpetrators and "protection" of their rights.

191. Australia and Singapore stated that it was not necessary to replicate the wide array of rights possessed by an alleged offender before a national court in the provision. The United Kingdom noted positively the references, in the commentary to the draft article, to certain provisions contained in the treaties. Brazil, Canada, Colombia, Liechtenstein and the United States expressed willingness to add more detailed text to reflect fair trial guarantees found in international instruments. For instance, Colombia suggested including a range of guarantees that were enshrined in various treaties and in customary international law and recognized by international and regional courts. Colombia also suggested including the procedural guarantees recognized by the Inter-American Court of Human Rights, or, alternatively, clarifying that the guarantees provided reflected the minimum required. The United States believed that the provision could be more effective if the rights under applicable national or international law which it encompassed were stated. Canada suggested adding further detail to reflect the rights of accused persons and detainees, as well as clarifying what was meant by the qualifier "applicable" before "national and international law" in paragraph 1. Brazil recommended strengthening the text and incorporating the fair trial guarantees found in articles 55 and 67 of the Rome Statute, while Liechtenstein proposed inserting the text of those articles immediately after paragraph 1 of draft article 11, in the form of three subparagraphs following the introductory phrase "including but not limited to the following".

Paragraphs 2 and 3

192. Belgium, Mexico and Portugal welcomed paragraphs 2 and 3, highlighting that they were inspired by article 36 of the Vienna Convention on Consular Relations of 1963 and were in line with international criminal law conventions and the jurisprudence of the International Court of Justice. Canada, the United Kingdom and the United States emphasized the importance of maintaining consistency between paragraph 2 and article 36 of the Vienna Convention on Consular Relations. Canada and the United States stressed that the "rights" of consular notification and access outlined in article 36 belonged to States, not individuals. Canada suggested replacing the current subparagraph 2 (b) with a new paragraph 3, in alignment with the Vienna Convention on Consular Relations.

193. Canada also suggested that the term "stateless person" in subparagraph 2 (a) could be covered by the phrase "any such person", allowing for the removal of the latter part of the subparagraph. According to the United Kingdom and the United States, the provision of consular communication by States for stateless persons seemed to introduce a novel concept in international law and merited further consideration by States. The United States suggested further discussions regarding the application of paragraph 2 during armed conflict, highlighting that visits to individuals under the Geneva Convention relative to the Treatment of Prisoners of War or the Geneva Convention relative to the Protection of Civilian Persons in Time of War were typically conducted by the protecting Power or the International Committee of the Red Cross. Canada suggested clarifying the content of paragraph 3.

Draft article 12
Victims, witnesses and others

194. Argentina, Australia, Belgium, Brazil, Czechia, Colombia, Mexico, New Zealand, Portugal, Sweden (on behalf of the Nordic countries), the United Kingdom and the United States supported draft article 12. Australia highlighted that the draft article was consistent with international treaties on criminal matters. Australia was open to addressing the rights of victims in a stand-alone article. Sweden (on behalf of the Nordic countries) welcomed the survivor-centred approach of the draft article. Belgium, Colombia, Czechia, Portugal and the United States emphasized the importance of taking into account the role of victims in international criminal justice, including their participation in criminal procedures and access to reparations.

Paragraph 1

195. Australia and Canada suggested specifying that the obligation under paragraph 1 would apply with regard to crimes against humanity occurring within the State's territorial jurisdiction only. The United Kingdom welcomed the explicit reference to the "right to complain", while the United States suggested clarifying its scope. Argentina and Liechtenstein proposed adding a reference to the right of victims to know the truth about the circumstances in which the crimes occurred; Liechtenstein made specific textual proposals to reformulate the provision. Canada suggested adding greater flexibility in subparagraph 1 (a), recognizing that States might have a variety of procedures regarding the protection of victims, survivors and witnesses. The United Kingdom suggested adding, at the end of subparagraph 1 (a), the phrase "and be informed about the progress and result of that complaint".

196. For Canada, the reference to "extradition" in subparagraph 1 (b) might be unnecessary, as it could be covered by "other proceeding". Canada suggested incorporating references to sexual and gender-based violence and violence against children, with a view to protecting the well-being, integrity and dignity of victims, survivors and witnesses and helping to prevent their retraumatization.

197. The United Kingdom proposed that subparagraph 1 (b) be edited to read:

> (b) the safety, well-being and privacy of complainants, victims, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, is protected. Protective measures shall include protection against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given and may include the use of communications technologies; and

198. The United Kingdom also proposed taking a more explicit approach with respect to the term "ill-treatment" and adding, in subparagraph 1 (b), "[to have] their safety, physical and psychological well-being, dignity and privacy protected", drawing inspiration from article 68 of the Rome Statute, and proposed emphasizing that States should take into account various factors when considering the protection of witnesses and victims, particularly in cases involving sexual or gender-based violence or violence against children. The United Kingdom further suggested referring to the need to protect the rights of the child and others with vulnerabilities. The United Kingdom suggested adding, as a new subparagraph 1 (c), the phrase "procedures and evidentiary rules that follow international best practice in evidence collection are established, with the objective of avoiding the retraumatization of victims".

199. New Zealand stated that it was open to enhancing the protection of the rights and role of victims, witnesses and persons affected by crimes against humanity. Argentina suggested stipulating that, in cases where a person requested to testify does

not possess travel documents, the State of residence of that person and third States through which the person needs to travel should cooperate with the requesting State to provide the necessary travel documents.

200. With regard to the definition of the term "victims", Australia supported the decision of the Commission not to define the term, emphasizing that such an approach followed standard treaty practice and that treaties and customary international law provided guidance on its interpretation. Argentina, Brazil, Colombia and Liechtenstein expressed their willingness to discuss the inclusion of a definition. They suggested that inspiration could be drawn from the Rome Statute and the Rules of Procedure and Evidence of the International Criminal Court. Liechtenstein deemed it essential to clarify who was considered a victim eligible for reparation rights, and proposed adding the phrase "as defined in paragraph X" after the term "victims" in subparagraph 1 (b) and two new paragraphs after paragraph 3, one drawing inspiration from article 24 (2) of the International Convention for the Protection of All Persons from Enforced Disappearance and the other from rule 85 of the Rules of Procedure and Evidence of the International Criminal Court.

Paragraph 2

201. For Canada, while paragraph 2 struck a balance between the rights of the victims and those of the alleged perpetrators, States had flexibility to proceed in various ways, and such flexibility should be reflected in the provision. For Portugal, the phrase "in accordance with its national law" granted States enough flexibility to tailor the requirement included in the provision to the characteristics of their criminal law systems and was without prejudice to additional obligations that had been established or might be established under each domestic system.

202. The United Kingdom suggested balancing the needs to protect victims and offenders by adding, at the end of paragraph 2, "and draft article 12 (1) (b)". The United Kingdom highlighted the importance of engaging with and responding to the needs of victims and survivors. The need to reduce the barriers that victims and survivors face when seeking justice, notably retraumatization, reprisals, stigma and rejection, was also emphasized.

Paragraph 3

203. Colombia, Mexico, New Zealand and Sweden (on behalf of the Nordic countries) supported the flexibility given to States to determine the appropriate form of reparation. Mexico affirmed that the list contained in paragraph 3 was illustrative and non-exhaustive. For New Zealand, the provision demonstrated a recognition of the fact that, in the aftermath of the commission of crimes against humanity, various scenarios might arise which required reparations to be tailored to specific circumstances. Sweden (on behalf of the Nordic countries) welcomed the comprehensive concept of reparation, which reflected the evolution in international rights law on the matter. Colombia emphasized that reparation measures should be individual and collective.

204. Belgium highlighted that it was essential for States to take the necessary measures to give effect to the right of victims to seek full reparation for material and moral damages. China suggested that it should be left to the discretion of States to determine the form and scope of reparation for victims, including whether to provide reparation for "moral damages", given the differences between legal systems. Portugal supported the inclusion of the right to obtain reparation for material and moral damages and suggested a stand-alone provision to deal with the issue. Australia suggested modifying the paragraph to enable greater flexibility for States in giving effect to the right to reparation, in accordance with their domestic law frameworks; it

emphasized that such an approach would not preclude States from implementing additional measures to provide reparations for victims through non-judicial or non-criminal mechanisms. Canada suggested adding a general reference to the "right to reparation", since the right to restitution might vary from State to State. Singapore considered the reference to moral damages unnecessary and inappropriate, as the scope of damages for which reparation was available should be left to each State to determine, consistent with the approach in existing conventions addressing crimes. Singapore suggested clarifying in the text itself that reparation might be provided "through the use of regular civil claims processes in national courts". The United States suggested further discussions regarding the scope of the "right to obtain reparation".

205. The United Kingdom suggested further discussions on a text addressing potential stigma and rejection that victims might face in their own community.