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**Crimes against humanity
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(check against delivery)

Mister Chair,

I would like to thank you for giving me the floor to convey Brazil's commentaries on the articles pertaining to national measures. Those articles are essential for a future convention's ability to really fill the gap in international criminal law concerning crimes against humanity.

I take the liberty of referring to the statement delivered yesterday by the distinguished representative of Sweden on behalf of the Nordic countries on the need and by the esteemed representative of Cameroun today of the mental elements for further elaboration; and by the distinguished delegates of Egypt and Jordan on the vagueness of the expression "had reason to know" in article 6 (3) about the criminal responsibility of commanders and superiors.

Laudable though it is the ILC's attempt not to be too prescriptive for allowing policy space to Member States, Brazil believes that article 6 (3) would benefit from a more detailed approach in terms of legal certainty.

It is worth recalling that, in article 2 (1), knowledge of the systematic or widespread attack is established as a constituent element ("mens rea") of a crime against humanity by its perpetrator. In its turn, article 6 (3) states that commanders or superiors must be held accountable for their subordinates' acts if they had knowledge or had a reason to

have knowledge of them. “Having a reason to know” may seem too vague a term for a criminal provision. Therefore, it could be advisable to use terms similar to those in article 28 (a) (i) of the Rome Statute, which specifies that the reason to know is verified in light of the circumstances of the time.

Alternatively, a formulation such as found in article 86, paragraph 2, of the Additional Protocol I to the Geneva Conventions could also prove to be more accurate (“had information which should have enabled them to conclude in the circumstances at the time”). Otherwise, there would be a theoretical risk of strict liability being applied, what would not be in line, in principle, with international jurisprudence.

It is also the understanding of the Brazilian government that nothing in the present draft articles shall be interpreted as affecting the immunities of State officials from foreign criminal jurisdiction, in accordance with international customary law and in line with the case law of the International Court of Justice. Therefore, it would be important to complement this article with a provision in this regard.

Mister Chair

Turning to article 10, Brazil welcomes the inclusion of the *aut dedere aut iudicare* principle in the draft articles, as it may be an important instrument to fighting impunity. This principle is set out in numerous international conventions and, according to the case-law of the International Court of Justice, it creates an *erga omnes partes* obligation. Therefore, each State party has an interest in compliance with them in any given case.

It is worth mentioning that, depending on the legal instrument under consideration, the obligation may be placed on prosecution, rather than extradition, or vice versa.

In the present draft, the obligation is to prosecute the alleged offender, and the alternative is to extradite or surrender the accused. Therefore, this text must be read in conjunction with other articles on national jurisdiction and extradition.

In this regard, Brazil believes that a future convention will benefit from additional safeguards, with a view to preventing the abuse of the universality principle. For instance, the obligation to be created by article 10 as currently drafted could apply to the cases contemplated in article 7(1).

At the same time, in cases where the custody State has no direct link to the crime, the offender or the victim, we could consider creating the obligation to extradite, and the alternatives to surrender to international criminal tribunals, as appropriate, or to prosecute, as envisaged in article 7(2). Brazil believes this would give jurisdictional priority to States with the closest links to the crimes, thereby preventing the misuse of universal jurisdiction.

I thank you.