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Crimes against humanity

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Draft written summary

Annex

Summary by the Chair on the deliberations at the first resumed session (2023) and at the second resumed session (2024) of the Sixth Committee on the draft articles on prevention and punishment of crimes against humanity and on the recommendation of the International Law Commission

1. Thematic cluster 1: introductory provisions (preamble and draft article 1)

1. Thematic cluster 1 concerned the introductory provisions, namely, the preamble, which comprises 10 paragraphs, as well as draft article 1. It was discussed at the 37th to 39th meetings at the first resumed session, held on 10 and 11 April 2023[1] and at the 38th and 39th meeting at the second resumed session, held on 1 April 2024.[2] It was also discussed during informal meetings.

2. Throughout the debates on thematic cluster 1, a number of delegations expressed their views on whether an international convention based on the draft articles would be desirable, as well as on the recommendation of the International Law Commission. Such views are addressed in the section of the present summary concerning the discussion dedicated to the recommendation of the Commission (sect. 6).

3. In the discussion of the **draft preamble**, delegations recalled the role of preambles in the interpretation of treaties, as reflected in article 31 of the 1969 Vienna

[1] A/C.6/77/SR.37, A/C.6/77/SR.38 and A/C.6/77/SR.39.
[2] A/C.6/78/SR.38 and A/C.6/78/SR.39.

Convention on the Law of Treaties.[3] Several delegations welcomed the draft preamble and considered that it appropriately reflected the context and objectives of the draft articles. Delegations noted that several of its paragraphs drew inspiration from the respective preambles of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[4] and the Rome Statute of the International Criminal Court.[5] However, the importance of reflecting the lessons of the decades since the adoption of such conventions, including the potential impact of new technologies and related treaty work, was highlighted. The importance of having a streamlined and coherent preamble was noted. Some delegations called generally for the reformulation of the preamble, while others indicated their openness to amendments.

4. Delegations expressed support for the reference in paragraph 1 to the shocking nature of crimes against humanity and millions of victims of such crimes throughout history. It was proposed to strengthen the text by recognizing the persistence of the commission of such atrocities. A number of delegations expressed support for a proposal to make paragraph 1 more inclusive by referring to "people" rather than "children, women and men". It was emphasized that a widespread or systematic attack against "any civilian population", regardless of their particular group, could be the context for the commission of crimes against humanity.

5. Several delegations welcomed the emphasis in paragraph 2 on the relationship between justice and accountability for crimes against humanity and peace and security. It was proposed to clarify in the text of the paragraph that it did not authorize States to interfere in the internal affairs of another State. It was also suggested to add the phrase "and must not go unpunished" at the end of the paragraph.

6. The reference in paragraph 3 to the principles of international law embodied in the Charter of the United Nations was welcomed. While some delegations expressed a preference for a general reference to the Charter, several delegations considered that the paragraph could be improved by specifying individual principles of international law, with some delegations suggesting existing treaties as models. The prohibition on the threat or use of force and the principles of sovereign equality of States, non-intervention in the internal affairs of other States and the self-determination of peoples were raised. Reference to the interests of justice was also proposed. Some delegations called for a reference to the immunities of States and State officials. It was also suggested to refer to universally recognized principles and norms of international law, and it was proposed to delete the specific reference to the Charter to address this. Several delegations highlighted the importance of avoiding double standards and political abuse of the concept of crimes against humanity. Differing views were expressed as to whether paragraph 3, new paragraphs of the preamble or draft article 1 would be the best place to address the principles discussed. It was also suggested that the best way to avoid politicization would be to maintain the current, general text of the paragraph.

7. A number of delegations stressed the importance of the recognition in paragraph 4 that the prohibition of crimes against humanity was a peremptory norm of general international law (*jus cogens*). Some of them recalled that the International Law Commission, in its work on peremptory norms of general international law (*jus cogens*), had characterized the prohibition of crimes against humanity as such a norm. Relevant jurisprudence of international courts and tribunals and scholarly works

[3] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[4] Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277 ("Genocide Convention").

[5] Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3 ("Rome Statute").

supporting that conclusion were also highlighted. It was noted that the paragraph did not imply that all provisions of the draft articles reflected peremptory norms of general international law (*jus cogens*). A doubt was raised as to whether each of the acts enumerated in draft article 2 fell within the scope of the peremptory prohibition of crimes against humanity.

8. Other delegations preferred the omission of the paragraph. The reservations expressed by some States regarding the aforementioned work of the Commission were recalled by several delegations. Some delegations also noted that norms characterized as being peremptory in nature must meet the criteria for the identification of such norms and considered that further study was necessary in that respect. It was stated that jurisprudence and scholarly opinion were not themselves sufficient to establish that a norm enjoyed such status. It was observed that reference to the peremptory nature of a particular norm was not common in treaty practice, and some delegations expressed doubts as to the consequences of including such a paragraph in a convention. Some delegations highlighted the need to proceed cautiously and in a consensual manner. A proposal was made to refer to the prohibition of crimes against humanity as a universal principle.

9. Delegations generally agreed with the statement in paragraph 5 of the preamble that crimes against humanity were among the most serious crimes of concern to the international community as a whole. A number of delegations also welcomed the emphasis on the obligation to prevent such crimes. It was proposed that the paragraph also refer to the obligation to investigate, prosecute and punish such crimes, as well as to apprehend alleged offenders. Delegations also expressed support for the emphasis in paragraph 6 on ending impunity for crimes against humanity. The link between ending impunity and advancing prevention was emphasized. It was also proposed to highlight the importance of accountability as an outcome of fighting impunity. A further reference to the imperative of prevention, recognizing the perspective of those at risk of such crimes, was requested. The need for a balance between prevention and punishment was also underscored.

10. Several delegations welcomed the reference in paragraph 7 of the preamble to the definition of crimes against humanity in article 7 of the Rome Statute and highlighted the importance of consistency between a possible convention on crimes against humanity and the Rome Statute. For several delegations, that reference was viewed as a means to avoid the fragmentation of international law, enhance legal certainty and ensure consistency with the principles of complementary and *non bis in idem*. Several delegations did not support a reference to the Rome Statute, as it did not enjoy universal adherence and therefore could impair universal acceptance of a future convention. It was stressed by several delegations that further discussions regarding the inclusion of the reference were necessary. According to a view, such reference was unnecessary and could be misleading, as it might imply the existence of discrepancies between the draft articles and the Rome Statute. Differences of views concerning the definition of crimes against humanity at the time of the negotiation of the Rome Statute were recalled. Other delegations recalled the work of the International Law Commission and the extensive negotiations that had led to the adoption of the Rome Statute. It was proposed that the paragraph could expressly refer to that history. A number of delegations emphasized that the draft articles concerned all States, whether or not they were parties to the Rome Statute. It was suggested that it might also be appropriate to refer to the work of previous tribunals, including the Nürnberg and Tokyo tribunals. A number of delegations emphasized that becoming a party to a convention on crimes against humanity would not require becoming a party to the Rome Statute, and that referencing the Rome Statute in no way created obligations towards the International Criminal Court for States that were not parties to the Rome Statute. It was proposed that the word “considering” be

replaced by “noting”. A number of delegations expressed openness to discussing the possibility of replacing the word “considering” with “noting” and adding a reference to customary international law.

11. With respect to paragraph 8 of the preamble, several delegations expressed support for the emphasis on the primary responsibility of States to prevent and punish crimes against humanity. It was suggested that the paragraph could express that point more clearly. Several delegations highlighted the importance of the principle of complementarity, and a number of delegations suggested its inclusion in the paragraph. The view was expressed by a number of delegations that States had the prerogative to exercise their jurisdiction over crimes against humanity committed on their territory or by their nationals. Several delegations affirmed that States had an obligation to exercise their criminal jurisdiction over such crimes. Several delegations considered that the duty to exercise criminal jurisdiction should be limited to cases where there was a clear nexus between the forum State and the crime. It was submitted that the paragraph did not require States to exercise universal jurisdiction. The need for States to have the necessary legislative, administrative and judicial tools to fulfil their responsibility was also emphasized, including to enhance international cooperation with respect to extradition and mutual legal assistance. A suggestion was made to replace the term “duty” with “responsibility” and to clarify in the paragraph that priority should be given to territorial jurisdiction.

12. Several delegations expressed appreciation for the focus in paragraph 9 on the rights of victims and witnesses. Several delegations expressed interest in expanding the text to reflect a survivor-centred approach. The importance of consistency between a future convention and the principles relating to the right to reparation of victims was emphasized. A number of delegations suggested including references to the right to redress and the right to truth; it was reaffirmed that reparations should include material and moral damages and extend to subsequent generations living with the consequences of those crimes. It was suggested the inclusion of references to the right to redress, including material and moral damages, and the right to truth. It was also suggested that reparations should extend to subsequent generations living with the consequences of those crimes. It was stated that the terms “survivor-centred” and “victim-centred” approaches and “right to truth” lacked clarity. It was proposed to clarify the scope of the term “others” and to add a reference to the concept of human dignity. With respect to the rights of alleged offenders, it was suggested that those should be understood in the light of the International Covenant on Civil and Political Rights.[6] It was proposed that those rights would be better addressed in a separate paragraph. It was emphasized that the inclusive nature of the accountability process was fundamental to ensure its effectiveness and strengthen its credibility.

13. Several delegations welcomed the emphasis of paragraph 10 on horizontal cooperation among States in the implementation of measures at the national level, and a number of suggestions were made to enhance the text. It was suggested that the paragraph could use stronger phrasing referring to a requirement to cooperate, drawing from the Genocide Convention. A reference to investigations was also proposed. Those included, for example, reflecting the role of intergovernmental organizations in the fight against impunity, adding references to the Convention

[6] International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 9999, No. 14668, p. 171.

against Torture,[7] the Enforced Disappearance Convention[8] and the *Apartheid* Convention,[9] and clarifying the principle of *aut dedere aut judicare*. It was stated that punishment of crimes against humanity was a responsibility and obligation of both States and intergovernmental organizations. It was also stated that international cooperation should not be obligatory, and a concern was raised regarding the reference to extradition.

14. Several delegations expressed openness to considering additional preambular text, including the need to integrate a gender perspective and the importance of taking into account the perspectives of Indigenous Peoples. It was proposed to add a reference to the Universal Declaration of Human Rights and a reference to the general contribution of international courts and tribunals in addressing impunity and protecting the rights of victims. A number of delegations also proposed clarifying the interplay between the draft articles and international humanitarian law, which they considered to be the *lex specialis* in armed conflict. According to another view, there was no need for the draft preamble to include provisions on the relationship between fields of international law, duplicate or emphasize the content of some draft articles, nor to elaborate on applicable rules of treaty law.

15. In the discussion of **draft article 1 (Scope)**, delegations generally welcomed the legal clarity and certainty brought by its dual focus on the prevention and punishment of crimes against humanity. Several delegations considered the provision to be acceptable in its current form. A number of delegations noted that the provision was similar to provisions of other treaties, including the Genocide Convention, the Convention against Torture, the Convention against Corruption[10] and the Organized Crime Convention.[11] The importance of taking into account relevant regional and international instruments was underscored. It was also proposed that the provision could be reformulated to make explicit that crimes against humanity were prohibited.

16. A number of delegations noted that matters not falling within the scope of a future convention would continue to be regulated by customary international law. The importance of not affecting the body of law concerning the prohibition of genocide and war crimes, as well as international humanitarian law more generally, was noted.

17. Delegations discussed a number of suggestions made with respect to draft article 1. A number of delegations expressed support for the addition of the words “by States” after the words “prevention and punishment”, in order to add legal precision to the provision and to emphasize that the draft articles were concerned with horizontal cooperation among States. It was also suggested to rephrase the paragraph to refer to crimes against humanity more broadly or to focus on the purpose of the draft articles, rather than their scope. It was proposed to make clear that prevention and punishment had a sequential relationship.

18. Some delegations expressed support for a clear statement that the draft articles could not be construed as authorizing an act of aggression or the resort to the use of force inconsistent with the Charter. A call was made for a provision on non-

[7] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85 (“Convention against Torture”).

[8] International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), United Nations, *Treaty Series*, vol. 2716, No. 48088, p. 3 (“Enforced Disappearance Convention”).

[9] International Convention on the Suppression and Punishment of the Crime of *Apartheid* (New York, 30 November 1973), United Nations, *Treaty Series*, vol. 1015, No. 14861, p. 243 (“*Apartheid* Convention”).

[10] United Nations Convention against Corruption (New York, 31 October 2003), United Nations, *Treaty Series*, vol. 2349, No. 42146, p. 41 (“Convention against Corruption”).

[11] United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), United Nations, *Treaty Series*, vol. 2225, No. 39574, p. 209 (“Organized Crime Convention”).

intervention along the lines of article 3 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).[12] References to capacity-building and the transfer of proceedings to an international jurisdiction in accordance with the principle of complementarity were also proposed.

19. Further clarification of the temporal, spatial, objective and personal scope of the draft articles was called for. Some delegations suggested the inclusion of a provision on territorial scope, while others considered that the territorial scope of the draft articles was made sufficiently clear by references to territory throughout them. The view was expressed that the primacy of territorial jurisdiction should be clearly reflected in draft article 1.

20. A number of delegations supported a reference to the non-retroactivity of the draft articles, in line with general international law. Others considered such a provision unnecessary, in view of the rule reflected in article 28 of the Vienna Convention on the Law of Treaties. The need to clarify whether and which reservations would be permitted was also highlighted.

21. Beyond draft article 1, the inclusion of a provision on use of terms was proposed.

2. Thematic cluster 2: definition and general obligations (draft articles 2, 3 and 4)

22. Thematic cluster 2 dealt with the definition and the general obligations, contained in draft articles 2, 3 and 4. Thematic cluster 2 was discussed at the 39th and 40th meetings, held on 11 April 2023 at the first resumed session,[13] and at the 39th, 40th and 41st meetings, held on 1 and 2 April 2024 at the second resumed session.[14] It was also discussed during informal meetings.

23. In relation to **draft article 2 (Definition of crimes against humanity)**, further to the debate on cluster 1 and, in particular, on the preamble, the central question discussed by delegations was the fact that the definition of crimes against humanity contained in draft article 2 was modelled after article 7 of the Rome Statute. A number of delegations highlighted the importance of avoiding the fragmentation of international law and ensuring legal certainty, as well as consistency and coherence with the Rome Statute. Other delegations emphasised their concerns that many States were not parties to the Rome Statute and that the definition of crimes against humanity in draft article 2 was too broad, lacked specificity, or was not in accordance with treaties and recent developments.

24. The significance of the historical evolution of the definition of crimes against humanity was stressed by several delegations. A number of delegations recalled the negotiating history of the Rome Statute in 1998 at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.[15] While several delegations emphasized the fact that the negotiations in Rome had been extensive, robust and consensual, others pointed out that certain aspects of the definition had been subject to intensive debate in Rome and that the Rome Statute was not a universally accepted treaty. A number of delegations stated that the

[12] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17513, p. 609 ("Additional Protocol II").
[13] A/C.6/77/SR.39 and A/C.6/77/SR.40.
[14] A/C.6/78/SR.39, A/C.6/78/SR.40 and A/C.6/78/SR.41.
[15] A/CONF.183/13.

definition in the Rome Statute was the most authoritative one in international law and enjoyed wide acceptance, including by some States that were not parties to the Rome Statute. Therefore, using article 7 of the Rome Statute as a starting point for draft article 2, or a basis for negotiation of a future convention, was reasonable and appropriate. It was emphasised that that did not in any way affect the obligations of States that were not parties to the Rome Statute.

25. It was acknowledged that certain appropriate adjustments to the definition might be necessary to reflect normative progress. A number of delegations stated that the definition of crimes against humanity in article 7 of the Rome Statute, and consequently in draft article 2, reflected customary international law and therefore any changes to the definition contained therein should be approached with caution. Other delegations expressed the view that article 7 of the Rome Statute did not reflect customary international law because it was not representative of the practice of States; in that regard, treaties and instruments containing alternative definitions of crimes against humanity were mentioned, such as the Charter of the International Military Tribunal established at Nürnberg,[16] the draft Code of Offences against the Peace and Security of Mankind,[17] and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[18] The view was expressed that it was important to work with a definition that reflected the views of the international community as a whole and that could facilitate consensus. A number of delegations stated that the Commission had not engaged in a codification exercise. Instead, the objective of the Commission had been to draft provisions that would be both effective and acceptable to States.

26. Regarding the constituent elements of criminal acts listed in draft article 2, it was stated that some of them should be clarified. A suggestion was made to incorporate, for clarity, certain aspects of "Elements of crimes" of the International Criminal Court into draft article 2. Delegations cited examples of national laws and regional treaties regarding crimes against humanity.

27. Delegations presented their interpretations of several of the terms contained in draft article 2. For example, the phrases "widespread or systematic attack", "civilian population" and "knowledge" contained in the *chapeau* of draft article 2 were subject to debate. With regard to the phrase "widespread or systematic attack", delegations engaged in a discussion on whether the word "or" meant that the phrase should be read in a disjunctive or conjunctive manner. Differing views were expressed on that aspect. Some delegations were of the view that the phrase should be read in a disjunctive manner because the elements "widespread" and "systematic" were not cumulative, as had been confirmed by the jurisprudence of international courts and tribunals, in particular that of the International Criminal Tribunal for the Former Yugoslavia. It was stated that, in any event, the phrase should be read in conjunction with the definition of "attack directed against any civilian population" in paragraph 2(a) of draft article 2 and the policy element contained therein. According to another view, the definition of "attack" lacked clarity, since it was unclear whether all underlying acts could be categorized as attacks, and it was pointed out that an attack did not need to be a military attack. Other delegations were of the view that the two elements should be understood as being cumulative in order to avoid ambiguities, as well as self-serving and politicized interpretations of crimes against humanity. It was

[16] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, art. 6 (c) (London, 8 August 1945), United Nations, *Treaty Series*, vol. 82, No. 251, p. 279.

[17] Yearbook of the International Law Commission 1954, vol. II, p. 150, para. 50, art. 2, para. 11.

[18] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (New York, 26 November 1968), United Nations, *Treaty Series*, vol. 754, No. 10823, p. 73.

also stated that the term "civilian population" lacked clarity and ought to be discussed further.

28. Delegations also exchanged views on whether the definition of crimes against humanity required a nexus to armed conflict. While a number of delegations stated that crimes against humanity could be committed both in peacetime and during an armed conflict, as evidenced by State practice and the jurisprudence of international courts and tribunals, others were of the view that a nexus to armed conflict was necessary. In that connection, it was pointed out that the term "civilian population" in draft article 2 indicated that crimes against humanity could be committed only in the context of an armed conflict.

29. Regarding the reference to "knowledge" in the *chapeau*, a number of delegations expressed the view that actual intention should be one of the elements of the required *mens rea*. It was considered that further discussion was needed regarding the mental element of the crime.

30. In relation to subparagraph (c) of paragraph 1, it was stressed that the term "enslavement" merited further analysis. A suggestion was made to add the slave trade as a crime against humanity, which several delegations either supported or expressed a willingness to discuss further. Some delegations presented their own definition, or proposals for a possible definition, of the slave trade. It was also suggested to add "slavery" as a crime against humanity.

31. The omission of a definition of the term "gender", contained in subparagraph (h) of paragraph 1, was subject to debate by delegations. A number of delegations supported the omission, stating, in particular, that the definition contained in the Rome Statute had become obsolete. It was underlined that its absence provided more flexibility for States at the national level. Other delegations preferred to retain the definition of gender contained in the Rome Statute, which in their view had not become obsolete, was unambiguous and constituted agreed language. It was stressed that although there were difficulties in clarifying the term, guidance was still needed on how to define it.

32. Regarding subparagraph (k) of paragraph 1, several delegations expressed concern about the potential misuse of the phrase "other inhumane acts of a similar character", in particular that it might contradict the principle of *nullum crimen sine lege*. It was stated that the phrase should be interpreted narrowly. According to another view, the provision was useful because it allowed for flexibility in the implementation of the draft articles at the national level.

33. With respect to paragraph 2, a number of suggestions were made to refine and align certain definitions contained therein, such as "deportation or forcible transfer of population", "torture", "forced pregnancy", "enslavement", "persecution" and "enforced disappearance of persons", with treaties and relevant jurisprudence. For example, the view was expressed that specific reference to "girls" ought to be included in the definition of "forced pregnancy". Some delegations suggested that the definition of "persecution" should be reviewed, or that "persecution" should be presented as a standalone crime, while others opposed the suggestion to present it as a standalone crime. It was also stated that the "policy" element contained in the definition of the phrase "attack directed against any civilian population" was one of the key features of the case law elaborated by international courts and tribunals on the topic of crimes against humanity. Further analysis and discussion of the term "policy" was also suggested.

34. On paragraph 3, a number of delegations supported the "without prejudice" clause contained therein. It was emphasised that it afforded States the flexibility to provide in their national laws for a definition that was broader than the one contained

in draft article 2, as well as for potential future developments in international law through other legal instruments. In that connection, the commentary to draft article 2 was recalled, which explained the scope of paragraph 3. A debate ensued regarding the normative value of the commentaries adopted by the Commission. Some delegations, however, expressed a preference for omitting the clause from the provision, stating that it could lead to confusion, legal uncertainty and inconsistencies, in addition to the fragmentation of international law.

35. A number of suggestions were made for other underlying acts to be potentially added to draft article 2. Those included, amongst others, "starvation of the civilian population", "ecocide", "forced marriage", "unilateral coercive measures against civilians", "terror related acts", "use of nuclear weapons", "colonialism", "exploitation of natural resources", "economic and mineral exploitation and environmental degradation" and "acts of human trafficking". Crimes committed against Indigenous Peoples were also mentioned.

36. Several delegations suggested incorporating gender-based crimes, such as "gender apartheid", and "reproductive violence", including forced sterilization. A suggestion was also made to adopt a cross-cutting gender dimension in a future convention. The importance of specifying forms of sexual and gender-based violence that amounted to crimes against humanity, in light of the principle of legality, was emphasised.

37. Several delegations stated that the various suggestions made by delegations would be better addressed and discussed in formal negotiations of a future convention. Some delegations expressed cautious openness towards discussing adding underlying acts that had not achieved the status of customary international law, while distinguishing them from those that had, such as forced marriage. The importance of adopting a victim- or a survivor-centred approach in draft article 2 was emphasised by a number of delegations.

38. A suggestion was made to add a new provision regarding the sovereign equality of States and non-interference before addressing general obligations of States.

39. Support was expressed for **draft article 3 (General obligations)** by a number of delegations. Several delegations highlighted the paramount importance of the obligations of States not to engage in and to prevent and punish crimes against humanity, and further emphasised that those obligations, as provided for in draft article 3, were in line with the jurisprudence of the International Court of Justice. At the same time, some delegations expressed the view that the text of the draft article was ambiguous and required further clarification. Several delegations also noted the need to introduce references to the principles of sovereign equality of States and non-interference in the internal affairs of States. A proposal was made to specify that crimes against humanity could be committed by both States and non-State actors.

40. Regarding paragraph 1, it was stated that the obligation contained therein implied an obligation on the part of States not to engage in acts that constituted crimes against humanity through their own organs or through persons over which a State had control and whose conduct was attributable to a State. At the same time, questions were raised as to whether the explicit inclusion of paragraph 1 in the draft article was necessary. A request was made to further improve the text by explicitly indicating in paragraph 1 that States were under an obligation both "not to commit acts that constitute crimes against humanity" and "not to aid or assist, or to direct, control or coerce another State in the commission of an internationally wrongful act".

41. On paragraph 2, some delegations welcomed its twofold dimension, covering the obligations to both prevent and to punish conduct that amounted to crimes against humanity. It was stated that the obligation to prevent crimes against humanity

reflected customary international law and was recognized by international jurisprudence. At the same time, it was questioned whether the qualifier "which are crimes under international law" was needed.

42. Regarding the obligation of prevention, several delegations emphasized that such obligation was one of conduct, rather than of result, and required States to employ all means reasonably available to them to prevent crimes against humanity. It was emphasized that the primary responsibility to prevent such crimes remained that of the State in which the acts were committed. Moreover, it was stressed that a breach of the obligation occurred only where crimes against humanity had been committed. Several delegations expressed the view that the obligation of prevention should be considered one of due diligence.

43. A number of delegations supported the application of the general obligations contained in draft article 3 both in times of armed conflict and in peacetime. It was suggested that how armed conflict affected the constitutive elements of the obligations of prevention and punishment merited further analysis and discussion. A question was raised whether the phrase "whether or not committed in time of armed conflict" was necessary.

44. On paragraph 3, several delegations welcomed the clarification in the text that no exceptional circumstances whatsoever might be invoked as a justification for crimes against humanity. In that connection, it was noted that there was no need to provide the list of unacceptable circumstances in paragraph 3 of the draft article. Some delegations emphasized the application of international humanitarian law as *lex specialis*.

45. **Draft article 4 (Obligation of prevention)** was considered by a number of delegations to be inspired by similar or analogous provisions contained in several treaties (for example, the Genocide Convention, the Enforced Disappearance Convention and the Convention against Torture) and recognized by international jurisprudence. In that regard, the judgment of the International Court of Justice in the case on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* was recalled.[19]

46. Several delegations expressed support for the provision. At the same time, a view was expressed that the draft article was misleading, as States could not be perpetrators of international crimes and their duty was limited to prevention and punishment. A proposal was made to align the draft article closer with article 2 of the Convention against Torture. A number of delegations raised questions with regard to the scope of the obligation of prevention.

47. A number of delegations welcomed the reference to international law in the *chapeau* and stated that the prevention of crimes against humanity should be conducted "in conformity with international law" and should not involve the violation of fundamental human rights. Several delegations emphasised that States were expected to exercise due diligence in fulfilling the obligation to prevent crimes against humanity.

48. Regarding subparagraph (a), some delegations suggested the inclusion of concrete examples of preventive measures, following the precedent of relevant provisions contained in existing conventions such as the Convention against Torture and the Enforced Disappearance Convention. Others noted that the text of the draft article was sufficiently clear, and that it was not necessary to prescribe the means of

[19] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43.

prevention in detail since the inclusion of the word "appropriate" provided sufficient flexibility to States. According to another view, the ways and means of preventing international crimes fell within the national jurisdiction of States, and broad terminology such as "or other appropriate preventive measures" imposed excessive obligations upon them.

49. Some delegations supported the territorial jurisdictional scope of the obligation of prevention enshrined in subparagraph (a). A suggestion was made to include an express reference to both *de jure* and *de facto* jurisdictions. At the same time, divergent opinions were expressed as to whether the scope of the obligation should exclude extraterritorial application or, on the contrary, whether the obligation of prevention extended beyond the State's territory.

50. Regarding subparagraph (b), the intention to foster international cooperation was welcomed by several delegations, and some delegations expressed support for the reference to international organizations. At the same time, doubts were expressed as to whether the paragraph was too broad. A request was made to further clarify the extent of the obligation to cooperate with "other States, relevant intergovernmental organizations, and, as appropriate, other organizations". Some delegations noted that a reference to "other organizations" in subparagraph (b) was inappropriate. A proposal was made to include a reference to cooperation with international courts and tribunals. Different views were also expressed as to whether the words "as appropriate" should be placed in the *chapeau* or retained in subparagraph (b) of the draft article.

51. It was suggested that the relationship between subparagraph (b) and draft articles 3, 9 and 14 ought to be discussed further. It was also deemed necessary to clarify the role of third States in the prevention of crimes against humanity.

3. Thematic cluster 3: national measures (draft articles 6, 7, 8, 9 and 10)

52. Thematic cluster 3 dealt with national measures as reflected in draft articles 6, 7, 8, 9 and 10. The cluster was discussed at the 41st and 42nd meetings, held on 12 April 2023 at the first resumed session,[20] and at the 41st, 42nd and 43rd meetings, held on 2 and 3 April 2024 at the second resumed session.[21] It was also discussed during informal meetings.

53. It was noted that the provisions under cluster 3 were key to the effective prevention and deterrence of crimes against humanity.

54. In their exchange of views on **draft article 6 (Criminalization under national law)**, various delegations considered that the draft article was a key provision establishing the obligation of States to criminalize crimes against humanity under domestic law and to avoid impunity. The view was expressed that draft article 6 offered a good basis and could help States in cases where existing laws covered isolated conduct such as murder or torture but where the incorporation of international standards required additional steps. Having a duty to incorporate such isolated conduct could assist in the prosecution of crimes against humanity at the national level. Some delegations noted that the draft article provided a common standard, adding that domestic laws could go beyond customary rules in the regulation of such crimes. A view was expressed that there could be further analysis of the effects of automatic incorporation of treaties in the domestic legal system. A view was also expressed that the prohibition of crimes against humanity also entailed an obligation

[20] A/C.6/77/SR.41 and A/C.6/77/SR.42.
[21] A/C.6/78/SR.41, A/C.6/78/SR.42 and A/C.6/78/SR.43.

to cooperate in good faith with other States in the prevention and prosecution of crimes against humanity.

55. A view was expressed for the draft article to only state the obligation to criminalize crimes against humanity under national law without elaborating measures to be undertaken by the State. Another view was expressed for the draft article as a whole to be recommendatory in nature. Various States noted that while the acts constituting a crime should be penalized, the exact title or name of a crime under national law need not conform with its title in international law, so as to allow some flexibility for States. A view was expressed that the draft article should allow States the discretion to implement the definitions of crimes against humanity, to the extent that they conform with the object and purpose of a future convention. A delegation also noted that differences among States with respect to their national criminal laws did not preclude them from entering into a future convention.

56. In relation to paragraph 2, concerning the forms of participation in the perpetration of a crime against humanity, a number of delegations noted that States addressed that point in different ways in their domestic laws. Some delegations proposed that a future convention refer to direct and indirect forms of liability, while noting that States might take different approaches to the prosecution of conspiracy, common purpose or other forms of criminal responsibility and emphasising that States should be given flexibility. It was noted that a without prejudice clause to that effect would be desirable. Several delegations proposed that other forms of responsibility, including incitement, conspiracy, planning and financing, be taken into account.

57. Regarding paragraph 3, several delegations agreed with the inclusion of command responsibility. A view was expressed to support the non-invocability of superior orders as a cause to exclude criminal responsibility as they may, in some cases, lead to mitigation in punishment. It was stated that paragraphs 2 and 3 reflected customary international law and the developments of the jurisprudence of international criminal tribunals. A view was also expressed that the text in paragraph 3 should not prevent States from adopting a more detailed standard.

58. There was a suggestion that an element of effective control of the superior be introduced and that the scope be broadened to cover persons effectively acting as superiors or commanders. A suggestion was also made to consider the corresponding provision in article 28 of the Rome Statute. The view was expressed that the phrase “if they knew, or had reason to know” captured the meaning that the superior should have known of the conduct and should have been able to take action to prevent it. It was mentioned in that regard that it could be difficult to determine whether a commander had knowledge or had taken all necessary measures. Some delegations expressed the view that the phrase “had reason to know”, in the case of a commander, was vague for a criminal provision, and it was suggested that the formulation in Additional Protocol II could be used, thus requiring that the persons “had information which should have enabled” the prevention of the crime.

59. Further discussion on the meaning and possible application of the phrase “had reason to know” was called for. A view was expressed that the provision should be rebalanced so as to indicate that the commander status would not attenuate the sentence.

60. Regarding paragraphs 4 and 5, delegations generally concurred that, while holding an official position would not exclude criminal responsibility, paragraph 5 should have no effect on the procedural immunity of foreign State officials, namely, Heads of State, Heads of Government and Ministers for Foreign Affairs, which was regulated by treaty and customary international law. The view was expressed that, as expressed in the commentary of the Commission, the provision related to immunity as a substantive defence and not as a procedural bar to prosecution. The view was

also expressed that there should be further consideration of defences based on the observance of orders from a superior. Some delegations proposed incorporating an express provision referring to the immunities of State officials. Some delegations supported such an idea, while others considered that they were regulated under another body of law. It was emphasized that the question of immunities in paragraph 5 concerned immunities at the domestic level that could create procedural barriers to the prosecution of State officials.

61. The view was expressed that the application of personal immunities of Heads of State, Heads of Government and Ministers for Foreign Affairs when in office should be applied without prejudice to the obligation to cooperate with international tribunals such as the International Criminal Court. Reference was made to the need to follow the ongoing work of the International Law Commission on the topic "Immunity of State officials from foreign criminal jurisdiction" and to retain consistency between the draft articles on that topic and the draft articles on prevention and punishment of crimes against humanity. Some delegations noted that *immunity ratione materiae* should not apply in respect of crimes against humanity. It was mentioned that the draft articles did not contemplate a situation in which persons could be coerced into perpetrating such conduct.

62. In relation to paragraph 6, delegations expressed support for the non-application of the statute of limitations to the prosecution of crimes against humanity. The view was expressed that in addition to criminal proceedings, civil and administrative proceedings should also be exempt from statutes of limitation to allow civil actions by victims and survivors. A view was expressed that it should be made clear that States would not be obliged to prosecute crimes against humanity perpetrated before such crimes were criminalized by their national law.

63. It was recommended that the text include an explicit provision for States to take necessary measures in domestic law to ensure that crimes against humanity be tried by civil tribunals and excluded from the jurisdiction of domestic military tribunals, as only civil courts could guarantee the right to an impartial judgment and due process.

64. Several delegations noted a need to include an express prohibition on the granting of amnesties, in particular blanket amnesties, that could prevent the prosecution of crimes against humanity. A view was expressed that the prohibition of amnesties for crimes against humanity had been recognized in the decisions of various international human rights tribunals and international criminal tribunals and was a consequence of the peremptory *(jus cogens)* status of the prohibition.

65. Another view expressed was that amnesties are important tools in transitional contexts and a preference was expressed for not addressing such aspect in the possible future convention. A view was stated that the granting of an amnesty within a jurisdiction would not bar prosecution in a different jurisdiction or an international criminal tribunal.

66. Regarding paragraph 7, concerning the appropriate penalties, several delegations expressed the view that there should be no death penalty for the commission of crimes against humanity. Some delegations mentioned that procedural safeguards had been put in place in their domestic legislation preventing the transfer of individuals to jurisdictions where they could be subject to the death penalty. Some delegations expressed the view that there existed no universal prohibition of the death penalty under international law. Some delegations stated that the identification of the appropriate penalty for the perpetration of a crime was within the power of the State exercising jurisdiction.

67. The view was expressed that penalties should be addressed in an objective manner in domestic legal systems. It was suggested that a specific provision be included indicating that commander status would have no impact on the sentencing or the penalty. A view was also expressed that the penalties to be imposed for the perpetration of crimes against humanity should be in conformity with international human rights law. It was noted that the penalties for the perpetration of crimes against humanity should be commensurate with the crime, the severity of the crime and the context of the commission of the crime.

68. With respect to the question of liability of legal persons in paragraph 8 of draft article 6, some delegations supported the provision as a desirable normative development. Various delegations noted that the possible future convention would not need to be limited to the codification of rules. The view was expressed that the provision could also refer to the prohibition of the financing of crimes against humanity, regardless of whether such conduct was carried out by natural or legal persons, States or criminal organizations.

69. Other delegations noted that there existed no universally recognized principle of criminal liability of legal persons and that such aspect should not be addressed in a future convention. Some delegations noted that criminal liability was not intended to cover legal persons in their national legal systems. The view was expressed that the inclusion of criminal liability of legal entities could serve as a barrier that might prevent States from joining a future convention. A view was expressed that while other conventions like the Convention against Corruption and the Organized Crime Convention included liability for corporations, such treaties dealt with a different type of crimes. The view was also expressed that the liability of corporations would have to be determined by domestic law.

70. Other delegations considered that the principle reflected in paragraph 8 was key and that the text of a possible convention should elaborate on the analysis of liability broadly, while also taking into consideration administrative, criminal and civil liability.

71. Delegations also exchanged views on **draft article 7 (Establishment of national jurisdiction)**; various delegations welcomed the fact that the draft article provided for a wide range of jurisdictional bases to limit gaps in the prosecution of crimes against humanity. Some delegations also welcomed the inclusion of additional grounds in paragraphs 2 and 3, noting that the text of the draft article would not exclude broader jurisdictional bases under national law. Another view expressed was that only paragraph 1 related to existing law and that paragraphs 2 and 3 addressed universal jurisdiction, which was still being discussed by the Sixth Committee. Other delegations considered passive personality jurisdiction, as anticipated in paragraph 3 of draft article 7, to be optional. Some delegations expressed the view that the primary jurisdiction should be of the State on whose territory the crime occurred. Another view was that primary jurisdiction should be based on any of the criteria set in paragraph 1. A view was expressed that establishing priority of jurisdiction was not necessary under the possible future convention, and it was noted that other treaties of a similar nature did not have such a provision.

72. Several delegations noted that draft article 7 only required States to establish a jurisdictional basis and did not actually oblige them to exercise such jurisdiction. It was noted that the purpose of paragraph 2 was to prevent a jurisdiction from becoming a haven from prosecution.

73. A suggestion was made to discuss situations like the jurisdiction over crimes committed on a ship or aircraft using the flag of a State. Another view was expressed that paragraph 3 merited clarification. Reference was made to the need for a link between the State exercising jurisdiction and the alleged crimes committed by the

accused. Some delegations considered that draft article 7 would only apply to the nationals of States parties to a future convention.

74. A view was expressed that draft article 7 should give flexibility to States to establish and exercise jurisdiction, including universal jurisdiction. According to another view, establishing jurisdiction over crimes committed outside the territory of a State should not lead to the violation of the sovereignty of another State. The view was expressed that draft article 7 should not be misused to exercise jurisdiction owing to political considerations or to avoid extraditing the accused to States that would have grounds to exercise jurisdiction for the alleged crimes committed. A proposal was made to limit the text of draft article 7 to follow that of the Genocide Convention. Another delegation proposed the inclusion of a conference of the parties or a body wherein States could meet to discuss issues such as procedural safeguards and concurrent jurisdiction. It was stated that the text of draft article 7 could be restrictive of the concept of universal jurisdiction.

75. Another view was that the provision did not explain how to resolve a potential conflict of jurisdictions and that paragraph 2 could further magnify the complexity of such an overlap of jurisdictions.

76. Regarding **draft article 8 (Investigation)**, several delegations referred to the need for investigations to be conducted in good faith and expressed the view that sham, delayed or misleading investigations should not be qualified as investigations under the draft article. Some delegations welcomed the inclusion of draft article 8, considering that the investigation described therein was not a criminal investigation as such, but rather one that focused only on the possible commission of crimes against humanity.

77. Some delegations emphasized the importance of the preliminary measures envisaged under the draft articles respecting human rights and preventing abuses for political purposes. A view was expressed that the obligation should encompass a duty of States to investigate allegations of crimes against humanity committed by officials abroad.

78. Various States voiced the need for a more detailed discussion of the possibility of overlapping jurisdiction between two States with ongoing investigations against the same accused. Various delegations expressed that it would be preferable for crimes to be investigated in the State where they occurred, as that could be the State whose authorities might have a better chance of collecting and preserving evidence for the investigations. Delegations also called for further discussion on certain terms, such as the scope of the relevant "reasonable grounds" needed prior to taking persons into custody and the application of immunities. A view was expressed that further clarification was needed concerning the situation of alleged offenders who were subject to objective investigation for other proceedings by their States of nationality.

79. With respect to **draft article 9 (Preliminary measures when an alleged offender is present)**, several delegations noted the importance of the draft article in facilitating the prosecution of an alleged offender and combating impunity. It was also noted that the provision, together with draft article 7, constituted the prerequisite for the implementation of the obligation to prosecute or extradite (*aut dedere aut judicare*), as contained in draft article 10. It was recalled that the text of draft article 9 was based on similar provisions contained in other international instruments, in particular the Convention against Torture.

80. Several general proposals were made with a view to refining the text of the draft article. The need to introduce safeguards into the text of the provision in order to prevent its abuse for political purposes was emphasized. It was noted that the risk of political abuse of prosecution was not contingent on the existence of a future

convention. In the absence of a convention, States could theoretically make broad jurisdictional claims over crimes against humanity with a view to exercising such jurisdiction. The possibility of such a situation justified the incorporation of uniform standards and procedural safeguards in a future convention.

81. The view was expressed that the provision could be reformulated in order to make it more appropriate for criminal justice systems in common law States, which applied the adversarial approach. It was proposed that the text be considered further in the light of other obligations States might have under various international agreements. In particular, some delegations expressed the view that the provision should not affect the application of the rules of international law on immunity. A proposal was made to bring the text in line with draft article 8 by replacing the word "State" throughout draft article 9 with the phrase "competent authorities".

82. Delegations stated that any legal measures directed against an alleged offender should not be arbitrary and would need to comply with internationally recognized fair trial standards. It was noted that any provisional detention measure imposed in accordance with the draft article should be of a fixed and reasonable duration. A proposal was made to include in paragraph 1 of draft article 9 a reference to the fair treatment obligations of alleged offenders, as provided for in draft article 11.

83. With regard to paragraph 1 of draft article 9, a proposal was made to emphasize in the text that any provisional measure should be conditional on a request from a competent jurisdiction or on the existence of judicial proceedings against the alleged offender. It was further proposed that the paragraph be expanded by providing further detail on the considerations that should inform a State's decision to take an alleged offender into custody. A concern was also raised that paragraph 1 could be perceived as lowering the evidentiary standard by allowing States to take preliminary measures on the basis of "information available" to them.

84. With regard to paragraph 2 of draft article 9, it was noted that the scope of the obligation to make "a preliminary inquiry into the facts" had been clarified by the International Court of Justice in its *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* judgment.[22] A proposal was made to replace the phrase "preliminary inquiry", which could have specific connotations in some legal systems, by a more neutral term, such as "investigation" or "inquiry".

85. With regard to paragraph 3 of draft article 9, it was questioned whether the words "as appropriate" were fitting, as they appeared to give excessive discretion to the investigating State. The requirement to "immediately notify the States referred to in draft article 7, paragraph 1", was welcomed. At the same time, it was recalled that some States had previously expressed concerns regarding the obligation to "immediately notify" and observed that such obligation should be interpreted in the light of the circumstances of a particular situation. It was also emphasized that under certain circumstances the disclosure of information to third States could be detrimental to the investigation process.

86. A proposal, also raised in connection with draft article 8, to give jurisdictional priority to the State with the stronger jurisdictional link, in particular in which a crime had taken place or to the State of nationality of the alleged offender, was made. Accordingly, the wording of the final sentence of paragraph 3 of the draft article was considered unsatisfactory, since it tied the exercise of jurisdiction to the intention of a State in which a suspect was present, even in the absence of any territorial or personal jurisdictional link. It was also suggested that draft articles 9 and 10 should be replaced with a single provision, that would streamline jurisdictional rules and

[22] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422.

specifically prevent States without strong jurisdictional links to prosecute the alleged offenders.

87. With respect to **draft article 10 (*Aut dedere aut judicare*)**, several delegations welcomed this provision and recalled the importance of the principle of *aut dedere aut judicare* in combating impunity. The view was expressed that draft article 10 created *erga omnes* obligations. Some delegations recalled that similar provisions were contained in multiple widely ratified international instruments, as well as in national law. It was noted that "the Hague formula", as contained in the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft,[23] and also used in various international instruments, could be used as a source of inspiration for the text of draft article 10.

88. Some delegations noted that draft article 10 was linked to and should be read together with paragraph 2 of draft article 7, as well as with draft article 13. On the other hand, the view was expressed that draft article 10 rendered paragraph 2 of draft article 7 unnecessary, and the removal of the latter provision was proposed.

89. The view was expressed that the principle of *aut dedere aut judicare* should not be limited to criminal proceedings, but also include administrative and civil remedies. It was stated that the obligation to prosecute should be interpreted in a way that would respect prosecutorial discretion. At the same time, some delegations considered it unacceptable for a State to stall or conduct sham proceedings with the sole aim of shielding the alleged offender. A proposal was made introduce a provision addressing the relationship between the principles of *aut dedere aut judicare* and of *ne bis in idem*. Another proposal was made to address the issue of multiple requests for extradition.

90. According to another view, draft article 10 should be interpreted in the light of the jurisprudence of the International Court of Justice, in particular the 2012 Judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*.[24] It was noted that, with respect to crimes against humanity, the obligation to prosecute should be considered to take precedence over the obligation to extradite the alleged offender. At the same time, it was observed that the obligation to extradite could take precedence in cases where there was a stronger jurisdictional link, in particular a territorial jurisdictional link, in a third State. A proposal was made to amend the draft article with a view to defining the criteria for giving priority to either the obligation to prosecute or to extradite, depending on the circumstances of a particular case.

91. A view was expressed that the implementation of draft article 10 should be consistent with other relevant international obligations of a concerned State. In particular, it was noted that the obligation in draft article 10 should have no effect on the procedural immunity of foreign State officials. Accordingly, it was proposed that the draft article be amended to include an absolute obligation to extradite an alleged offender who was also a foreign State official in cases where his or her immunity had not been waived. It was also proposed that the text of the draft article be adjusted to reflect the fact that the obligation contained therein should not be considered fulfilled in the case of the extradition of an alleged offender for an unlawful act other than a crime against humanity.

92. It was stated that the draft article should not be interpreted as allowing for the exercise of universal jurisdiction over crimes against humanity. A suggestion was

[23] Convention for the Suppression of unlawful seizure of aircraft (the Hague, 16 December 1970), United Nations, *Treaty Series*, vol. 860, No. 12325, p. 105.
[24] Ibid.

made that there should be safeguards introduced to guard against the abuse and misuse of universal jurisdiction.

93. Some delegations welcomed the reference to competent international criminal courts and tribunals and underlined their important role in combating impunity. It was proposed that the word "tribunals" should be understood as encompassing hybrid criminal courts. It was noted that the surrender of an alleged offender to an international tribunal was recognized, but not required and should be dependent on the recognition of the jurisdiction of such tribunal by the State concerned. Other delegations proposed the removal of the reference to international criminal courts and tribunals or alternatively to place the reference in a separate paragraph, underlining the principle of complementarity. It was noted that the draft articles dealt with horizontal cooperation among States, while relations with international tribunals were guided by the principle of complementarity, went beyond the scope of the principle of *aut dedere aut judicare* and should be addressed separately.

94. It was recalled that, while the commentary of the Commission to the draft article discussed the potential impact of an amnesty granted by one State on proceedings before the courts of another State, the text of the provision was silent on that issue. Several delegations observed that amnesties were incompatible with the prevention and prohibition of crimes against humanity and proposed to explicitly reflect this in the draft articles. According to another view, there was no need to address the issue of amnesties in the draft articles.

95. A request for clarification was made with respect to draft articles 8, 9 and 10 on the situation of alleged offenders who had already been the subject of genuine investigation or other proceedings by their State of nationality.

4. Thematic cluster 4: international measures (draft articles 13, 14 and 15 and annex)

96. Thematic cluster 4 related to international measures, as detailed in draft articles 13 to 15 and the annex. The cluster was discussed at the 42nd and 43rd meetings, held on 12 and 13 April 2023, during the first resumed session,[25] and at the 43rd and 44th meetings, held on 3 and 4 April 2024, during the second resumed session.[26] It was also considered in the informal meetings.

97. Delegations made general comments with respect to **draft article 13 (Extradition)**. Several delegations recalled that extradition was an important legal tool in the fight against impunity and emphasized the importance of draft article 13 for inter-State cooperation in the punishment of crimes against humanity.

98. Some delegations welcomed the fact that the text of the provision was derived from provisions in widely accepted conventions, such as the Convention against Corruption and the Organized Crime Convention. At the same time, the view was expressed that those instruments should not be used as a basis for the draft articles, as crimes against humanity were of a different nature than corruption and organized crime, requiring a more specific approach. It was considered that the provision did not add value as the offences in other conventions were of a different nature. A proposal was made to follow a similar provision contained in the Genocide Convention, which gave more discretion to States in defining extradition arrangements.

[25] A/C.6/77/SR.42 and A/C.6/77/SR.43.
[26] A/C.6/78/SR.43 and A/C.6/78/SR.44.

99. The need for draft article 13 to reflect States' obligations to respect bilateral and regional agreements was noted. It was stated that the provisions of draft article 13 should not be interpreted as requiring States to extradite their nationals. Another view was expressed that the principle should remain that when States have multiple extradition treaties, they should be able to choose among such extradition treaties how to implement extradition. Delegations welcomed that the issue of multiple requests for extradition was not dealt with in detail in the draft articles but rather was left to the discretion of States. It was also suggested that the question of how to address concurrent requests for extradition be considered.

100. Several delegations proposed the inclusion of new paragraphs in draft article 13. A proposal was made to introduce additional safeguards, in particular with regard to the possibility of extradition to a State where the alleged offender could be tried by an extraordinary tribunal or could face the death penalty or be subject to cruel, inhuman or degrading treatment. The view was expressed that international law did not prohibit the resort to the death penalty and that there was no international consensus on its prohibition. It was also noted that the Convention against Corruption and the Organized Crime Convention did not exclude the death penalty. Accordingly, such a prohibition should not be included in a future convention.

101. Various delegations supported the consideration of additional situations that could be subject to extradition, such as preventive detention, detention based on Interpol requests, as well as the simplified extradition procedure on the basis of consent of the alleged offender. It was also noted that reference could be made to the principle of speciality that would preclude the prosecution of persons for offences different from those contained in the extradition request.

102. Several delegations welcomed the clarification contained in paragraph 3 that all offences listed in the draft articles were extraditable and that there was no exception for political offences. The view was, however, expressed that there was no universally accepted definition of political offences, which could pose difficulties in practice. Another view was expressed that it was for the requesting State to make a determination whether the crime was a political offence or not.

103. At the same time, paragraph 3 was deemed as being excessively prescriptive, hampering the ability of States to examine an extradition request. Furthermore, a call was made for more careful consideration as there was no similar provision in either the Convention against Corruption or the Organized Crime Convention.

104. The view was expressed that paragraph 4 of the draft article established a significant tool for international cooperation. Another view was that the paragraph did not correspond to existing international law standards or national legislation. With respect to paragraph 5 of draft article 13, the view was expressed that additional clarifications were necessary. Subparagraph (b) was considered to go beyond the existing rules on the matter. It was also emphasized that the information indicated in paragraph 5 should be provided upon the deposit of a ratification instrument.

105. A request was made to revisit paragraph 8, as provisions of national law should not be used to alter existing international obligations of States. It was also noted that the paragraph could be seen as lowering evidentiary standards and prioritizing urgency over the quality of the investigation.

106. Several delegations expressed their support for paragraph 11 of the draft article and stated that no one should be prosecuted or punished on account of any ground indicated in the paragraph. Delegations discussed possible modifications to the list of impermissible grounds in light of the clauses found in the relevant provisions of the Convention against Corruption and the Organized Crime Convention. Another view was expressed that some of the grounds to refuse extradition, such as membership of

a particular group, could be subject to a wide range of interpretations, which could hinder international cooperation.

107. A proposal was made to introduce a reference to "a State of nationality of the accused" in paragraph 12 of the draft article and also to take into consideration the place where the person was located. It was further observed that in a case of refusal of extradition of an alleged offender, the obligation of a State to submit the case to its own competent authorities, as contained in draft article 10, was applicable.

108. **Draft article 14 (Mutual legal assistance)** was considered by several delegations to contain a comprehensive framework in matters of mutual legal assistance and to be imperative for the effective prosecution and punishment of crimes against humanity. Several delegations supported the approach of the International Law Commission to draw inspiration from the mutual legal assistance framework contained in the Convention against Corruption and the Organized Crime Convention. A number of delegations stressed that the provision and the annex constituted a strong addition to international law and contributed to the fight against impunity.

109. Some delegations were of the view that draft article 14 should not seek to encompass all mutual legal assistance issues that might arise during the investigation and prosecution of crimes against humanity. In that connection, the view was expressed that the mutual legal assistance provision in the Genocide Convention was a better model for the draft article. It was stated that a high level of detail might have an adverse impact on States' ability to accede to a potential convention. Other delegations expressed their willingness to further consider, in the context of treaty negotiations, how to streamline some aspects of draft article 14 and the annex to facilitate greater flexibility.

110. Several delegations observed that the provision afforded the necessary flexibility for States on matters of mutual legal assistance and did not affect their obligations under existing treaties on mutual legal assistance and recalled the commentaries of the International Law Commission in that respect. Other delegations raised questions regarding the commentaries and noted that aspects thereof required further clarification. Those delegations recalled that the Ljubljana – The Hague Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and other International Crimes pursued a similar objective of facilitating international cooperation in the investigation and prosecution of international crimes through mutual legal assistance and extradition and expressed the view that that convention and the draft articles would complement and reinforce each other in the fight against impunity. The importance of ensuring consistency between those two complementary instruments was emphasized.

111. Others noted that the Ljubljana – The Hague Convention was negotiated outside the United Nations and enjoyed limited participation, while a future treaty on crimes against humanity should aim for universality. Therefore, it would not be appropriate to simply duplicate text from the Ljubljana – The Hague Convention or to redraft the draft articles in order to make them compatible with said Convention. It was observed that any possible incompatibility between the Ljubljana – The Hague Convention and a future treaty on crimes against humanity should be governed by article 30 of the Vienna Convention on the Law of Treaties on the application of successive treaties relating to the same subject matter, especially its paragraphs 3 and 4.

112. Several delegations highlighted the role of bilateral treaties in the area of mutual legal assistance, which took into account the respective national legislation. It was noted that States could choose the applicable instrument as the basis for mutual legal assistance. Some delegations welcomed the recognition that mutual legal assistance should adhere to the conditions specified in the national law of the requested State. It

was suggested to add a reference to the dual criminality requirement in draft article 14. It was also suggested to add a new paragraph concerning the grounds for refusal of mutual legal assistance, parallel to paragraph 11 of draft article 13, with the necessary modifications.

113. As regards specific comments on each paragraph of draft article 14, a suggestion was made to add the phrase "without prejudice to domestic law" before the word "State" in paragraph 1.

114. With respect to paragraph 2, it was stated that the inclusion of the liability of legal persons would create practical difficulties and uncertainties concerning implementation and that the issue should be left to the decision of States, to be undertaken in accordance with their respective national legislation. Alternatively, a paragraph identical to paragraph 7 of draft article 13 could be incorporated into draft article 14 to clarify that such mutual legal assistance would be subject to the domestic legislation of the requested State concerning the extent of liability, investigations, prosecutions and judicial or other proceedings relating to such legal persons.

115. Regarding paragraph 3, it was suggested to clarify that mutual legal assistance could be used for providing financial documents, ensuring the protection of witnesses in accordance with national law, carrying out security measures on behalf of the requesting State that were compatible with the rules of the requested State, and providing assistance in the interception of communications as well as part of special investigative techniques. The importance of the testimony of survivors in the process of building cases against alleged offenders was emphasized. It was also suggested that reference to obtaining digital evidence be added.

116. The necessity of subparagraph 3 (a) was questioned on the basis that the Convention against Corruption did not contain an equivalent provision, and because the scope of the subparagraph was too broad.

117. Concerning subparagraph 3 (b), some delegations suggested careful consideration about the advisability of questioning witnesses by videoconference, while other delegations stated that the provision for taking statements by videoconference was useful.

118. It was suggested that some safeguards be introduced in subparagraph 4 in order to ensure that norms on fundamental human rights and the protection of personal data and trade secrets be duly observed.

119. With respect to paragraph 7, regarding the relationship between the draft article and other legal instruments, while the "without prejudice" clause concerning the applicability of national law was supported, it was also stressed that a future convention would have to establish with precision its relationship with other treaties on mutual legal assistance.

120. Regarding paragraph 9, a number of delegations expressed concerns about the reference to agreements or arrangements with international mechanisms that were established by the United Nations or by other international organizations to collect evidence with respect to crimes against humanity and observed that the paragraph was unnecessary. It was stated that the provision might lead to the abuse of the draft articles as an instrument in the interest of politicized objectives, not that of justice. Concerns were also expressed with respect to the commentaries by the Commission on that paragraph. Some delegations were of the view that the provision did not create any legal obligation on States but simply acknowledged the important role such mechanisms could play in the process of gathering evidence.

121. With regard to the **annex**, it was stated that it could be used as both a model law and a cooperation framework. Some delegations were of the view that a more detailed

text was warranted, as was more clarity on the relevant commentaries. In particular, further discussion was considered to be needed regarding the "designation of a central authority", the establishment of a monitoring mechanism, technical guidance and capacity-building and related fiscal matters.

122. For some delegations, the annex could serve as a legal basis for judicial cooperation between States that were not bound by a treaty on mutual legal assistance. Several delegations welcomed the flexible approach taken in the annex to cases where a State was bound by existing treaties on mutual legal assistance, which had the potential to facilitate wide adherence to a future convention by States bound by other treaties, while also furnishing them with an optional mechanism to reinforce the prevention and punishment of crimes against humanity through mutual legal assistance. It was also suggested that adding a new section on extradition in the annex be considered.

123. Concerning paragraph 2, a number of delegations observed that the designation of a central authority would strengthen the effective communication between States and allow for more effective cooperation. The use of electronic means to communicate requests and additional materials was supported. It was suggested that paragraph 2 be streamlined.

124. In paragraph 16, it was suggested the phrase "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" be deleted, on the ground that the use of video links was an equally valid option rather than a secondary less attractive option, than appearing in person.

125. In paragraph 20, it was suggested that a reference to a requesting State bearing all necessary special costs for the execution of mutual legal assistance, including hiring an interpreter, be added. It was also suggested that a paragraph on fiscal matters, using the phrasing of article 22 of the Convention against Corruption, be added.

126. Regarding **draft article 15 (Settlement of disputes)**, several delegations welcomed the inclusion of the provision, with some highlighting the two-step approach of referring the dispute to the International Court of Justice or to arbitration if negotiations had failed. It was noted that the draft article did not include a time limit on the negotiations and a suggestion was made to set the limit at six months as in the Convention Against Corruption and the Organized Crime Convention. It was considered that such structure could provide flexibility for States.

127. Several delegations expressed the view that the compulsory jurisdiction of the International Court of Justice would be the strongest path for promoting accountability for crimes against humanity and for solving disputes concerning the interpretation of a future convention on crimes against humanity. Another view was expressed that the draft article reflected a standard dispute settlement clause, similar to that contained in the Convention Against Corruption or the Organized Crime Convention. Some delegations emphasized the role of consent in inter-State disputes.

128. Some delegations stated that they did not support paragraph 3, which allowed States to opt out of the dispute settlement mechanism, as it would weaken the provision. It was mentioned that while the text was based on the Convention against Corruption, the gravity of crimes against humanity merited a stronger dispute settlement mechanism, along the lines of that of the Genocide Convention, where disputes should be submitted to the International Court of Justice.

129. It was noted that the consideration of the provision had to be in conjunction with the discussion on whether reservations to a future convention would be allowed. A view was expressed that the possibility of reservations envisaged in paragraph 3

should be maintained. A suggestion was made to omit paragraphs 3 and 4 of the draft article. Another suggestion was made to include a reference in paragraph 2 to any other means of dispute settlement, such as those listed in Article 33 of the Charter.

130. Other delegations stated that draft article 15 reflected a careful balance. Some delegations expressed the view that the draft article ensured the right of the parties to choose the means of settling their disputes and could have a positive influence on the accession and ratification of a future convention. A view was expressed that the various dispute settlement modalities contained in draft article 15 could enhance the effectiveness of the draft articles.

131. A number of delegations expressed the view that it would be desirable for any future convention to have a monitoring mechanism, and reference was made to examples analysed in the memorandum prepared by the Secretariat of the International Law Commission during its consideration of the topic "Crimes against humanity".[27] A proposal was made for the monitoring mechanism to assist in capacity building and the exchange of experiences at the national level to support the ability to prosecute, investigate and facilitate inter-State cooperation. In terms of another view, a possible monitoring mechanism could prove challenging in practice as the labelling of conduct as crimes against humanity should be done by a judicial body and there would be uncertainty as to the role of such a mechanism.

5. Thematic cluster 5: safeguards (draft articles 5, 11 and 12)

132. Thematic cluster 5 concerned the safeguards provisions in draft articles 5, 11 and 12. The cluster was discussed at the 43rd and 44th meetings at the first resumed session, held on 13 April 2023,[28] and at the 44th and 45th meetings at the second resumed session, held on 4 April 2024.[29] It was also discussed during informal meetings.

133. Throughout the discussions on cluster 5, delegations expressed support for the inclusion of the safeguards provisions in the draft articles. Several delegations indicated that the safeguards provided for minimum standards and suggested additional guarantees for persons concerned, based on well-established international and regional legal mechanisms. Delegations highlighted the need to balance, on the one hand, the interests of individuals and States, and, on the other, the desire for detail in light of the universal aspirations of a convention.

134. During the discussion on **draft article 5 (*Non-refoulement*)**, delegations expressed appreciation and support for the explicit reference to the principle of *non-refoulement*. A number of such delegations expressed the view that the provision reflected customary international law. Reference was made, in support of the principle, to several widely ratified international conventions dealing with refugee law, international humanitarian law and international human rights law, at both the global and regional levels. It was observed that the draft article reflected an understanding widely shared by the international community and thus was suitable for inclusion in a future convention on crimes against humanity. A number of delegations stated that the application of the principle of *non-refoulement* was essential to prevent persons from being exposed to crimes against humanity. The view that draft article 5 reflected a peremptory norm of general international law (*jus cogens*) was expressed.

[27] A/CN.4/698.
[28] A/C.6/77/SR.43 and A/C.6/77/SR.44.
[29] A/C.6/78/SR.44 and C/C.6/78/SR.45.

135. However, a number of delegations, while recognizing the principle of *non-refoulement*, nonetheless expressed reservations as to its inclusion in the draft article. Some delegations considered that the principle was, strictly speaking, not part of international criminal law, but related mainly to international human rights law. A number of delegations expressed the view that the provision did not reflect customary international law, as the principle did not apply to crimes against humanity as such. Clarification was sought as to whether the provision purported to expand existing *non-refoulement* obligations of States. Some delegations noted that the principle of *non-refoulement* would continue to apply under international refugee law, international and regional human rights treaties, and relevant national law, regardless of the draft articles.

136. Several delegations raised concerns that the application of the principle would soften national measures to prevent and punish crimes against humanity and could pave the way for abuses and politicization of extradition and mutual legal assistance by States. It was noted that that might lead to impunity or arbitrary implementation of justice. Thus, several delegations expressed a need for, or openness to, further deliberation on the inclusion of the draft article, and a possible redrafting of its text or the clarification of its scope.

137. Other concerns raised were that the reference to *non-refoulement* in the title and the use of the definition contained in the 1951 Convention relating to the Status of Refugees[30] could lead to a misunderstanding that the provisions were being limited to only refugees or asylum seekers. The lack of clarity regarding the relationship of draft article 5 with paragraph 11 of draft article 13 was also raised. It was noted that the text of the provision drew on that of article 3, paragraph 1, of the Convention against Torture, which was questioned in light of substantive differences between torture and crimes against humanity.

138. A number of suggestions were made with respect to the two paragraphs of draft article 5. With respect to paragraph 1, several delegations expressed concerns regarding the lack of clarity as to how to determine the existence of the standard of "substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity". It was suggested that the application and interpretation of similar treaties by various courts, human rights treaty bodies and Committees of Experts could be of guidance in applying the standard. It was also proposed that the provision incorporate a standard of "serious risk" rather than "substantial grounds", consistent with certain regional human rights instruments. Furthermore, it was observed that national courts were already in a position to apply such a standard, as they had been doing in relation to refugees.

139. It was noted that, especially in cases of non-international armed conflict, there might be situations where the danger of crimes against humanity being perpetrated was confined to one part of the territory of a State. It was proposed to amend the provision to refer to "territories of another State or part of the territories of that State" to allow individuals to be returned to a part of a State where such danger did not exist.

140. It was stated that the term "surrender" in paragraph 1 should be re-examined, as it referred to the act of delivering a person to an international court or tribunal, which went beyond inter-State cooperation. It was further suggested that the risk of genocide, war crimes and torture should also be included as grounds for applying the *non-refoulement* principle.

141. As for paragraph 2, it was pointed out that it was necessary to refine the reference to "consistent pattern of gross, flagrant or mass violations of human rights

[30] Convention relating to the Status of Refugees (Geneva, 28 July 1951), United Nations, *Treaty Series*, vol. 189, No. 2545, p.137).

or of serious violations of international humanitarian law", as such matters concerned international human rights law and international humanitarian law. It was stated that the phrase "all relevant considerations" was inherently vague. Some delegations expressed the view that the paragraph added to the risk of abuse of the principle of *non-refoulement*. Doubts were expressed as to whether the paragraph added value, since relevant considerations were already addressed in paragraph 1. It was proposed to align the paragraph more closely with the scope of the draft articles by amending it to refer to "the existence in the State concerned of a consistent pattern of acts listed in draft article 2." A doubt was expressed concerning the expression "consistent pattern" and it was suggested that either the expression "according to international standards" be added at the end of the sentence or that alternative drafting be adopted. It was also suggested that the expression "as appropriate" be introduced.

142. During the discussion on **draft article 11 (Fair treatment of the alleged offender)**, several delegations expressed support for the draft article and emphasised that it reflected important principles recognized by international and regional human rights instruments. It was indicated that references to fair trial guarantees would be an important element of any future convention on crimes against humanity and that the right to a fair trial constituted an essential component of the implementation of the obligation to punish crimes against humanity. Several delegations stated that such guarantees were necessary to uphold the rule of law and ensure the legitimacy of proceedings against an alleged offender.

143. A number of delegations welcomed the specific reference in the draft article to "at all stages of the proceedings" and "fair trial" and emphasized that the rights of the persons concerned should be guaranteed in accordance with the highest international standards. It was noted that the Commission intended to incorporate all the guarantees generally recognized under international law, in particular those contained in article 14 of the International Covenant on Civil and Political Rights.

144. While it was stated that draft article 11 did strike the right balance, some delegations proposed strengthening the draft article through the provision of greater guarantees with a view to bringing it closer to the fair trial guarantees provided for in other multilateral instruments, including the Rome Statute. The view was expressed that the phrase "full protection" was unclear, and several delegations suggested that the draft article could be made clearer and more effective by specifying which rights were to be guaranteed under applicable national or international law. Some delegations proposed the inclusion of various specific rights. However, some other delegations considered that a repetition of relevant legal standards was not necessary. It was noted that such detailed guarantees had been provided for in the Rome Statute because it established an international court, which the draft articles did not seek to do. It was also proposed that the provision make clear that it provided for minimum guarantees and that other sources of law might require greater protections. The view was expressed that the provision gave the incorrect impression that persons accused of crimes against humanity enjoyed special standards of treatment.

145. A concern was raised that the draft article did not indicate the consequences of failing to ensure fair treatment for the persons concerned, nor did it set a time frame for the guarantee of the realization of the rights provided for in paragraph 2. The necessity to clearly state that the draft article in no way modified international humanitarian law was expressed.

146. Delegations also made comments on and proposed suggestions to the three paragraphs of draft article 11. It was indicated that, by resorting to the formulation of the Rome Statute, paragraph 1 would benefit from more precision. It was also suggested that the broadest interpretation be given to paragraph 1 so that the guarantees provided by the draft article would cover all stages of the proceedings. It

was further suggested that the phrase "including human rights law and international humanitarian law" was not necessary and should be deleted.

147. Some delegations expressed the view that paragraph 2 was consistent with the 1963 Vienna Convention on Consular Relations. The importance of such consistency was underscored. It was suggested that the paragraph be amended to reflect the fact that the right to visit detained nationals was the right of States, rather than of the individuals concerned. A number of delegations called for further discussion of the protection of stateless persons provided for in paragraph 2, including how such a process would work in practice. A doubt was expressed regarding the subjectivity and imprecision of the term "without delay".

148. With respect to paragraph 3, concerns about the effectiveness of the rights foreseen in paragraph 2 were raised in light of the strict rules imposed by some States on the exercise of such rights. Concerns about the clarity of the content of paragraph 3, including with regard to the terms of enjoyment of the guarantees provided for in paragraph 2, were also raised. Furthermore, the addition of "the Vienna Convention on Consular Relations, 1963" as another source for paragraph 3 was suggested.

149. The view was expressed that the draft articles should not include provisions addressing immunity or amnesty, particularly in view of the ongoing work of the Commission on the topic "Immunity of State officials from foreign criminal jurisdiction".

150. With regard to **draft article 12 (Victims, witnesses and others)**, several delegations welcomed its inclusion and its broad scope, including that of the categories of persons protected by the provision. A number of delegations expressed their support for a victim or survivor-centred approach to accountability for crimes against humanity. The desire for international minimum standards with respect to such rights was expressed.

151. Some delegations recalled that the rights of victims, witnesses and others enjoyed increasing prominence in international criminal law. It was noted that similar safeguards had already been incorporated in most national legal systems. Some delegations emphasized the importance of allowing States a degree of flexibility in the protection of the rights of victims, witnesses and others, thus allowing for effective implementation in their national legal systems. The centrality of the protection of victims' rights to the legitimacy of prosecutions was emphasized. It was noted that the reports and testimony of victims and witnesses were necessary for successful prosecutions. The view was expressed that the provision was not needed and that it was preferable to leave such matters to national law.

152. Regarding paragraph 1, some delegations suggested that it should be specified that the obligation contained therein would apply only with respect to crimes against humanity occurring within the State's territorial jurisdiction. With respect to subparagraph (a), it was noted that the commentary to the paragraph explained that that included legal persons, for example, religious groups and non-governmental organizations. The ability of any person to make a complaint under the provision was welcomed. It was suggested to add, at the end of subparagraph (a), a reference to the right of victims to be informed of the progress and outcome of a complaint. With respect to subparagraph (b), it was proposed that ill-treatment related to physical and psychological well-being, as well as to dignity and privacy, should be specified in the text of the provision. The importance of ensuring that victims and their families were protected from retaliation was emphasized. It was also suggested that adding the words "as appropriate" would clarify the scope of the subparagraph. Clarification of the meaning of the term "other persons" was requested. The importance of taking into account the age, gender and health of victims was emphasized. It was suggested that a reference to the most vulnerable groups, particularly victims of sexual and gender-

based violence and violence against children, be included. It was also suggested that references to whistle-blowers and persons with disabilities be included. Other delegations indicated that there was no need to specify particular categories of victims as the crimes in question concerned humanity as a whole.

153. A new subparagraph encouraging States to establish best practices aimed at preventing re-traumatization during evidence collection was suggested by some delegations. The importance of the availability of legal aid to victims was mentioned. The suggestion to address practical issues concerning victims and witnesses, especially concerning the lack of travel documents and the need for cooperation of third States where witnesses might be located, was made.

154. With respect to paragraph 2, a number of delegations stressed the importance of ensuring that the voices of victims and survivors were heard. The need to address procedural and substantive aspects of the right of access to justice was emphasized. The need to reduce the barriers that victims and survivors face when seeking justice, notably re-traumatization, reprisals, stigma and rejection, was also emphasized. A suggestion was made to include an obligation for States to examine the complaint impartially and promptly and to allow the parties involved in the complaint to present their opinions and observations at the criminal trial; it was noted that inspiration for text in that regard could be drawn from the Ljubljana-The Hague Convention. The flexibility granted by the phrase "in accordance with national law" in the paragraph was appreciated, and it was noted that the scope of application of paragraph 2 was without prejudice to additional obligations that had been established or might be established under each domestic system.

155. With respect to paragraph 3, a number of delegations welcomed the provision. Several delegations recalled the importance of reparations to restorative justice and the prevention of further crimes. Several delegations supported the flexibility given to States to determine the appropriate form of reparation. Other delegations suggested modifying the paragraph to allow greater flexibility for States in implementing the right to reparation according to their domestic laws. It was recalled that the list of forms of reparation in the provision was non-exhaustive, allowing for reparations tailored to the circumstances of each individual case. The importance of victims' rights to information and to the truth was also emphasized. However, the view was expressed that the concept of "right to truth" lacked clarity. Some delegations suggested that the text should specify that the availability of reparations in civil proceedings could meet the requirements of the paragraph. Delegations expressed differing views as to whether the provision should provide for moral damages, with some welcoming their inclusion and others preferring to leave the scope of available damages to national law. It was suggested that a general reference to the right to reparation would be sufficient. Several delegations also emphasized the need to ensure respect for the immunities of States and their property.

156. Further distinction between the obligations of States and those of offenders to make reparations was requested, and some delegations called for clarification about the scope of the obligation in the case of a State exercising its jurisdiction on the basis of passive personality or universal jurisdiction. The view was expressed that only the State on whose territory a crime occurred had jurisdiction to consider compensation.

157. Several delegations supported the recognition of the right to obtain reparation on a collective basis. A concern was raised regarding the extent to which reparations should be implemented regarding the transatlantic slave trade and other crimes against humanity related to colonialism. Another concern highlighted was the potential inability of conflict-fragile States to allocate the necessary resources to fulfil the right to obtain reparations.

158. A number of textual proposals were made to reformulate paragraph 3. Those included suggestions, amongst others, to add the phrase "and under its control" after the phrase "any territory under its jurisdiction", to establish a timeline for the provision of compensation and to add the possibility of allowing victims to choose the type of reparations. A suggestion was also made to include a provision for judicial cooperation regarding seizure and confiscation for the purpose of reparation; it was noted that inspiration for text in that regard could be drawn from the Ljubljana-The Hague Convention.

159. Overall, several delegations expressed interest in further discussion of draft article 12 and improvements to its text, including considering additional paragraphs and its structure. The suggestion to add a fourth paragraph based on article 4, paragraph 1, of the International Covenant on Civil and Political Rights was made. A number of delegations suggested addressing the "rights of victims," the "rights of witnesses," and the "right to reparation" in separate paragraphs. Delegations remained divided on whether the provision should include a definition of "victim" or whether the question should be left to national law. The definitions of "victim" in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, annexed to General Assembly resolution 60/147, of 16 December 2005, and in rule 85 of the Rules of Procedure and Evidence of the International Criminal Court were recalled as potential models. Calls were made to adopt a definition that extended to witnesses of atrocities and children born of sexual violence. It was also suggested to discuss the application of statutory limitations to proceedings where victims requested reparation, the provision of reparations in the context of armed conflict, the reintegration of victims that might face potential stigma and rejection in their own community, and voluntary restorative justice mechanisms, including the possibility of converting assets of perpetrators into monetary reparations for victims within their territories. The importance of including a gender perspective and providing for the views of Indigenous Peoples was emphasised, and support for a specific reference to the perspectives and rights of children was voiced.

6. Recommendation of the International Law Commission

160. The question of the recommendation of the Commission contained in paragraph 42 of its report on the work of its seventy-first session for the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles was not subject to a substantive debate at the first resumed session. Instead, in accordance with the programme of work adopted at the beginning of the first resumed session, the Secretariat provided a briefing at the 43rd meeting of the Sixth Committee, on 13 April 2023,[31] during which time it provided some general remarks about the Commission's authority to make recommendations before discussing the recommendation being considered by the Committee. It also sought to contextualize the recommendation within the overall history of the Commission's recommendations since its establishment. The briefing was followed by a question-and-answer segment at both the 43rd and 44th meetings, held on the same day.[32]

161. At the second resumed session, the substantive debate on the recommendation of the Commission was held at the 45th meeting, on 4 April 2024.[33]

[31] A/C.6/77/SR.43. See also A/C.6/77/INF/4.
[32] A/C.6/77/SR.43 and A/C.6/77/SR.44.
[33] A/C.6/78/SR.45.

162. Throughout the debates on thematic cluster 1, both at the first resumed session[34] and at the second resumed session,[35] comments were made on the question whether an eventual international convention based on the draft articles was desirable, as well as on the recommendation of the Commission. Those comments and the statements delivered during the second resumed session are covered in the present section.

163. A number of delegations recalled that, as decided in General Assembly resolution 77/249, the purpose of the discussion in the resumed session was not to prejudge the final decision on the recommendation of the International Law Commission but rather to exchange substantive views on the draft articles and to consider further the recommendation of the Commission.

164. Delegations discussed whether a gap existed in the international legal framework that a possible convention might address. A number of delegations stated that they were convinced that a comprehensive convention on crimes against humanity would fill a gap in the existing legal framework, given the existence of similar conventions relating to genocide and war crimes but none dedicated to crimes against humanity. It was noted that such a gap was further evidenced by the fact that existing treaties and customary international law regulating crimes against humanity were limited and that a considerable number of States did not have national legislation criminalizing crimes against humanity. The potential for a convention to serve as an accountability tool, bring legal certainty, facilitate inter-State cooperation, strengthen the international legal system and national legal systems, including through the provision of technical assistance, was highlighted. It was stated that a legally binding international instrument would consolidate the legal edifice of international criminal law in light of the *jus cogens* nature of the prohibition of crimes against humanity. The inclusion of stronger protections for the rights of the child was called for.

165. Delegations that did not consider there to be a gap in the international legal order cited the existence of various instruments and tribunals, which in their view provided sufficient legal basis for addressing crimes against humanity. Further substantiation of the existence of such a gap was requested. The view was expressed that a convention could lead to the fragmentation of international law, which would not be conducive to the prevention and punishment of crimes against humanity. It was observed that many States had criminalized crimes against humanity, or specific elements thereof, in their national laws. Accordingly, legal tools to combat impunity already existed and, therefore, it was preferable to strengthen international cooperation between States on the basis of such existing legal frameworks**.**

166. A number of delegations supported the recommendation of the International Law Commission for the elaboration of a convention on prevention and punishment of crimes against humanity on the basis of the draft articles prepared by the Commission. Support was expressed for the Sixth Committee taking a decision at the seventy-ninth session of the General Assembly to begin a process to negotiate a future convention; it was stated that the decision of the Sixth Committee was one of a procedural nature to launch a process. In that regard, willingness to engage in a formal negotiation of an international convention, in accordance with the mandate established in Article 13, paragraph 1(a) of the Charter of the United Nations, was emphasized. A number of delegations expressed a preference for a dedicated international conference of plenipotentiaries. A delegation reiterated its willingness to host an international conference. Other delegations underlined the importance of negotiations being conducted under the auspices of the United Nations. It was clarified that the phrase “on the basis of the draft articles” meant that the draft articles would be a starting point for negotiation by States, which would exercise their

[34] A/C.6/77/SR.37, A/C.6/77/SR.38 and A/C.6/77/SR.39.
[35] A/C.6/78/SR.38 and A/C.6/78/SR.39.

sovereign prerogative in deciding whether and how to participate in those negotiations, what positions to take and whether to ratify a final convention.

167. Several delegations stressed that collective and cross-regional efforts were necessary for any future convention, noting the importance of holding inclusive, thorough, constructive and transparent negotiations. It was emphasised that the legitimate concerns expressed by States ought to be taken into account. It was considered that political mutual trust had to be enhanced, since the elaboration of a convention was not only a legal matter, but also required the necessary political will. The need to build trust among States that a potential convention would not prejudice the principles of sovereignty equality of States and non-intervention was emphasised. The importance of a text that enjoyed wide support and that was adopted on the basis of consensus was highlighted. It was stated that improvements to the substance of the draft articles would bring States closer to consensus. The view was expressed that consensus on all substantive aspects of the draft articles was not needed in order to achieve consensus on a decision to launch a treaty negotiation process. A number of delegations considered that the fact that there were differences of views on some aspects of the draft articles should not prevent the Sixth Committee from moving forward with a process to negotiate a convention, since it was the very essence of multilateralism that such differences could be better addressed and discussed in a negotiation process. The negotiation processes of the Genocide Convention and the Rome Statute were cited as examples of such a process.

168. Other delegations stated that there still remained highly diverging views among States on the recommendation of the Commission and on the draft articles, such as on issues related to the definition of crimes against humanity, the bases of jurisdiction, and the role of international bodies. In light of such diverging views, it was stated that a convention on crimes against humanity would not become an effective instrument enjoying universal support. In that connection, it was considered that a convention would be premature and more in-depth study and serious consideration of the draft articles were needed. Delegations were urged to proceed in a prudent manner. It was stressed that certain legal issues in the draft articles lacked clarity and that the draft articles were ambiguous and a reflection of selective justice. Some delegations expressed the view that the draft articles did not reflect customary international law and a thorough examination of the practice of States on crimes against humanity was necessary. A suggestion was made to return the draft articles to the Commission for further consideration and revision, taking into account the views of States in an exhaustive and inclusive manner. It was stated that the politicization of crimes against humanity posed the biggest obstacle to a possible convention.