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Crimes against humanity
(Agenda item 80)
Cluster III

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(check against delivery)

Madam Chair,

Turning to cluster III, on national measures, Brazil considers that article 6 (3) would benefit from a more detailed approach in terms of legal certainty. "Having a reason to know" may seem too vague a term for ascertaining “mens rea” in a criminal provision.

Therefore, it could be advisable to use the same terms as those in article 28 (a) (i) of the Rome Statute or a wording such as found in article 86, paragraph 2, of the Additional Protocol I to the Geneva Conventions, with regard to command responsibility. Otherwise, there would be a theoretical risk of strict liability being applied.

It is also worth noting that the ILC, in its commentaries to article 6, acknowledged that "paragraph 5 has no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law". In any case, it would be essential, for the benefit of legal certainty, to complement this article with an explicit provision in this regard.

Brazil underscores that the establishment of national jurisdiction as per article 7, especially by means of the principle of universality, may not serve other interests than those of justice. Therefore, it is important to introduce safeguards against the abuse and misuse of universal jurisdiction.

Brazil commends the ILC for its balanced drafting of article 8 and interprets it as an obligation by States which is not contingent on formal complaints filed by the victims with authorities, who must investigate whenever there are reasonable grounds to believe that acts constituting crimes against humanity have been or are being committed in any territory under the jurisdiction of their State. Still, this obligation must be fulfilled without prejudice to the right of victims to present complaints to the competent authorities.

Regarding article 9, Brazil notes with appreciation the provision in paragraph 3 according to which a State that has taken a person into custody shall immediately notify the States referred to in draft article 7 paragraph 1 of the fact and of the circumstances which warrant the detention. This is important to ensure that the State with the closest links to the crime have priority in exercising jurisdiction over it.

Madam Chair,

Brazil welcomes the formula *aut dedere aut judicare*, instrumental to fight impunity for crimes against humanity. In creating *erga omnes partes* obligations, this clause may fill loopholes, inasmuch as States Parties to the convention will have the obligation either to submit the case to its competent authorities for the purpose of prosecution, or to extradite or surrender the offender to another competent jurisdiction.

At the same time, this formula should not be used as a pretext for the misuse of universal jurisdiction, which should only be applied in a judicious manner.

States with the closest links to the crime must always have jurisdictional priority to prosecute perpetrators. Many States have reiterated this in their written comments.

As currently drafted, article 10 sets out the obligation to prosecute, regardless of the basis for criminal jurisdiction. In other words, it creates the obligation to prosecute even when the custody State has no direct link to crime. It obliges States to exercise universal jurisdiction, extradition being the mere alternative to this obligation.

In our view, this contradicts the basic principle that universal jurisdiction is subsidiary to more direct connecting factors, such as territoriality and nationality, as reaffirmed by many states in their written comments.

In this respect, Brazil notes that the formula *aut dedere aut iudicare* can be found in over 60 multilateral instruments. Depending on the treaty under consideration, the obligation may be placed primarily on prosecution, rather than extradition, or vice versa.

Judge Yussuf, in the ICJ judgment on the Obligation to Prosecute or Extradite, alluded to two categories of conventions containing the formula *aut dedere aut judicare*: (a) those that impose an obligation to extradite, and prosecution as a secondary obligation after the refusal of extradition; and (b) those that impose an obligation to prosecute, with extradition

being an option available to the State. According to him: “It is clear that category (a) conventions are structured in a manner that extradition to the State in whose territory the crime is committed is given priority”.

Examples of multilateral instruments belonging to this category include Article 15 of the African Union Convention on Preventing and Combating Corruption; and Article 5 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

In this context, Brazil reiterates that article 10 would benefit from two different paragraphs.

The first one could build upon the current draft, in order to set out the obligation to prosecute when the custody State has a direct link to the crime, the suspect or the victim, unless it decides to extradite or surrender.

The second paragraph would apply in cases where the custody State has no direct link to the crime, the offender or the victim. In these cases, extradition should be the primary obligation, while prosecution should be the alternative.

This would reinforce our collective commitment to fight impunity while preserving the jurisdictional priority of the States with the closest links to the crime.

I thank you.