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Resumed Session

Cluster III)

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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

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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

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 Tm 0 g 0 G [(s -6(r)5()gm 0 g 0 G 7>()] TJ Tm [(s -6(rax-252(t)1

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 iudicare*: (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

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clear that category (a) conventions are structured in a manner
that extradition to the State in whose territory the crime is
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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

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.