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Developments concerning the international Criminal Court

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Introduction

I was honoured to chair the Diplomatic Conference that adopted Ljubljana -The Hague Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes, and other International Crimes on 26 May 2023. Now I am grateful for the opportunity to present this new treaty to you. I am thankful for this invitation.

The Conference was a success because it resulted in the adoption by consensus of an ambitious new treaty intended at strengthening interstate cooperation in the investigation and prosecution of the gravest international crimes.

It was not very successful in shortening the title of the new treaty which, not surprisingly, it is by now better known as The Ljubljana- The Hague Convention.

Ljubljana because it is in this beautiful city where the treaty was adopted after two very intense weeks of negotiations. The Hague, because this is where the treaty will be open for signature at a Conference to take place at the Peace Palace on 14-15 February next year.

It is to be hoped that many will come to the Conference and join the treaty as soon as possible. At a moment that we see a multiplication of national efforts to investigate and prosecute international crimes, this new treaty will be of great assistance to facilitate proceedings at the domestic level.

Only three ratifications are necessary for its entry into force and states have also the possibility of provisional application while they conduct the ratification process. This could already allow for cooperation among some states. However, it is obvious that the universal participation in the treaty will be very important for its effectiveness. As it is the case for most multilateral treaties, achieving universal participation will be very challenging. In this case, even more so, considering the peculiar process that led to its adoption, which was entirely conducted outside the United Nations framework.

There is to my knowledge only one precedent of an important multilateral treaty being negotiated and adopted outside the United Nations, that is the Ottawa Convention on the ban of anti-personnel landmines. However, in the Ottawa process, it had been agreed that the UN Secretary General would become the depositary and several UN resolutions referring to the initiative were also adopted during the process. There has been no link between the MLA process and the UN although this could change in the future.

I. The MLA PROCESS.

Let me briefly remind you of the modalities of the MLA process that culminated in the Ljubljana Conference. The Conference was short, only two weeks, but it followed more than a decade of efforts to develop the treaty and gather support.

The initiative was launched in 2011 by a small group of states which diagnosed that there was a gap in the law that needed to be filled to ensure appropriate cooperation in relation to investigations and prosecutions of the gravest international crimes. Indeed, there was no multilateral framework for these crimes, contrary to what existed for transnational crimes or corruption.

The group of states that led the process or so called “core group” was composed of Argentina, Belgium, Mongolia, The Netherlands, Senegal, and Slovenia.

As said, the process took years, and included various preparatory meetings open to all states and civil society organisations as well as other events and briefings intended to disseminate information and obtain comments that enriched the successive drafts that followed. Crucial steps in this regard were the two Preparatory Conferences that took place in Doorn and Noordwijk in the Netherlands in 2017 and 2019 respectively. These were followed by three rounds of virtual consultations during the pandemic.

Throughout these years the core group was not only keen to obtain comments to the successive drafts from states and civil society. It also made a point of constantly consulting practitioners, national prosecutors in particular, to ascertain what was necessary and helpful for their investigations. Indeed, the objective was to achieve a practical, useful toolkit for cooperation that would take into account needs and lessons learned from existing practices.

During these years, efforts were also made to allay any fears of a negative impact of the proposed convention on the work of the International Criminal Court. It was regularly explained that the proposed convention would not undermine the ICC but, on the contrary, help it to achieve its goals as a last resort, complementary institution. ICC Judges and prosecutors regularly came to the meetings to endorse this view. As a judge and later President of the Court, I participated myself in various occasions, emphasizing that states and the Court had a shared responsibility in the fight against impunity.

By the time of the Conference, 80 states had formally supported the treaty. Many of these supporting states attended the conference together with others that participated as observers. The interest by civil society organisations also grew along the years. They also participated in the conference and played an extremely active role in the discussions – at the plenary sessions as well as in the three working groups.

I would like to stress here the extraordinary leadership provided by the Chair of the Drafting Committee, Mr Rene Lefeber from the Netherlands and the three coordinators of the working groups, Vaious Koutrolis of Belgium, Erica Lucero of Argentina and Matevs Pezdirc of Slovenia. They played a crucial, indeed indispensable role, given the many contentious issues as well as the tight timeline we had to achieve consensus and have a final treaty text adopted. Without them and the great commitment of delegations and work of the Secretariat of the Conference we would have never achieved this result. My special recognition goes to the Secretary General of the Conference, Ambassador Marko Rakovec of Slovenia and his team.

Now, let me give you a general overview of what the Convention is about.

II. CONTENT OF THE CONVENTION

As some of you well know, there were two alternative approaches to the Convention. Some argued in favour of a convention that would be pure MLA. That is a treaty that would **only** include obligations related to mutual legal assistance and extradition. The alternative approach put forward by the core group was to adopt a convention that would also include, *inter alia,* definitions of crimes, obligations to criminalize and establish jurisdiction and provisions for the protection and reparation of victims. This was the approach put forward by the core group, which eventually prevailed.

This approach, as you can well imagine did not make my life, our life any easier at the Conference. It added controversial issues to the table and raised considerable risks of undermining existing or developing international law. Fortunately, we were all aware of the risks and we all worked collectively to make sure that this would not occur. We were extremely careful not to change agreed language of the Rome Statute and other conventions. We were also very conscious of the need not to undermine draft provisions currently included the UN Convention of Crimes against Humanity or impact negatively in ongoing discussions of this Convention in any way. It was not always easy, but I believe we managed, as a result, to set appropriate standards that do not undermine or prejudice in any way existing or developing provisions of international law.

There is also a specific provision in the Convention which emphasizes that nothing in the Convention shall be interpreted as limiting or prejudicing in any way the development of the law, including in relation to the definitions of the crimes.

A. MLA and Extradition provisions

While general provisions of international law are the ones that attract most attention, the technical provisions related to MLA and extradition indeed constitute the bulk of the Convention.

The Convention places significant emphasis on fostering international cooperation and responsibility-sharing in the investigation and prosecution of the covered crimes. In the Convention, States have a clear duty to execute requests for cooperation, requiring them to provide the broadest possible mutual legal assistance in all aspects of investigations, prosecutions, judicial proceedings, and execution of judgments related to the crimes to which the Convention applies.

The provisions cover various aspects and important areas, such as joint investigation teams, cross-border observations, the confiscation of assets, procedure for executing requests for mutual legal assistance, extradition, and transfer of persons.

Some of them reproduce mutatis mutandis provisions contained in other multilateral instruments, such as the United Nations Convention against transnational crimes, the United Nations Convention against Corruption and other international or regional relevant instruments.

Other provisions contain innovations, such as the provision contained in Article 42 on cross-border observation. Other provisions are innovative in the sense that for the first time certain practices applied for other crimes or certain regions only are now incorporated for the first time to be applied across regions for these type of crimes, such as the important provision on joint investigation teams.

All of these provisions, some of them very long and detailed constitute, as Vaious Koutrolis has rightly put it in one of his articles, “the living and breathing heart of the Convention”.

However, as already indicated, the Convention goes beyond pure MLA and extradition instrument and includes important provisions in other areas.

B. Key additional obligations

1. Obligation to criminalize Genocide, Crimes Against Humanity and War Crimes

States are **mandated** to criminalize and establish appropriate penalties for the crimes to which the Convention applies.

At a minimum the Convention applies to **genocide, crimes against humanity and war crimes** as defined by the Rome Statute. These definitions are reproduced in article 5 of the Convention.

In addition to the mandatory scope of the convention to genocide, crimes against humanity and war crimes defined in article 5 of the text of the Convention, states ***may*** extend the Convention’s application to the crimes listed in the annexes to the Convention. This is an **option** for states. The crimes contained in the annexes are the crimes of torture and enforced disappearance, as well as crimes contained in the amendments to the Rome statute adopted since 1998, namely the crime of aggression and other war crimes. **The Convention only applies to these crimes in relation to states that have accepted this application.**

In addition, article 6 of the Convention gives the opportunity to States to decide on an *ad hoc* basis whether they want to use the Convention for a specific request of international cooperation on criminal matters, provided that the conditions set out in the article (article 6) are met. (international crime covered by the convention or annexes, such a crime in requesting state and extraditable offence in the requested state)

2. Obligation to establish jurisdiction over certain Persons (article 8)

States Parties are required to take measures to establish their jurisdiction over the crimes to which it applies the Convention “when the crimes are committed in any territory under its jurisdiction or on board a vessel or aircraft registered in that State” (territoriality) and “when the alleged offender is a national of that State” (active personality principle).

In addition to these obligations based on the principles of territoriality and active personality States “***may*** take such measures” to provide for their jurisdiction “when the alleged offender is a stateless person who is habitually resident in that State’s territory” and “when the victim is a national of that State” (passive personality principle).

Most importantly and in a clear development of international law, Article 8(3) of the Ljubljana-The Hague Convention stipulates that:

“Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such crimes in cases where the alleged offender is **present in any territory under its jurisdiction and it does not extradite the alleged offender** to any of the [relevant] States […] or surrender the alleged offender to a competent international criminal court or tribunal”.

This obligation in relation to persons present in any territory is already contained in the International Convention on enforced disappearance and the Convention against Torture. Now,

it is expanded to the other crimes covered by the Convention. This was the most controversial provision in the negotiations and general agreement could only be found by allowing a limited reservation. A state may make a reservation for renewable periods of three years, based on grounds existing in its domestic law and in accordance with its obligations under international law".

3. *The obligation to prosecute or extradite (aut dedere aut judicare)*

The Convention reproduces the clause on *aut dedere aut judicare* contained in the Convention against Torture. This obligation of a state party to either prosecute or extradite the alleged perpetrator that is found in its territory becomes now applicable to **all** crimes to which the Convention applies.This considerably broadens the list of crimes covered by a treaty obligation to prosecute or extradite.

4. Victims Protection

The Convention is also an important step towards strengthening the international protection of victims, having three provisions on the subject: Article 81 contains a definition of victims; Article 82 obliges states parties to "take appropriate measures within its means to provide effective protection from potential retaliation or intimidation" of victims, witnesses, experts, and other persons. Finally, article 83 of the Convention on reparations provides a path for States to cooperate on the implementation of victims' right to reparation including through the recovery of perpetrators' assets.

Concluding remarks

So, this is what this landmark Convention is about. I am convinced that it will foster cooperation to fight against impunity for the most serious crimes of international concern, as stated in article 1 and the Preamble of the Convention. It is now up to all states to join in as soon as possible and to put it in practice.

To conclude, let me briefly address the way forward.

At the outset, let me remind you the convention will open for signature at a conference to be held at the Peace Palace, in The Hague on 14-15 February and will remain open for signature for two weeks from them. The core group continues to work on the final language editing of the text, which will be circulated at the end of this month. As agreed in Ljubljana, if there are no objections, this text will be approved on 31st October.

The Convention shall enter into force three months after the third entry into force.

The Kingdom of Belgium shall act as depositary of the Convention and any amendments thereof.

A first meeting of state parties will be convened at the request of a third of State parties, in 5 years of its entry into force or two years after the deposit of the 15th instrument of ratification. At that meeting, states will decide on the establishment of lean and cost-effective institutional arrangements necessary for the implementation of the Convention.

Until then the Kingdom of the Netherlands will provide interim support, the extent of which will depend on the availability of voluntary contributions from state parties.

I thank you for your attention.