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***Dispute settlement: a critical component for legal effectiveness***

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Thank you so much. It is an honour to be here today. I want to echo something that Ms Stephanie Egerer-Uhrig mentioned: we are here today because of the victims of crimes against humanity. It used to be that we thought victimisation in Europe might be a thing of the past. However, the war in the former Yugoslavia proved otherwise, and the ongoing war in Ukraine shows us that this is still very much a present reality. Crimes against humanity occur in every region of the world, both during war and in times of peace. Right now, I dedicate my remarks and my work on this treaty to those who have suffered from victimisation and to the survivors of these crimes.

Our project on crimes against humanity began in 2008, and I started it at my university in Saint Louis. We began this project and developed a draft treaty, which some of you might already be familiar with. I want to touch upon some of the core rationales for this effort. As we consider the future direction of this new treaty, it is important to ask what exactly are we trying to accomplish? What are the social values that the treaty will protect? And what must be included in the convention to accomplish these goals effectively?

As Professor Murphy mentioned, the Rome Statute system of the International Criminal Court ('ICC') was established in 1998, which was a tremendous achievement. However, the system has major gaps: there is no enforceable duty to prevent crimes against humanity or any of the crimes covered; no clear state responsibility; no interstate enforcement; no mutual legal assistance provisions; and no liability for legal entities, which is a concept that has gained more traction in recent years but was not well developed back in 1998. Additionally, the system is not binding on non-State parties and operates primarily as a vertical rather than horizontal framework.

Our prediction in 2008 was that the ICC would have limited jurisdiction and would handle only a small number of cases. Unfortunately, the forecast also anticipated that the number of cases would continue to rise, leading to a diminished capacity as the ad hoc tribunals completed their work. Alas, this prediction has proven entirely accurate. The ICC has prosecuted very few cases, and crimes continue to escalate unchecked.

Our treaty was significantly longer than the draft prepared by the International Law Commission ('ILC'). This is mainly because our team was made up of a diverse group of academics, including experts from civil society, judges, and practitioners, thus bringing together a wide range of insights. Like the ILC, the Rome Statute's definition was considered the central pillar of the draft convention, and its horizontal mechanism was the starting point. However, I want to focus on what I call the four pillars, because two of these remain underdeveloped in the current draft, and there are critical areas that States should consider as negotiations move forward.

One of these is the development of the 'normative foundations' of crimes against humanity. Over the past two years, especially with the conflict in the Middle East and the war in Gaza, there has been an intense debate about whether the situation amounts to genocide. When journalists interview me, they always ask about war crimes and genocide. However, they rarely ask about crimes against humanity. This is largely because there is no dedicated treaty addressing crimes against humanity and, therefore, the media gives very little attention to crimes against humanity. Yet, all the empirical data show us, in tandem with insights from experts like Judge Mettraux and Ms Egerer-Uhrig, that prosecuting crimes against humanity ais central to achieving successfully prosecuting instances involving mass atrocities. Yet because there is no dedicated treaty, this important category of crimes is largely excluded from public discourse.

Prevention is also a crucial aspect of combatting the commission of crimes against humanity, but it is not covered by the Rome Statute. It features in the Convention on the Prevention and Punishment of the Crime of Genocide (the 'Genocide Convention'), and the ILC's draft articles on crimes against humanity rightly highlight prevention as a core element of the text. Punishment, on the other hand, is the area where the most activity has been observed. There is established jurisprudence, recognised modes of liability, and a significant body of work in this area.

Capacity building emerged as an important focus in our project, and States have also raised it during discussions in New York. The question is how do you achieve what Germany has today, namely the ability to effectively prosecute and prevent crimes through technical expertise, police training, and military education? This is especially critical for States with fewer resources. These four elements represent, to me, why crimes against humanity matter so deeply.

A question came up in today's discussion about when the concept of crimes against humanity happening in peacetime first emerged. In fact, the emergence of crimes against humanity

during peacetime can be traced at least as early as the to the 19th Century in the guise of slavery and slave trade, during which approximately thirteen million Africans were forcibly taken from their homeland and trafficked into slavery.

The British saw themselves as the power that could put an end to the transatlantic slave trade. But other States were reluctant to allow Britain to exercise that power during peacetime, which required the development of specific treaties to grant that authority. Thus, this peacetime element of crimes against humanity as a matter of treaty codification really dates to the 19th century.

At the same time, during my 10 years at the ICC I observed that the biggest challenge faced by the Court was not determining whether crimes against humanity occurred during wartime. That is because, as Judge Mettraux noted, charges are often brought in parallel. Instead, the challenge was defining the frontier between human rights violations and crimes against humanity.

The central question is at what time do human rights violations become so widespread that they actually cascade into criminality. I refer to this process as an ‘atrocity cascade’ This is challenging to determine. If you can staunch, in literal terms, the bleeding early in peacetime, situations can be prevented from escalating into conflict like the civil war in Syria, with pockets of genocide in it. The idea is to advance deterrence and prevention earlier in this ‘cascade’, thereby reducing the number of atrocities in the world. This is precisely why developing a new treaty on crimes against humanity is so critical.

I am going to fast forward to New York, since the audience has already heard what happened in Geneva. New York is where the Sixth Committee of the UNGA’s debates took place, and it took six years to work through that process. I had the privilege of being involved in that important endeavour during that time. For three years, the project faced technical rollovers, which were frustrating. Many States were deeply committed to moving forward, but progress was stalled due to the consensus tradition of the Sixth Committee of the UNGA. I might respectfully disagree with my good friend, Professor Giorgetti, when it comes to consensus. It does not always produce positive results but often blocks forward motion. In the end, the resolution that was adopted envisages a long time before the treaty comes to fruition, in an effort to maintain consensus. However, due to the consensus tradition, many States were reluctant to move forward. Mr Pablo Arrocha will provide a much more detailed overview of the New York process, so I will not delve into it. But I do want to recognise the brilliant innovation in 2022, when Mexico and The Gambia led a core group of States and a coalition

to establish a two-year window for in-depth discussion on the draft of the convention, giving States the opportunity to engage fully with the substance.

Being flexible and innovative will be important in moving forward over the next two years, and the year following. The experience to date offers valuable insight into the priorities and concerns of governments as the treaty now moves into negotiations, and a resolution was adopted (UNCA/79/122). The number of States that have spoken on the issue can be tracked each year, and reached a peak in 2024 of 125. But, of course, the reaction of States that remain silent cannot be measured. Since the ILC began its work in 2013, a sizeable number of States has engaged positively. The dip visible on the slide corresponds to the pandemic, which is an outlier, but was retained for accuracy. This resolution marks a key milestone and provides a great segue to Mr Pablo Arrocha's presentation. The original resolution proposed by Mexico and The Gambia, along with their coalition, called for a two-year process. However, due to the consensus tradition, it became a five-year process. It is a complex resolution overall. Negotiations will open in January 2026, but the substantive discussions will not really begin until 2028, when the diplomatic conference opens.

We can delve into this more during the Q&A, as I want to explore in greater depth what happened during those six years of discussions in New York. What kinds of questions did States raise regarding the ILC draft? Broadly speaking, the proposals fell into three distinct categories. First, there were additions addressing issues that the draft articles themselves did not cover. Second, there were additions suggested by States or civil society actors, often based on developments in international criminal law since 1998 or reflecting particular concerns and priorities. Now that the work is conducted within a forum of 193 States, voices from the Global South have raised important topics like environmental destruction, colonial crimes, and slave trade, which is a widely accepted proposed addition to the draft. Third, there were discussions about changes to the Draft Articles themselves, some proposing deletions, others proposing additions aimed at clarifying, expanding, or even contracting state obligations. These three categories of concerns or proposals have been central to the debates over the past six years, as States have begun to engage seriously with the 2019 Draft Articles and consider what a future treaty might include.

I convened a study group under the aegis of the International Law Association ('ILA') to examine some of the proposals on the table. The focus has been on areas that have generated significant comments from States and where States requested specific proposals, as well as concerns raised by civil society. For example, in the definition of the crime, there has been discussion about adding slave trade and starvation as crimes against humanity, as well as environmental crimes. Articles 3 and 4 of the Draft Articles have been extensively debated,

both in intersessional meetings hosted by Germany in 2023 and 2024 and during the resumed sessions of the Sixth Committee of the United Nations General Assembly in 2023 and 2024. There have also been suggestions for additional measures, such as a monitoring mechanism. The question is whether a treaty on crimes against humanity could better achieve prevention if it included ongoing monitoring and oversight, considering prevention in this context not just as prosecution or litigation, but as continuous interpretation and surveillance. Thematic papers on these topics are underway. There are also other areas our group has not yet examined, but I believe the ILA will address these issues in the years to come.

For the purpose of this seminar, I was asked to speak specifically about Article 15 of the Draft Articles on dispute settlement. One key difference between the proposed treaty and the Rome Statute is that it could grant jurisdiction to the International Court of Justice ('ICJ') to adjudicate matters of state responsibility for crimes against humanity. The ILC included a provision on settlement of disputes in Article 15. A group of experts has reviewed this provision. It has done so not because the ILC did not do an excellent work, which it did, but because as members of civil society, we have some remaining concerns. One suggestion is that the term 'fulfil' should be added to the provision. This term appears in the Genocide Convention but was not included in the draft articles on crimes against humanity of the ILC. After reviewing the *travaux préparatoires*, our group, which will publish a short paper on this in October, recommended adding 'fulfil' for greater clarity.

In addition, our group examined how state responsibility for the commission of crimes against humanity, and for their failure to prevent them, could be better expressed in the draft articles. We asked whether the words 'state responsibility' should be explicitly included in the text. In *Bosnia v. Serbia and Montenegro*,[1] the International Court of Justice found that failure to fulfil the obligations of the genocide convention could give rise to state responsibility, and the excellent commentary of the ILC attached to Article 15 explains how the ICJ interpreted state responsibility in that context. However, Judge Owada disagreed and did not consider state responsibility to be applicable under the terms of the genocide convention. This raised questions about whether the concept needs to be explicitly stated. There is also the matter of *erga omnes* standing, as Articles 3 and 4 of the Draft Articles imply it, but the text of these provisions is not entirely clear. *Erga omnes partes* obligations could be important to specify,

[1] See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* available here.

even though cases like *The Gambia v. Myanmar*[2] and *Belgium v. Senegal*[3] show the ICJ's reading of these obligations into treaties.

Finally, the ILC included a provision allowing states to opt-out of compulsory dispute settlement. Our group opposed including an opt-out clause and recommended removing it.

Opting out of the treaty *might* be acceptable if reservations are prohibited but seems clearly inappropriate if they are permitted or the treaty is silent. In the latter case, the current jurisprudence of the ICJ does allow for reservations, although there has been some resistance to that, and certain States have recently objected to reservations to Article 9 of the Genocide Convention, which permits an opt-out. The Vienna Convention on the Law of Treaties includes a provision requiring States to seek dispute settlement in the event of a *ius cogens* violation, suggesting that the idea of an opt out from dispute settlement in cases involving the commission of crimes against humanity would not be appropriate. Since crimes against humanity are considered *ius cogens* crimes, it has been concluded that it might be preferable to remove the opt-out clause, as there are fundamental violations that States should not be able to contract out of. The question of reservations remains a critical issue for States to decide.

As Professor Murphy noted, there are many elements the ILC did not address because they fell outside of its mandate or the scope of the project. The question of dispute settlement is just one example, and since I was asked to discuss it, I have highlighted it here. There are also other issues related to prevention. For instance, what about incitement to crimes against humanity? The Human Rights Council, which is cited in the ILC commentaries, has recognised incitement to genocide and to crimes against humanity. Prosecuting incitement is a crucial element of prevention. Therefore, the modes of liability section could be developed to specifically address the crime of incitement.

I will stop there for now. I hope I have given you much to consider, and I look forward to your questions. Thank you so much for inviting me to be here today.

[2] See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar: 11 States intervening)*, available here.
[3] See ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, available here.