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Overview of the ILC Draft Articles

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Thank you, Professor Giorgetti, for that very kind introduction. Thank you also to the Swiss government for the invitation, and to the audience for coming on a cold and rainy Friday afternoon.

In 2012, after I was elected to the International Law Commission ('ILC'), I proposed that the ILC take up crimes against humanity as a topic. There had been previous discussions in academia, NGOs, and within some governments about a gap in the fields of international criminal law, international humanitarian law, and human rights law with respect to crimes against humanity. I proposed to the ILC that it undertake the process of drafting articles that would serve as the basis for a new convention on the prevention and punishment of crimes against humanity. The ILC does not decide to take up all topics that Members propose, but it ultimately did decide to add this one to the programme of work of the ILC. One of the reasons was, of course, that crimes against humanity are occurring across the globe in various places, and we have not yet found a way to prevent and fully punish them.

Furthermore, although the Rome Statute establishes the International Criminal Court ('ICC'), that instrument primarily focuses on an *international* tribunal serving as a venue for prosecuting crimes against humanity. The Rome Statute does not have elements within it that speak directly to building up national laws and national jurisdiction. At most, the Rome Statute provides for States Parties to cooperate with the ICC, but it does not speak to prevention and prosecution at the national level. Therein lies the gap. By contrast, the Convention on the Prevention and Punishment of the Crime of Genocide addresses, to some extent, national laws and national jurisdiction with respect to that crime. The 1949 Geneva Conventions address to some degree the same gap with respect to war crimes. However, there is no multilateral convention focused on devising national laws and national jurisdiction, and establishing inter-state cooperation, in relation to the prevention and punishment of crimes against humanity. That is really what this is all about: trying to develop a way to address this particular crime in the context of national laws.

In 2013, a clinic at the George Washington University Law School conducted a comparative law study which determined that, at most, half of the countries in the have implemented national laws on crimes against humanity. When examining those national laws, the study found them often to be minimalist in nature. Some of them refer only to the cooperation between a State Party to the Rome Statute and the ICC. Other national laws utilise older definitions of crimes against humanity that emerged from the Nuremberg and Tokyo Tribunals in the 1940s and 1950s. They are not particularly modern in the sense that you would want them to be if States are going to be in a cooperative relationship on matters such as extradition and mutual legal assistance.

So, the ILC proceeded with the project based on a series of four reports that I completed from 2015 to 2019. The ILC progressively adopted various draft articles that the members thought should be included in the project, along with commentary explaining what those articles meant, leading to a final product in 2019 consisting of a preamble, 15 draft articles, and an annex, along with commentary. To the extent that governments are preparing for the upcoming negotiations, they are likely reviewing that final product. However, it may also be worth looking to the materials that led up to the final product, including the four reports I prepared for the ILC, as well as the discussions that took place throughout the work of the ILC in Geneva.

It may be important to note that the process for the ILC's work includes a symbiotic relationship between the ILC and government's meeting in the Sixth Committee of the United Nations General Assembly ('UNGA') in New York. Each year that a report on crimes against humanity was produced, it was subsequently discussed in Geneva. Based on these discussions, the ILC drafted a few articles along with accompanying commentaries, which were included in the ILC's annual report. Then those few draft articles and commentary were debated in the fall of that year in New York by delegations of States gathered in the Sixth Committee. The ILC closely monitored each of those debates and considered how to improve the text of the draft articles in light of the reactions received.

Moreover, after the ILC concluded the first reading of its draft article on crimes against humanity in 2017 (meaning a full first draft), it then waited two years before moving on to the second and final reading. During those two years, from 2017 to 2019, the ILC received not only oral comments by delegates of States gathered in New York, but also written comments submitted by 38 States and 7 international organisations. Further, the ILC received comments from various human rights committees, from individuals holding human rights mandates, from NGOs, and from individuals. In total, more than 700 non-governmental organisations or persons submitted comments to the ILC. All of these reactions were taken into account for the

purpose of conducting the second reading, which took place in 2019 and modified the draft articles and their accompanying commentary to complete a final product that would be most helpful to States. In 2019, the ILC also recommended that the UNGA not only take note of the draft articles with its commentaries, but also proceed with the elaboration of a convention, either within the UNGA itself or through a diplomatic conference.

As for their substance, the draft articles can be grouped into six different clusters. The first one consists of the opening provisions: the draft preamble and the first two draft articles. The draft preamble comprises 10 clauses. In these clauses, the ILC attempted to indicate the reason for and to foreshadow the substance of the Draft Articles. Draft Article 1 identifies the scope of the Draft Articles, which is quite succinct, conveying in one sentence that the Draft Articles focus on crimes against humanity, including their prevention and punishment.

Article 2 then defines what is meant by “crimes against humanity.” The ILC discussed carefully what the definition should contain, principally by examining Article 7 of the Rome Statute, and ultimately by copying that definition almost verbatim into draft Article 2. The ILC had to implement some modifications to the language taken from Article 7 of the Rome Statute, as the draft articles are not establishing an international court with jurisdiction over various crimes. However, in principle, the text of the definition remains faithful to that contained in Article 7 of the Rome Statute. Why has this decision been taken? The thinking behind it is that more than 120 States have become Parties to the Rome Statute, so presumably they are comfortable with that definition. Furthermore, if the objective is in part to facilitate interstate cooperation on extradition and mutual legal assistance, then there is value in having a harmonious definition among States that both are and are not Parties to the Rome Statute. In other words, even if your country is not a party to the Rome Statute, adopting this definition can place you in a strong position for cooperation with other States, regardless of whether they are parties to the Statute or not.

The second cluster of Draft Articles consists of Draft Articles 3 and 4, which contain general obligations to prevent and punish. These Draft Articles impose an obligation on States to refrain from engaging in conduct that, if prosecuted against an individual, would constitute crimes against humanity. The core principle is that States should not, through their organs or agents, carry out acts that would amount to crimes against humanity. Within these general obligations, there is also an obligation to exercise due diligence to prevent crimes against humanity. What does this mean? It involves activities such as training police and military personnel on topics including the definition of crimes against humanity, their problematic nature, how to recognise and prevent them, and the options for prosecuting such crimes. It

also includes the idea that a State should use any influence it has over other States or non-state actors who might be involved in crimes against humanity and try to leverage that influence to prevent such crimes.

The third cluster of Draft Articles, consisting of Draft Articles 6 to 10, outlines specific measures that must be taken at the national level regarding the adoption of laws, particularly if the State in question has not yet enacted such legislation. Draft Article 6 is a core provision of the Draft Articles. It sets out the obligation to include the offence of crimes against humanity in national legislation. This offence must cover not only the direct commission of such crimes, but also attempts to commit them, as well as aiding, abetting, or otherwise assisting in their commission. These are the modes of liability that typically are a part of any national criminal law system. Draft Article 6 also addresses issues of command responsibility, that the defence of superior orders is not permissible, that there should be no statute of limitations, and other aspects when designing the national criminal law.

Draft Article 7, in turn, addresses the circumstances when the State must be in a position to exercise of jurisdiction over an alleged offender. Draft Article 7 spells out that if the crime occurs in a State's territory, the State in question must be in a position to exercise jurisdiction. This is no surprise. The provision also stipulates that if the crime is allegedly committed by one of the State's nationals, even if it occurs outside the State's territory, the State in question must be in a position to exercise jurisdiction. Draft Article 7 further stipulates that if an alleged offender turns up in the State's territory, even if the individual in question is not a national of that State and even if the crime was allegedly committed abroad, the State must be able to exercise jurisdiction. If a State wants to exercise jurisdiction when a victim of the alleged crime is of its nationality, it can do so, but that jurisdiction is not mandatory.

Draft Article 8 provides that if a potential situation involving crimes against humanity arises within a State's territory, the State is obligated to take steps to investigate it. Such an investigation is not about targeting a specific individual. Instead, it involves taking investigative steps to understand what may be occurring in a particular region, possibly in a province or elsewhere, and may concern actions carried out by non-state actors. The authorities are required to conduct an on-the-ground investigation to assess whether there is a risk of crimes against humanity and, if necessary, take measures to prevent them.

Draft Article 9 focuses on the apprehension and gathering of facts with respect to a particular individual. If someone within the State's territory is suspected of committing crimes against humanity, the State is required to take that person into custody or otherwise prevent them

from fleeing. The State must then conduct a fact-specific inquiry into the individual's actions, essentially compiling a dossier detailing the basis for the suspicion. In addition, the State must notify other States that may have an interest in the case. This entails notifying States that have asserted, or may assert, jurisdiction, such as the suspect's State of nationality or the State where the alleged crimes were committed, if those different from the State of custody. Such notification can become central in establishing the possibility of mutual legal assistance or extradition.

Draft Article 10, the last in this cluster, obliges the State to submit the case for prosecution or to extradite the suspect to a State prepared to submit the case to prosecution. This is the basic *aut dedere aut judicare* obligation. Once the dossier has been prepared, it is handed over to the prosecutors, who retain the discretion to determine whether the case is suitable for prosecution. However, this obligation to submit the case to prosecution can be avoided by a State if the individual is extradited to another State willing to do so.

The fourth cluster of Draft Articles focuses on the protection of individuals. Draft Article 11 addresses the fair treatment of alleged offenders, including guarantees such as the right to a fair trial, access to legal counsel, and other fundamental protections commonly found in human rights law and domestic legal systems that safeguard the rights of accused persons. These protections must be upheld. Draft Article 12 shifts the focus to victims. It emphasises the importance of allowing victims to engage with government authorities without fear that their identities will be exposed, highlighting the need for privacy and confidentiality safeguards. In addition, this Draft Article 12 affirms the right of victims to seek reparation but does not specify the form that reparation should take, nor require that it be provided on an individual (as opposed to collective) basis. Both the State where the crime took place and the State responsible for committing the crime, which may be different, are obligated to consider and establish appropriate procedures for reparation.

The fifth cluster of Draft Articles addresses interstate cooperation. Draft Article 13 addresses extradition. In this respect, it is important to emphasise that the Draft Articles do not impose an obligation to extradite. Instead, the provision outlines procedures that facilitate extradition if a State chooses to pursue it with another State. Draft Article 14, as well as the Annex to the Draft Articles, turns to mutual legal assistance. At its core, these provisions help facilitate cooperation whenever a State requires another State's help to gather witness testimony, documentary evidence, or to enable witnesses to testify in a cross-border trial concerning crimes against humanity. If the two States have a mutual legal assistance treaty ('MLAT')

already in place, Draft Article 14 and that MLAT would be used. The Annex applies when there is no existing MLAT between the two States.

The sixth and final cluster consists of a single article, namely Draft Article 15, on dispute settlement. Similar to the Convention on the Prevention and Punishment of the Crime of Genocide, the idea in this Draft Article is that, if one State has a disagreement with another regarding the proper application or interpretation of the convention, it can raise the issue with the other State. Both States are then obligated to attempt to negotiate in an effort to resolve the dispute. If no settlement can be reached, the matter may be referred by either State to compulsory dispute resolution at the International Court of Justice ('ICJ'). However, paragraph 3 of that article allows a State to opt out of the ICJ's compulsory jurisdiction.

These are the key elements of the Draft Articles. As mentioned, they were completed by the ILC in 2019 and forwarded to governments in New York, along with a recommendation that they serve as the basis for the negotiation of a convention on prevention and punishment of crimes against humanity.