Crimes against Humanity – Cluster 4

12 April 2022

Statement by H.E. Mohan Pieris, Permanent Representative of Sri Lanka to the UN

As much as I would commend the bold spirits that put down draft articles 13, 14 and 15 in black and white, I would venture to strike a note of caution when we endeavor to address the rights, obligations and procedures applicable to the extradition of persons for alleged offences in terms of the draft articles pro-forma. We know that in the ordinary course the process of extradition is whereby the requesting state would ask the requested state, to send back, the suspect to the requesting state to enable the offender to start trial in the requesting state. It can also be that the request can be made for the extradition of a fugitive from justice inclusive of a convict who has escaped. Many of our countries have bilateral treaties on extradition although that is not strictly necessary. We know that resolution 3074 of the United Nations highlighted the need for extradition of persons who have allegedly committed crimes against humanity to make sure that they are prosecuted, proven guilty, and punished. You will note that the sub commission on the promotion and protection of human rights of the commission of the human rights reaffirmed that principle. I am respectfully of the view that the mere satisfaction of the principle of aut-dedere aut judicare in terms of article 10 is not to be taken lightly. The threshold criteria of reasonable suspicion as my Russian friends were pleased to observe this morning of sufficient evidence must be satisfied to trigger the jurisdiction. It cannot be a fancy suspicion. It can be an arbitrary suspicion. It cannot be a suspicion structured on political grounds, for political purposes. It cannot be a suspicion at the vims and fancies of the powerful. That would be clearly anathema to the rule of law. We must bear in mind that the liberty of any human being is sacrosanct. It cannot be used as a tool of the powerful to move human beings like pawns on the chess board of global politics and we have seen this happen and we cannot afford to countenance such conduct for the present and for the future. We are of the considered view that article 13 must be given more than careful consideration. It is observed that the treatment of the nationals of the state to which the request is made (and non -nationals for the reason that many states have) must be for a compelling reason as the courts will be slow to handing over a nationals to another state to be prosecuted when the requested state has a competent criminal jurisdiction to deal with the

alleged offender. We must bear in mind that there is also the aspect of public policy that comes in to play. I am fairly sure Mr. Chairman that no state would hand over and offender to an another state more particularly a national of that state when the circumstances are such that the person sought to be extradited will not be ensured a fair trial in the territory of the requesting state and we have living examples of that situation if we look around us. I believe that article 13.3 seeks to anticipate precisely the concerns that I expressed a few minutes ago. I must more respectfully beg to differ with the last sentence of sub article 3 which leaves the window slightly open by using the words "extradition based on such an offense may not be refused on these grounds alone". I believe that extradition must be refused on any one of those grounds for the reasons that handing over a judicial process to a political process would be anathema to the rule of law. Sub article 4 appears to be equally ambitious as it seeks to put in place a universal treaty that permits extradition. I am not so confident that many states would have the appetite to digest such a wide sweeping legislative change to accommodate this process. I am also of the view that these laws need to be tested for consistency with the constitutions of our own country by way of judicial review. Sub article 5 appears to provide an escape clause for those states to leave the questions of whether to adopt or not as a matter of simple choice with a fall back situation of the safety net of informing the Secretary General or to enter in to Ad-Hoc treaties with contracting states at their pleasure. Sub article 8 creates the space for expeditious disposal of the procedure and I hope I am wrong, to lower the threshold of evidence. Mr. Chairman, I wish to remind this assembly that we cannot sacrifice justice on the altar of expediency or condemn the worst of them by a consideration of evidence in a simplified form. I am of the respectful view there is only one type of evidence that can be presented in a competent court and that is evidence so that we can be sure at least on a preponderance of material that the procedure must be invoked. We must remember that if we do not defend the worst of them that we cannot defend the best of them. Sub article 10 for all intents and purposes would not be easy to find accommodation in our courts. I cannot see any court proceeding to incarcerate a person on the basis of a conviction in a foreign court unless it is sure that the conviction that has been secured in terms of the procedures established by law. This may be a fit and proper matter for extradition.

Draft article 14 which deals with mutual legal assistance is in my view a sweeping provision. These provisions have to be brought in line with our own statues governing mutual legal assistance in investigations, prosecutions and covered by the present draft articles. It is my respectful view that as referred to in the annex mutual legal assistance by the requested state must be made to the designated central authority of the requested state. I must however concede that the underlying principle that has been laid out in draft article 14 is an aspect that is worthy of favourable consideration subject to the reconciliation of the condition set out therein with our own legislative instruments.

To say a word on draft article 15 it is my respectful view that we to be sufficient to limit joining issue on matters between states themselves. The mutual respect for the concept of sovereignty as enshrined with the UN charter must be respected. If states cannot agree on a particular issue regarding mutual assistance, it must be allowed to rest where it falls fails. We are disinclined to accept the position that we should go so far as to invite states disagreeing on a matter concerning the interpretation of the present draft articles to be submitted to the international court of justice which might be a luxury for most of us who only require a simple clear predictable legal system that facilitates the promotion of dignified live style for all its citizens.

Let me conclude by what Prof Gerry Simpsons in his article international criminal law the next 100 years said "in the world of rogue hyper- finance, ecological self-destruction, trigger happy nuclearism, dark webs, black money, half-crazed populism is international criminal law really where its at? Then there is the atmosphere of decay, backlash and recession internal to the field; the withdrawals and threaten withdrawals from the ICC the sun sets of ad hoc tribunals the sense of a late-style torpor settling over ICL institutions. Of course new proposals continue to be advanced. Such as the crimes against humanity draft, but international criminal tribunals do not feel like the future and, when the history of the future is written ICL itself might have a vaguely asterix quality. So at the very moment of its consummation or completeness and normalization it is experiencing a moment of anti-climates or it's becoming what the editor's call in more mellifluous terms a tenuous proposition in a deeply divided and pruritic international environment.