THE CONTRIBUTION OF LATIN AMERICA TO THE INTERNATIONAL LAW COMMISSION AND THE APPLICATION OF THE INTERNATIONAL LAW COMMISSION OUTCOMES IN LATIN AMERICA: A RETROSPECTIVE

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Good morning. I am truly honoured to have been invited to deliver this Keynote address. I only regret not to be able to do so in person. On a professional ground, as it would have allowed me to meet and interact with such a distinguished audience and with many friends. And personally, as I would have escaped, if only for a few days, from the not-so-wonderful Dutch weather.

I am very grateful to the Latin American Society for International Law (SLADI) and to Professor Alejandro Chehtman in particular for this invitation, as well as to Professor Justina Uriburu for moderating this panel with my good friend and ILC colleague Professor George Galindo.

As the panel is on Latin America and the International Law Commission, I thought that I could address, on the one hand, the impact of Latin American doctrine and State practice in the work of the International Law Commission and, on the other, the impact of the outcomes of the ILC in Latin America.

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Well, it turned out that assessing either dimension was not an easy undertaking. The ILC outcomes are the result of a long process where all ILC members and UN member States influence the result to a larger or lesser extent. Even the influence of the Special Rapporteurs, while not negligible, is not decisive, and therefore the influence of Latin America cannot be measured simply by how many Latin American members of the ILC acted as Special Rapporteurs (SR). The same goes, of course, for the other regional groups.

The influence of ILC outcomes in Latin America could arguably be best measured by looking at the number of Latin American States that have ratified conventions drafted by the ILC. But the ILC, for a long time now, seems to have changed its codification method from draft articles aimed at becoming treaties to soft law instruments, such as draft guidelines, draft conclusions or draft principles, and therefore the degree of adherence by States—and Latin American ones in particular—is far less evident.

I will make 3 points. I will refer first to the contribution of Latin America to the International Law Commission. Then I will speak about the impact that the outcomes of the International Law Commission have had in Latin America. And third and last, I will mention some challenges for Latin America as regards the ILC.

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(a) The Contribution of Latin America to the International Law Commission

I will start with some basic data regarding the participation of Latin America in the ILC.

Out of 247 members of the International Law Commission since it was established in 1947, 41 have come from Latin America: 7 from Mexico; 6 from Brazil; 3 from Argentina, Chile, Ecuador, Peru and Venezuela; 2 from Colombia, Nicaragua, Panama and Uruguay; and 1 from Bolivia, Costa Rica, Cuba, El Salvador and Guatemala. No nationals from the Dominican Republic, Haiti, Honduras or Paraguay have ever served in the ILC. Also, the numbers above are somewhat misleading as some members were re-elected and served more than one term.

Some of the Latin American ILC members have made a significant contribution to international law in the International Law Commission and beyond. 9 of them served as members of the International Court of Justice, for example in the case of Eduardo Jimenez de Arechaga from Uruguay, Jose Maria Ruda from Argentina, Jose Sette Camara from Brazil and, as of February 2024, Juan Manuel Gomez Robledo from Mexico, to mention just a few.

Currently nationals and some distinguished members of SLADI, from Chile, Ecuador, Nicaragua and Peru are members of the International Law Commission, together with Professor Galindo from Brazil and myself from Argentina.

10 Latin American ILC members have served as Special Rapporteurs, out of the 65 SRs that the ILC has had throughout the years. Ricardo Alfaro from Panama was SR on the Question of international criminal jurisdiction (1950). Julio Barboza from Argentina was SR on International liability for injurious consequences arising out of acts not prohibited by international law (1985-1996). Roberto Cordova from Mexico was SR on Nationality including statelessness (1953-1954). Leonardo Díaz-González from Venezuela was SR on Status, privileges and immunities of international organizations, their officials, experts, etc. (1983, 1985-1986, 1989-1991). Francisco García Amador from Cuba was SR on State responsibility (1956-1961). Juan Manuel Gomez Robledo also from Mexico was SR on Provisional application of treaties

(2013-2021). Victor Rodriguez Cedeño again from Venezuela was SR on Unilateral Acts of States (1998-2006). Also, Eduardo Valencia-Ospina from Colombia was SR on Protection of persons in the event of disasters (2008-2016), and negotiations are currently underway in the United Nations with the aim of negotiating a convention on the basis of the ILC draft articles.

Also currently, Marcelo Vazquez-Bermudez from Ecuador is SR on General principles of law (since 2018), and Claudio Grossman from Chile is the new SR on Immunity of State officials from foreign criminal jurisdiction (since 2023). That is not counting Juan Jose Ruda Santolaria from Peru who is co-chair, together with 4 other members from other regions, of the Study Group on Sea-Level Rise in relation to International Law (since 2019).

It may be worth mentioning that Latin American countries are part of the Group of Latin American and Caribbean States (known as GRULAC) although no Caribbean national has ever served as SR. In turn nationals of the Asia-Pacific Group have been SRs on 6 occasions; nationals of the Eastern European Group on 9 occasions; and nationals of the African Group on 10 occasions like GRULAC; while nationals of the Western European and Others Group have served as SRs on 42 occasions, that is on 7 more occasions than all the nationals of all the other regional groups combined.

As I mentioned before, the outcomes of the International Law Commission are the result of a long and exhaustive negotiating process inside the Commission, in consultation with the Sixth Committee of the United Nations General Assembly, from the very inclusion of the topic in the ILC's programme of work, to the overall approach to be given to the topic, as well as the final outcome including the commentaries that accompany the draft articles, draft conclusions etc.

Some outcomes bear the trade mark of the Special Rapporteur, the clearer example being the 2001 Articles on Responsibility of States for Internationally Wrongful Acts with commentaries which are to a large extent the making of James Crawford. But it may be fair to say that in most cases, very little remains of the original text proposed by the Special Rapporteurs in his or her report.

This speaks to the collective work that the ILC does which, together with the consensus decision-making system—as a matter of principle that is—used for the adoption of its outcomes, leads to a result that aims to ensure that the views of the members of the different regions and different legal systems are taken into consideration and reflected as much as possible in the adopted text.

The members of the International Law Commission are—or rather should be—elected primarily on the basis of their qualifications, and once elected they represent the wider international community and not the region where they come from, much less the country of which they are a national. However, ILC members are expected to contribute their own regional and national approaches to international law. This is how the distribution of the 34 ILC seats among the five different UN regional groups is explained and justified.

Contributions made by the regional and national perspectives are also reflected in the comments made orally in the UNGA Sixth Committee or sent in writing by the national delegations in the course of the consideration of a topic. The comments of member States are an important source of information of State practice and *opinio juris* in the process of codification and progressive development that the ILC is mandated to assist States with.

The importance of regional and national perspectives lies—and I would like to emphasize this—in the need for international legal norms, which are often criticised

as being a Western product, to be representative of the different cultures and legal systems of the world. As well as the legal norms, the materials being used as subsidiary means for the determination of rules of international law must also be representative, as subparagraph a) of draft conclusion 3 of the work currently being undertaken by the ILC on the matter, and adopted earlier this year, suggests.

(b) The Application of the International Law Commission's Outcomes in Latin America

Having referred to the channels in which the views and approaches of Latin America are taken into account in the course of the work of the International Law Commission, I will address now, as much as possible, what influence the ILC outcomes have had in Latin America.

Several successful conventions have been negotiated and adopted on the basis of prior drafts prepared by the ILC.

The Vienna Conventions of 1961 on Diplomatic Relations, of 1963 on Consular Relations, and of 1969 on the Law of Treaties are arguably the most important ones, to which the 1998 Rome Statute of the International Criminal Court may be added.

All Latin American countries are parties to the Conventions on Diplomatic and on Consular Relations, and all but 2 countries (Bolivia and El Salvador) are parties to the Convention on the Law of Treaties. All Latin American countries are also parties to the ICC Statute.

Most Latin American countries have also ratified the 1961 Convention on the Reduction of Statelessness (except for the Dominican Republic, El Salvador and Venezuela)

Other ILC-originated conventions have not been so enthusiastically embraced. Such is the case of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses which no Latin American country has ratified (Paraguay and Venezuela signed it but never ratified it). Perhaps the reason lies in the fact that several bilateral or multi party treaties exist regulating the navigational as well as the non-navigational uses of international rivers in Latin America including the ones concluded by Argentina with all its neighbouring countries with the exception of Chile. Several of these treaties provide a framework for cooperation which is more robust and in the vanguard of the UN Convention despite some of them having been concluded decades before.

Only Mexico has ratified the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property. But the Convention has not entered into force as only 23 out of the 30 necessary instruments of ratification have been deposited and, thus, the lack of interest in Latin America in this Convention is not unique. It it worth remembering that a Latin American member served as SR on this topic but that this did not translate into regional support for the Convention negotiated on the basis of the ILC draft.

The Inter-American Commission of Human Rights also reiterated last September its call to sign and ratify the international instruments for the protection of stateless persons and the reduction of statelessness factors, such as the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. Like the 1961 Convention, the 1954 Convention was also negotiated on the basis of a prior draft prepared by the ILC.

But treaty-law aside, acceptance by Latin American countries of non-legally binding ILC outcomes is, as I said previously, much more difficult to assess.

The 2001 Articles on Responsibility of States for Internationally Wrongful Acts are widely considered to reflect customary international law and Latin American countries have affirmed such character in diplomatic negotiations and before international tribunals. Argentina for example, referred extensively to the Articles in its Memorial, Reply and Oral Arguments before the International Court of Justice in the 2010 Pulp Mills on the River Uruguay case, and so did Uruguay in its Counter Memorial, Rejoinder and Oral Arguments. More recently, Argentina invoked the customary nature of the system of international responsibility stemming from the 2001 Articles in the negotiations that led to the successful resolution of the dispute on the question of the waste disposal belonging to "Minera Los Pelambres· on the Chile-Argentina border in 2017.

Both Chile and Bolivia also invoked the 2001 Articles in support of their respective claims in relation to the remedies sought in the Dispute over the Status and Use of the Waters of the Silala decided by the International Court of Justice in 2022. Also, in the same case, both parties also refer to the draft articles on the law of the non-navigational uses of international watercourses adopted by the International Law Commission in 1994, which served as the basis for the 1997 Convention, as well as to the commentaries of the ILC to those draft articles. The Court noted in its Judgement that both parties consider that a number of provisions of the 1997 Convention reflect customary international law, while disagreeing about whether this is true as regards certain other provisions, including those relating to procedural obligations, in particular the obligation to notify and consult.

These examples should suffice to understand the reception that ILC outcomes have had and the influence that they have exerted in Latin America, and should also serve as an incentive for Latin American States to follow closely and to participate actively in the ILC's work by sending comments to the ILC drafts and reports from an early stage.

(c) Challenges and Methods

This leads me to my final point which relates to the challenges ahead for Latin American States as regards the International Law Commission. As the ILC is producing more and more soft law instruments, the importance of member States' participation in the elaboration of said instruments becomes greater, as there will be no future occasion where States can decide for themselves whether in ratifying a treaty or not the instrument at stake will apply to them or not.

The ILC's mandate is primarily to progressively develop international law, together with but not only codifying it. It is in the best interest of States to participate in such development so that the international law of the future reflects their views, interests and values.

This presents challenges for developing States, in particular medium and small size States, to be able to process and react to the outcomes of the ILC, which normally works on several topics at a given time, given that these number hundreds of pages annually, and to submit comments in a timely manner. The ILC is very mindful of these challenges and it is reviewing its working methods to address them together with other issues including how to seek enhanced engagement on the side of civil society in its work.

Nevertheless it is important that they do participate, as participation increases legitimacy and ownership of the norm-building process and the construction of the global legal architecture in which Latin America is so invested.

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I thought I should stop here and leave the rest for the Q&A part, including issues relating to the topics currently under consideration of the ILC that may be of importance and interest to Latin America.

Some are obvious, because of their cross-cutting nature, such as general principles of law or subsidiary means. Other more specific ones are nevertheless equally important, such as the topic of sea-level rise which one way or another is affecting all Latin American coastal and non-coastal States. I look forward to engaging on these and other issues.

With this, I finish my presentation and remain available for any questions that the audience may have.

Thank you very much.

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Let me conclude by reiterating what a pleasure it has been to appear before you today, listening to your comments and questions and learning from them. My thanks go, once again, to Professor Chehtman, as well as to Professor Justina Uriburu and the entire SLADI staff for being so accommodating and for giving me this opportunity.

Many thanks and goodbye.