

## **Towards a Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes**

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It is the solemn responsibility of all States to comply with their international obligations to end impunity for the crimes of genocide, crimes against humanity and war crimes. This responsibility notably includes thorough investigation and prosecution at the domestic level of persons responsible for such crimes. Not just to adequately penalize violations of international law, but also to avoid the recurrence of such heinous atrocities.

Because of the very nature of these most serious international crimes, suspects and witnesses, evidence or assets relating to these crimes are quite often not limited to the territory of one single State. This means that States which have to investigate and prosecute these crimes will have to cooperate practically and judicially in order to be truly effective in the fight against impunity and comply with their international obligations. This is the only way to avoid the creation of safe havens for perpetrators of mass atrocities.

As a practical tool to enable States to both comply with their international obligations and empower their national judiciaries, it is proposed to set up a modern procedural multilateral treaty on MLA and extradition which would facilitate better practical cooperation between States investigating and prosecuting these crimes.

At a first expert meeting on the subject, practitioners and legal experts from nineteen countries across five continents concluded that the international procedural legal framework for mutual legal assistance and extradition for these international crimes is incomplete and outdated. An increasing number of like-minded States share this conclusion. The most efficient and practical way to fill this gap is to open negotiations for a new multilateral instrument for international cooperation.

The envisaged treaty could be based upon existing procedural provisions from more recent treaties on mutual legal assistance dealing with other international or transnational crimes – such as the UN Convention against Transnational Organized Crime (UNTOC) and the UN Convention against Corruption (UNCAC) –, and be adapted for cooperation in the investigation and prosecution of crimes of genocide, crimes against humanity and war crimes.

## **A new multilateral instrument**

### **Why a new multilateral treaty?**

Effective investigation and prosecution of crimes of genocide, crimes against humanity and war crimes at the national level require international legal cooperation. As indicated above, suspects, witnesses, evidence or assets relating to these crimes are frequently not limited to the territory of one single State. Although States do not all require the same level of formality for international legal cooperation, experience has shown that a reply to a request for assistance can be obtained much more expeditiously when a formal agreement exists. On the basis of such bilateral or multilateral convention, the countries concerned have a duty to respond to requests for legal assistance. Moreover, enhancing mutual legal assistance is not only essential for the investigation and prosecution of these international crimes but is also an effective tool to designate direct channels of communication to expedite the judicial cooperation and to exchange best practices, know-how and expertise.

### **Why should such an instrument be a priority?**

Crimes of genocide, crimes against humanity and war crimes are the most serious crimes of international concern and all States are under the obligation to investigate and prosecute them effectively. Paradoxically, no adequate mutual legal assistance legal framework exists to date regarding these crimes. The adoption of the new treaty will enable all States to be fully efficient in their fight against impunity.

### **For whom is this new instrument intended?**

Such an instrument is meant for all States as a practical tool to enhance their capacity for investigation and prosecution, at the domestic level, of crimes of genocide, crimes against humanity and war crimes, as well as for all States which could transmit or receive a request for mutual legal assistance in these matters.

### **Why is the use of existing multilateral treaties unsatisfactory?**

The treaties addressing these international crimes – such as the Genocide Convention and the Geneva Conventions – contain only limited and largely outdated provisions for mutual legal assistance and extradition, if any. Existing multilateral treaties that do provide for provisions on mutual legal assistance and extradition – such as UNTOC and the UN Convention against Torture – only apply to the crimes covered by those specific treaties. The crimes of genocide, crimes against humanity and war crimes do not fit the legal definition of the crimes to which those treaties apply, rendering them useless for this purpose. Hence the need for a new treaty.

### **What is the added value of a multilateral instrument vis-à-vis bilateral agreements?**

A multilateral instrument would provide a more coherent approach for all countries dealing with these matters and would draw on United Nations General Assembly Resolution 3074 (XXVIII) on the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, which stipulates that “*States shall cooperate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.*” A multilateral system would be more efficient than the ad-hoc system of bilateral agreements. Moreover, a multilateral instrument also holds a remarkable message reaffirming the importance attached by the international community to the efficient prosecution of these crimes.

### **What kind of issues would be solved by such an instrument? A**

list of decontextualized cases is annexed to the present note.

### **No new concepts but a focus on efficiency**

#### **Would this project entail extensive negotiations on new concepts or provisions?**

Since the relevant crimes have already been defined in existing conventions and international customary law, there would be no need for lengthy debates on definitions. Provisions of mutual legal assistance and extradition have also previously been negotiated for existing treaties such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption. These agreed upon definitions and procedures can be combined to ensure an effective mechanism for international cooperation.

#### **What crimes would be covered by the treaty?**

The treaty would cover mutual legal assistance and extradition for the domestic prosecution of, in any case, the crimes of genocide, crimes against humanity and war crimes.

#### **What about other crimes?**

Under the current draft of the treaty all States Parties are obliged to cooperate in relation to core crimes (genocide, crimes against humanity, and war crimes) as they were defined in the original text of the 1998 Rome Statute. This forms the baseline of the Convention.

In addition to this baseline, the current draft allows States Parties to cooperate voluntarily and on an ad hoc basis in relation to core crimes in so far as they are not covered by the definitions copied from the original text of the 1998 Rome Statute.

Furthermore, the current draft allows for the adoption of Annexes through which States Parties may choose to apply this Convention to additional international crimes (such as torture and enforced disappearance), as well as expanded definitions of the core crimes listed in the current draft.

Together, these provisions on the scope ensure that States Parties, in their application of the Convention, may take into account the progressive development of the law.

#### **Does the foreseen treaty contain provisions regarding amnesties?**

During the Second Preparatory Conference on the MLA initiative, that took place from 11-14 March 2019 in Noordwijk (the Netherlands), there was broad support among the participating supporting States and representatives from civil society for deleting the reference to the granting of amnesty. The current draft therefore does not contain any provision pertaining to the possibility of granting amnesties.

#### **How does the foreseen treaty deal with the death penalty? Can States that have the death penalty become a State Party?**

All UN Member States can become a party to the foreseen treaty.

In the current draft the requested State Party may refuse to provide mutual legal assistance unless the requesting State Party gives sufficient guarantees that the death penalty sentence will not be imposed or, if imposed, will not be carried out.

Where it concerns an extradition request, the request shall be refused unless the requesting State Party gives sufficient guarantees that the death penalty will not be imposed or, if imposed, will not be carried out.

### **Extradition and mutual legal assistance – what does it mean in practice?**

The provisions on extradition would offer a conventional basis for extradition without derogating to the traditional rules pertaining to the matter. The envisaged treaty could be based upon existing procedural provisions from more recent treaties on mutual legal assistance. It would inter alia cover the following topics: freezing of assets, seizure and confiscation; protection of witnesses; transfer of criminal proceedings; disposal of confiscated proceeds of crime or property; taking evidence or statements from persons; service of judicial documents; searches and seizures; identification or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes; facilitation of the voluntary appearance of persons in the requesting State Party; designation of central authority and channel of communication; videoconference; and assistance to and protection of victims.

### **Link with existing systems or other initiatives to fight impunity**

#### **How does this initiative relate to the Rome Statute system and the ICC?**

This initiative is meant for all States, regardless of whether or not they are States Parties to the Rome Statute of the International Criminal Court. The international obligations on all States to prevent and prosecute these international crimes, the compliance with which this instrument seeks to facilitate, precede the ICC.

The Rome Statute does recall the duty of every State to exercise its criminal jurisdiction over those responsible for these international crimes but it only obliges its States Parties to cooperate with the Court for the cases brought before it. In that way the envisaged instrument would enable States Parties to effectively fulfill their primary responsibility to investigate and prosecute these crimes at the national level. The cooperation between States and the ICC will be left to the Rome Statute.

#### **How does this initiative relate to the ILC's work on the topic "Crimes against humanity"?**

The ongoing study by the International Law Commission of the topic "Crimes against humanity" focuses on this crime only and may deal not only with mutual legal assistance but also with the definition of the crime and other rules and concepts (role of victims, reparation, etc...). In contrast, the MLA initiative seeks to rapidly set up a new and operational framework for an efficient interstate cooperation regarding crimes against humanity, as well as war crimes and crimes of genocide. The MLA initiative would keep the existing definition of the three categories of targeted crimes and embark all modern mutual legal assistance and extradition provisions in order to have a uniform international regulation applicable to these crimes. The MLA initiative is therefore distinct and independent from the initiative on "Crimes against humanity".

The initiatives are mutually supportive as they work towards the same goal of fighting impunity of international crimes while proceeding along different trajectories. Even if both initiatives materialize, not all States may sign and ratify both. Both frameworks can be seen as complementary and can co-exist and continue to develop side by side. To this extent, the supporting States maintain close contact with Special Rapporteur Sean Murphy and the relevant UN departments.

One of the overriding considerations should be the avoidance of diverging substantive treaty provisions. The MLA initiative aims to achieve the greatest degree of complementarity by, inter alia:

- Maintaining close contacts with key actors, including with the ILC's Special Rapporteur and other ILC members, as well as other key actors such as UNOLA;
- Coordination of input into ILC and UN fora where the ILC's work on crimes against humanity is discussed; highlighting the usefulness to coordinate – where necessary – with the MLA initiative.

*Please note: the Core Group has drafted a Non-Paper on the relationship of the MLA initiative to the ILC draft articles on Crimes against Humanity. This document is available at [www.mla-initiative.com](http://www.mla-initiative.com).*

**How can States become involved in the initiative?**

In order to become a supporting State for the MLA initiative, States need to have signed an official note verbale voicing their support for the Permanent Declaration. The Permanent Declaration (available at [www.mla-initiative.com](http://www.mla-initiative.com)) is not a binding legal instrument, but rather a way for States to express their support for the objective of States to open negotiations on a procedural multilateral treaty on mutual legal assistance and extradition to cover the existing gap in the international legal framework for core international crimes.

**Who can I contact if I have additional questions regarding the MLA initiative?**

Additional questions can be addressed to [MLA-initiative@minjenv.nl](mailto:MLA-initiative@minjenv.nl).

- Annex -

**Examples of instances where a treaty framework would have been instrumental to help speeding up – or merely to allow for – the initiation of prosecution.**

- Problem of legalization: State A wanted to send a MLA request to State B. State B required that any MLA request sent to its authorities had to be legalized by the Embassy of State B in State A. In some cases, the MLA request took over a 1 year to be transmitted to State because it had to be sent back several times (for issues such as legalization of the translation missing, problem to pay in local currency for the legalization, etc).
  
- Extradition: A treaty base is needed in State A to extradite a suspect. State B requested the extradition of X, citizen of B, who was currently staying in A. Even though the extradition request was sent through appropriate channels, A could not extradite him, as there was no bilateral treaty between A and B. In this concrete case, while examining the extradition request, A realized that the visa of X had expired and arrested X on the basis of violations of immigration law. X was then expelled back to B, where he was arrested at the border.
  
- Identification of channels: In August 2013, a MLA request was sent by State A to State B. The investigation concerned X, citizen of A, suspected of trafficking having directly financed war crimes atrocities committed in B. The MLA request aimed to allow investigating authorities of A to come to B to interview witnesses and visit the place where the atrocities took place, in cooperation with B. The request was sent through diplomatic channel. Although an acknowledgment of receipt was sent by the Ministry of Foreign Affairs of B at the end of September 2013, no response has been received by A yet, more than 18 months later, mainly because A has been unable to properly identify the competent authorities in the Justice Department of B. The execution of the request is crucial for the investigation in A, which will be dismissed without that necessary evidence.
  
- Extradition and MLA: State A requested State B for the extradition of a national of A residing in B for genocide and crimes against humanity. Extradition was only possible for genocide, not for crimes against humanity. Country A also requested a house search upon arrest of this suspect. This required a legal basis, which did not exist for MLA for the crimes at stake in the current example. In this concrete example, a national investigation of B was already taking place and the house search and arrest of the suspect took place under the national investigation of B. Had A's extradition request already been received by B, this would not have been possible.

**In many cases prosecutors decide in the course of investigations that, as extradition of a suspect or obtaining the required evidence is not possible, they have to halt investigations.**