

Approaching a Convention on International Cooperation in the Investigation and Prosecution of the Crimes of Genocide, Crimes against Humanity and War Crimes

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By: Ania Kwadrans

"The perpetrators of the most serious international crimes are not stopped by international borders. The example of Eichmann … is just one example, but there are many more. What to think of that other famous Nazi Joseph Mengele, who, unlike Eichmann, was never brought to justice for the crimes he committed? The current legal framework still leaves loopholes for a modern day Mengele. I'm sure that [many States have] examples of cases where effective prosecution was impeded by our inadequate system for international cooperation on these matters."

- Speech by Ferdinand Grapperhaus, Dutch Minister of Justice and Security, on the EU Day against Impunity, 23 May 2013

We are living in the manifestation of the "global village" predicted long ago by Marshall McLuhan, who observed the growing connectivity and interdependence of our media, technology, and communications in our modernizing world. This notion has extended to serious crimes, which, as pointed out by Minister Grapperhaus, often occur in international and transnational contexts and require effective international cooperation for national criminal justice efforts to succeed. McLuhan's insights were invoked by Judge Kimberly Prost of the International Criminal Court at a side event held on 3 December 2019 at the 18th Assembly of States Parties (ASP) of the International Criminal Court (ICC) entitled, "Towards a Convention on International Cooperation in the Investigation and Prosecution of the Crimes of Genocide, Crimes against Humanity and War Crimes."

The event, co-organized by a Core Group of Governments of Argentina, Belgium, Mongolia, the Netherlands, Senegal, and Slovenia, provided an update regarding efforts since 2011 to introduce a new mutual legal assistance treaty for the investigation and prosecution of genocide, war crimes, and crimes against humanity.

Mutual legal assistance (MLA) conventions are multilateral treaties that provide a common framework and platform for cooperation on investigations, prosecutions, and extraditions related to specified crimes. Examples include the *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*; the *United Nations Convention against Corruption*; the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*; and the *Draft Comprehensive Convention on International Terrorism*. A glaring gap in international law, identified in November 2011 at an expert meeting of 38 participants from 19 States convened by the Hague Institute for Innovation of Law and the Dutch Ministry of Security and Justice, was the lack of a similar MLA convention to facilitate international cooperation around investigation and prosecution of international crimes.

In April 2013, a number of States proposed to begin negotiating a multilateral Convention on mutual legal assistance for genocide, war crimes, and crimes against humanity, initiating a process that

culminated in a Draft *Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes* (proposed MLA Convention), produced in October 2019 (Ward Ferdinandusse, "Improving Inter-State Cooperation for the National Prosecution of International Crimes: Towards a New Treaty (21 July 2014)", 18 American Society of International Law, Issue 15 https://www.asil.org/insights/volume/18/issue/15/improving-inter-state-cooperation-national-prosecution-international.)

At the December 3rd ASP event, Judge Kimberly Prost provided a keynote address setting out three arguments for why States should adopt the proposed MLA Convention.

First, she noted that the Convention is important for realizing the complementarity principle set out in Article 17 of the *Rome Statute of the International Criminal Court (Rome Statute)*, the treaty underpinning the ICC. Article 17 gives primacy to States to pursue investigations and prosecutions of international crimes within their jurisdiction and provides that the ICC can only pursue criminal proceedings in situations where a State is "unwilling or unable genuinely to carry out the investigation or prosecution." Judge Prost emphasized that the proposed MLA Convention on international crimes would provide a crucial tool for the full realization of the Rome Statute, which envisages States using every form of jurisdiction available in international law to prosecute perpetrators of atrocity crimes domestically and even regionally, before turning to the ICC as a forum of last resort in the event of unwillingness or inability to investigate and bring perpetrators to justice.

Secondly, Judge Prost argued that the proposed MLA Convention would also bring significant practical benefits, including significant cost savings, to States who normally do not have the capacity to negotiate and enter into ad hoc or bilateral cooperation agreements on investigations and prosecutions with various governments. She noted that the proposed Convention designates a central authority for all requests for international cooperation, giving clarity to practitioners regarding the entry point to seek information and evidence. Judge Prost observed that many States are put in a position where requested extraditions are mutually desired, but the law requires them to have legal arrangements in place in order to fulfill them. Rather than making these arrangements on an ad hoc or bilateral basis, the proposed MLA Convention would mean a legal framework would already be in place to facilitate quick and efficient cooperation.

Thirdly, Judge Prost stressed that there are principled reasons that States should adopt the proposed MLA Convention. She recalled that in the aftermath of the Second World War, many States turned to carrying out prosecutions on the basis of extraterritorial jurisdiction in order to try to bring justice and accountability, but no mechanisms existed to facilitate cooperation around these criminal processes. By joining the proposed MLA Convention, Judge Prost emphasized that States can assert their intentions to take every measure to "safeguard our village" by pursuing justice for the victims of "the most serious crimes of concern to the international community as a whole" (*Rome Statute*, preamble), including building capacity for national prosecutions and investigations.

The conversation then turned to Matthew Cannock, Head of Amnesty International's Center for International Justice. Mr. Cannock commended the drafters of the proposed MLA Convention for their work in strengthening the treaty throughout the drafting process by including human rights safeguards throughout it, e.g. the inclusion of torture and enforced disappearances as crimes within the scope of the treaty, and the inclusion of a right to a fair trial. However, Mr. Cannock noted that there is still room for improvement, including by:

- Narrowing the grounds for refusal of assistance and removing the ground of "sovereignty, security, *ordre public* and other essential interests (proposed MLA Convention, Art. 20(1)(b));

- Introducing bars on assistance in cases where extradition would expose the perpetrator to a real risk of receiving the death penalty, being subjected to an unfair trial, or experiencing torture, ill treatment, or other serious human rights violations; and

- More fully considering and incorporating victims' rights throughout the proposed MLA Convention, in line with the 8 March 2019 joint open letter sent by Amnesty International and nine other civil society organizations to the Core Group and Co-sponsoring States of the proposed treaty.

Next, Mr. René Lefeber of the Netherlands Legal Affairs Department spoke about the relationship between the proposed MLA Convention and a related initiative being led by the International Law Commission, which, in August 2019, presented the Draft Articles on Crimes against Humanity and commentary in Chapter IV of its Report the work of the seventy-first session (more background here). Mr. Lefeber noted that while both the proposed MLA Convention and the ILC Draft Articles both work toward the same goal of combating impunity, there are some key differences between the two that warrant the establishment of two separate instruments, which would operate in distinct but complementary ways. First, the Draft articles deal with crimes against humanity only, whereas the proposed MLA Convention's scope covers crimes against humanity, war crimes, and genocide. More importantly, he argued that the ILC Draft Articles aim to provide universal standards around crimes against humanity, whereas the proposed MLA Convention reflects a more pragmatic approach of addressing practical issues that arise in international cooperation around investigation and prosecution of international crimes.

Finally, the event provided an opportunity for Ms. Sanja Štiglic, Ambassador and Permanent Representative at the Embassy of Slovenia to The Netherlands, to announce that the proposed MLA Convention will be subject to informal consultations in the Hague from 27-29 January 2020, in advance of a diplomatic conference to be held in Slovenia 8-9 June 2020. Formal treaty negotiations will take place during the diplomatic conference, and the hopes are that the conference will result in a widely ratified convention that will create a mechanism for meaningful and effective international cooperation on investigations and prosecutions related to international crimes. With the immense benefits that the treaty can yield for States – helping to facilitate their complementarity commitments under the Rome Statute, making practical cooperation easier and more efficient, and enabling a strong reinforcement of the principles underpinning our collective mission of international justice – Ms. Štiglic

encouraged other States, whether Party to the Rome Statute or not, to join the 69 States currently supporting the initiative and make it a reality.

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