

The relationship of the MLA initiative to the ILC draft articles on Crimes against Humanity.

As the initiative on a Multilateral Treaty for Mutual Legal Assistance and Extradition for Domestic Prosecution of the Most Serious International Crimes ("MLA initiative") makes significant progress, it is important to describe how the MLA initiative relates to the work of the International Law Commission (ILC) on crimes against humanity.

1) The ILC's work on crimes against humanity

The topic of crimes against humanity has been on the ILC's agenda since 2014 when the Commission decided to include it in its programme of work and appointed Prof. Sean D. Murphy as Special Rapporteur for the topic.

Contrary to genocide and war crimes, there is no specific treaty dealing with crimes against humanity. The lack of specific and adequate international standards on crimes against humanity hampers effective and efficient investigation and prosecution of these crimes.

The obligation to establish national jurisdiction over crimes against humanity in domestic legal systems follows from various treaties and from customary international law. However, the treaties concerned are not of a universal character. Only a limited number of States have incorporated crimes against humanity into their domestic legislation and those that have done so often lack provisions on mutual legal assistance and extradition, which impedes the effectiveness.

Therefore, an important gap in the international legal framework needs to be filled in order to provide national authorities with the necessary tools for inter-state cooperation. This gap can best be filled by a robust, efficient and modern multilateral legal framework for cooperation between states with a view to facilitating extradition and mutual legal assistance in combating crimes against humanity.

The ultimate aim of the ILC's work on crimes against humanity – as formulated by the Special Rapporteur - is to "develop draft articles that might serve as the basis of an international convention on crimes against humanity." Potential benefits of such a convention have been identified as imposing obligations on States to:

- Promote the adoption of national laws that contain a widely accepted definition of such crimes and that allow for a broad ambit of jurisdiction when an offender is present in territory under the jurisdiction of the State party;
- Prevent crimes against humanity;
- Cooperate on mutual legal assistance for the investigation and prosecution of such crimes in national courts;
- Extradite or prosecute alleged offenders.

The ILC requested states, at its 69th Session (2017) to submit to the Secretary-General any comments and observations that they may have on the Draft Articles on Crimes against Humanity ("Draft Articles") adopted that year on first reading. A considerable number of States, international organisations and non-governmental organizations have submitted their comments and observations, which the Special Rapporteur took into account in his fourth report to the ILC. A

drafting committee is currently finalising the draft articles after which the ILC will decide on its recommendations to the UN General Assembly.

In terms of recommendations for possible follow-up of its own work, the ILC can recommend a range of options, including further study, the convening of a diplomatic conference to negotiate a treaty, or the adoption of the draft articles as a convention by a General Assembly Resolution. Seventy years after Nuremberg, the Commission's work to elaborate a text of a new global treaty on crimes against humanity is historically significant and is clearly an important contribution to both the progressive development and codification of international law.

The core group of states supporting the MLA initiative have highlighted the importance of both initiatives in their comments and observations on the Draft Articles on Crimes against Humanity and will continue to support progress towards filling the gap in the legal framework.

2) *A comparison with the MLA initiative*

The MLA initiative, currently¹ supported by 69 States, aims to develop a modern operational framework for efficient inter-state cooperation regarding all three core crimes: genocide, war crimes, and crimes against humanity. As such, the treaty should become a practical tool to enable States to both comply with their international obligations and empower their national judiciaries.

As the ILC's work on crimes against humanity and the MLA initiative progress in parallel, questions have arisen regarding their precise scope, their (potential) relationship and the position which States should adopt in respect of both initiatives. Although there are convergent qualities between the MLA initiative and the Draft Articles, there are also important differences.

Relevant differences between the initiatives include:

- *Scope of application ratione materiae*: the MLA initiative seeks to offer a mutual legal assistance and extradition framework for all three groups of the most serious crimes under international law. The ILC initiative focuses exclusively on crimes against humanity;
- *Differences in approach*: the ILC initiative has a holistic approach and aims to deal with a wide range of rules and concepts, ranging from MLA and extradition to prevention, state responsibility and reparations for Crimes against Humanity. The MLA initiative on the other hand focuses on creating a modern framework for mutual legal assistance and extradition for the three categories of targeted crimes. The scope of the provisions on mutual legal assistance and extradition as covered by the MLA initiative is likely to be much wider and more extensive than the procedural provisions of the ILC's draft articles on crimes against humanity, including the Annex to the draft articles which includes MLA provisions that are more limited in scope than the provisions included in the draft treaty of the MLA initiative;
- *Differences in procedural/organizational framework*: for the MLA initiative, participation in preparatory conferences and the diplomatic conference is limited to States that have expressed their support for the MLA initiative. This stand-alone framework allows for a discussion among States that already support the idea of a new treaty and minimizes the role of potential

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spoilers. The ILC's work on crimes against humanity on the other hand is – by definition – firmly embedded in the UN framework.

- *Differences in timeline:* The differences in approach and procedural/organization framework of these processes will have a significant impact on their foreseen timelines. By steering clear of re-examination of substantive provisions within a coalition of the willing the MLA initiative has a shorter foreseen timeline.

3) *Conclusion*

The initiatives are mutually supportive as they work towards the same goal 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 co-sponsoring 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, including with the provisions in the Rome Statute of the International Criminal Court, 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 necessity to coordinate – where possible – with the MLA initiative.