

Understanding the New Convention on Mutual Legal Assistance for International Atrocity Crimes

Introduction

On May 26, 2023, the “Ljubljana-The Hague MLA Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes Against Humanity, War Crimes and Other International Crimes” was adopted at a Diplomatic Conference convened in Slovenia.¹ The 87-article treaty, known as the “MLA Treaty,” or “MLAT,” emerged from a project launched by Belgium, the Netherlands, and Slovenia in 2011.² Known as the “*MLA Initiative*,” it emerged in the wake of the *Crimes against Humanity Initiative*, a non-governmental initiative that drafted a model draft treaty on crimes against humanity that was published in 2010.³

During the discussions surrounding the idea of a new crimes against humanity treaty, it was observed that unlike modern transnational crime treaties, such as the 2000 UN Convention against Transnational Organized Crime (Organized Crime Convention)⁴ or the 2003 UN Convention against Corruption (Corruption Convention),⁵ older treaties addressing *jus cogens* crimes such as genocide, torture, and serious war crimes did not include robust provisions on interstate cooperation.⁶ The principle behind the MLA Initiative was to essentially fill this gap for the *jus cogens* offenses in the Rome Statute of the International Criminal Court, and, possibly, other treaty crimes.

After unsuccessful efforts to engage the United Nations in the negotiation and adoption of such a convention, the three states, joined by Argentina, Mongolia, and Senegal, determined to proceed outside the United Nations system.⁷ The 87 articles of the new

treaty, which will open for signature on February 14, 2024, in The Hague, Netherlands, were negotiated at a two-week conference held in Ljubljana, Slovenia, attended by 53 supporting states and 15 observing states. Ten civil society organizations were also present.⁸

This *Insight* will review the basic framework and drafting history of the MLA Treaty, as well as offer some perspectives on the MLAT in relation to the current draft articles on crimes against humanity.

Treaty Framework and Provisions

The MLA Treaty is divided into eight parts, accompanied by eight annexes. Its objective is “to facilitate cooperation in criminal matters” with a view to “strengthening the fight against impunity for the commission of core international crimes.”⁹

The treaty makes cooperation mandatory for all states parties regarding genocide, crimes against humanity, and war crimes, as defined in the Rome Statute of the International Criminal Court (ICC Statute or Rome Statute). It also allows states parties to opt into cooperation regarding additional crimes found in annexes to the MLAT including the war crimes amendments to the ICC Statute, torture as defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁰ enforced disappearances as defined in the International Convention for the Protection of All Persons from Enforced Disappearance,¹¹ and the crime of aggression as codified in Article 8*bis* of the Rome Statute.¹²

Although originally proposed as a pure MLA treaty, as ultimately adopted, the treaty is much broader. The MLA Treaty requires ratifying states to do three things: (1) criminalize war crimes, crimes against humanity, and genocide (as defined in the ICC Statute and reproduced in Article 5 of the MLAT); (2) exercise jurisdiction over offenders accused of such crimes (Article 8 of the MLAT); and (3) provide mutual legal assistance regarding the extradition, judicial proceedings, and enforcement of penal sanctions with respect to offenders. It also eliminates statutes of limitations over the crimes listed in Article 5 (Article 11), provides for possible liability of legal persons (Article 15), includes data protection provisions (Article 16), establishes a vehicle for future meetings of the states parties to the treaty (Articles 84-85), and includes a dispute resolution provision providing for the possibility of arbitration, with recourse to the International Court of Justice if that fails, regarding “[a]ny dispute between two or more States Parties concerning the interpretation or application of this Convention.”¹³

The technical aspects of the MLA Treaty are contained in Articles 20 to 80 of the convention. The text is rich and complex and provides extensive possibilities of cooperation including the designation of central authorities (Articles 20-21), and a long list of possible mutual legal assistance measures set out in Article 24. It provides for the possibility of covert investigations (Article 40), a provision likely to be controversial in practice, and from which states parties may opt-out (Article 92); the establishment of joint investigative teams (Articles 41-42); international cooperation for purposes of confiscation of proceeds of crimes (Article 45); transfer of criminal proceedings (Article 48); and extensive provisions on extradition (Articles 49-65).

Pursuant to Article 90, the MLAT will come into effect when three states have ratified it—a seemingly low number for a major multilateral treaty involving core international crimes, although consistent with the 1959 Council of Europe treaty on Mutual Assistance in Criminal Matters.¹⁴ By way of contrast, the Organized Crime Convention required 40 ratifications to enter into force.¹⁵

Drafting History

Because there is no commentary attached either to the MLAT or the drafts that preceded its adoption, choices that were made in terms of language and specific provisions are not easily determined. Various iterations of the treaty were circulated from 2017 until 2023, the most detailed of which was dated November 30, 2022, which formed the basis for the negotiations in May 2023,¹⁶ and which contains helpful footnotes indicating the provenance of specific provisions.

The MLA Initiative followed the lead of the UN International Law Commission (ILC) in its drafting of articles for a new treaty on crimes against humanity¹⁷ by taking for its starting point the MLA provisions of the Organized Crime Convention as well as provisions found in other mutual legal assistance instruments, including the European Convention on Mutual Legal Assistance¹⁸ and the UN Model Extradition Treaty.¹⁹ The idea was to take the enhanced MLA provisions already found in treaties on transnational crimes and embed them in a cooperation regime for core international crimes.²⁰

Despite the long incubation period of the MLA Treaty, during which time multiple drafts were circulated, significant tensions regarding specific provisions of the treaty emerged during the two weeks of negotiations in Ljubljana, negotiations that were described by one civil society participant as sometimes “fraught.”²¹

As an initial matter, Switzerland circulated an alternative version of the draft MLAT that would have eliminated the definitions of the crimes addressed by the treaty on the grounds that the new treaty would thereby prove more useful to states not already party to the Rome Statute, and, like other MLA treaties, should simply provide a framework for mutual legal assistance based upon dual criminality.²² While the Swiss proposal also had the practical advantage of allowing the MLA Treaty to be adopted without any potential conflict with the emerging treaty on crimes against humanity, this position was ultimately rejected by the core group.

Other areas of contention emerged as well. France, supported by the United Kingdom, endeavored to amend the jurisdictional provisions of the treaty so as to render the exercise of universal jurisdiction discretionary by amending the provisions on jurisdiction and *aut dedere aut judicare*. This was opposed by other States as well as civil society,²³ and ultimately rebuffed.

Another area of disagreement surfaced regarding the question of reservations: the November 2022 draft of the MLAT provided in Article 85(1) that no reservations were permitted other than those specifically provided for. The treaty as adopted permits reservations to the provisions on special investigative techniques, including electronic surveillance; the use of covert investigations and cross-border observations; and the dispute settlement provisions, from which states are permitted to opt-out.²⁴ States are, controversially, permitted to make a reservation to Article 8(3) of the treaty providing for universal jurisdiction.

Finally, there was a debate over the provisions on data protection and whether they should essentially track the Budapest Convention on Cybercrime and its Second Additional Protocol on enhanced co-operation and disclosure of electronic evidence.²⁵

Perspectives on the Draft Articles on Crimes Against Humanity

The experience of the MLAT negotiations offers some interesting perspectives on the ILC's 2019 Draft Articles on Crimes Against Humanity, which have been the subject of ongoing discussions at the UN General Assembly (UNGA) for several years, and about which a decision will be taken in October 2024.²⁶

First, in terms of the process, the MLAT negotiations were relatively closed from the outset. To participate, states had to sign a declaration of support for the treaty. This had

the advantage of allowing a group of committed states to move forward, but the disadvantages of rendering the process less transparent and inclusive and the final product less universal. Even states attending the MLA Diplomatic Conference were divided into participating and observer states.²⁷ While it is true that it has been difficult to reach consensus on the draft treaty on crimes against humanity, during the most recent session of the UNGA Sixth Committee, held from October 11-12, 2023, a total of 110 states, from a broad cross-regional group, expressed their support for the elaboration of a new treaty on crimes against humanity, with another seven offering their views but not explicit support; only eight spoke in opposition.²⁸

Second, as others have noted, throughout the MLAT negotiations, provisions that seemed inconsistent with existing international law, as well as regressive provisions were offered by states. The important effect of civil society in rebuffing provisions such as these cannot be overstated.²⁹ An early example of such a provision was included in the draft circulated at the first MLA Preparatory Conference in Doorn, the Netherlands, Article 52 of which stated: “Each State Party may grant pardon, amnesty or commutation of the sentence in accordance with its Constitution or other laws.” Yet as Amnesty International noted in its comment on the draft MLA text, countervailing provisions in the draft articles on crimes against humanity “appear[...] to set an insurmountable obstacle for amnesties at national level,” including amnesties for the crimes of genocide and crimes against humanity.³⁰ Likewise, civil society participation was critical during the MLA Treaty negotiations to prevent states from softening provisions on universal jurisdiction and to address issues such as victims’ rights and due process during criminal proceedings.

Third, questions arose during the MLA Treaty negotiations regarding the definitions of the crimes in the convention. Because the core group wished to include definitions, they ultimately decided to keep the Rome Statute definitions without change, aside from deleting the definition of gender in Article 7(3) of the ICC Statute on crimes against humanity, which the ILC had also done. Because many states have modified their own national definitions of these crimes, however, some of those states, including Canada, expressed concern during the negotiations about the definitions in the MLAT. While the MLA Treaty has provisions that endeavor to allow for the development of customary international law outside the treaty (Article 4), as well for other definitions of the crimes to emerge in other international agreements (Article 5), the fact is that the MLA Treaty is undeniably pegged to the Rome Statute in its current form.

Discussions regarding the crimes against humanity treaty, however, as it has been developing slowly in the UNGA Sixth Committee, have begun to incorporate

conversations about how the Rome Statute Article 7 definition of crimes against humanity might be gently enlarged to take into account developments over the last 25 years since the Statute's negotiation. Sierra Leone, for example, has proposed the inclusion of the slave trade both as an amendment to the Rome Statute and the new treaty on crimes against humanity. It also proposed this amendment at Ljubljana but was rebuffed.

While it is understandable that the MLA treaty core group wished to rely upon the Rome Statute, particularly in 2011 when the *MLA Initiative* began, which was also the view taken by the *Crimes Against Humanity Initiative* and by the ILC, with the passage of time, that position may ultimately give states wishing to ratify both the crimes against humanity treaty and the MLA Treaty pause. It may be that the Swiss proposal would have done a better job of "future proofing" the MLA Treaty so that developments pertaining to the crimes addressed emerging in other instruments (or even new amendments to the Rome Statute) would not create problems of mutual legal assistance, and thus the MLA Treaty, the Rome Statute, and the future crimes against humanity convention could work together seamlessly with respect to the fight against impunity for the commission of international crimes.

That said, the MLA Treaty will undoubtedly prove useful to states wishing to deepen their cooperation with other states on core crimes, which do not yet have either MLA treaties or extradition agreements otherwise allowing them to do so.

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¹ The Ljubljana-The Hague MLA Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes Against Humanity, War Crimes and Other International Crimes, adopted May 26, 2023, <https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/The-Ljubljana-The-Hague-MLA-Convention-English-v6.pdf> [hereinafter MLA Treaty]; see also Government of Slovenia, MLA (Mutual Legal Assistance) Initiative, <https://www.gov.si/en/registries/projects/mla-initiative/>.

² Home, MLA Initiative, Ministerie van Buitenlandse Zaken, <https://www.centruminternationaalrecht.nl/mla-initiative>.

³ See, e.g., Leila Nadya Sadat, Crimes Against Humanity Initiative, Washington University School of Law, Whitney R. Harris World Law Institute, <https://sites.wustl.edu/crimesagainsthumanity/>.

⁴ U.N. Convention Against Transnational Organized Crime, Nov. 20, 2000, G.A. Res. 55/25, Annex I, 2225 U.N.T.S. 209 (entry into force Sept. 29, 2003).

⁵ U.N. Convention Against Corruption, Oct. 31, 2003, G.A. Res. 58/4, 2349 U.N.T.S. 41 (entry into force Dec. 14, 2005).

⁶ Steering Committee member Christine Van Den Wyngaert (Belgium) raised this as a possibility during the discussions on a new treaty for Crimes Against Humanity. Leila Nadya Sadat, *Comprehensive History*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY p. 464, ¶ 30 (2d ed., Leila Nadya Sadat, ed., 2013) (proposing a possible protocol to the Rome Statute that would include other Rome Statute crimes).

⁷ Alison Bisset, *The Mutual Legal Assistance Treaty for Core Crimes: Filling the Gap?*, EJILTALK! (June 13, 2022), <https://www.ejiltalk.org/the-mutual-legal-assistance-treaty-for-core-crimes-filling-the-gap/>.

⁸ Government of Slovenia, MLA Diplomatic Conference, <https://www.gov.si/en/registries/projects/mla-initiative/diplomatic-conference-for-formal-negotiations/>.

⁹ MLA Treaty, *supra* note 1, art. 1.

¹⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, Annex, 1465 U.N.T.S. 85 (entry into force June 26, 1987).

¹¹ International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, G.A. Res. 61/177, Annex, U.N. Doc. A/61/448 (entry into force Dec. 23, 2010).

¹² Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 (entry into force July 1, 2002, last amended 2010).

¹³ *Id.* art. 86(2).

¹⁴ European Convention on Mutual Assistance in Criminal Matters, 1959, Europ. T.S. No. 30, Mutual Assistance in Criminal Matters, Strasbourg (Apr. 20, 1959)(entry into force June 12, 1962), art. 27(2).

¹⁵ Organized Crime Convention, *supra* note 4, art. 38.

¹⁶ Draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes (version Nov. 30, 2022), <https://www.gov.si/en/registries/projects/mla-initiative/>.

¹⁷ U.N. International Law Commission, 2019 Draft Articles on Prevention and Punishment of Crimes Against Humanity, https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf.

¹⁸ European Convention on Mutual Assistance in Criminal Matters, *supra* note 14.

¹⁹ U.N. Model Treaty on Extradition, 1990, G.A. Res. 45/116, Annex, U.N. Doc. A/RES/45/49 (Dec. 14, 1990).

²⁰ This followed the view of the *Crimes Against Humanity Initiative*, which was relied upon by both the ILC and the MLA Initiative in their drafting, although the *Crimes Against Humanity Initiative* and the International Law Commission also drew heavily from the U.N. Convention against Corruption. ILC Draft Articles & Commentary to Article 14, Mutual Legal Assistance, ¶¶ 6, 9, at pp. 102-104.

²¹ Priya Pillai, *Introducing a Symposium on Ljubljana – The Hague Convention on Mutual Legal Assistance: Critical Reflections*, OPINIO JURIS (July 24, 2023), <https://opiniojuris.org/2023/07/24/introducing-a-symposium-on-ljubljana-the-hague-convention-on-mutual-legal-assistance-critical-reflections/>.

²² Written comments of Switzerland on the Draft Convention 2020 (proposal), Draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes (version Mar. 12, 2020), <https://www.centruminternationaalrecht.nl/mla-initiative/publications>.

²³ *Global: French government tries to weaken new treaty in way that could allow war criminals to escape justice*, Amnesty International (May 22, 2023), <https://www.amnesty.org/en/latest/news/2023/05/global->

[french-government-tries-to-weaken-new-treaty-in-way-that-could-allow-war-criminals-to-escape-justice/](#); Jennifer Keene-McCann, *Symposium on Ljubljana – The Hague Convention on Mutual Legal Assistance: Critical Reflections – Wanted: ‘Widest Adoption Possible’ of the Ljubljana – The Hague Mutual Legal Assistance Convention*, OPINIO JURIS (Apr. 8, 2023), <https://opiniojuris.org/2023/08/04/symposium-on-ljubljana-the-hague-convention-on-mutual-legal-assistance-critical-reflections-wanted-widest-adoption-possible-of-the-ljubljana-the-hague-mutual-legal-assistance-c/>.

²⁴ MLA Treaty, *supra* note 1, art. 92.

²⁵ Convention on Cybercrime, E.T.S. No. 185 (Nov. 23, 2001), and Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence, C.E.T.S. No. 224 (May 12, 2022).

²⁶ Leila Nadya Sadat and Akila Radhakrishnan, *Coming Debates to Advance New Treaty on Crimes Against Humanity will Require Skillful Leadership*, JUST SECURITY (Dec. 20, 2022), <https://www.justsecurity.org/84496/coming-debates-to-advance-new-treaty-on-crimes-against-humanity-will-require-skillful-leadership/>; see also Leila Nadya Sadat and Akila Radhakrishnan, *Differences ‘Getting Narrower’ on Proposed Crimes Against Humanity Treaty*, JUST SECURITY (May 15, 2023), <https://www.justsecurity.org/86582/differences-getting-narrower-on-proposed-crimes-against-humanity-treaty/>.

²⁷ MLA Diplomatic Conference, Ljubljana, Slovenia, 16-25 May 2023, MLA/INF.1 (May 26, 2023), <https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/List-of-Participants.pdf>.

²⁸ Author’s Notes.

²⁹ Pillai, *supra* note 21.

³⁰ Amnesty International, *Key Observations and Recommendations, Second Preparatory Conference of States Party to the ‘Mutual Legal Assistance Initiative,’ 11th-14th March 2019.*