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Inter-State Cooperation in Prosecuting International Crimes: Lessons from the United Nations Convention on Transnational Organised Crime

Key words

Ljubljana-The Hague Convention, inter-state cooperation, UNTOC

Abstract

The Ljubljana-The Hague Convention was adopted in May 2023, creating a previously lacking global framework for inter-state judicial cooperation on international crimes. It is an important feature of a shifting international criminal justice landscape, in which there is a new focus on investigations and prosecutions at national levels. However, its cooperation regime is based on that of the UN Convention on Transnational Organised Crime (UNTOC), which studies suggest has been of limited utility in operationalising cooperation in the context of transnational crimes. This article explores the likely consequences of transplanting the UNTOC model, arguing that its cooperation regime is likely to limit the effectiveness of the Ljubljana-The Hague Convention and that treaties on international crimes require distinct cooperation arrangements in which traditional obstacles to cooperation are removed.

1 Introduction

In May 2023, The Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes (the MLA Convention) was adopted. It creates a global

framework for inter-state judicial cooperation on international crimes[1] and will give ratifying states the technical tools to provide mutual legal assistance in sharing information and evidence, accessing victims, witnesses and assets, and extraditing suspects. The adoption of the Convention remedies the long-standing 'cooperation gap' around international crimes, in which the absence of a multilateral cooperation regime has thwarted national investigations and prosecutions.[2] As record numbers of states pursue domestic prosecutions for international crimes,[3] effective inter-state cooperation via a robust legal framework is essential.

The potential significance of the MLA Convention in tackling impunity should not be underestimated; it could – and should – transform the prosecution of international crimes by facilitating the exchange of evidence and information between states which is essential to carry out effective domestic prosecutions. It therefore serves an important role in the international criminal justice system, supporting the ICC principle of complementarity[4] by enhancing domestic prosecutorial function. However, the MLA Convention's mutual assistance and extradition framework borrows heavily from the UN Convention on Transnational Organised Crime (UNTOC)[5] and this may limit its ability to deliver real change vis-à-vis international

[1] Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes, 2023, Article 1.

[2] Dire Tladi, 'A Horizontal Treaty on Cooperation in International Criminal Matters: The next step for the evolution of a comprehensive international criminal justice system?' 29 *South African Public Law* (2014) 368-387; Sean D. Murphy, 'New Mechanisms for Punishing Atrocities in Non-International Armed Conflicts', 16 *Melbourne Journal of International Law* (2015) 299-310.

[3] TRIAL International, *Universal Jurisdiction Annual Review 2024*, April 2024, available online at www.trialinternational.org/wp-content/uploads/2024/04/UJAR-2024_digital.pdf/ (accessed 9 January 2025).

[4] ICC Statute, Articles 1 and 17.

[5] United Nations Convention Against Transnational Organized Crime, A/Res/55/25, 15 November 2000.

crimes. Although data is limited and patchy, small-scale studies[6] suggest that UNTOC is under-used in transnational crimes investigations. This raises questions as to why the UNTOC regime was in large parts transplanted into the MLA Convention. It also necessitates an interrogation of the available state practice under UNTOC in order to better understand its use as a basis for cooperation, the barriers to the provision of inter-state assistance and the prospects for cooperation under the MLA Convention. The consequences of transplanting a transnational crime cooperation regime into a treaty on international crimes has not been examined, either by policy makers or in the existing scholarship. This article therefore contributes to current understanding of whether and how the MLA Convention can provide states with an effective foundation for cooperation in the prosecution of international crimes while relying on a transnational crimes assistance model.

To that end, this article asks: (1) are states reluctant to use UNTOC as a basis for the provision of judicial assistance and, if so, why; (2) are those reasons relevant in the context of the MLA Convention and the prosecution of international crimes; and (3) (how) can those issues be mitigated in the context of the MLA Convention? The article begins by explaining the significance of the MLA Convention in the international effort to end impunity and the legal framework adopted to facilitate inter-state cooperation. It examines the extent to which the UNTOC regime has been incorporated within the MLA Convention and critiques the practice of 'borrowing' in treaty creation. The article then moves to examine the UNTOC experience

[6] Neil Boister, 'The Cooperation Provisions of the UN Convention against Transnational Organised Crime: A Toolbox Rarely Used?' 16 *International Criminal Law Review* (2016) 39-70; UNODC, *State of Implementation of the United Nations Convention against Corruption. Criminalization, law enforcement and international cooperation* (2nd edn) (Vienna, 2017).

and identifies three principal barriers to cooperation under UNTOC: (a) resource constraints; (b) law and policy; and (c) perception. The article argues that reliance on the UNTOC regime is likely to limit the effectiveness of the MLA Convention and that treaties on international crimes require distinct cooperation arrangements in which traditional obstacles to cooperation are removed.

2 The MLA Convention

The MLA Convention is the outcome of a project launched in 2011 when the Netherlands convened an expert meeting on what was termed the 'legal gap'.[7] The gap that had been identified related to the absence of a multilateral instrument that facilitated inter-state cooperation on mutual legal assistance and extradition in the prosecution of international crimes. Prior to the adoption of the MLA Treaty, there were no international or regional treaties designed to enable horizontal cooperation in relation to international crimes. The arrangements within the Genocide Convention[8] and the war crimes provisions of the Geneva Conventions[9] are rudimentary. They instruct states parties to provide each other with assistance but give no detail on what sorts of assistance or how to provide it. Although the General Assembly has

[7] *A Legal Gap? Getting the evidence where it can be found: Investigating and prosecuting international crimes*, The Hague Institute for Global Justice, 22 November 2011.

[8] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, Article VII.

[9] Only Additional Protocol I applicable solely to crimes committed in international armed conflict, makes any provision for mutual legal assistance and extradition. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3, Article 88(2).

passed a resolution[10] authorising the formulation of a treaty based on the ILC's Draft Articles on Crimes Against Humanity,[11] it is likely to be at least five years until a final treaty can be adopted.[12] The Statute of the International Criminal Court (ICC) does not contain a regime for cooperation between states.[13] Regional arrangements, of which there are few, are similarly deficient, with little on the technicalities of extradition and no framework for mutual legal assistance.[14] Although European countries have successfully developed a series of practical measures to enable and enhance inter-state cooperation, including beyond EU member states,[15] through Eurojust and the Genocide Prosecution Network,[16] this does not negate the

[10] UNGA Resolution 79/122, 12 December 2024, UN Doc.A/RES/79/122.

[11] International Law Commission, Text and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on second reading, Prevention and punishment of crimes against humanity, A/CN.4/L.935, 15 May 2019.

[12] UNGA Resolution 79/122, 12 December 2024, UN Doc.A/RES/79/122. See also Richard Dicker, 'Moving Ahead to a Crimes Against Humanity Treaty', *Opinio Juris*, 19 December 2024.

[13] The ICC regulates vertical cooperation only. *See* Part IX, ICC Statute.

[14] Protocol for the Prevention and the Punishment of the Crimes of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination, adopted at the International Conference on the Great Lakes Region, 26 November 2006, Preamble, para 5.

[15] A number of states have Observer State status in the Genocide Network, including Bosnia and Herzegovina, Canada, Norway, the United Kingdom and the United States. Note too that the EU has recently launched a National Authorities Against Impunity Project which aims to enhance cooperation between EU and non-EU Member States and build regional networks. *See* www.eurojust.europa.eu/national-authorities-against-impunity (accessed 23 June 2025).

[16] Council Decision of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, 2002/494/JHA, OJL 167, 26 June 2002; Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, 2003/335, JHA, OJL 118, 14 May 2003.

requirement for a truly international cooperation instrument. Indeed, the creation of a global cooperation framework has formed part of the Genocide Network's strategy since 2014.[17]

International treaties that do contain more modern cooperation arrangements, such as UNTOC and the UN Convention Against Corruption (UNCAC),[18] cannot easily accommodate international crimes within the parameters of their definitions. The inadequacies of these arrangements, as well as the slow pace of relying upon letters rogatory to gain necessary information and evidence,[19] were lamented by practitioners for their stifling effect on national level prosecutions.[20] The 2011 meeting concluded that the development of a modern mutual legal assistance treaty (MLAT) was essential to enable efficient inter-state cooperation relating to genocide, crimes against humanity and war crimes.

To 'fill the gap', a core group of states (Argentina, Belgium, Mongolia, the Netherlands, Senegal and Slovenia) led the development of a new cooperation treaty under the auspices of the 'MLA Initiative'. By December 2018, a draft Convention was finalised. There were Preparatory Conferences in 2019 and 2020 in the Netherlands, three rounds of virtual consultations in 2021 and 2022 and in May 2023 a Diplomatic Conference was held in Ljubljana, which concluded with the adoption of the Convention.

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[17] Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States, (Eurojust, The Hague, November 2014) p.40.

[18] United Nations Convention Against Corruption 2003, 2349 UNTS 41.

[19] *See* the various keynote addresses of expert practitioners included in *A Legal Gap*?, *supra* note 7.

[20] *A Legal Gap?, supra* note 7; Explanatory Note, Towards a Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity and War Crimes, 2020, Annex, available online at www.centruminternationaalrecht.nl/mla-initiative (accessed 28 April 2022).

The final treaty applies not only to the core crimes of genocide, crimes against humanity and war crimes.[21] States parties can extend its application to a range of other international crimes (torture,[22] enforced disappearance,[23] the amendments to war crimes under the ICC Statute[24] and aggression[25]) contained in a series of annexes. The final Convention is also much more than a MLAT. It requires states to criminalise treaty crimes in domestic law,[26] includes obligations to extradite or prosecute,[27] and creates new protections for victims in judicial assistance proceedings.[28] With few exceptions, it is these aspects of the Convention that have attracted early attention.[29] Yet, it is the Convention's technical, cooperation regime that is likely to be most valuable in international criminal law practice and that is the focus of this article.

In terms of cooperation, the Convention appears, at least on paper, a significant step forward in expanding national prosecutorial function and effectiveness and in fighting impunity. It lays down provisions for the designation of central authorities,[30] channels and means of

[21] Article 1.

[22] Annex F.

[23] Annex G.

[24] Annexes A-E.

[25] Annex H.

[26] Article 7.

[27] Article 14.

[28] Part VI.

[29] Priya Pillai, 'Introducing a Symposium on Ljubljana- The Hague Convention on Mutual Legal Assistance: Critical Reflections', *Opinio Juris, 24* July 2023*;* Bruno de Oliveira Biazatti and Ezechiel Amani, 'The Ljubljana-The Hague Convention on Mutual Legal Assistance – Was the Gap Closed?' *EJIL:Talk!*, 12 June 2023.

[30] Article 20.

communication,[31] and language of requests,[32] all of which are essential elements of effective cooperation systems. On mutual legal assistance, states parties are required to provide each other with the widest measure of mutual assistance in investigations, prosecutions and judicial proceedings in relation to the crimes within the Convention.[33] The treaty outlines a non-exhaustive list of the purposes for which assistance can be sought.[34] It includes traditional types of assistance, such as taking evidence and statements from persons of interest,[35] examining sites and objects,[36] providing evidentiary items[37] and copies of documents and records,[38] carrying out search, seizure and confiscation operations[39] and serving judicial documents.[40] It also regulates the appearance of persons in the requesting state,[41] hearings by video conference,[42] and the deposition of witnesses in the requested state.[43]

Additionally, there is extensive regulation of more complex forms of assistance, such as using special investigative techniques, including electronic surveillance and undercover operations,[44]

[31] Article 21.

[32] Article 22.

[33] Article 23(1).

[34] Article 24.

[35] Article 24(a).

[36] Article 24 (b).

[37] Article 24(c).

[38] Article 24(f).

[39] Article 24(d).

[40] Article 24(e).

[41] Article 35.

[42] Article 34.

[43] Article 33.

[44] Article 39.

conducting cross-border observations[45] and setting up joint investigation teams.[46] It has already been suggested that these may prove controversial in practice due to their implications for state sovereignty and domestic privacy and human rights laws.[47] While European states are making increasing use of mechanisms such as JITs, including in core crimes investigations,[48] they typically do so on the basis of regional, European instruments and mechanisms[49] and in a context where states are closely politically and legally connected.[50] States are reportedly reluctant to enter agreements with those with which they do not already have close connections.[51] This may explain the possibility of reservation in respect of these three types of

[45] Article 42.

[46] Article 41.

[47] Leila Sadat, 'Understanding the new Convention on Mutual Legal Assistance for International Atrocity Crimes', 27:12 *ASIL Insights*,15 November 2023.

[48] JITS are operating in relation to: Ukraine between Estonia, Lithuania, Latvia, Slovakia, Poland, Romania and Ukraine; Syria between Germany, France and Sweden; the Yezidi Genocide between France, Sweden, Belgium and the Netherlands; Libya between Italy, the Netherlands, the UK and Spain. *See* Andrea Furger, 'Can They Deliver? The Practice of Joint Investigation Teams (JITS) in Core International Crimes Investigations', 22 *Journal of International Criminal Justice* (2024) 43-58, p.49-40.

[49] Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union ([2000] OJ C 197/3); Council Framework Decision of 13 June 2002 on joint investigation teams ([2002] OJ L 162/1) (hereafter 'EU JIT Framework Decision'); Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, ETS 182 (almost entirely reproduces the text of art 13 of the EU MLA Convention)

[50] Furger, *supra* note 48, p.52.

[51] Eurojust, Third JIT Evaluation Report: Evaluations received between: November 2017 and November 2019, March 2020, at 8. available online at www.eurojust.europa.eu/sites/default/files/assets/2020_03_3rd_jits_evaluation_report_en.pdf (visited 27 February 2025).

assistance. Although reservations to the Convention are generally not permitted,[52] under Article 92(2), states parties can enter reservations in respect of special investigative techniques, cross-border observations and joint investigation teams. No signatory state has yet done so, although it is possible that reservations may be entered following ratification processes at national levels.

The format of requests,[53] procedures for their execution[54] and grounds for refusal of assistance[55] are all set out in detail. The grounds for refusal again reflect traditional and more contemporary concerns. International human rights issues feature heavily, and assistance can be refused where the requested state believes that prosecution is motivated by discrimination,[56] where the crime is punishable by the death penalty in the requesting state, unless guarantees of non-imposition are given,[57] and where there is likelihood of torture, denial of a fair trial or other flagrant violations of fundamental rights.[58] Requests can also be refused on *ne bis in idem* grounds,[59] where the relevant person faces trial by an extraordinary court or tribunal,[60] and where there is a risk of indefinite sentence.[61]

[52] Article 92(1).

[53] Article 25.

[54] Article 33.

[55] Article 30.

[56] Article 30(1)(a).

[57] Article 30(1)(b).

[58] Article 30(1)(d).

[59] Article 30(1)(c).

[60] Article 30(1)(h).

[61] Article 30(1)(j). This will be discussed further below.

Conventional grounds for refusal where the requested state believes that execution of the request may 'prejudice its sovereignty, security, *ordre public* or other essential interests'[62] are also included. These grounds are routine across existing MLATs. However, they are legally ambiguous and open to exploitation by states reluctant to cooperate. While international criminal law no longer accepts unilateral assertions of national sovereignty[63] or national security as grounds for refusing assistance to international courts,[64] inter-state assistance in cases involving serious human rights violations has often been refused on these grounds.[65] The breadth of information covered by 'national security' and the ease with which states can classify categories of information as relating to it[66] makes this an easy means of avoiding assistance for a state that is unwilling to provide judicial assistance. The ground of threats to public order is similarly open to exploitation. It has been suggested that this ground is rarely invoked and serves only as a protection in principle for states.[67] However, in states that have

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[62] Article 30(1)(g).

[63] See ICTY, *Prosecutor* v. *Blaskic,* Case No. IT-95-14-AR108BIS, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 65; ICTR, *Prosecutor* v. *Kanyabashi*, Case No. ICTR-96-15-T, Judgment of the Defence Motion on Jurisdiction, 18 June 1997. See also Salavatore Zappala, 'Blaskic Subpoena Proceedings', in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, (Oxford University Press, Oxford, 2009), pp.613-615.

[64] ICC Statute, Art. 72.

[65] Alison Bisset, 'Truth Commissions: A Barrier to the Provision of Judicial Assistance?' 10 *International Criminal Law Review* (2010) pp.647-678.

[66] David Banisar, 'Freedom of Information, International Trends and National Security', *Geneva Centre for the Democratic Control of Armed Forces*, October 2002; Campbell Public Affairs Institute (ed.), *National Security and Open Government: Striking the Right Balance*, (Campbell Public Affairs Institute, New York, 2003), pp.75-101.

[67] Kimberly Prost, 'Toward Meaningful Adherence to Multilateral Instruments for Meaningful Cooperation: The Challenges to Effective Mutual Legal Assistance' in Rodrigo Yepes-Enriquez and Lisa Tabassi (eds.), *Treaty*

experienced international crimes, the threat posed by criminal prosecutions to peace and stability is often advanced as an argument against pursuing trials.[68] Such fears may be legitimate or may be fabrications to avoid criminal accountability. Nevertheless, the availability of this ground for refusal provides an uncooperative state with legally permissible grounds for refusing assistance.

On extradition, the Convention provides protections under the rule of speciality,[69] ensuring that anyone who is extradited is prosecuted, sentenced or detained only for the crime for which they were extradited. As with mutual legal assistance, formalities and procedures for making requests,[70] are set out in detail. The Convention contains a large number of mandatory and optional grounds for refusal.[71] Extradition must be refused if there are grounds to believe that prosecution is motivated by discrimination,[72] where the death penalty may be imposed, again unless guarantees are given,[73] where final judgement has already been rendered by the requested state for the same conduct[74] and where there are grounds to believe that violations of

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Enforcement and International Cooperation in Criminal Matters with Special Reference to the Chemical Weapons Convention (TMC Asser Press, The Hague, 2002) pp.480-491, 484.

[68] Alison Bisset, *Truth Commissions and Criminal Courts*, (Cambridge University Press, Cambridge, 2012), pp.162-164.

[69] Article 52.

[70] Articles 55-57.

[71] Article 51.

[72] Article 51(1)(a).

[73] Article 51(1)(b).

[74] Article 51(1)(c).

fundamental rights are likely, including torture and denial of a fair trial.[75] These mirror the grounds for refusal of mutual legal assistance above.

The optional grounds for refusal combine procedural and human rights considerations and situations where there may be competing or concurrent requests. Extradition can be refused where the request does not conform with the provisions of the Convention,[76] or if it has become time-barred under domestic law, as long as this would not run contrary to international law.[77] States can deny extradition of nationals,[78] but must in this situation submit the case to their competent authorities for the purposes of prosecution.[79] The potentially problematic grounds of sovereignty, security, ordre public or any other essential interests are also included as permissible grounds for refusal.[80] The age or state of health of the sought person[81] can act as a bar to extradition, as can a request from an extraordinary court.[82] Requests can also be refused where there is a risk of life imprisonment without parole or indefinite sentence in the requested state.[83] This is an important consideration for states parties to the ECHR which prohibits extradition where there is no prospect of adequate review and release under Article 3.[84] Outside

[75] Article 51(1)(d).

[76] Article 51(2)(g).

[77] Article 51(2)(i).

[78] Article 54.

[79] Article 14(1).

[80] Article 51(2)(j).

[81] Article 51(2)(h).

[82] Article 51(2)(e).

[83] Article 51(2)(a).

[84] See *Vinter* v. *UK* (2016) 63 EHRR 1

Europe, however, more than 60 states globally allow for life imprisonment without parole,[85] making this a very European provision.

Requests can be refused where the requested state is already proceeding against the requested person,[86] where it has already granted a request to another State or international court or tribunal[87] or where the person is to be or has already been tried by an international court or tribunal.[88] This provision is not found in other MLATs but is essential to enable states to harmonize their obligations with those arising under statutes of international courts and tribunals.[89] In the event of conflicting requests, the requested state makes a decision based, first, on any primacy of jurisdiction under international law, for example vis a vis an international tribunal, and secondly, in light of all relevant circumstances of the case.[90]

[85] See Dirk van Zyl Smit and Catherine Appleton, *Life Imprisonment a Global Human Rights Analysis,* (Harvard University Press, 2019), xiii; Dirk van zyl Smit and Christopher Seeds, 'Extradition and Whole Life Sentences' 35 *Criminal Law Forum* (2024) 1-17, p. 2.

[86] Article 51(2)(d).

[87] Article 51(2)(f).

[88] Article 51(2)(b) and (c).

[89] Matteo Colorio, 'The *Aut Dedere Aut Judicare* System for Crimes Against Humanity, 22 *Journal of International Criminal Justice* (2024) 1-17, p. 16.

[90] Article 58.

Finally on extradition, the Convention lays down detailed procedures for provisional arrest and transit,[91] surrender,[92] re-extradition to third states[93] and provides a mechanism for seizure and exchange of property.[94]

3 The Issue of 'Borrowing'

3.1 *The MLA Convention's Borrowed Content*

Much of the cooperation regime of the MLA Convention is 'borrowed'. The annexes below map the sources of the cooperation regime in Parts III and IV of the MLA Convention. They demonstrate that almost 50 per cent of the mutual legal assistance and extradition provisions come from UNTOC,[95] with the remainder borrowed from a variety of European and other international instruments.

The mechanics of mutual legal assistance – the purposes for which assistance can be sought, the format requests should take, how to execute them, many of the grounds for refusal and the processes for confiscation and restitution - are all replications of UNTOC provisions.[96] Provisions on more specific methods of cooperation, such as hearings by video conference,

[91] Article 59.

[92] Article 61.

[93] Article 53.

[94] Article 64.

[95] *See* Annexes 1 and 2. Articles 23-32, 36, 39, 45, 46, 49, 50, 54, 55, 57 and 59 of the MLA Convention are copied from UNTOC.

[96] *See* Annex 1.

cross-border observations, covert investigations, and the creation of joint investigation teams are not found in UNTOC. These have been borrowed from the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters,[97] which itself transplants, in large parts, Articles 10, 13 and 14 of the EU MLA Convention.[98] While UNTOC and UNCAC make reference to the possible establishment of 'joint investigative bodies',[99] the actual creation of such bodies requires conclusion of additional and separate agreements between relevant states and JITs have been little used in transnational crimes investigations.[100] The human rights related grounds for refusal of assistance – concerns over discrimination, fair trials, risk of torture and imposition of the death penalty – can be found in the UN Model Treaty on Extradition.[101] The MLA Convention borrows these and makes them grounds for refusal of mutual legal assistance.[102]

On extradition, the picture is more mixed, with provisions borrowed from a range of international and European instruments. Matters of scope, legal basis, many optional grounds for refusal, regulation of extradition of nationals and rules on execution of requests all come from UNTOC.[103] Rules on speciality, re-extradition, provisional arrest, and surrender are

[97] Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 8 November 2001, ETS No. 182.

[98] Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union ([2000] OJ C 197/3

[99] UNTOC, Article 19; UNCAC, Article 49. 'Joint teams' are also mentioned in Art. 9(1)(c) of the Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1582 UNTS 95.

[100] Furger, *supra* note 48, p.48.

[101] UN Model Treaty on Extradition, A/RES/45/116, 14 December 1990, Articles 3 and 4.

[102] MLA Convention, Article 30(10(a-e).

[103] *See* Annex 2.

borrowed from the European Convention on Extradition,[104] as are the mandatory grounds for refusal of extradition where the death penalty might be imposed[105] or where the request is suspected to be based on an intention to prosecute or punish on account of a particular characteristic.[106] As with mutual legal assistance, grounds for refusal relating to *ne bis in idem*, torture, trial before extraordinary courts and humanitarian considerations can be found in the UN Model Treaty on Extradition.[107] Overall, there are barely any novel or unique cooperation provisions within the MLA Convention.

3.2 *The Practice of Borrowing*

The practice of grafting new treaties from existing provisions is well documented.[108] It is supported by efficiency related considerations[109] and as a measure to counteract fragmentation in international law.[110] States are traditionally reluctant to depart from existing standards and

[104] European Convention on Extradition 1957, ETS 24, Articles 14, 15, 16, 18 and 19.

[105] *Ibid*, Article 11.

[106] *Ibid*, Article 3(2).

[107] UN Model Treaty on Extradition, Articles 3 and 4.

[108] Todd Allee and Manfred Ellsig, 'Are the Contents of International Treaties Copied and Pasted? Evidence from Preferential Trade Agreements', 63 *International Studies Quarterly* (2019) 603-613; Anne-Marie Carstens, 'Interpreting Transplanted Treaty Rules', in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds.) *Interpretation in International Law* (Oxford University Press, Oxford, 2015) pp. 229-248, 232.

[109] Claire Peacock, Karolina Milewicz and Duncan Snidal, 'Boilerplate in International Trade Agreements', 63 *International Studies Quarterly* (2019) 923-937.

[110] Peacock, Milewicz and Snidal, *ibid*, at 925, 935; Wolfgang Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreements', 19 *Journal of International Economic Law* (2016) 561-588, p. 565.

uneasy about setting new norms. In recent times, states have become reluctant to embark upon multi-lateral treaty making at all, resulting in stagnation in international law development.[111] Thus, the familiarity with and wide acceptance of UNTOC processes seemed to make it an uncontroversial starting point for the drafting of the MLA treaty.

However, while the practice of borrowing might be commonplace, there is a lack of clarity on when, why and how it should be adopted as a drafting approach. Increasingly concerns are being raised around the borrowing of existing treaty language.[112] Beyond the efficiency related considerations of relying on past language, it has been argued that the replication of past treaty language can become a blind and automatic exercise which overlooks the limitations, ambiguities and gaps of existing regimes and carries them forward into new arrangements.[113] Biazatti terms this a 'dysfunctional exercise of copy and paste'.[114] It may create problems in treaty interpretation where the borrowing is incomplete or revised and where the borrowing leads to a lack of clarity in the *travaux preparatoires*.[115] In the context of the MLA Convention, there are no *travaux preparatoires,* only brief overviews of the preparatory conferences presented as Chairs' Conclusions.[116] The absence of *travaux preparatoires* in the case of the MLA Convention may yet prove a difficult issue. If interpretation of particular provisions is

[111] Joost Pauwelyn, Ramses Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Law-Making', 25 *European Journal of International Law* (2014) 733-763.

[112] Bruno Biazatti, 'The Future in the Past? The Replication of Existing Treaty Language in the Making of the ILC's Draft Articles on Crimes Against Humanity', 34 *European Journal of International Law* (2023) 449-489.

[113] *Ibid*, p. 472.

[114] *Ibid*.

[115] Carstens, *supra* note 108, pp. 245-247.

[116] The Chairs' Conclusions on the First and Second Preparatory Conferences are available online at: www.gov.si/en/registries/projects/mla-initiative/ (accessed 5 December 2024).

required in future, it may not be possible to find resolution by referring to the official records of the negotiations. The *travaux* for UNTOC, while admittedly focussed in large part on standard MLA and extradition provisions, were, nevertheless negotiated in a different context and relate to organised, rather than international, crimes. As such, they may be of only limited utility should interpretation of provisions of the MLA Convention be needed.

Additionally, in contrast to the non-fragmentation argument, it has been suggested that transplantation of language may eventually lead to stagnation and rigidity, hampering international legal development.[117] Interestingly, in the context of the ILC DACaH, it is argued that the belief that states were more likely to agree to the inclusion of transplanted legal provisions led to an overly conservative approach on the part of the ILC and a refusal to embark on a merit-centred discussion on difficult issues.[118]

The practice of resorting to transplantation of past treaty language without proper consideration of the relevant merits and shortcomings can arguably be seen in the incorporation of the UNTOC cooperation regime within the MLA Treaty. Although the success of a treaty regime cannot be determined simply on how many times it is used, there are significant gaps in international understanding of the ways in which UNTOC is used and whether it is being used effectively as a basis for inter-state cooperation.[119] The absence of a review mechanism under

[117] ILC, Remarks by Tladi, 3348th Meeting, UN Doc. A/CN.4/SR.3348, 1 May 2017, 8.

[118] Sarah Nouwen, 'Is There Something Missing in the Proposed Convention on Crimes against Humanity? A Political Question for States and a Doctrinal One for the International Law Commission', 16(4) *Journal of International Criminal Justice* (2018) 877-908, pp.898–903, 906–907.

[119] Cecily Rose, 'Treaty Monitoring and Compliance in the Field of Transnational Criminal Law' 1.2-3 *Transnational Crime* (2017) 40-64.

UNTOC until 2018[120] means that there has been no systematic collection of data from states on the use being made of UNTOC from a cooperation perspective. Thus, the MLA Convention's reliance on the UNTOC regime seems not to be based on an assessment of its efficacy in facilitating cooperation in the context of organised crime but on familiarity with the language within the treaty and a desire for rule-making efficiency.[121] Indeed, it might be questioned whether the preoccupation with and political wrangling over more controversial aspects of the MLA Convention, such as the assertion of jurisdiction and *aut dedere aut judicare* obligations,[122] resulted in a failure to properly consider the legal regime which would facilitate the primary purpose of the MLA Convention: inter-state cooperation.

3.3 *Borrowing of an Unsuitable Model?*

It is not clear why the MLA Convention relies upon UNTOC as the basis of its cooperation regime. The developments within the MLA Initiative were not easy to track from the outside.[123] The proceedings were open only to the group of supporting states.[124] Information was spread

[120] Conference of the Parties to the United Nations Convention against Transnational Organized Crime (UNTOC), Resolution 9/1, Establishment of the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 15-19 October 2018.

[121] Cartsens, *supra* note 108, p.232.

[122] Frederika Schweighoferova, 'Critical Reflections: Fulfilling the Potential of this Landmark Treaty' Symposium on Ljubljana-The Hague Convention on Mutual Legal Assistance, *Opinio Juris*, 3 August 2023.

[123] Madaline George, 'Some Reflections on the Proposal for a New Mutual Legal Assistance Treaty for International Crimes', *Opinio Juris*, 11 January 2019.

[124] A number of observers have flagged this as problematic. See Comments on the Draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against

across websites, one hosted by the Netherlands,[125] and one by Slovenia[126] and neither held all of the relevant information.[127] There is no official commentary on the discussions from the Preparatory Conferences, only a very brief overview of the issues arising from discussions in the form of Chairs' Conclusions.[128] Interestingly, the ILC relied upon UNCAC for the cooperation regime in the Draft Articles on the basis of state familiarity.[129] In reality, the regimes of UNTOC and UNCAC are very similar, with UNCAC modelled to a large extent on UNTOC.

The Chair's Conclusions from the First Preparatory conference for the MLA Convention state that reliance upon UNTOC was the preference of participating states.[130] At first glance, this seems logical. UNTOC is one of the most modern multilateral cooperation regimes. It was adopted in 2000 with the aim of promoting inter-state cooperation on transnational organised

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Humanity and War Crimes, September 2020, Submitted on behalf of the Crimes against Humanity Steering Committee., 10, available online at www.centruminternationaalrecht.nl/mla-initiative (accessed 19 May 2022).

[125] Available online at www.centruminternationaalrecht.nl/mla-initiative (visited 9 May 2022).

[126] Available online at www.gov.si/en/registries/projects/mla-initiative/ (visited 9 May 2022).

[127] For example, the Core Group has received two letters on different drafts of the MLA treaty from groups of NGOs. Only the most recent of these is included in the list of documents on the Netherlands webpage. The other is available via the website of Amnesty International. These letters are discussed below.

[128] First Preparatory Conference Chairs' Conclusions, Doorn (The Netherlands), 16-19 October 2017, available online at www.gov.si/en/registries/projects/mla-initiative/ (visited 9 May 2022); Second Preparatory Conference Chairs' Conclusions, Noordwijk (The Netherlands), 11-14 March 2019, available online at www.gov.si/en/registries/projects/mla-initiative/ (visited 9 May 2022).

[129] Report of the International Law Commission, Seventy-First Session (29 April-7 June 2019 and 8 July-9 August 2019), A/74/10, Chapter IV, p. 112

[130] First Preparatory Conference Chairs' Conclusions, *supra* note 128, p.2.

crime[131] and was similarly established to fill a cooperation gap, albeit in relation to organised crime. It seeks to overcome the inefficiencies related to traditional diplomatic channels of cooperation,[132] which were similarly identified as problematic by practitioners at the 2011 meeting on the MLA Convention.[133] Much of its focus is therefore on laying down processes and procedures to facilitate smooth and speedy cooperation for a range of different purposes, with the Treaty itself used as the basis of cooperation where there is no existing bilateral or regional agreement.[134] It is also widely ratified with 192 parties and states are familiar with the processes involved.

Nevertheless**,** questions are being raised over whether UNTOC ought to have served as a cooperation model for the MLA Convention.[135] The UNTOC framework requires relatively little alteration to domestic legal systems and permits states parties to continue to rely on national law and practice[136] thereby retaining many of the obstacles to the provision of assistance.[137] It has therefore been argued that UNTOC is a state-centric model of cooperation, and that this is inappropriate in the context of core crimes, which demand the ceding of

[131] UNTOC, Preamble para. 7 and Article 1.

[132] Sabine Gless, 'The Prominent Procedural Issues: Obtaining Evidence Abroad – A European Approach' in Hans-Jorg Albrecht and Cyrille Fijnaut (eds), *The Containment of Transnational Organized Crimes: Comments on the UN Convention of December 2000* , (Freiburg im Breisgau, Max Plank Institute, 2002) pp.133-145, 133-4.

[133] *See* the various keynote addresses of expert practitioners included in *A Legal Gap*?, *supra* note 7.

[134] Article 16(4) on extradition

[135] 'The Core Crimes MLAT: A Reason for (Cautious) Optimism?', forthcoming in *Transnational Criminal Law Review* (2025).

[136] Boister, *supra* note 6, at 54.

[137] Boister, *supra* note 6, at 54.

sovereignty rather than its reinforcement.[138] There is doubt over whether there is sufficient similarity between the contexts – transnational crimes on the one hand and international crimes on the other - underpinning the two regimes to support the transplantation of rules from UNTOC to the MLA Convention.[139] The implication is that a more international crimes specific model should have been pursued in the MLA Convention, in which the types of assistance that can be requested were developed to reflect the circumstances likely to be encountered in international crimes investigations, and some of the traditional grounds for refusal of assistance removed to enhance cooperation.

This might have aligned more closely with the direction of travel in international criminal law. The ICC cooperation regime, although it does not impose absolute obligations on states parties[140] and is considered relatively weak by some,[141] only permits refusal of requests in very limited circumstances[142] and typically mandates a resolution process between the requested state and the Court.[143] Extradition is replaced by the process of surrender, a vertical model in

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[138] 'The Core Crimes MLAT: A Reason for (Cautious) Optimism?', *supra* note 135. Note though that some scholars assert that the ICC, as an extension of national criminal jurisdiction, does not infringe upon national sovereignty. See M Cherif Bassiouni, 'The Permanent International Criminal Court' in Mark Lattimer and Philippe Sands (eds.) *Justice for Crimes Against Humanity*, (2003, Hart Publishing, Oxford), p. 181

[139] Carstens, *supra* note 108, p.235.

[140] Phasiko Mochochoko, 'International Cooperation and Judicial Assistance' in Roy S. Lee (ed), *The International Criminal Court: The making of the Rome Statute – Issues, Negotiation, Results*, (The Hague, Kluwer Law International , 1999) p.395.

[141] Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, (New York, Transnational Publishers, 2002) p.254

[142] ICC Statute, Article 93(4).

[143] ICC Statute, Article 93(5).

which the requested state is expected to comply, and the main grounds for refusal, such as nationality, political offences and dual criminality, typically found in horizontal inter-state models are removed.[144] Moreover, all specific forms of cooperation between the ICC and its states parties take place under the overarching obligation to fully cooperate with the Court in its investigations and prosecutions.[145] This can be contrasted with the UNTOC and MLA Convention standard where states must provide each other with assistance to 'the fullest extent possible under relevant laws',[146] which, of course includes laws which require or permit the refusal of assistance.

Whether the ICC regime can truly be considered an example of sovereignty-ceding is questionable. Some scholars assert that the ICC, as an extension of national criminal jurisdiction, does not infringe upon national sovereignty.[147] Instead, the creation of the Court has been described as an exercise of state sovereignty as no other entities had the authority to create a permanent international criminal court.[148] Nonetheless, it must be accepted that the ICC affects state sovereignty as states undertake obligations of cooperation and submit their domestic judicial processes to external to oversight through the complementarity principle of the ICC.[149] Thus, perhaps the ICC regime is best understood as sovereignty changing, in which

[144] ICC Statute, Article 89.

[145] ICC Statute, Article 86. Annalisa Ciampi, 'The Obligation to Cooperate' in Antonio Cassese, Paula Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (OUP, Oxford, 2001), pp. 1607-1638.

[146] UNTOC, Article 18)2); MLA Convention, Article 23(2).

[147] Bassiouni, *supra* note 138, p. 181

[148] Robert Cryer, 'International Criminal Law vs State Sovereignty: Another Round?', 16 *European Journal of International Law (*2005) 979-1000, p. 985.

[149] *Ibid*.

sovereignty and what is meant by it adjusts according to the developing nature of international law.[150] Regardless, it mandates a departure from traditional cooperation arrangements, where states retain significant control over whether and in which circumstances to provide assistance.

Although its focus is not international crimes, another model in which the conventional methods of cooperation and grounds for refusal have been altered and narrowed is the EU system of cooperation under the European Arrest Warrant scheme.[151] It is underpinned by the assumption of mutual trust among EU member states and the principle of mutual recognition,[152] and operates so that member states recognise the decisions of the authorities of others as if they were their own. There are a limited number of grounds for non-execution of a warrant,[153] the executing state[154] cannot refuse to 'surrender'[155] on the basis of nationality[156] and procedures

[150] Andrew Clapham , 'National Action Challenged: Sovereignty, Immunity and Universal Jurisdiction before the International Court of Justice', in Lattimer and Sands, *supra* note 138, pp. 305, 312 and 313.

[151] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002

[152] Article 1(2). See also Wouter van Ballegooij, *The Nature of Mutual Recognition in European Law*, (Intersentia, Cambridge, 2015).

[153] EAW, Articles 3 and 4.

[154] Executing state, rather than requesting state.

[155] The EAW refers to 'surrender' rather than 'extradition'.

[156] However, Article 4(6) EAW allows for the non-execution of a warrant issued for the execution of a custodial sentence when the requested person is a national, a resident, or is staying in the executing MS, as long as the latter enforces the sentence itself. In the same vein, Article 5(3) allows for the executing MS to subject surrender to the condition that the requested national or resident, if convicted to a custodial sentence in the issuing MS, be returned to the former to serve his/her sentence there. See also Zsuzsanna Deen-Racsmany, 'Lessons of the European Arrest Warrant for Domestic Implementation of the Obligation to Surrender Nationals to the International Criminal Court' 20 *Leiden Journal of International Law (*2007) 167-191.

take place between judicial authorities,[157] thereby preventing political interference by the executive.[158] Although not entirely without issue, the EAW has made judicial cooperation in the EU swifter and more efficient.[159] However, it operates in a context where there is much common ground between the states concerned and it was always unlikely that such a scheme would be incorporated in a global treaty.

Nonetheless, some perceived shortcomings of the MLA Convention have been directly linked to the borrowing of UNTOC's sovereignty centring regime and the failure to consider a cooperation regime more specifically tailored to international crimes. For example, the MLA Convention is silent on the issue of immunities, and whether a state can refuse assistance in relation to its officials on the basis that the sought person is entitled to immunity under customary international law.[160] This is in contrast to the ICC Statute, which is clear that 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its

[157] EAW Articles 6 and 9-10.

[158] The CJEU has issued a number of judgments on judicial authorities. See CJEU, OG and Pi, Joined cases Nos. C-508/18 and C-82/19 PPU, Judgment, ECLI:EU:C:2019:456, 27 May 2019, 27 May 2019; JR and YC, Joined cases Nos. C-556/19 PPU and C-626/19 PPU, Judgment, ECLI:EU:C:2019:1077; XF, No. C-625/19 PPU, Judgment, ECLI:EU:C:2019:1078; ZB, No. C-627/19 PPU, Judgment, ECLI:EU:C:2019:1079, all of 12 December 2019; and AZ, No. C-510/19, Judgment, ECLI:EU:C:2020:953, 24 November 2020; CJEU, AZ, No. C-510/19, Judgment, ECLI:EU:C:2020:953, 24 November 2020.

[159] Pedro Caeiro and Miguel Joao Costa, 'Extradition and Surrender. From A Bilateral Political Arrangement to a Triangular Legal Procedure', in Kai Ambos and Peter Rackow (eds.), *The Cambridge Companion to European Criminal Law*, (Cambridge University Press, Cambridge, 2023), pp.254-282.

[160] On this issue generally, see International Law Commission, *Immunity of State Officials from Foreign Criminal Jurisdiction*, 23 July 2024, UN Doc A/CN.4/L.1001,

jurisdiction over such a person'.[161] Likewise, the Draft Articles on Crimes Against Humanity contain a provision requiring states to take measures to ensure that official capacity does not act as a bar to criminal responsibility.[162] The failure to explicitly remove immunity of state officials in respect of the offences governed by the MLA Convention has been flagged as potentially problematic and a means by which investigations and prosecutions might be 'legitimately' hampered by reluctant third states.[163]

Similarly, it has been pointed out that states parties will be able to frustrate investigations and prosecutions while still complying with the express terms of the treaty because of the inclusion of provisions such as non-extradition of nationals.[164] Interestingly, this ground also remains in the draft Articles on Crimes Against Humanity,[165] where refusal of extradition can be based on national laws, and in many civil law states non-extradition on the basis of nationality is a constitutional right.[166] The Convention also fails to clearly mandate cooperation in

[161] ICC Statute, Article 27(2).

[162] Draft Article 6(5).

[163] The Core Crimes MLAT, *supra* note 135.

[164] Joint NGO letter to the Core-Group and Co-Sponsoring States to the Mutual Legal Assistance (MLA) Initiative, 24 September 2020, p.3, available online at www.amnesty.org/en/wpcontent/uploads/2021/05/IOR5131232020ENGLISH.pdf, (accessed 26 June 2025). This was also raised by Amnesty International in relation to the ILC Draft Articles on Crimes Against Humanity, *see* Amnesty International, *International Law Commission: Commentary to the Third Report on Crimes Against Humanity*, Index: IOR 40/5817/2017, April 2017, p. 14.

[165] Draft Article 13(7).

[166] William Julie and Juliette Fauvarque, 'The rule against the extradition of nationals: overview and perspectives, International Bar Association, available online at www.ibanet.org/article/22af1681-37a0-487a-a660-3aca32938540 (accessed 24 January 2025). The absolute position on non-extradition of nationals has declined following the creation of international criminal tribunals and the establishment of the European Arrest Warrant

investigative tools, such as locating offenders and witnesses and in providing forensic evidence, despite their relevance to investigations of genocide, crimes against humanity, and war crimes.

Of course, when a state exercises universal or extraterritorial jurisdiction over international crimes, it is involved in a form of transnational litigation; a domestic legal process with a foreign element.[167] In this sense, there are parallels between the transnational cooperation treaty regimes and that of the MLA Convention, which might be argued to justify the transplantation of UNTOC's cooperation provisions into the MLA Convention. It is also argued that there is an increasingly blurred line between the commission of 'core' crimes and transnational crimes, such as smuggling and trafficking.[168]

Yet, the two distinct legal regimes continue in law-making and in practice. Some of the justification for the development of the MLA Convention and the draft Articles on Crimes against Humanity rests on the inadequacy of the transnational crime treaties vis a vis core

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system. *See* Zsuzsanna Deen-Racsmany and Rob Blekxtoon, 'The Decline of the nationality Exception in European extradition? The Impact of the Regulation of (non-) Surrender of Nationals and Dual Criminality under the European Arrest Warrant', 13 *European Journal of Crime, Criminal Law and Criminal Justice* (2005) 317-364.

[167] Asif Efrat, *Intolerant Justice: Conflict and Cooperation on Transnational Litigation*, (Oxford University Press, New York, 2023), p. 5.

[168] Charles C. Jalloh, *The Distinction between 'International' and 'Transnational' Crimes in the African Criminal Court*, (Edward Elgar Publishing ,Cheltenham, 2017). On the links and blurred lines between state and criminal actors in the context of transnational organised crime in Russia, see Mark Shaw, Ian Tennant, Ana Paula Oliveira and Darren Brookbanks, *Is the UNTOC Working? An Assessment of the Implementation and Impact of the Palermo Convention,* Global Initiative Against Transnational Organized Crime, October 2024, p. 19.

crimes.[169] In the discussions prior to the MLA Convention, delegates considered that UNTOC and UNCAC do not easily adapt to accommodate international crimes within the parameters of their definitions.[170] The ILC considered that a specific treaty on crimes against humanity is required because crimes of corruption and organised crime are far less egregious than crimes against humanity.[171] Crimes against humanity – and presumably other core crimes – therefore require distinct treatment and consideration. That said, as discussed above, the ILC borrows from UNCAC's cooperation regime in its draft Articles on Crimes Against Humanity, which in turn was modelled on article 16 of UNTOC. The ILC concluded that 'although a crime against humanity by its nature is quite different from a crime of corruption, the issues arising in the context of extradition are largely the same regardless of the nature of the underlying crime'.[172] This statement was not supported by any reasoning or analysis on the ways in which the issues are the same and it remains unconvincing. If the nature of the crime is so fundamentally different[173] – and in the ILC's view, more serious– then a cooperation regime which reflects that seriousness is necessary.

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[169] *A Legal Gap?*; *supra* note 7; *The Global Fight Against Impunity: The International Criminal Court and Dutch Foreign Policy*, 7 August 2015.

[170] *Ibid*.

[171] Report of the International Law Commission, Seventy-First Session (29 April-7 June 2019 and 8 July-9 August 2019), A/74/10, Chapter IV, p 22.

[172] *Ibid*, p. 112.

[173] Note here Heller's work where he argues that under a positivist understanding of how acts become universally criminal, the traditional distinction between international and transnational crimes is eroded and that some transnational crimes may have a claim to international status. He does not, however, draw upon organised crime or corruption crimes as examples. Kevin Jon Heller, 'What is an International Crime? (A Revisionist History)', 58 *Harvard Law Journal (*2017) 353, pp. 407-413.

The status of immunities ought to have been clarified in the MLA Convention, preferably by explicitly prohibiting them as a bar to the exercise of jurisdiction and the provision of assistance. The use of traditional grounds for refusal, particularly the nebulous grounds of sovereignty, security, *ordre public* or other essential interests might have been reconsidered in light of their propensity to manipulation. Their use could have been attached to a resolution provision, similar to that on national security within the ICC Statute, whereby States are obliged to work with the Court – or in this instance, together - to find a resolution in situations when they consider their interests to be compromised by disclosure of particular information or a particular course of action.[174] The end result might ultimately remain a refusal of assistance, but inclusion of such a mechanism would indicate a departure from the state centric models in which sovereignty is prioritised, and acknowledge the need to cede sovereignty in the interests of ending impunity for international crimes through inter-state cooperation.

Additional forms of cooperation, such as mutual legal assistance in locating relevant persons and sharing of forensic evidence could have been explicitly included. Location of persons and items and exhumation and examinations of graves and sites are listed in the forms of cooperation States are to provide to the ICC upon request.[175] They are included due to their particular relevance in international crimes investigations and could equally have been listed in the MLA Convention. Of course, these forms of cooperation could be provided under Article 24(l) which enables provision of any other type of assistance that is not contrary to the domestic law of the requested State Party. Again, however, their explicit inclusion would have created a cooperation regime more reflective of the requirements of states in the context of international

[174] ICC Statute, Article 72.

[175] ICC Statute, Article 93(1) (a) and (g).

crimes investigations, rather than simply borrowing the standard provisions of existing treaties. A cooperation regime tailored to the particularities of international crimes might also have considered removing the possibilities for politicisation by judicialising the cooperation process.

Some of these are, admittedly, ambitious proposals which may well have risked push back, or outright rejection, from negotiating states. However, other aspects of the MLA Convention, such as the provisions on data protection[176] and the protection of victims' rights[177] constitute significant international legal developments, suggesting that greater innovation in the cooperation provisions might have also been possible. In short, decisions on the cooperation regimes – in both the MLA Convention and the draft Articles, which take a similarly conservative approach – ought to have been considered in much greater depth before being incorporated into the two instruments.

4 UNTOC as a Basis for Cooperation

Although questions persist over the transplantation of UNTOC's inter-state cooperation framework, it has nevertheless been incorporated within the MLA Convention. It is therefore necessary to examine the cooperation experience under UNTOC in order to understand how it may translate in the MLA Convention context.

[176] MLA Convention, Article 16.

[177] *See* particularly MLA Convention, Part VI.

As mentioned above, because UNTOC did not have a review mechanism until 2018, and no review process underway until 2020,[178] little is known about state practice under the Treaty. Already, the implementation of the review mechanism is running behind schedule, backed by few resources and little political will.[179] No country review has been published in the four years since the mechanism was operationalised. A limited number of small-scale studies have been carried out by UNODC, civil society groups and academics.[180] The absence of review mechanism data, coupled with the fact that no state maintains systematic records of its MLA or extradition dealings,[181] means that those studies tend to be based on open-source case law, cases within the UNODC's SHERLOC database[182] or cases reported by States to the UNTOC Conference of the Parties.[183] The results of these studies are mixed; some suggest that UNTOC is poorly implemented[184] and little used.[185] One recent assessment envisages a particularly bleak scenario, stating that without action, UNTOC will become irrelevant.[186] Others paint a

[178] Resolution 10/1, Launch of the review process of the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, contained within Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its tenth session, held in Vienna from 12 to 16 October 2020, CTOC/COP/2020/10,

[179] Shaw et al, *supra* note 168, p. 6.

[180] *See supra* note 6.

[181] Shaw *et al*, *supra* note 168, p. 22.

[182] Note, however, the inadequacies of the SHERLOC portal in its lack of central analysis or summary and absence of a requirements upon states parties to report to it, Shaw *et al, supra* note 168, p. 15.

[183] UNODC 2021, *Digest of Cases of International Cooperation in Criminal Matters Involving the United Nations Convention against Transnational Organized Crime as a Legal Basis, (*Vienna, 2021*)* p. 7.

[184] Ian Tennant, *The Promise of Palermo: A Political History of the UN Convention against Transnational Organised Crime*, Global Initiative Against Transnational Organised Crime, October 2020, pp. 22-23.

[185] Boister, *supra* note 6.

[186] Shaw et al, *supra* note 168, p. 11.

more optimistic picture of a framework increasingly being relied upon as a useful basis to engage in cooperation,[187] albeit as a fall back when more familiar bilateral or regional arrangements are not available or require bolstering. In some cases, UNTOC, as an almost global treaty, can act as the basis for cooperation where there is no existing treaty between the states concerned[188] or where an existing treaty, perhaps because of its age, does not regulate the provision of a specific type of assistance sought.[189] All, however, identify a range of impediments and obstacles to cooperation. These barriers to cooperation fall into three main groups: (1) resources; (2) law and policy; and (3) perception.

4.1 *Resource Related Barriers*

Many of the identified barriers to effective cooperation are practical and relate to an absence of financial, technological and human resources. The creation of implementing and enabling legislation, operation of highly technical procedures and training of personnel required to facilitate interstate assistance all require the dedication of significant resources.[190] In developing, small, and transitional states, the administrative, human, and financial resources associated with international cooperation can pose particular challenges.[191] Cooperation can be

[187] UNODC 2021, *supra* note 183, p. 120

[188] UNTOC, Article 16(4).

[189] UNODC 2021, *supra* note 183, pp.112-115.

[190] UNODC, Informal Expert Group Meeting on International Cooperation in Criminal Matters, (Vienna, 9-11 April 2019), 3; UNODC 2021, *supra* note 183, p. 122.

[191] Adreas Schloenhardt, 'International Cooperation under the Convention against Transnational Organised crime: Expectations and Experiences' in Serena Forlati (ed.), *The Palermo Protocol at Twenty: The Challenge of Implementation*, (Brill, Leiden, 2021), pp. 3-25, 24.

impeded by language barriers and the costs of interpreting requests[192] and supporting documentation,[193] as well as by a lack of coordination between national executing authorities and backlogs due to an increasing number of complex cases.[194] There is also an imbalance between states in available technology. Transnational crime cases are increasingly complex and involve large volumes of digital material. Without appropriate technological tools, states may not be able to review or action requests.[195]

These resource related issues seem likely to be replicated in cooperation on international crimes which are also typically complex and often involve states with unequal available resources. Although resource related barriers may appear to be relatively simple to remedy through the dedication of funding, training and support, these pose real problems in the context of the MLA Convention. Having been developed through a standalone process, outside the UN and ICC frameworks,[196] the MLA Convention lacks the institutional support structures which typically lead and fund capacity building initiatives in relevant states and regions. For example, UNODC has led much of that work in relation to UNTOC, but as a standalone process the MLA Convention does not have similar resources or funding routes to fall back on.

[192] UNODC, Informal Expert Group Meeting on International Cooperation in Criminal Matters, (Vienna, 9-11 April 2019), 4.

[193] Shaw *et al*, *supra* note 168, p. 26.

[194] UNODC, Informal Expert Group Meeting, *supra* note 192, p. 3.

[195] Shaw *et al*, *supra* note 168, p. 26.

[196] Lasrissa van den Herik, 'Relating to 'The Other': The ILC Draft Convention on Crimes Against Humanity and the Mutual Legal Assistance Initiative' 6 *African Journal of Criminal Justice* (2020) 274–284, p. 277 on the development of the MLA Convention outside the UN and ICC.

4.2 *Barriers Related to Law*

Differing legal frameworks present challenges to cooperation and the provision of assistance. UNTOC provides a broad framework for mutual legal assistance and extradition. It allows states that make extradition conditional on the existence of a treaty to consider the Convention the legal basis for cooperation.[197] The Convention also allows for flexibility in approach in that all offences under the Convention are deemed to be included in existing extradition treaties, thus allowing States parties ease of implementation with respect to those crimes.[198] However, as discussed above, it does not mandate major changes in domestic law and practice. The ways in which states implement treaty provisions at domestic levels therefore vary and material and procedural obstacles persist. Evidentiary standards and procedural requirements differ, particularly between civil and common law jurisdictions.[199] Although modern cooperation regimes such as the EAW have judicialized the cooperation process making it more efficient, globally, many states require requests to be sent through diplomatic channels, making the provision of assistance slow.

Although not exclusive to UNTOC, differences in international human rights law and privacy standards, the requirements of asylum and refugee laws and national prohibitions on the extradition of nationals can all hamper cooperation, particularly extradition.[200] Extradition is not possible where asylum or refugee proceedings are ongoing in the requested state and where

[197] UNTOC, Article 16.

[198] UNTOC, Article 18.

[199] Boister, *supra* note 6, p. 54.

[200] UNODC, Informal Expert Group Meeting, *supra* note 192, p. 10. Note, however, that it has also been suggested that human rights obligations may also pose a barrier in MLA proceedings, Robert Currie, 'Human Rights and International Mutual Legal Assistance: Resolving the Tension' 11 *Criminal Law Forum* (2000) 143-181.

asylum has been granted, extradition to the country of origin is prohibited. UNHCR has emphasised that asylum/refugee proceedings should be considered separately from extradition requests and that under international refugee law, a person enjoys protection against *refoulement* to the country of origin for the entire duration of asylum proceedings, including those on appeal.[201] For EU member states, one member state cannot extradite a third country national recognised as having refugee status in another Member State, unless the latter authority revokes or withdraws refugee status.[202] Of course, Article 1F of the Refugee Convention allows states to deny the protections of the treaty to those whom there are reasons to believe have been involved in international and other serious crimes. However, even in that situation, international human rights law obligations may still prevent extradition, unless assurances can be obtained from the requesting state that individual rights will be respected. Human rights concerns are not only implicated in archetypal scenarios where the requested person may face the death penalty or torture if extradited, but also where issues such as prison conditions do not comply with international standards.[203] Indeed, human rights concerns have

[201] UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes ("Fair and Efficient Asylum Procedures"), EC/GC/01/12, 31 May 2001, at para. 50(g).

[202] Court of Justice of the European Union, Judgment of the Court in Case C-352/22 | Generalstaatsanwaltschaft Hamm (Request for the extradition of a refugee to Türkiye), 18 June 2024.

[203] *See* for example a recent case where a German court ordered the release of a prisoner whose extradition was sought by the UK on the basis that if convicted the accused would face a long prison sentence in conditions which might be inhuman and degrading under Art 3 ECHR, Karlsruhe Higher Regional Court, decision of 10 March 2023 – 301 OAus 1/23. Discussed in Dirk van Zyl Smit, 'Human Rights Standards as a Bar to Extradition from the European Union to the United Kingdom', 32 *European Journal of Crime, Criminal Law and Criminal Justice* (2024) 15-31.

been specifically identified as an obstacle to cooperation under UNTOC in African states[204] causing frustration where extradition of those who have fled African states is refused.[205]

Although these barriers to cooperation are identified in the context of UNTOC, they are likely to be a far more pressing issue, potentially involving far higher numbers of extradition requests, in the context of international, rather than transnational, crimes. The commission of international crimes frequently gives rise to displacement and significant population movements, with large numbers of victims, witnesses and, notably, perpetrators located across different countries.[206] Conditions in states of origin are often unstable and rule of law and human rights concerns may well prevent return or extradition of sought persons. Where states find themselves unable to extradite persons suspected of involvement in international crimes, it becomes all the more important that those third states exercise jurisdiction so that international protection regimes do not enable perpetrators to evade justice. In this scenario, international cooperation again becomes important, but questions arise as to whether the UNTOC regime – and others like it - is the best model on which to base cooperation around international crimes.

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[204] Olwethu Majola, 'Measuring the Treatment: The UNTOC in Africa' presented at a workshop on 'Is Africa making the most of MLA and extradition to combat organised crime?', hosted by the Institute for Security Studies, 20 June 2024.

[205] *Ibid*.

[206] *See*, for example, the ways in which perpetrators of crimes committed in Syria are being prosecuted in European states after fleeing there as a result of the conflict: ECCHR, *Patchwork Justice for Syria? Achievements and Blind Spots in the Struggle for Accountability*, Policy Paper, 2024, available online at www.ecchr.eu/fileadmin/Fachartikel/ECCHR_PP_SYRIA_EN_F2.pdf/ (accessed 18 December 2024)

It is also clear that many states prefer to rely on regional or bilateral mechanisms to cooperate. This is particularly so amongst European states which often use EU or Council of Europe instruments due to their detailed procedural frameworks.[207] It has been noted that given the breadth and depth of the EU framework relating to international cooperation in criminal matters, it is unlikely that UNTOC would be used in cases between member states of the EU.[208] However, as UNODC points out, the disadvantage of regional arrangements is that they can only assist with cooperation between states in a particular region.[209] Indeed, many European practitioners expressed frustration about the lack of an international cooperation treaty on international crimes in early meetings at the MLA Initiative, demonstrating that the existence of strong European processes is insufficient when information or suspects are situated outside Europe.

In some instances, there is 'layered' use of UNTOC, where it might be used as a basis for gaining some form of cooperation but is then supplemented by regional arrangements.[210] In some respects this is to be expected; UNTOC was envisaged as a minimum set of standards and states parties are encouraged to conclude additional bi and multilateral agreements and arrangements vis a vis confiscation,[211] extradition,[212] transfer of sentenced persons,[213] MLA,[214]

[207] Shaw *et al, supra* note 168, pp. 23-4.

[208] UNODC 2021, *supra* note 183, p. 106.

[209] UNODC 2021, *supra* note 183, p. 118

[210] UNODC 2021, *supra note* 183, p. 24.

[211] UNTOC, Article 12(9)

[212] UNTOC, Article 16(17).

[213] UNTOC, Article 17.

[214] UNTOC, Article 18(30).

the creation of joint investigation teams,[215] special investigative techniques[216] and law enforcement cooperation.[217] Nonetheless, there is some frustration around the perceived failure of states to use UNTOC as a basis of cooperation as widely as they might.[218]

Finally, the politicised nature of MLA and extradition proceedings in many countries has been flagged as problematic for cooperation under UNTOC. Cooperation procedures are not always, or not exclusively, within the domain of judicial entities and frequently involve executive decision makers and ministers of justice. This opens inter-state cooperation to political meddling and corruption. It has been suggested that one of the main challenges for cooperation in some African states is vested interests and corrupt political elites, acting in concert with corrupt economic elites, using political powers to halt inter-state judicial assistance.[219] Again, the potential for political meddling is a live issue under the MLA Convention where cooperation will similarly be dependent upon domestic arrangements for approval of cooperation requests.

4.3 *Barriers of Policy, Perception and Uneven Use*

[215] UNTOC, Article 19.

[216] UNTOC, Article 20(2).

[217] UNTOC, Article 27(1)(d) and (2).

[218] Shaw *et a*l, *supra* note 168, p. 24.

[219] Charles Goredama, 'International Cooperation against Cross-Border Organised Crime: Evaluating the Effectiveness of Mutual Legal Assistance and Extradition in Africa' at 'Is Africa making the most of MLA and extradition to combat organised crime?', workshop hosted by the Institute for Security Studies, 20 June 2024.

In addition to international and domestic legal hurdles, the UNODC's 2021 study on UNTOC uncovered barriers stemming from what are termed 'domestic criminal policy and general strategic attitudes'.[220] In one way, this can be connected to resource constraints in that where a law enforcement agency is faced with a choice in committing resources to either a domestic incident or an international cooperation request, the former will likely take precedence.[221] However, attitudinal obstacles are also present. These include a lack of willingness to become involved in a crime that occurred in another country, reluctance to engage with certain jurisdictions due to other geo-political considerations, non-compliance with international legal instruments and conflicting perceptions of priority issues at the global and regional level.[222] A number of studies have shown that judicial authorities often hold negative perceptions of international cooperation and seek to avoid it,[223] hampering cooperation.

Efrat argues that all inter-state cooperation is influenced by ethnocentrism.[224] Home legal systems sit at the top of a hierarchical relationship between national legal systems, serving as a metric and reference point, and foreign systems inspire suspicion and hostility.[225] In this model, states prefer and are more likely to cooperate with those whose legal system resembles

[220] UNODC 2021, *supra* note 183, p. 122.

[221] Shaw *et al*, *supra* note 168, p. 26.

[222] UNODC 2021, *supra* note 183, p. 122.

[223] Amandine Scherrer, Antoine Mégie,and Valsamis Mitsilegas, *The EU Role in Fighting Transnational Organized Crime,* (EU Parliament Study,16 February 2009); Marianne Wade, *EuroNEEDs –Evaluating the need for and the needs of a European Criminal Justice System. Preliminary Report*, (Max Planck Institute for Foreign and International Criminal Law, 2011).

[224] Efrat, *supra* note 167, p.10.

[225] *Ibid*, p. 44.

their own in some fundamental way.[226] The greater the dissimilarity in substantive legal rules or in legal procedures and institutions, the less likely two countries are to cooperate. Indeed, this would seem to be borne out in practice as bilateral and regional cooperation arrangements, where the states concerned often have shared traditions and similar systems and processes, are preferred over international instruments.[227] It can also be seen in the lack of trust between states and agencies reported in empirical studies.[228] These issues are much more difficult to tackle than those which arise from a lack of training and resourcing and suggest that a solid legal basis alone is not sufficient to promote international cooperation.[229]

Issues connected to national perceptions and policies on inter-state cooperation may go some way to explaining UNODC's 2021 study finding that use of UNTOC is geographically uneven. While states in the Western European and Others and, more recently, Latin America and the Caribbean groups make frequent use of UNTOC, African states and those in the Asia-Pacific make very little use of it.[230] It is unclear whether states in these latter groups use other methods to cooperate or whether they refrain entirely from international cooperation. Studies of the

[226] *Ibid*, p. 44.

[227] See discussion above on the EAW.

[228] European Commission: Directorate-General for Migration and Home Affairs, *Study on paving the way for future policy initiatives in the field of fight against organised crime – Effectiveness of specific criminal law measures targeting organised crime – Final report*, Publications Office, 2014, available online at https://data.europa.eu/doi/10.2837/61146/, (accessed 9 January 2025); *Report of the Fourteenth United Nations Congress on Crime Prevention and Criminal Justice, International cooperation and technical assistance to prevent and address all forms of crime: terrorism in all its forms and manifestations, and new and emerging forms of crime*, A/CONF.234/7 (2020).

[229] Schloenhardt, *supra* note 191, p. 25.

[230] UNODC 2021*, supra* note 183*,* p. 121.

experience of UNTOC, and cooperation more generally, within the Asia-Pacific region suggest that very few states are using it as a judicial assistance framework. There are a number of reasons for this: large numbers of developing states in the region with few resources,[231] traditions of non-intervention in the affairs of other states;[232] difficulties posed by the diversity of domestic criminal laws and procedures;[233] an inclination to rely upon bilateral agreements.[234] It has been suggested that many African states are wary of what are perceived as cumbersome and overly bureaucratic Eurocentric procedures and processes, which are incompatible with African legal systems and at variance with a simpler and more direct African approach.[235]

This aligns with arguments advanced in previous research that non-Western states, despite their initial enthusiasm for UNTOC, have come to view it as a Western attempt to ensure their cooperation through the multilateralization of existing bilateral and regional measures of international cooperation.[236] This should be a significant concern under the MLA Convention,

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[231] Roderic Broadhurst and Nicholas Farrelly, 'Organized Crime Control in Asia: Experiences from India, China, and the Golden Triangle' in Letizia Paoli, (ed.), *The Oxford Handbook of Organized Crime* (Oxford University Press, Oxford, 2014), pp.634-655, p. 649.

[232] Pushpahathan Sundram, 'ASEAN Cooperation to Combat Transnational Crime: Progress, Perils and Prospects' *Frontiers of Political Science*, 15 February 2024.

[233] Tom Obokata, 'The Value of International Law in Combating Transnational Organized Crime in the Asia-Pacific', 7 *Asian Journal of International Law* (2017) 39-60, p. 40.

[234] *Ibid*, p. 49

[235] Martin Ewi, ENACT Regional Observatory Coordinator, ISS, comments at workshop on 'Is Africa making the most of MLA and extradition to combat organised crimes?' hosted by the Institute for Security Studies and ENACT, 20 June 2024.

[236] Boister, *supra* note 6, pp. 43-45.

which, as shown above, incorporates a high number of judicial assistance and extradition provisions from European instruments, which states from other regions may be unfamiliar with and resistant to. There are reports that governments of the Global South consider UNTOC a 'one-way street' in which Western governments expect cooperation from them but are not willing to provide judicial assistance in the other direction.[237] That experience may well feed forward to influence willingness to ratify the MLA Convention.

5 Lessons for the MLA Convention

While understanding of state practice under UNTOC is incomplete, the studies that have been conducted hold valuable lessons for the MLA Convention. The adoption of the MLA Convention is only the first, albeit significant, step. It is an important acknowledgement of the role that states can play in tackling impunity and emphasises the need not only for technical legal tools to enhance prosecutorial function but the need for a cooperative inter-state culture around international crimes prosecutions. However, to bring real change, the MLA Convention must be used. The barriers to use of and cooperation under UNTOC are varied, complex and often inter-connected. Without careful consideration around how to tackle and remedy these overarching issues, they seem likely to be carried into the MLA Convention practice.

As discussed above, although resource related barriers might appear to be the simplest to remedy, it may prove challenging to fund training and capacity building initiatives given the standalone nature of the MLA Convention. It seems likely that international human rights law

[237] Shaw *et al*, *supra* note 168, p.24.

obligations, the requirements of refugee and asylum laws and prohibitions on the extradition of nationals may continue to pose legal barriers to cooperation in some situations under the MLA Convention. That has been the experience under UNTOC, but these are complex issues which arise to a degree in most MLATS and will be encountered in any global treaty regime that involves states from varied legal traditions and practices.

However, the most significant challenge currently facing the MLA Convention is its ability to attract global support. To fill the cooperation gap and make a real contribution to ending impunity, the Convention must be widely ratified, implemented and *used* by states, ideally beyond states that are already party to the ICC. The limitations of the ICC regime and need for domestic courts to offer an alternative route to prosecution have been brought to attention through the experiences of Syria,[238] Myanmar[239] and others. As a result, numbers of domestic prosecutions of international crimes have reached previously unseen levels,[240] but there are significant challenges associated with prosecuting such crimes. Lack of resources, capacity, expertise and technical and evidentiary challenges frequently forestall national proceedings.[241] Similar to UNTOC, with its uneven geographical use and differing national perceptions and prioritisation of transnational crime, the MLA Convention has been created in a global landscape where national positions on the importance of prosecuting international crimes vary

[238] Asser Khattab, 'What Justice Can International Law bring to Syrians?', *OpinioJuris*, 15 March 2021; Kate Vigneswaran, 'A Pathway to Accountability for Syria? The Broader Implications of the ICC's Findings on Jurisdiction over Cross-Border Crimes?', *OpinioJuris*, 19 September 2019.

[239] Grant Shubin, 'Implications of the Myanmar ICJ and ICC Cases for Non-Rohingya Minorities', *Just Security*, 31 July 2020.

[240] TRIAL International, *Universal Jurisdiction Annual Review 2024*, *supra* note 3.

[241] Polina Levina Mahnad, 'An Independent Mechanism for Myanmar: A Turning Point in the Pursuit of Accountability for International Crimes' , *EJIL: Talk!,* 1 October 2018.

markedly. Domestic prosecution of international crimes may be at an all-time high, but the practice is far from global. Currently, only 13 jurisdictions are pursuing extraterritorial cases on international crimes and 10 are European.[242] TRIAL International notes that 86 per cent of those being investigated or prosecuted for international crimes are subject to proceedings in just 6 out of the 13 countries.[243]

From its inception, the MLA Initiative struggled to garner truly international appeal. In May 2023 as the final treaty was negotiated, of the 80 Supporting States, more than half were European. There were none from the Middle East and only three from Asia. The MLA Initiative was dominated by ICC States Parties throughout; only 7 of the Supporting States were non-States Parties.[244] Despite the core group's initial desire to develop the MLA Convention at arm's length from the ICC in an effort to attract support beyond ICC states parties, it is undeniably connected to the ICC model as a means of operationalising complementarity.

Since 14 February 2024, when the Convention opened for signature, 37 states have signed it.[245] Most of them did so as soon as the Convention was opened. None have yet ratified. 26 of the signatory states, more than 70 per cent, are European (Albania, Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Finland, France, Germany, Ireland, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, North Macedonia,

[242] TRIAL International, *supra* note 3, p. 11.

[243] *Ibid*.

[244] Belarus, Kazakhstan, Rwanda, Sao Tome and Principe, Togo, Ukraine and Vietnam. Ukraine has since ratified the ICC Statute on 25 October 2024. MLA Initiative List of Supporting States as of 12 May 2023, available online at www.centruminternationaalrecht.nl/mla-initiative/ (accessed 24 April 2024).

[245] List available online at www.gov.si/en/registries/projects/mla-initiative/ (accessed 8 January 2025).

Norway, Poland, Slovakia, Slovenia, Sweden, Switzerland, Ukraine). There are five African states (Central African Republic, Democratic Republic of Congo, Ghana, Rwanda and Senegal), four from Latin America and the Caribbean (Argentina, Chile, Costa Rica, Uruguay), and one from Asia (Mongolia). Perhaps unsurprisingly, the signatories are overwhelmingly ICC States Parties. Only Rwanda is non-states party to the ICC.

Although it is early days, the MLA Convention is, at present, dominated by European states. Those states, although many have stressed the need for improved procedures, already have a range of possibilities for cooperation and collaboration amongst themselves via EU and Council of Europe instruments and initiatives. Another treaty ratified predominantly by European states will not remedy the problems associated with an absence of international MLA instruments. Much work therefore remains to be done to encourage wide ratification, and, more importantly, to build international consensus on the need to end impunity for international crimes and to overcome the perceptions of western dominance that have beset UNTOC practice.

To that end, a pledge has recently been adopted at the 34th International Conference of Red Cross and Red Crescent statutory meetings. It is led by the core group of the MLA Initiative.[246] Under the pledge, signatory states pledge to raise awareness of the potential of the MLA Convention and encourage states to sign it. The action plan consists of a series of measures to

[246] Support for the Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity , war crimes and other international crimes, 22 October 2024, available online at: rcrcconference.org/pledge/support-for-the-ljubljana-the-hague-convention-on-international-cooperation-in-the-investigation-and-prosecution-of-the-crime-of-genocide-crimes-against-humanity-war-crimes-and-other-international/ (accessed 9 January 2025).

raise awareness of the Convention at international, regional and domestic levels amongst state and judicial actors. Progress is intended to be measured by numbers of signatures and ratifications, events and references to the Convention in documents adopted in national and international fora, as well as in the public domain. Interestingly, a separate pledge by the EU and its Member States on fighting impunity for international crimes, lists ratification of the MLA Convention in its action plan.[247] As a first step, these measures appear logical. Again, however, the experience of UNTOC – with 192 parties and wide implementation at the domestic level – should not be overlooked. A cooperation treaty needs more than wide acclaim and high numbers of states parties to make a practical impact. That said, progress in international law can be slow and haphazard[248] and only time will tell the impact of the MLA Convention.

6 Conclusion

In sum, whether and how much states will use the MLA Convention as a basis for cooperation on international crimes remains to be seen. The logic of transplanting a treaty regime about which relatively little is known is questionable. In the context of the MLA Convention, the time for that debate has passed. However, the experience of the MLA Convention is relevant

[247] Fighting impunity of serious violations of IHL and other core international crimes at the national and international level, 28 October 2024, available online at rcrcconference.org/pledge/fighting-impunity-of-serious-violations-of-ihl-and-other-core-international-crimes-at-the-national-and-international-level/ (accessed 9 January 2025).

[248] On the notion of progress in international law see Thomas Skouteris, 'The Idea of Progress' in Anne Orford and Florian Hoffmann (eds) *The Oxford Handbook of the Theory of International Law*, (OUP, Oxford, 2016) pp. 940-953.

to wider debates on the practice of treaty transplantation and the contexts in which it is appropriate. As states move to negotiate a treaty on crimes against humanity, which will also involve an interstate cooperation regime, they should have an eye to the discussions taking place on the MLA Convention. The difficulties foreseen here of transplanting a generic, sovereignty centring cooperation regime which regurgitates prior provisions and retains traditional grounds for refusal of assistance should inform negotiations on crimes against humanity. In that Treaty, there is time to consider whether a slightly more innovative cooperation regime, tailored to the specific requirements of international crimes investigations, might be possible. The negotiating states should carefully consider the kinds of cooperation that might be needed to investigate and prosecute crimes against humanity and whether the nature of the crimes justify a re-evaluation of the circumstances in which States can refuse to provide assistance. Negotiating such treaties is, of course, a delicate exercise and replication of widely agreed provisions and procedures may offer a smoother path to conclusion. However, reform should not be stifled by caution and a lack of ambition. The opportunity to develop a new treaty on international crimes is not often presented; it should not be wasted.

For the MLA Convention going forward, it is essential to learn from practice under UNTOC and consider how best to build global political consensus, encourage wide ratification and facilitate and support implementation and use. The ‘legal gap’ may be filled in theory and on paper. In practice, there is much work to be done.

Annex 1. Sources of the mutual legal assistance provisions

MLA Convention	**UNTOC**	**UNCAC**	**European Convention on Mutual Assistance in Criminal Matters**	**2nd AP to the European Convention on MA in Criminal Matters**	**UN Model Treaty on Extradition**
Article 23 Scope	Article 18(1)				
Article 24 Purpose of requests	Article 18(3)				
Article 25 Format of requests	Article 18(14) and (15)				
Article 26 Confidentiality	Article 18(20)				
Article 27 Provisional Measures				Article 24	
Article 28 Additional Information	Article 18(16)				

Article 29 Legal basis	Article 16(4)[249]				
Article 30(1)(a)-(e) Grounds for refusal					Article 3(a), (b), (d), (f) and 4(e)[250]
Article 30(1)(f)-(g) Grounds for refusal	Article 18(21)(a),(b)				
Article 30(1)(h) Grounds for refusal					Article 4(g)
Article 30(1)(i) Grounds for refusal	Article 18(21)(d)				
Article 30(1)(j)[251]					

[249] Art. 16 UNTOC refers to extradition, whereas the MLA Convention swaps the wording of 'extradition' for 'mutual legal assistance'.

Grounds for refusal					
Article 30(2) Grounds for refusal – unknown source					
Article 30(3) Grounds for refusal	Article 18(8) and (22)				
Article 30(4) Grounds for refusal	Article 18(23)				
Article 30(5) Grounds for refusal	Article 18(26)				
Article 31(1) and (2) Limitations Article 31(3) and (4) – unknown source	Article 18(19)				

Article 32 Execution of Requests	Article 18(17), (23-26)				
Article 33 Depositions				Article 9	
Article 34 Hearing by video conference				Article 9	
Article 35 Appearance in requesting state			Article 10		
Article 36 Temporary Transfer	Article 18(10) and (11)				
Article 37 Safe conduct		Article 46(27)			
Article 38 Transmission Unknown source					
Article 39	Article 20				

Special Investigative Techniques					
Article 40 Covert investigations				Article 19	
Article 41 JIT				Article 20	
Article 42 Cross Border Observations				Article 17	
Article 43 Criminal Liability Officials				Article 21	
Article 44 Civil Liability Officials				Article 22	
Article 45 Confiscation	Articles 12 and 13				
Article 46 Restitution	Article 14(2)				

Annex 2. Sources of the extradition provisions

MLA Convention	**UNTOC**	**UNCAC**	**European Convention on Extradition**	**UN Model Treaty on Extradition**	**Inter-American Convention on Extradition**
Article 49 Scope					
Article 49(1)		Article 44(1)			
Article 49(2)			Article 2(1)		
Article 49(3)		Article 44(3)			
Article 49(4)	Article 16(3)				
Article 50 Legal Basis	Article 16(4)				
Article 51(1) Mandatory Refusal			Article 3(2) and 11	Article 3(b), (d), (f) and 4(d)	
Article 51(2) (a)-(c)					

Optional grounds for refusal					
Article 51(2)(d)			Article 8		
Article 51(2)(e)				Article 4(g)	
Article 51(2)(f)			Article 17		
Article 51(2)(g)	Article 18(21)(a)[252]				
Article 51(2)(h)				Article 4(h)	
Article 51(2)(i)			Article 10		
Article 51(2)(j)	Article 18(21)(b)[253]				
Article 51(3)	Article 18(26)[254]				

[252] This provision relates to refusal of MLA in UNTOC. However, the wording is identical and is applied here to extradition also.

[253] This provision relates to refusal of MLA in UNTOC. However, the wording is identical and is applied here to extradition also.

[254] This provision relates to refusal of MLA in UNTOC. However, the wording is very similar and is applied here to extradition refusals. A similar provision can be found in UNCAC, Art 44(17).

Article 52 Speciality			Article 14		
Article 53 Re-extradition			Article 15		
Article 54 Extradition of nationals	Article 16(11) and (12)				
Article 55 Execution of requests	Article 16(7)				
Article 56 Requests				Article 5	
Article 57 Confidentiality	Article 18(20)[255]				
Article 58[256] Conflicting Requests			Article 17		
Article 59 Provisional Arrest	Article 16(9)		Article 16		
Article 60					

[255] This provision relates to refusal of MLA in UNTOC. However, the wording is identical and is applied here to extradition also.

[256] This provision is largely based on Art 17 European Convention on Extradition, with some amendment for the possibility of compliance with obligations to surrender to international courts and tribunals.

Consideration of detention					
Article 61 Surrender			Article 18		
Article 62 Postponed Surrender			Article 19		
Article 63 Simplified Procedure				Article 6	
Article 64 Property			Article 20		
Article 65 Transit				Article 15	