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Extradition and Mutual Legal Assistance in the Draft Convention on Crimes Against Humanity

Harmen van der Wilt*

Abstract

Working on crimes against humanity, the International Law Commission (ILC) has modelled its draft articles on extradition and mutual assistance on corresponding provisions of the United Nations Conventions against Corruption and Transnational Organized Crime. Nevertheless, some provisions are clearly adapted to the special nature of crimes against humanity. This article seeks to explore how the ILC has navigated between producing a flexible and general framework and adapting the system more specifically to the specificities of crimes against humanity. The ILC has been censured for easily transposing already existing regimes that were not designed for such specific contexts. On closer scrutiny, that criticism is not entirely justified. A comparison with the parallel provisions in the Statute of the International Criminal Court (ICC) reveals that the ILC's provisions do not deviate much from the system as adopted by the ICC. This similarity may be indicative of the soundness of the ILC's approach in construing a framework that may contribute to the improvement of interstate cooperation in the suppression of crimes against humanity.

1. Introduction

Draft Articles 13 and 14 of the International Law Commission's (ILC) project on crimes against humanity — a blueprint for a convention on the subject — respectively cover extradition and mutual legal assistance. Moreover, a separate annex to the draft articles addresses a number of primarily procedural issues related to mutual legal assistance. The provision on extradition is connected to draft Article 10, which contains the well-known principle of *aut dedere, aut judicare* that serves to create a closed system of criminal law

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enforcement. The state party on whose territory an alleged offender is present has the option to either prosecute the person or extradite him to another state. The ILC's Commentary on the draft articles qualifies the obligation to submit the case to its competent authorities as a primary one, prevailing over an alternative possibility to render extradition (*primo judicare, secundo dedere*).¹ However, such a hierarchy between the alternative obligations cannot be derived from the literal text of the articles or from general international law. It would make perfect sense for a state to consider extradition of the alleged offender to a state with a stronger jurisdictional claim, rather than starting prosecution itself. The prior mentioning of the duty to prosecute reminds the state party of this obligation, even if an extradition request is not forthcoming. The conjunction in draft Article 10 ('*unless it extradites or surrenders the person to another state or competent international criminal tribunal*') clarifies that a state is relieved from its obligation to prosecute whenever an extradition request is submitted and it decides to grant it, rather than stipulating that even in such a case it should first consider prosecution.

The ILC indicates that it has decided to model both the articles on extradition and mutual legal assistance on analogous provisions on international cooperation in criminal matters in existing conventions. Accordingly, Article 44 of the 2003 United Nations Convention against Corruption and Article 16 of the 2000 United Nations Convention against Transnational Organized Crime (UNTOC) have served as a blueprint for draft Article 13 on extradition, whereas draft Article 14 on mutual legal assistance *largo sensu* copies Article 46 of the Corruption Convention and Article 18 of the UNTOC.² The ILC proceeds by asserting that, while it acknowledges that a crime against humanity by its nature considerably differs from corruption or organized crime, the cooperation regime is likely to be quite similar.³ In reality, however, some provisions are clearly adapted to the special nature of crimes against humanity.

The major objective of this essay is to explore how the ILC has attempted to strike a balance between general and more specific elements in its search for an effective and fair system of interstate cooperation on the suppression of crimes against humanity. I will focus therefore on those topics that are of particular importance for crimes against humanity. In the context of extradition, I will dwell upon the relevance of treaties, the political offence exception and the rule of dual criminality. The sections on mutual legal assistance will highlight special investigation methods, like exhumations and examination of grave sites, the identification of victims and the recovery and freezing of assets that have been stolen from them — issues that are obviously important in case of crimes against humanity.

1 *Report of the International Law Commission, Sixty-ninth session (1 May-2 June and 3 July-4 August)*, UN Doc. A/72/10 (hereinafter 'ILC Report'), at 100, § 4.

2 *Ibid.*, at 100, § 5 and 111, §§ 4 and 6. See United Nations Convention against Corruption, 31 October 2003, UNTS 2349, 41; United Nations Convention against Transnational Organized Crime (UNTOC), 15 November 2000, UNTS 2225, 209.

3 ILC Report, *supra* note 1, at 100, § 5.

In the final section, I will briefly reflect on the question whether the current draft articles sufficiently take the specific nature of crimes against humanity into account. To that purpose, I will compare these articles with parallel provisions in the International Criminal Court (ICC) Statute. This comparison does not imply that I consider the cooperation framework of the ICC ideal. To be sure, the system has some weak spots where it does not succeed in imposing stricter obligations on states parties.⁴ However, Part 9 of the ICC Statute, whatever its qualities or flaws, is tailored to law enforcement in respect of core crimes and therefore serves as an important frame of reference for the draft convention.

2. Extradition

A. *The Relevance of Extradition Treaties*

For several reasons, treaties are of major importance in the law and practice of extradition. By concluding treaties, states indicate under what conditions they are prepared to mutually surrender fugitives from justice. Treaties therefore ensure reciprocity and improve legal certainty and predictability. Moreover, a treaty may serve as a yardstick for the degree of confidence in the administration of (criminal) justice in the requesting state. Whenever that confidence is lacking, the requested state will be reluctant to expose a fugitive to a situation where his fair trial rights or even his life may be at risk. To be sure, not all states opt for expressing that confidence in a treaty requirement and the position has been censured for being rather rigid. However, states that do make extradition dependent on a treaty intend to save themselves from the predicament of having to make awkward choices in each and every specific situation.

The draft convention acknowledges the relevance of treaties in extradition at several places. Draft Article 13(3) stipulates that states parties 'may consider the present draft articles as the legal basis for extradition in respect of any offence covered by the present draft articles'. The opening words of the provision — '[i]f a State that makes extradition conditional on the existence of a treaty receives a request for extradition' — clarify that it serves to accommodate those states whose legislation requires a treaty for extradition. An article of this kind is commonly included in international conventions on the suppression of international and transnational crimes.⁵ The treaty framework for the purpose of the extradition of suspects of crimes against humanity is further reinforced by draft Article 13(1), that prescribes that '[e]ach of the offences covered by the present draft articles shall be deemed to be included as an

4 For a very balanced assessment, see B. Swart and G. Sluiter, 'The International Criminal Court and International Co-operation', in H.A.M. von Hebel, J.G. Lammers and J. Schukking (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (T.M.C. Asser Press, 1998) 91–120.

5 See, for example, Art. 9 International Convention for the Suppression of Terrorist Bombings, 15 December 1997, UNTS 2149, 256; and Art. 13 International Convention for the Protection of All Persons from Enforced Disappearances, 20 December 2006, UNTS 2716, 3.

extraditable offence in any extradition treaty existing between States', adding that 'States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.' Finally, draft Article 13(5) addresses those states that do not make extradition conditional on the existence of a treaty, enjoining them to 'recognize the offences covered by the present draft articles as extraditable offences between themselves'.

As indicated, these provisions are by no means innovative, but they reflect the primordial importance of a convention on crimes against humanity for the purpose of extradition. Together they aim to confront all possible obstacles and make sure that extradition is always an option. If two states parties maintain no treaty relations on international cooperation in criminal matters whatsoever and the requested state considers a treaty mandatory, it may predicate the extradition on this convention and thus formally comply with its own legislation. If an extradition treaty is in force but it does accidentally not cover crimes against humanity, the requested state is bound to grant the extradition of a suspect of crimes against humanity nonetheless. While that situation will not occur in case of (multilateral) extradition treaties that incorporate the so-called elimination method — implying that extradition is mandatory for all offences that are penalized in both states by a minimum prison sentence of a certain length (usually one year)⁶ — it can arise in case of (bilateral) treaties that only prescribe extradition in respect of certain well-defined offences, if crimes against humanity do not feature on the list. Moreover, draft Article 13(1) ensures that extradition shall be granted for the purpose of a crime against humanity, and not for an ordinary crime, like murder or rape that is included in the list of enumerated offences.

It should be emphasized that Article 13(3) is drafted in optional terms: 'States *may* consider the present draft articles as the legal basis for extradition' (emphasis added). In other words: states that require a treaty basis for extradition are never under an obligation to comply with a request. The same holds true for those states that do not make extradition conditional on the existence of a treaty. They are not obliged to grant extradition either but are only enjoined to adapt their national legislation to the eventuality. The fact that the draft articles nowhere *oblige* states to grant extradition should be read in conjunction with draft Article 13(9) that contains the so-called 'anti-discrimination' clause. The provision mirrors one of the main rationales for the treaty requirement as expounded above: states must have the leeway to refuse extradition whenever the fugitive is likely to be persecuted on religious, political etc. grounds in the requesting state.⁷

6 It should be noted in this context that draft Art. 6(1) of the ILC project obliges states parties to take the necessary measures to ensure that crimes against humanity constitute offences under their criminal law, whereas draft Art. 6(7) adds that states shall take the necessary measures to ensure that crimes against humanity are punishable by appropriate penalties, taking into account their grave nature.

7 The full provision reads as follows: 'Nothing in the [present draft] articles shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on

Amnesty International and some delegations of states parties have criticized the provision for being too narrow. They favour the inclusion of a general ground for refusal of extradition, in case of impending imposition of the death penalty, torture and other cruel, inhuman or degrading treatment or punishment.⁸ There is some merit in this criticism. After all, harsh punishment, amounting to flagrant human rights violations, may not be inspired by discriminatory motives. The ILC has attempted to counter this criticism by pointing out that the requested state would be allowed to invoke human rights considerations as a ground for refusal of extradition, if its national law — for instance — prohibits extradition where the offence at issue is punishable by the death penalty.⁹ The response is adequate, as the ‘anti-discrimination clause’ is not framed as a mandatory ground for refusal either.

B. Exclusion of the ‘Political Offence’ Exception

According to draft Article 13(2), an offence covered by the draft articles shall not be considered as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Consequently, states are not allowed to refuse extradition on that basis. The provision obviously alludes to the well-known ‘political offence’ exception that has been incorporated in many extradition treaties.¹⁰ Many scholars have addressed the scope and the rationales of this exception.¹¹ In this context, concern for the due process right of the fugitive, the necessity of states to keep aloof from internal political disturbances and a potential sympathy with the cause of political dissidents have been emphasized. It is fair to state that the exception is generally on the wane, a development that has been spurred by the war against terrorism. Contemporaneous treaties on the suppression of specific terrorist offences

account of that person’s gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group, political opinions or other grounds that are universally recognized as impermissible under international law, or that compliance with the request would cause prejudice to that person’s position for any of these reasons.’

- 8 See Amnesty International, *International Law Commission: Commentary to the Third Report on Crimes against Humanity*, April 2017, available online at <https://www.amnesty.org/en/documents/ior40/5817/2017/en/> (visited 25 May 2018), at 11, favouring the inclusion of general effective human rights safeguards. See also, for example, Switzerland, *Statement at the UN GA 6th Committee*, UN Doc. A/C.6/72/SR.18, 25 October 2017, § 103, advocating the inclusion of a provision allowing the refusal of extradition to states that still apply the death penalty, unless guarantees are given that the death penalty will not be sought, imposed or carried out.
- 9 ILC Report, *supra* note 1, at 104, § 17. Draft Art. 13(6) provides that extradition ‘shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including the grounds upon which the requested State may refuse extradition’. See more Section D.
- 10 See, for example, Art. 3 European Convention on Extradition, 13 December 1957, ETS 24; and, Art. 3(a) UN Model Treaty on Extradition, 14 December 1990, ILM 1991, 1407.
- 11 See, among others, C. Van den Wyngaert, *The Political Offence Exception to Extradition* (Kluwer, 1980); G. Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms* (Martinus Nijhoff, 1998), at 203–334.

explicitly reject the political offence exception in terms that are similar to the provision under scrutiny.¹²

The inclusion of a provision on the exclusion of the political offence exception raises the question whether crimes against humanity and other core crimes could ever qualify as political offences. Apparently, the answer is not self-evident, because the drafters of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide took the trouble to clarify that genocide and other enumerated acts 'shall not be considered as political crimes for the purpose of extradition'.¹³ The infamous *Artuković* case — in which US courts declared the extradition of the fugitive in first instance inadmissible, because the alleged crimes had been committed during a political uprising and were not triggered by personal motives — puts the issue in sharp perspective. *Artuković* was charged by the requesting state (Yugoslavia) with having ordered the death of some 30,000 civilians when he acted as Minister of the Interior of the Croatian Government during the Second World War, a crime that would effortlessly qualify as a war crime and a crime against humanity.¹⁴

Three lines of argumentation have been advanced to counter the claim that crimes against humanity could — in principle — be considered as political offences for the purpose of extradition. The first borrows partially from the terrorist analogy and stresses the heinousness of the crime. In this sense, a US District Court held that 'if the act complained of is of such a heinous nature that it is a crime against humanity, it is necessarily outside the political offence exception'.¹⁵ Secondly, it has been questioned whether crimes against humanity can ever be instrumental in subverting the existing political order. Such was the explicit reasoning by a Swiss court in the case of *Kroeger*, whose extradition was sought for his alleged complicity in the extermination of Jews, communists and inmates of mental institutions in Poland and Ukraine during the Second World War. The Court succinctly characterized the essence of a political offence as 'having been committed in the course of a struggle for power in the State and must also be in appropriate proportion to the object pursued, in other words suitable to the attainment of that object'. The Court proceeded by concluding that the case at hand did not fit the archetype: '[t]he accused was acting at a time when the nationalist socialist regime stood at the pinnacle of its power. He acted against helpless women, children and sick persons who could not possibly have threatened German dominion'.¹⁶ The Swiss Court

12 See, for example, Art. 11 International Convention for the Suppression of Terrorist Bombing.

13 Art. VII Convention on the Prevention and Suppression of the Crime of Genocide, 9 December 1948, UNTS 78, 277.

14 *US ex rel. Kardazole v. Artuković* (170 F. Supp. 383 (S.D. Cal. 1959)). *Artuković* was ultimately extradited by the United States to Yugoslavia, see *Artuković v. Rison* (784 F.2d 1354 (9th Cir. 1986)). For an extensive discussion of the case, see Gilbert, *supra* note 11, at 389.

15 US District Court S.D. New York, *In the Matter of the Extradition of Mousa Mohammed Abu Marzook* (924 F. Supp. 565 (1996)), at 577.

16 *Kroeger v. The Swiss Federal Prosecutor's Office*, 72 International Law Reports (Swiss Federal Tribunal, 1966), 606, 612–613. In the *Arambasić* case, a US Court of South Dakota followed a similar approach. *Arambasić's* extradition was sought by the Republic of Croatia on account of his alleged commission of 'criminal acts against humanity and international law'. The Court

correctly, although somewhat indirectly, suggested that political offences are typically committed *against* established political power, whereas crimes against humanity usually imply involvement of the state as perpetrator. It is a related, but separate, argument that sustains the conclusion that crimes against humanity are to be excluded from the ambit of the political offence exception. This opinion was more clearly expressed by a French court in the case of *Spiessens* whose extradition was requested by Belgium on the charge of collaboration with the enemy. The Court held that ‘in time of war, in a country occupied by the enemy, collaboration with the latter *excludes the idea of a criminal action against the political organization of the State which characterizes the political offence*’.¹⁷

None of these arguments on its own is perhaps entirely persuasive. After all, the seriousness of a crime does not affect its political character, especially not if it is the only and ultimate means to achieve the desired political outcome. Together, however, they offer a solid reason for denying perpetrators of crimes against humanity, the preferential status of political offenders who may wish to invoke the exception in case of extradition. Gilbert neatly summarizes this position by asserting that ‘there is a developing customary international law to the effect that war crimes and crimes against humanity are not to be regarded as political offences’.¹⁸ The current section in draft Article 13 of the draft convention both reflects and corroborates that development.

C. Dual Criminality

Extradition is usually only granted if the conduct for which the surrender of the suspect is requested constitutes a criminal offence in both the requesting and the requested state. This so-called ‘rule of dual criminality’ relieves the requested state from the obligation to cooperate and apply its criminal law system in respect of conduct which it does not consider criminal itself.¹⁹

found that the ‘evidence show[ed] that the alleged victims were policemen who were unarmed and had surrendered while others were unarmed civilians’ and concluded that such ‘atrocities committed upon these unarmed people were not in furtherance of a political cause’. *Arambasić v. Ashcroft and others*, Judgment on Petition for Writ of Habeas Corpus (403 F. Supp. 2d 951 (D.S.D. 2005)), ILDC 709 (US 2005), 18 November 2005, §§ 39–41.

17 Court of Appeal of Nancy, France, *In re Spiessens*, 16 *International Law Reports* (1949) 275, 276 (emphasis added).

18 Gilbert, *supra* note 11, at 395.

19 Outside the scope of crimes against humanity, the question has arisen whether double criminality requires that the offence for which extradition is sought matches exactly a corresponding offence in the requested state. The Italian Supreme Court denied that such a stringent test was necessary and held that an ‘equivalence of the repressive elements’ of the offences in the two legal systems would suffice. Italy, Court of Cassation, 6th Criminal Section, Judgment No. 30087/2014 (Reporter: G. Nesi), 9 July 2014, ILDC 2215 (IT 2014). See also M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn., Martinus Nijhoff, 1999), at 298–299, where the author points out that this implies an assessment of dual criminality *in abstracto*, ‘inquiring whether or not the crime in the requested state is generally comparable to the crime in the requesting state’.

In treaties, this objective is accomplished by either stipulating that extradition shall be granted in respect of offences punishable under the laws of the requesting state and of the requested state by a prison sentence or detention order of a minimum length and severity,²⁰ or by incorporating a list of offences which constitutes a common denominator of the criminal legislation of both states. The rule of dual criminality is not a general principle of international law, in the sense that states are only allowed to mutually exchange fugitives when the condition is met. To be sure, the Framework Decision on the European Arrest Warrant has abolished dual criminality in respect of 32 ‘listed offences’.²¹ Interestingly, crimes within the jurisdiction of the ICC feature on the list.

The ILC observes that any reference to dual criminality is lacking in its draft articles on crimes against humanity, and advances two reasons for this ‘omission’.²² First, it notes that the draft articles on crimes against humanity define the elements of crimes against humanity in draft Article 3 and subsequently, in draft Article 6, oblige states parties to ensure that crimes against humanity constitute offences in their own national legislation. In view of the intended full harmonization of national legislations, dual criminality is automatically satisfied. Secondly, the ILC indicates that extradition is never mandatory, provided that the requested state submits the case to its own competent authorities for the purpose of prosecution (*aut judicare*). While the former argument is sound, the latter is less convincing. Let us suppose that an extradition indeed falters on the requested state having insufficiently implemented the elements of crimes against humanity in its national criminal law. In the execution of the alternative option — criminal prosecution — it would be confronted with the same legal obstacles that prevented it from complying with the extradition request. It would imply that the requested state would only be able to prosecute the suspect for an ordinary crime like, for instance, murder or rape. Such a diluted, ‘second best’ performance is likely to defeat the very purpose of the Convention. The rather pragmatic second argument, suggesting that any criminal prosecution on lesser charges is better than none, detracts from the more principled aspiration to approximate national legislations that would obviate any concern in respect of dual criminality.

D. Other ‘Miscellaneous’ Provisions on Extradition of General Purport

The previous paragraphs have addressed those aspects of extradition law that are of special relevance for crimes against humanity. Draft Article 13 contains other provisions of general purport that deserve some brief comments.

20 See, for instance, Art. 2(1) European Convention on Extradition at least one year or by a more severe penalty.’

21 Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, OJ L 190, 18 July 2002, at 1, Art. 2(2).

22 ILC Report, *supra* note 1, at 108–109, §§ 32 and 33.

Draft Article 13(6) provides that 'extradition shall be subject to the conditions provided for by national law of the requested state or by applicable extradition treaties, including the grounds upon which the requested state may refuse extradition'. At first blush, this arrangement appears to be very lenient towards any inclination of states to curb their obligations under the convention, but the ILC rightly observes that the article refers to procedural regulations or grounds for refusal that are generally accepted in extradition law, like the prohibition of extradition in case of an impending imposition or execution of the death penalty or a prohibition of extradition on the basis of the rule of specialty.²³ The convention serves as the normative framework to test whether a certain ground for refusal would be permissible, disallowing, for instance, the invocation of a statute of limitations that would be contrary to the states' obligation to abolish statutes of limitations in respect of crimes against humanity.²⁴

States that are inclined to restrict extradition to states on whose territory the offence has allegedly been committed are summoned to change this practice and grant extradition requests issued by states that predicate prosecution on another principle of criminal jurisdiction. Draft Article 13(7) accomplishes this by resorting to the somewhat contrived fiction that the requested state should pretend that the offence has been committed (also) on the territory of the state making the extraterritorial claim.²⁵ The provision corresponds with the exhortation, included in draft Article 7, for states to expand their jurisdiction on the basis of the active and passive nationality principle and makes short shrift with narrow positions inspired by the prevalence of territorial sovereignty.

Finally, draft Article 13(8) makes the interesting suggestion that states whose national legislation does not allow the extradition of their nationals for the purpose of the execution of a sentence might consider taking over the enforcement of the sentence, imposed by the requesting state, as an appropriate alternative. The construction appears in the Convention against Transnational Organized Crime (Article 16(10)) and the Convention against Corruption (Article 44(13)).²⁶

Regrettably, the ILC has decided not to include a provision explicitly addressing the situation in which states could decide to extradite their nationals on the proviso that they are allowed to return to their home country in order to serve there any foreign sentence, arguing that draft Article 13(6) allows for

23 *Ibid.*, at 104, § 17.

24 *Ibid.* See draft Art. 6(5) and compare also the UN Convention on the Non-Applicability of Statutory Limitations of War Crimes and Crimes against Humanity, 26 November 1968, 754 UNTS 73.

25 The ILC (ILC Report, *ibid.*, at 105, § 19) explains that this provision is modeled on Art. 11(4) of the 1999 International Convention on the Suppression of the Financing of Terrorism, UN Res. 54/108, 9 December 1999, available online at <http://www.un.org/law/cod/finterr.htm> (visited 8 June 2018).

26 ILC Report, *ibid.*, at 106, § 22. It should be added that the provision features in Art. 4(6) Framework Decision on the European Arrest Warrant as well.

such arrangements.²⁷ While this is undoubtedly true, the failure to mention it explicitly is a missed opportunity to align with modern developments in the law and practice of international cooperation, and to convey the signal that prosecution in a state with a stronger jurisdictional claim might be preferable to proceedings on the basis of the active nationality principle.

3. Mutual Legal Assistance

A. General Aspects

Mutual legal assistance in criminal matters is a vital aspect of criminal law enforcement in respect of international and transnational crimes, as evidence, witnesses, judicial records — elements that are indispensable for a successful completion of a criminal procedure — are usually scattered over several jurisdictions. The legal regulation of mutual legal assistance is divided between draft Article 14 that applies between states parties as *lex specialis* whenever they seek cooperation in the investigation and prosecution of crimes against humanity and an ‘annex’ to the draft articles that primarily contains procedural rules and applies when the states are not bound by another Multi-Lateral Assistance Treaty (MLAT) or prefer to use the annex instead of that latter treaty.²⁸

Draft Article 14 is structured on a model that is followed in many conventions on the suppression of international crimes and in international and regional instruments dealing specifically with mutual legal assistance.²⁹ The draft of Article 14(1) starts by generally exhorting states to afford each other the widest possible measure of assistance in investigations, prosecutions and judicial proceedings in relation to crimes against humanity, emphasizing that the assistance is to cover the entire scope of the criminal procedure. Paragraph 3 follows by enunciating a number of specific procedural activities that states could deliver on a reciprocal basis. Most performances concern the gathering of evidence and are well known in MLATs:

- taking evidence or statements of persons, including by video conference;³⁰
- effecting searches and seizures;³¹
- examining objects and sites, including obtaining forensic evidence;³²
- providing information, evidentiary items and expert evaluations;³³

27 ILC Report, *ibid.*, at 106, § 23.

28 Draft Art. 14(8).

29 The ILC Report, *supra* note 1, at 111, § 4 mentions Art. 7 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 20 December 1988, UNTS 1582, at 95 as a scholarly example that was reproduced with the necessary modifications in Art. 18 UNCTOC and Art. 46 Convention against Corruption.

30 Draft Art. 14(3)(b).

31 Draft Art. 14(3)(d).

32 Draft Art. 14(3)(e).

33 Draft Art. 14(3)(f).

- providing originals or certified copies of relevant documents and records.³⁴

Another important objective of mutual legal assistance is to apprise people whose attendance at and cooperation in the criminal procedure is required of its imminent occurrence. To that purpose, draft Article 14(3)(a) mentions the identification and location of alleged offenders and, as appropriate, victims, witnesses or others. Paragraph 3(c) indicates that states might, on request, effect the service of judicial documents and paragraph 3(i) refers to facilitating the voluntary appearance of these persons in the requesting state. Interestingly, the draft articles do not limit mutual legal assistance to the investigation and prosecution of natural persons, but stipulate that it should also 'be afforded with respect to investigations, prosecutions, judicial and other proceedings in relation to the offences for which a legal person may be held liable'.³⁵ The provision refers to Article 6(7) of the draft articles that exhorts states to establish the liability of legal persons for crimes against humanity in accordance with their own national law. According to the ILC, the addition 'and other proceedings' alludes to the broad array of types of corporate liability (criminal, civil, administrative).³⁶

B. Special Provisions of Relevance for Crimes against Humanity

While draft Article 14(3) identifies concrete examples of mutual legal assistance that are common to many MLATs and applicable in respect of all criminal offences, some elements are geared to the special nature of crimes against humanity. The identification of victims as a form of assistance reflects the increasing attention for victims in international criminal justice with a view to their participation in criminal procedure and the reparation of their suffering. The inclusion of this activity in MLATs is of recent date and has particularly been propounded in the context of the suppression of trafficking in human beings. A comprehensive provision on identification features, for instance, in Article 14 of the Association of Southeast Asian Nations Convention against Trafficking Persons, Especially Women and Children (ACTIP).³⁷ Article 14(1) of the ACTIP obliges states to establish guidelines or procedures for the proper identification of victims of trafficking in persons, whilst paragraph 2 prescribes that states parties shall respect and recognize identification in other states on a mutual basis and paragraph 3 instructs the 'receiving party' to notify the identification to the 'sending party', unless the victim otherwise informs. The final part of the sentence expresses concern for the privacy of the victim, whose opinion on whether his/her whereabouts are

34 Draft Art. 14(3)(g).

35 Draft Art. 14(2).

36 ILC Report, *supra* note 1, at 112, § 9.

37 ASEAN Convention Against Trafficking in Persons, Especially Women and Children, 21 November 2015, available online at <http://asean.org/asean-convention-against-trafficking-in-persons-especially-women-and-children/> (visited 25 May 2018).

to be shared with other states should always prevail.³⁸ The use of videoconferences for the purpose of taking evidence or statements displays technological developments and is obviously an asset for all criminal procedures with a transnational element.³⁹ The practice has gained momentum in the context of war crimes trials at the International Criminal Tribunal for the former Yugoslavia (ICTY) and is particularly valuable when large numbers of witnesses are called to bear testimony and lack of resources or fear prevent them from leaving their home country. It is therefore apposite that draft Article 14(3)(b) provides for the possibility.

Even more relevant for the prosecution of crimes against humanity is the sentence ‘including obtaining forensic evidence’, added to the familiar investigative measure of ‘examining objects and sites’. The ILC clarifies that this section was modified ‘to emphasize the ability to collect forensic evidence relating to crimes against humanity, given the importance of such evidence (*such as exhumation and examination of grave sites*) in investigating fully such crimes’.⁴⁰ Indeed, as the legal practice of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) have revealed, the exhumation and examination of grave sites has been of paramount importance for the assessment of the number of victims and the *modus operandi* of mass killings, thus corroborating the (contextual) elements of war crimes and crimes against humanity.⁴¹ By their nature, exhumations are invasive on the territorial sovereignty of a state. Whereas the prosecutors’ offices of the ICTY and ICTR, sustained by a resolution of the Security Council, had the competence to conduct such investigations itself, the ICC Statute does not attribute similar powers to the ICC Office of the Prosecutor. Article 99 of the ICC Statute affords the Prosecutor limited powers to exercise directly ‘extraterritorial’ investigations on the territory of a state, but the conditional phrasing that the examination is to be executed ‘without modification of a public site or other public place’, makes immediately clear that exhumations are excluded. For such investigations the ICC is completely dependent on the assistance of states parties.⁴² It makes sense, therefore, that draft Article 14(3)(e) implicitly qualifies exhumation as a form of assistance over which the requested state yields complete autonomy.

38 In a similar vein, see ILC Report, *supra* note 1, at 113, § 12.

39 The procedural aspects of the application of this device are regulated in Art. 18(18) UNCTOC, and — very extensively — in Art. 10 EU Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000), 29 May 2000, OJ of the EC, No. C 197, 12 July 2000, 1.

40 ILC Report, *supra* note 1, at 113, § 12 (emphasis added). In its commentary on the draft articles, *supra* note 8, at 13, Amnesty International had advocated the explicit inclusion of ‘exhumation and examination of grave sites’ in the provision.

41 For a comprehensive study, see É. O’Brien, ‘The Exhumation of Mass Graves by International Criminal Tribunals: Nuremberg, the former Yugoslavia and Rwanda’ (PhD thesis, Irish Centre for Human Rights, National University of Ireland, Galway, 2011).

42 Art. 93(1)(g) ICCSt. explicitly mentions the ‘examination of places or sites, including the exhumation and examination of grave sites’ as one of the ‘other forms of co-operation’.

The provision on the ‘identification, tracing or freezing of proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes’⁴³ may appear at first sight to be the odd person out in a convention that deals with crimes that are usually not motivated by profit. The ILC observes that, in the context of crimes against humanity, assets may have been stolen and that the freezing etc. of those assets may serve the purpose of returning those assets to the rightful owners. After all, the addition ‘or other purposes’ implies that the measures need not only have an evidentiary objective.⁴⁴ The provision on financial measures should be read in tandem with draft Article 14(4) that denies states to invoke bank secrecy as a ground for refusal of mutual legal assistance. The article is modeled on provisions that feature in many conventions on the suppression of international or transnational crime.⁴⁵

Draft Article 14(6) makes clear that the exchange of information is not dependent on a prior request to that effect. In other words, states are allowed to take the initiative in notifying other states of any information that could ‘assist the competent authority in undertaking or successfully concluding investigations, prosecutions and judicial proceedings or could result in a request formulated by that State pursuant to the present Draft articles’. This so-called ‘spontaneous exchange of information’ originates in the regulative framework of the Schengen Agreement and Convention and has been replicated in other instruments.⁴⁶ It is a valuable addition in treaties on mutual legal assistance, as states may for instance be ignorant about the presence of a suspect of crimes against humanity on their territory. Any information may trigger an investigation and/or subsequent requests for further evidence.

C. *Procedural Regulations in the Annex*

As indicated earlier, the annex contains a number of procedural regulations that serve to facilitate the international cooperation between sovereign states. All these rules are well known and require few comments. Paragraph 2 of the annex stipulates that states are to establish a central authority for the reception and further processing of requests for mutual assistance. In issuing the request, states are to comply with certain formalities as to the format and language of the request which must contain information on the identity of the authority making the request, the motive, the fact pattern, the suspect (if possible), the nature of the assistance and the purpose for which it is sought.⁴⁷

Paragraphs 6–12 of the annex concern the response of the requested state. Worth mentioning in particular are paragraphs 6 and 8. The former stipulates that the request is to be executed according to the national law of the requested

43 Draft Art. 14(3)(h).

44 ILC Report, *supra* note 1, at 113–114, § 15.

45 See, for instance, Art. 7(5) Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances.

46 See, for instance, Art. 18(4) UNCTOC and Art. 7 Convention on Mutual Assistance.

47 ILC Report, *supra* note 1, Annex, at 18, §§ 3 and 4.

state, but that procedures specified in the request should be followed, to the extent that they are not contrary to the national law of the requested state. The provision is well known in MLATs and serves to reconcile the principle of *lex loci regit actum* — entailing that investigative measures are governed by the law of the state where they are executed — with the practical consideration that the results of the act of assistance will be used in criminal proceedings in the requesting state.⁴⁸ Paragraph 8 exhaustively enumerates the grounds that states may invoke for the refusal of a request. Apart from some formal grounds, the provision mentions sovereignty, security, *ordre public* or other essential interests that may be prejudiced by the execution of the request. Moreover, the requested state is allowed to refuse assistance if it would be precluded by its own national law to perform the action in respect of a similar offence, were the state to have jurisdiction over that offence.⁴⁹ The reason for such inhibition could not be that the conduct does not constitute a criminal offence under the law of the requested state, because, as indicated before, states parties are under an obligation to criminalize crimes against humanity in their legislation. In other words, the provision does not introduce double criminality by the back door.

Paragraph 13 of the annex gives expression to the principle of purpose limitation. The requesting state is not allowed to transmit or use information or evidence provided by the requested state for other investigations, prosecutions or judicial proceedings without the prior consent of the latter. The principle is analogous to the specialty doctrine in extradition law. That witnesses and experts who are summoned to bear testimony in the requesting state must obtain a ‘safe conduct’ and are not to be prosecuted or punished for any offences committed prior to them leaving the requested state is a generally accepted principle and practice in international cooperation in criminal matters. Inclusion of this arrangement in paragraph 15 is therefore self-evident. Equally common is the transfer for purposes of testimony or identification of persons that are detained in the requested state. The person in question has to freely consent to the transfer. It makes sense that this person is kept in custody, while remaining in the requesting state and that, after his performance, he is to be transferred to the requested state again, without the latter having to submit an extradition request.⁵⁰

All these provisions are generally known in MLATs and none of them is controversial. At most one could wonder why the drafters have opted to incorporate some provisions in the Annex and not in draft Article 14 itself or vice versa. Would it not have stood to logic, from a systematic perspective, to add ‘bank secrecy’ to the other grounds for refusal in paragraph 8 of the annex? The explanation for this separation is probably that ‘bank secrecy’ is not

48 See for a similar provision, for example, Art. 4 Convention on Mutual Assistance in Criminal Matters.

49 ILC Report, *supra* note 1, Annex, at 19, § 8(c).

50 See the extensive regulation in §§ 17–19 annex (ILC Report, *supra* note 1, at 20) that verbatim follows Art. 18(10–12) UNCTOC.

allowed as ground for refusal, whereas states can at their option invoke the grounds enumerated in paragraph 8. The drafters wanted to make sure that the prohibition of bank secrecy as a ground for refusal would supersede any deviating arrangement in other instrument.

4. Some Final Reflections

In drafting the provisions on extradition and mutual legal assistance the ILC has navigated between producing a flexible and general framework and adapting the system more specifically to the nature of crimes against humanity. Of course, it is difficult to predict whether this arrangement will fully work in practice. In general, the position of the ILC is rather conservative and one wonders whether some provisions could not have been more dauntless, for instance, by further reducing the scope for refusal of legal assistance.⁵¹ One could also contend, however, that the cautious and flexible approach is an asset. On the one hand, the draft articles provide a solid normative base by stipulating that the convention takes precedence over other treaties whenever the former affords greater mutual legal assistance.⁵² On the other hand, draft Article 14(5) explicitly allows and encourages states parties to conclude further-reaching bilateral or multilateral agreements. Initiatives like the recent one on developing a comprehensive treaty on extradition and mutual legal assistance in respect of all core crimes are therefore officially endorsed.⁵³

Another important question is to what extent provisions on extradition and mutual legal assistance should be attuned to the specific nature of the crime they aim to counter. In the context of the deliberations on the UNCTOC, the issue gave impetus to some discussion. The delegation of Australia favoured a more detailed provision along the lines of Article 7 of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.⁵⁴ Taking the advisability of a crime-centred approach as point of departure, would it not have been preferable if the ILC had taken even more the particular exigencies of international cooperation in respect of crimes against humanity into account?⁵⁵ A comparison with the ICC Statute may shed light on this question.

51 Amnesty International, *supra* note 8, at 15, has criticized the grounds for refusal of assistance as intolerably broad and vague.

52 Draft Art. 14(7). It should be observed that the draft convention goes beyond Art. 18(6) UNCTOC and Art. 46(6) Convention against Corruption, lacking a similar rule of priority.

53 The initiative has been taken by Argentina, Belgium, Mongolia, the Netherlands, Senegal and Slovenia. See Parliamentarians for Global Action, *Background Information: Towards a Multilateral Treaty for Mutual Legal Assistance and Extradition for Domestic Prosecution of the Most Serious International Crimes*, 2017, available online at www.pgaction.org/pdf/Background-Information-MLA-Initiative.pdf (visited 25 May 2018).

54 Commission on Crime Prevention and Criminal Justice, *International Cooperation on Combating Transnational Crime: Question of the Elaboration of the International Convention against Organized Transnational Crime*, Sixth session, UN Doc. E/CN.15/1997/7/Add.1 (1997), at 15.

55 Some delegations have expressed critical comments, accusing the ILC of taking similarities with the regimes that have been employed in respect of other crimes too much for granted.

It is remarkable that the draft articles on extradition and mutual legal assistance do not differ considerably from the parallel provisions in Part 9 of the ICC Statute. Obviously, the ICC Statute does not contain an *aut dedere, aut judicare* device, as the option of national prosecution is generally obsolete if the case has been held to be admissible. The implications of the complementarity principle come to the fore in Article 90 of the ICC Statute, addressing the situation of competing requests. Draft Article 14(3) largely mirrors the corresponding Article 93 in the ICC Statute. The latter explicitly mentions the questioning of any person being investigated or prosecuted (sub-section (c)) and refers to the states' obligation to offer protection to victims and witnesses and the preservation of evidence (sub-section (j)). Such arrangements reflect the limited powers of international judicial institutions in a vertical context of cooperation, rather than the particularity of the crimes. Interestingly, Article 93(1)(g) specifically alludes to the exhumation and examination of grave sites, whereas the ILC has encompassed this investigative measure under the heading of 'obtaining forensic evidence'. The leeway for states parties to invoke grounds for refusal is limited to 'an existing fundamental legal principle of general application in the law of the requested State' (Article 93(3) of the ICC Statute). This is arguably more restrictive than the 'sovereignty, security, *ordre public* or other essential interest' that feature in the annex. I tend to agree with Amnesty International that the current phrasing is overly broad, especially in view of the fact that other treaties dealing with international crimes, like the Geneva Conventions and the Convention against Torture, do not contain a similar qualification of the obligation to cooperate.⁵⁶

It is incontrovertible that the suppression of international crimes involves specific evidentiary issues that pervade mutual legal assistance. The assessment of superior responsibility for war crimes or crimes against humanity often requires information on the chain of military command. States may be reluctant to divulge this information as it may easily collide with their national security interests. Article 72 of the ICC Statute acknowledges this problem and contains a balanced procedure that serves to reconcile the conflicting interests. This procedure originates from the experience of the *Blaškić* case, in which the ICTY Appeals Chamber — confronted with an adamant state (Croatia) — had taken great pains to meet the latter's concerns by introducing devices that would guarantee discretion.⁵⁷ One cannot expect a treaty regulating interstate cooperation to adopt such a provision, because Article 72 of the

See, for example, the statement by the delegation of Portugal: 'we would advise the Commission to proceed carefully when considering adopting solutions that have proved to be successful for other types of crimes. We should avoid falling into the temptation of simply transposing already existing regimes that were not designed for the specific context and legal nature of crimes against humanity.' *Statement at the UN GA 6th Committee*, UN Doc. A/C.6/72/SR.18, 23 October 2017, available online at <http://papersmart.unmeetings.org/media2/16154208/portugal.pdf> (visited 25 May 2018).

56 See Amnesty International, *supra* note 8, at 15.

57 Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Blaškić* (IT-95-14-AR108bis), Appeals Chamber, 29 October 1997, §§ 67–69.

ICC Statute mirrors a vertical structure of cooperation in which international criminal courts and tribunals wield more power over states to accomplish their objectives. In a similar vein, it is highly unlikely that a complete abolition of functional and personal immunities as envisaged in Article 27 of the ICC Statute is feasible in the interstate context. Draft Article 6(5) stipulates that '[e]ach State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person holding an official position, is not a ground for excluding criminal responsibility.' The admonition is apposite as far as the prosecution of an office holder by his own state is concerned, but would obviously not apply in respect of the prosecution of an incumbent foreign head of state, in view of the finding of the International Court of Justice in the *Arrest Warrant* case that personal immunities still persist in the horizontal context.⁵⁸ Any extradition request for the surrender of a foreign head of state would equally be moot. In this context the delegation of the Republic of Korea has rightly pointed at another, more modest, proposition of the Drafting Committee on immunities, reading that 'immunity *ratione materiae* shall not apply for certain crimes under international law including crimes against humanity'. The delegation favours a careful review of the subject matter in the ILC drafting process.⁵⁹

In short, a comparison of the regulative framework on surrender and mutual legal assistance in the ICC Statute with the parallel provisions in the draft articles warrants two conclusions. First, the fact that the draft articles do not considerably differ from similar provisions in the ICC Statute may indicate that the ILC has opted for staying on the safe side. Secondly, the elements in which the two regimes differ can be attributed to the distinction between vertical and horizontal models of cooperation, rather than to the need of attuning the model of cooperation to the peculiarities of crimes against humanity.

Some delegations have censured the ILC's draft articles for lacking an empirical basis and insufficiently taking the *opinio juris* of states into account.⁶⁰ Although this criticism has some superficial appeal, as far as mutual legal assistance is concerned it is problematic for two reasons. First of all, the consequences of mutual legal assistance, whether positive or negative, do not often transpire in criminal judgments. It may, for instance, be highly difficult to ascertain whether insufficient cooperation has caused the failure of a criminal trial or an acquittal, due to lack of credible evidence. After all, prosecutions of international crimes are notoriously complex and often haunted by evidentiary

58 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, judgment of 14 February 2002, ICJ Reports (2002) 3, § 58. On the subject of immunities, see the contribution by M. Frulli in this special issue of the *Journal*.

59 Republic of Korea, *Statement at the UN GA 6th Committee*, UN Doc. A/C.6/72/SR.21, § 38.

60 See in particular the statement of the Chinese delegation, arguing that 'many provisions of the related draft articles lacked empirical analysis, as they derived mainly from analogous provisions of existing international conventions on international crimes and required a comprehensive review of the existing practice and *opinio juris* of States'. See China, *Statement at the UN GA 6th Committee*, UN Doc. A/C.6/72/SR.18, available online at <http://papersmart.unmeetings.org/media2/16154538/china-e-.pdf> (visited 25 May 2018).

problems, due to cultural differences and unreliability of testimonial statements of traumatized witnesses.⁶¹ It would indeed require a sophisticated and comprehensive empirical investigation to find out which shortcomings can be attributed to deficient cooperation. Secondly, and more importantly, domestic prosecutions of crimes against humanity have been scarce. In her seminal article on the ‘state of the art’ in respect of developments in the law of crimes against humanity, Leila Sadat observed that only ‘[a] handful of national jurisdictions incorporated crimes against humanity in one form or another in their domestic legal systems, the best known of which were Canada, Israel, and France,’ without elaborating on the case law.⁶² There has been little practice to offer guidance to the ILC, especially not in the realm of international cooperation. The present draft articles intend to address precisely this lacuna, and the proposed framework on extradition and mutual legal assistance makes for a promising start.

61 See the landmark study of N.A. Combs, *Fact Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2013).

62 L. Sadat, ‘Crimes Against Humanity in the Modern Age’, 107 *American Journal of International Law* (2013) 334–377, at 341. In a similar vein, R. Cryer et al., *An Introduction to International Criminal Law and Practice* (3rd edn., Cambridge University Press, 2014), at 70, noting that ‘domestic prosecutions (of international crimes) are sparse’.