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# Relating to ‘The Other’

## The ILC Draft Convention on Crimes Against Humanity and the Mutual Legal Assistance Initiative

Larissa van den Herik\*

### Abstract

*The International Law Commission (ILC) Draft Convention on Crimes Against Humanity and the Mutual Legal Assistance (MLA) Initiative have largely run in tandem throughout their development. Both projects are motivated by similar gap-filling desires and both projects aim to expand the international criminal justice toolkit; however, these similarities have led to questions if both projects are necessary. This article addresses that question, looking at how different actors have answered this question during the respective processes of maturation of both projects and where both projects stand today. It argues that, while there is significant overlap between the projects, both instruments have merits which the other is lacking, and the optimal solution would be to bring both projects to fruition.*

**Keywords:** International Law Commission (ILC), Draft Convention on Crimes Against Humanity, Mutual Legal Assistance (MLA) initiative, crimes against humanity, international criminal law.

### 1 Introduction

At its 66th session, in 2014, the International Law Commission (ILC) decided to include the topic “crimes against humanity” in its programme of work and to appoint Sean Murphy as Special Rapporteur.<sup>1</sup> In the run-up to this inclusion, in the recommendations regarding the long-term programme, a global convention on crimes against humanity was presented as ‘the missing piece’ in the current framework of international law.<sup>2</sup> The outcome of this process, the Draft Articles on Prevention and Punishment of Crimes Against Humanity, which was present-

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1 Int'l Law Comm'n, *Report on the Work of Its Sixty-Sixth Session*, U.N. Doc. A/69/10 (2014), at p. 266.

2 Int'l Law Comm'n, *Report on the Work of Its Sixty-Fifth Session*, U.N. Doc. A/68/10 (2013), Ann. B. See also, Draft Articles on Prevention and Punishment of Crimes Against Humanity, with commentaries, in Int'l Law Comm'n, *Report on the Work of Its Seventy-First Session*, U.N. Doc. A/74/10 (2019), p. 22, General commentary, Para. 2.

ed to the United Nations (UN) General Assembly at the ILC's 71st session in 2019, is discussed in this symposium.<sup>3</sup>

Around the same time as the Draft Articles were being conceived, albeit a bit earlier, namely, late 2011, an expert meeting had taken place in The Hague.<sup>4</sup> This meeting was held outside any formal structures of an international organization. At the meeting, organized by Belgium, the Netherlands and Slovenia, representatives of ministries of justice, foreign affairs and prosecution agencies of 19 States came together to discuss whether there was 'a legal gap' in the international legal framework concerning mutual legal assistance between States for the national adjudication of international crimes. Some ICC representatives were also present, including the ICC President. Having concluded that there was indeed a gap, six States took the lead in starting up a process towards the negotiation of a modern procedural multilateral treaty on mutual legal assistance and extradition for international crimes.<sup>5</sup> This came to be known as the Mutual Legal Assistance (MLA) Initiative. The six States organized preparatory conferences, informal consultations and side events at international gatherings, culminating in a Draft Convention and the setting of a Diplomatic Conference in June 2020 in Ljubljana for formal negotiations. The Diplomatic Conference was postponed because of the COVID-19 pandemic.

Both projects, the ILC Draft Articles and the MLA Initiative, were thus inspired by a similar gap-filling desire, and both projects aim at further expanding the international criminal justice toolkit. Yet, as soon as they came into being, proponents of both projects have had to justify their enterprise in relation to 'the other'. The leading question in this comparative exercise has been throughout whether the two projects were mutually supportive or whether they were rather mutually exclusive. This short essay sheds light on how different actors have answered this question during the respective processes of maturation of both projects and where both projects stand today.

## 2 Background and Ambition of the Two Projects

The inclusion of the topic of 'crimes against humanity' on the ILC agenda has been very much driven by scholars. The late professor Cherif Bassiouni advocated

3 See for an appraisal of the ILC draft article on first reading, C.C. Jalloh, 'The International Law Commission's First Draft Convention on Crimes Against Humanity: Codification, Progressive Development, or Both?', *Case Western Reserve Journal of International Law*, Vol. 52, 2020, pp. 331-405.

4 Report of Expert Meeting, 'A Legal Gap? Getting the Evidence Where It Can Be Found: Investigating and Prosecuting International Crimes', *The Hague Institute for Innovation of Law (HiIL)*, 22 November 2011, available at: [www.iapassociation.org/getattachment/Conferences/Annual-Conferences/Annual-Conference-2015/Wednesday-16-September-2015/20AC\\_SIGM\\_SG\\_Legal\\_Gap.pdf.aspx](http://www.iapassociation.org/getattachment/Conferences/Annual-Conferences/Annual-Conference-2015/Wednesday-16-September-2015/20AC_SIGM_SG_Legal_Gap.pdf.aspx) [hereafter 'Background Paper by The Netherlands, 2011'].

5 The group of Core States is composed of Argentina, Belgium, the Netherlands, Senegal, Slovenia and Mongolia.

a specialized global convention on crimes against humanity throughout his life.<sup>6</sup> Building on this legacy, professor Leila Sadat launched the Crimes Against Humanity Initiative in 2008 at her Whitney Harris Institute in St. Louis,<sup>7</sup> and in his capacity as ILC member professor Sean Murphy ultimately succeeded in putting the topic on the ILC agenda. In turn, the MLA Initiative has been pushed by practitioners, including national prosecutors and investigators, who were confronted in their crime-fighting efforts with deficiencies in the international legal framework on mutual legal assistance and extradition – a framework that was formed by ‘a patchwork of partly outdated treaties’.<sup>8</sup> The different trajectories (scholarly versus practitioner), and possibly also the different ministries involved in placing the projects on the international agenda (foreign affairs versus justice and security), has had implications for their conceptualization and framing as well as for the institutional setting in which both projects materialized.<sup>9</sup>

The project for a crimes against humanity convention, at least as conceived by scholars, was initially presented as laying the ground for an updated twin sister of the Genocide Convention.<sup>10</sup> This was the case, albeit to a much more limited extent, for the ILC as well. According to the scholarly views, a specialized convention could offer a holistic regime on crimes against humanity also including provisions on prevention, *non-refoulement*, state responsibility and a dispute settlement clause that would enable the International Court of Justice (ICJ) to exercise jurisdiction on these questions. It was thus envisaged that a global crimes against humanity convention would complement the regimes that exist for the other two categories of crimes, namely, genocide and war crimes.

In contrast, the MLA Initiative has always had a more technical flavour geared towards operationalizing general obligations and ambitions to investigate and prosecute international crimes. The MLA Initiative was thus based on the practical insight that international crime prosecution presupposes transnational efforts to be able to gather evidence across boundaries and particularly to gain access to sites where crimes were effectively committed and that legal structures facilitating such efforts were lacking. The Initiative was not confined to crimes against humanity, but encompassed all core international crimes in light of the conclusion at the 2011 expert meeting that the MLA-regimes offered by the Gen-

6 E.g., M.C. Bassiouni, ‘Crimes against Humanity: The Need for a Specialized Convention’, *Columbia Journal of Transnational Law*, Vol. 31, 1994, pp. 457-494.

7 L.N. Sadat (Ed.), *Forging a Convention for Crimes against Humanity*, Cambridge, Cambridge University Press, 2011. See also Crimes Against Humanity Initiative at Washington University in St. Louis School of Law, available at: <http://sites.law.wustl.edu/WashULaw/crimesagainsthumanity/>.

8 Background paper by the Netherlands, 2011, *supra* note 4, p. 2.

9 For an early comparative analysis, see P. Cahan, ‘Gaps in the Legal Regime of Interstate Cooperation in Prosecuting Crimes Under International Law’, *Czech Yearbook of International Law*, Vol. 6, 2015, pp. 289-311; D. Tladi, ‘A Horizontal Treaty on Cooperation in International Criminal Matters: The Next Step for the Evolution of a Comprehensive International Criminal Justice System?’, *South African Public Law*, Vol. 29, 2014, pp. 368-387.

10 See, e.g., Sadat, *supra* note 7, p. 359.

ocide Convention and the Geneva Conventions were deficient or even entirely lacking in certain respects.<sup>11</sup>

Having been included on the ILC agenda, the Draft Convention on Crimes Against Humanity is to be elaborated within the consolidated treaty-making structures of the UN. This allows for universal ambitions in terms of approach and contents. The MLA Initiative does not have a similar institutional embedding. While initially some steps were made to further develop the MLA Initiative within the forum of the United Nations Office on Drugs and Crime (UNODC) Commission on Crime Prevention,<sup>12</sup> it was eventually decided that the Initiative would operate as a stand-alone process, outside of the UN or the ICC Assembly of States Parties. Any State can become a supporting State for the MLA Initiative by signing a note verbale and only supporting States can actively participate in the Diplomatic Conference. Non-supporting States are invited as observers. Mid-April 2020, there were 73 States supporting the MLA Initiative.

In sum, the two projects had different starting points and initially they also had clearly distinct end products in mind. On the one hand, there was the ambition of dedicated scholars to develop an updated 21st century twin sister version of the Genocide Convention for Crimes Against Humanity later nuanced somewhat by the ILC Special Rapporteur, and on the other hand, practitioners were calling for an updated MLA-regime for all core international crimes. As such, the two projects and their interaction could be visualized as a Celtic Cross, whereby the ILC Draft Articles would constitute the vertical axe aimed at a holistic regime for crimes against humanity also including state responsibility and a clause for ICJ jurisdiction, and the MLA Initiative would represent the horizontal axe zeroing in on one specific feature, namely, state cooperation in the form of mutual legal assistance and extradition but then not only for crimes against humanity but also for genocide and war crimes. In this picture, only the part with provisions on mutual legal assistance and extradition for crimes against humanity would overlap within the ring that is exemplar for a Celtic Cross. Outside the ring, each product had its own merits and independent value that the other, for structural reasons, could not offer so easily.

### 3 Relationship to the ICC System

In their relationship to the ICC as an institution and the ICC system more broadly, both projects have taken care from the outset not to upset the existing framework. They have generally adhered to the crime definitions as agreed to in

11 For an analysis and the conclusion that the treaty framework regulating mutual legal assistance for genocide, crimes against humanity and war crimes prosecutions is limited and outdated, see also W. Ferdinandusse, 'Improving Inter-State Cooperation for the National Prosecution of International Crimes: Towards a New Treaty?', *ASIL Insight*, Vol. 18, No. 15, July 2014.

12 A draft resolution E.CN.15/2013/L.5 was eventually withdrawn because some delegations had reservations as to the competence of the Commission on Crime Prevention and Criminal Justice for this matter because the crimes were deemed too political, as recorded in UN Doc. E/2013/30 – E/CN.15/2013/27, 2013, Paras. 64-66.

Rome,<sup>13</sup> with the exception of the awkwardly defined notion of gender.<sup>14</sup> Both projects offer a *horizontal* cooperation framework that complements the *vertical* regime of Chapter IX of the ICC Statute. As such they can be conceptualized as structures that are supportive to the ICC's main goal to fight impunity and that correspond with the idea that the ICC is complementary to national criminal jurisdictions. Indeed, both projects contribute to the idea that the current system of international criminal justice relies on the notion of 'shared responsibility' by the ICC and States.<sup>15</sup> Despite this respect for ICC definitions and rules and the desire to foster the spirit of the ICC, both projects also have built-in options to disconnect from the system, for instance, through 'without prejudice' clauses that allow for further development through customary international law.<sup>16</sup>

More importantly, in the context of both projects, it has repeatedly been underlined that non States Parties to the ICC can also very well sign up to the newly envisaged treaties as the duty to prosecute international crimes predates the ICC and exists independently of it.<sup>17</sup> Indeed, States that have displayed a certain ambivalence towards the ICC as an institution do retain a separate and perhaps even increased interest in a treaty that encourages and facilitates domestic prosecution of international crimes. Such a treaty would not only enable States to effectively combat international crimes in accordance with their international obligations but it would also allow them to keep cases away from the ICC should they wish to do so for lack of confidence. In comparison to other initiatives that

13 The choice to copy-paste the ICC definition has not remained without criticism. China, for instance, submitted that some States had possibly not ratified the ICC Statute because of disagreement precisely over that definition, UN Doc. A/C.6/70/SR.22, 23 November 2015. Pursuant to this view, adhering to the ICC definition could negatively affect the aspiration of universal participation in a global crimes against humanity convention.

14 As noted in the commentaries, the understanding of the term gender had evolved towards an approach of viewing gender more as socially constructed rather than as biological and the decision not to include the ICC definition would offer space for this evolving understanding. Int'l Law Comm'n, 'Draft Articles on Prevention and Punishment of Crimes Against Humanity', in Int'l Law Comm'n, *Report of on the Work of Its Seventy-First Session*, U.N. Doc. A/74/10 (2019), Paras. 41-42.

15 Judge Pikis articulated this idea of 'shared responsibility' in the ICC context in his opinion to *Lubanda and Ntaganda*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", Appeals Chamber, 13 July 2006, Separate and Partly Dissenting Opinion of Judge Georgios M. Pikis, Para. 31, as cited by Judge Silvia Fernandez de Gurmendi in her Keynote Address at the Expert Meeting in 22 November 2011 referred to *supra* in note 4.

16 E.g., Draft Art. 2, Para. 3 of the ILC Draft Articles. See also Art. 3 of the draft MLA Initiative below.

17 See, e.g., the general commentary preceding the preamble in the Draft Articles on Prevention and Punishment of Crimes Against Humanity, with commentaries, *supra* note 2, Para. 4. The MLA website of Slovenia also emphasizes that the MLA Initiative is open to all UN member states and that since there is no relation to the work of the ICC, both States Parties as well as non-States Parties can join.

have been said to react – or rebel – against the ICC, such as the Malabo Protocol,<sup>18</sup> horizontal cooperation and domestic prosecution is probably more effective in pre-empting ICC intervention and in any event less burdensome or costly. Hence, reservation towards the ICC cannot in itself explain or justify a decision not to participate in either project and indeed also non States Parties to the ICC have displayed favourable positions towards either project.<sup>19</sup>

#### 4 Compatibility of the Two Projects – An Overview of Different Positions

While both projects were similar in their approach to the ICC system, they started out with a different orientation, as outlined above. Yet, despite each having own merits from a systemic and legal point of view, the question of compatibility has been ever present for both projects. To some extent, the question remains unresolved or an open question in the sense that different actors hold different views. It is also true that over time, the two projects have grown closer and the circle of overlap has increased rather than decreased.

Notably, when the crimes against humanity project was proposed for the ILC agenda, certain unique assets of a potential new convention were not mentioned as key elements, such as the introduction of a treaty-based obligation to prevent the codification of state responsibility and the possibility to include a jurisdictional clause for the ICJ. While litigation at the ICJ in a variety of cases has exposed the jurisdictional gap leading to an overfocus on genocide, these elements were naturally not the ones that would necessarily entice States. Instead, the key elements that were mentioned to support inclusion of the topic in the ILC agenda zoomed in on domestic prosecution and regarded the definition, criminalization and jurisdictional questions, robust inter-state cooperation and imposing an *aut dedere aut judicare* obligation.<sup>20</sup> This emphasis brought the project closer to the MLA Initiative in terms of perspective.

When the proposal to include the topic of crimes against humanity on the ILC agenda was discussed in the Sixth Committee, the States of the MLA Initiative agreed that gaps existed and drew attention to their own project. Referring to the Initiative and to existing questions regarding the relationship to the ICC, Slovenia held that inclusion of the topic of “crimes against humanity” on the ILC agenda “required further consideration”.<sup>21</sup> The Netherlands, in turn, indicated that,

18 See, more elaborately, L. van den Herik & E. van Sliedregt, ‘International Criminal Law and the Malabo Protocol – About Scholarly Reception, Rebellion and Role Models’, in S. Dewulf (Ed.), *La [CVDW] - Liber Amicorum Chris Van den Wyngaert*, Antwerp, Maklu Uitgevers België, 2017, pp. 511-529, also available as a Grotius Centre Working Paper 2017/066-ICL, available at: [www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voorpbliekrecht/grotius-centre/working-paper-series/2017-066-icl.pdf](http://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voorpbliekrecht/grotius-centre/working-paper-series/2017-066-icl.pdf).

19 An example of a State that has been very reserved towards international criminal jurisdictions but that supports the MLA Initiative is Rwanda. See list of supporting countries, available at: [www.gov.rw/en/registries/projects/mla-initiative](http://www.gov.rw/en/registries/projects/mla-initiative).

20 Int'l Law Comm'n, *Report on the Work of Its Sixty-Fifth Session*, *supra* note 2, Ann. B-II, Para. 8, p. 94.

21 UN Doc. A/C.6/68/SR.21, Para. 56.



“what was needed most in order to prevent and prosecute crimes against humanity was a renewed focus on improving the capacity to prosecute crimes at the domestic level”.<sup>22</sup> The Netherlands insisted that the missing link was an international instrument for mutual legal cooperation covering all major international crimes. Consequently, the Netherlands invited States to join their own effort for opening negotiations for a multilateral treaty for mutual legal assistance and extradition in the domestic prosecution of atrocity crimes.<sup>23</sup> In tune with this observation that an adequate international cooperation regime for all core crimes was needed most, it has been suggested that the ILC project be extended to genocide and war crimes, but this has never been seriously considered.<sup>24</sup>

As the Special Rapporteur moved forward with his work, the Netherlands as well as the other lead States of the MLA Initiative kept referring to their project, but they gradually became more supportive of the ILC Draft Articles and called for close cooperation between the ILC and the Initiative.<sup>25</sup> This call for close cooperation was echoed by States not involved in the MLA Initiative such as Sierra Leone.<sup>26</sup> When discussing the Draft articles on first reading in the Sixth Committee, the Netherlands stated:

Although there are convergent qualities between the MLA Initiative and the ILC’s ongoing work on crimes against humanity, there are also important differences, notably regarding the envisaged scope of application. We therefore consider that both initiatives are complementary, and that they can co-exist and be developed side-by-side.<sup>27</sup>

The position that both projects had a different scope and different purposes and negotiation processes has also been adopted by other States supporting the MLA Initiative. As Argentina stated, “both deserve to be considered separately by the international community, taking into account their specificities and the different forums in which they were developed”.<sup>28</sup> While generally agreeing, the Special Rapporteur also pointed out in his fourth report that the MLA Initiative had

22 UN Doc. A/C.6/68/SR.18, Paras. 36-37; UN Doc. A/C.6/69/SR.20, Para. 16.

23 UN Doc. A/C.6/69/SR.20, Para. 17.

24 This suggestion was made by Dire Tladi within the ILC. Tladi, *supra* note 9, at 382. The same point has also been made by Sierra Leone, UN Doc. A/CN.4/726, p. 25, and agreed to by ILC member Charles Jalloh. Int’l Law Comm’n, Summary record of the 3458th meeting, UN Doc. A/CN.4/SR.3458 (2019), p. 10.

25 UN Doc. A/C.6/70/SR.21, p. 9. See also Argentina UN Doc. A/C.6/71/SR.29.

26 Int’l Law Comm’n, Crimes against Humanity: Comments and observations received from governments, international organizations and others, UN Doc. A/CN.4/726 (2019), p. 26.

27 UN Doc. A/C.6/72/SR.20, p. 5. The full text is available at: <http://statements.unmeetings.org/media2/16154353/netherlands.pdf>. The Dutch government had asked its independent advisory committee on public international law for advice on the question of compatibility. The committee concluded that the two projects were compatible. The advice is available at: [www.cavv-advies.nl](http://www.cavv-advies.nl) and was attached to the Netherlands comments to the ILC for its 71st session in 2019. For full disclosure, it should be mentioned that the author of this article is the current chair of the Dutch Advisory Committee and she was also the lead author of that advice.

28 Comments and observations from governments, international organizations and others, *supra* note 26, p. 121 and for Belgium, p. 122.



evolved over time to include issues not normally dealt with in MLA and extradition treaties.<sup>29</sup> His comparison of topics addressed in the respective draft conventions highlighted significant overlap, and the Special Rapporteur feared that pursuit of both projects simultaneously might be inefficient and confusing with the risk of failure for both. He appreciated that the provisions on mutual legal assistance and extradition were more detailed in the MLA Initiative. In the eyes of the Special Rapporteur, the risk existed that, even if both projects were successful, this could lead to a situation where two States bound by similar obligations in different conventions would not be bound *inter se*.<sup>30</sup> While this is a valid concern, the risk should probably not be overstated, and it might equally be true that a State which has signed up to one of the two treaties may be more easily inclined to do so for the other as well, as it already has some relevant implementing legislation in place. More importantly, the Special Rapporteur's comparative table also illustrates that there are a number of unique features that only the ILC Draft Articles consider and which lie in the realm of prevention, state responsibility (general obligation) and dispute settlement regarding state responsibility.<sup>31</sup> As for the area concerning mutual legal assistance and extradition, this is and will probably remain a patchwork where different States are bound to different obligations towards other States depending on who ratified what. This would also be the case with only one of the two projects going forward that would then coexist with bilateral treaties and other multilateral treaties, including provisions on mutual legal assistance which all have different State parties.

The MLA Initiative recognizes this inevitable patchwork element and, in fact, it explicitly allows for a differentiated regime. According to the latest Draft Convention, States may opt in and extend the MLA-regime that the convention offers also in respect of crimes other than genocide, crimes against humanity and war crimes. The crimes currently included in the draft annexes are: aggression, torture and enforced disappearance or other extraditable offences under the law of the requested State Party. The MLA Initiative also opens the door for the further development of genocide, crimes against humanity and war crimes under international law beyond the ICC definitions to which the draft MLA Convention refers in the first instance in Article 2. This is laid down in Article 3 of the draft MLA Convention, which reads:

#### Optional extension of the scope of this Convention

- 1 Each State Party may, at the time of ratification, acceptance or approval of or accession to this Convention, or at any later time, notify the depositary that it shall apply this Convention to the international crime or crimes listed in any of the annexes to this Convention in relation to other

29 S. Murphy (Special Rapporteur on Crimes Against Humanity), *Fourth Report on Crimes Against Humanity*, A/CN.4/725 (2019), Para. 323.

30 *Ibid.*, Para. 331.

31 *Ibid.*, Para. 329.

States Parties which have declared to apply the Convention to the same crime.

- 2 The annexes to this Convention shall form an integral part thereof for the State Party that has notified the depositary that it shall apply this Convention to the international crime or crimes listed in any of the annexes to this Convention, in accordance with paragraph 1. Unless expressly provided otherwise, a reference to this Convention constitutes at the same time a reference to any annexes thereto.
- 3 Without prejudice to article 2 and paragraphs 1 and 2 of this article, States Parties may, on an ad hoc basis, agree to apply this Convention to any request that refers to an act or omission that qualifies as:
  - A crime of genocide, crime against humanity, war crime, crime of aggression, torture or enforced disappearance as defined in international law;
  - A crime of genocide, crime against humanity, war crime, crime of aggression, torture or enforced disappearance in the law of the requesting State Party; and
  - An extraditable offence under the law of the requested State Party.

This provision would allow States to move beyond only an MLA-regime for genocide, crimes against humanity and war crimes as defined in the ICC Statute and to extend it to other crimes and broader definitions, while also leaving space for States that prefer not to do so. Effectively, this will mean that States seeking mutual legal assistance from another State should verify whether the State is a party, and if so which annexes both States have agreed to, and whether other MLA treaties between the two States offer additional or alternative legal basis to facilitate mutual legal assistance. This query of what exact regime is in place between the two States is the inevitable result of the patchwork mentioned above. This is not problematic as such, and as the number of States signing up to the convention including the annexes increases, the amount of patchwork will decrease.<sup>32</sup>

The draft MLA Convention in its current form including the above-mentioned Article 3 is the outcome of two preparatory conferences and informal consultations. As indicated, the Diplomatic Conference was scheduled for June 2020, but has been postponed as a result of the COVID-19 pandemic. As per Article 97 of the current draft, a negotiated treaty could enter into force as soon as two States have ratified and the convention could then gradually expand in coverage as new States come on board. The General Assembly's Sixth Committee, in turn, has not taken the step to recommend the elaboration of a convention or organize an international conference of plenipotentiaries on the basis of the ILC Draft Articles.<sup>33</sup> In fact, at the 2019 meeting of the Sixth Committee during the 74th

32 For a more critical appraisal of both initiatives as well as their compatibility, see A. Bisset, 'And Then Two Came Along At Once: Inter-state Cooperation on Core Crimes, the ILC and the Group of Core States', *International Criminal Law Review*, Vol. 20, 2020, pp. 551-586.

33 GA Res. 74/187, 18 December 2019.

session of the General Assembly, a not insignificant number of States including the United States, Russia, Iran and Israel as well as others held the view that further deliberation was required before next steps could be made.<sup>34</sup> Both projects are thus currently on halt albeit for different reasons and with different prospects.

## 5 Conclusion

The parallel elaboration of the two projects discussed here is an illustration of the well-known fact that international law develops organically rather than systematically. As there are now two draft conventions on the table, it is up to States to bring them forward and to determine the pace of doing so. In their current shape, each draft still has merits that the other does not have, and from an international law and a rule of law perspective, the optimal outcome would be that both projects come to fruition.<sup>35</sup> If the actual negotiations of the respective drafts are sequenced rather than that they unfold in tandem, this might allow for better coordination particularly on the areas of overlap regarding mutual legal assistance and extradition. Ideally, and just as both projects adhered to the ICC definitions, the MLA provisions in both treaties should coincide as much as possible or at least they should preferably be formulated in similar ways and with sufficient detail and precision offering a legal basis for different types of legal assistance. It currently seems that the MLA Initiative will move forward faster with negotiations likely opening in the course of next year. It is to be hoped that the negotiations for a Crimes Against Humanity convention will follow suit at some point in the not too distant future after that as its unique features regarding prevention, state responsibility and ICJ jurisdiction are dearly needed too.

34 See, e.g., UN Doc. A/C.6/74/SR.24, 25 and 26. Contrary to that, there were 43 States that made statements to support the ILC draft, available at: <http://statements.unmeetings.org/media2/23557769/-e-austria-statement-item-79-eop.pdf>.

35 But see, on international and transnational criminal law treaties as modalities of extending transnational penal reach to repress political opposition beyond borders, N. Palmer, 'International Criminal Law and Border Control: The Expressive Role of the Deportation and Extradition of Genocide Suspects to Rwanda', *Leiden Journal of International Law*, Vol. 33, 2020, pp. 789-807, and as models for potential new forms of authoritarian international law, T. Ginsburg, 'Authoritarian International Law?', *American Journal of International Law*, Vol. 114, 2020, pp. 221-260.