A Legal Gap?

Getting the evidence where it can be found: Investigating and prosecuting international crimes.

Report expert meeting
The Hague, 22 November 2011

HiiL

Government of the Netherlands

Preface

This report contains the conclusions of an expert meeting that was held in The Hague on 22 November 2011 to explore the existence of a legal gap in the international legal framework concerning mutual legal assistance between States for the national adjudication of international crimes. It was prepared by HiiL for the Dutch Ministry of Security and Justice. We would like to thank the following persons for their work on this report: Matthew Simon, Gaetano Best, Agata Walczak, Marzia Della Corte and Denise Tan.

Introduction

On the 22nd of November 2012 experts from the Dutch Ministry of Security and Justice, the Dutch Ministry for Foreign Affairs, the Belgian Ministry of Justice, and the Slovenian Ministry of Justice, together with the Hague Institute for the Internationalisation of Law, organised an expert meeting in The Hague on the question:

> **Is there a legal gap in the international legal framework concerning mutual legal assistance between States for the national adjudication of international crimes?**
> **And, if such a legal gap exists, how might it best be filled?**

The expert meeting brought together 38 participants from 19 States, from ministries of justice, prosecution services, and ministries of foreign affairs. It was generally felt that there was, indeed, a gap and that a further exploration of the issue was necessary.

The meeting was moderated by Sam Muller, Director of the *Hague Institute for the Internationalisation of Law* (HiiL). A list of participants is attached as Annex I.

The following States were represented at the meeting: Argentina, Australia, Belgium, Canada, Colombia, Czech Republic, Denmark, Finland, France, Germany, Japan, Norway, Slovenia, South Africa, Sweden, The Netherlands, The Philippines, United Kingdom, United States.

Representatives of civil society, the international tribunals and the ICC were present at the concluding session of the meeting.

The challenge

The prosecution and trial of suspects of international crimes such as crimes of genocide, crimes against humanity and war crimes is primarily a national responsibility. In the words of the Statute of the International Criminal Court (ICC), it is the "duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." According to the principle of complementarity, the international community must step in only in the event a State is not able or not willing to prosecute or try these suspects. For the principle of complementarity to become truly effective, it is essential that international crimes are criminalised in domestic penal law, that sufficient jurisdiction is established, that States are truly able to give each other legal assistance and, if the case arises, extradite on the basis of *aut dedere aut judicare*.

On the first issue – criminalisation of the crimes under the Statute in domestic criminal law – impressive progress has been made over the past 10 years. The gap at the heart of the exploration conducted with the expert meeting relates to the procedural issues: international legal cooperation between States that want to prosecute nationally. International cooperation in criminal matters is paramount for effective national prosecutions relating to mass atrocities. As the highly experienced prosecutor, **Siri Frigaard**, said in her key-note address: "rarely, and if ever, will all witnesses and evidence be found in the state that is conducting the prosecution." It is therefore of the utmost importance that the international legal framework for cooperation in criminal matters in this domain facilitates and stimulates this aspect of complementarity.

The ICC Statute has extensive provisions on cooperation between the Court and States (mainly part 9, Articles 86 – 102). However, cooperation between States for the benefit of national prosecutions is less well regulated and, in many cases, absent: The Genocide Convention of 1948 and the Geneva Conventions of 1949, for instance, do not contain (adequate) provisions on extradition and legal assistance. Modern provisions on mutual legal assistance and extradition have only since the 1980's been included in treaties.
This shift in focus can be seen in the Torture Convention of 1984 where provisions on extradition and legal assistance are incorporated. This development continued and culminated in conventions as the United Nations Convention against Transnational Organized Crime (UNTOC) of 2000, the Convention Against Corruption (2003) and the Convention on Enforced Disappearances (2006). The UNTOC provides for a comprehensive legal framework consisting of substantive as well as procedural provisions.
Thus provisions on extradition and legal assistance with respect to these crimes are also absent.

The exploration

The expert meeting looked at two core questions:

- Is there a conventional legal gap in the international legal framework concerning the national adjudication of international crimes?
- If that is the case, how could it best be addressed?

The exploration was conducted into two parts:

- A number of addresses by experienced key experts in order to get a better grasp of the issues at hand and;
- An interactive discussion, both in small groups and during the plenary session.

Key-notes by experts

The meeting began with the keynote address delivered by **Judge Silvia Alejandra Fernandez de Gurmendi** of the ICC. In her address, Judge Gurmendi stated that in the early days of the ICC, the focus was placed primarily on the court itself. However, the Court has increasingly pronounced itself on the notion of shared responsibility between the ICC and the States. This, she said, is being driven by two trends: (i) the Court and Member States are making more use of the Rome Statute Article 93(10) and (ii) the concept of positive complementarity.

In her address, **Siri Frigaard**, *Chief Public Prosecutor at Norwegian National Authority for Prosecution of Organised and Other Serious Crime*, unequivocally concluded that there is indeed a conventional legal gap in this area. In her extensive experience as Public Prosecutor, she found that the prosecution of war crimes was an extremely resource intensive endeavor. Key to this is legal assistance from other states. Hence, effective legal assistance is directly related to the financial and other resources that are required for the case. Most typically this assistance is carried out through rogatory letters for legal assistance. Receiving answers from countries with no cooperation instrument creates much greater time delays. We need flexible and permissive legislation; we need treaties or agreements, knowledge, and also good contacts. In mutual legal assistance, thorough and detailed preparation is the key to success.

In his opening remarks, **Gérard Dive**, *Coordinateur fédéral de la coopération judiciaire belge avec les juridictions pénales internationales*, shared his extensive experience in dealing with mutual legal assistance in area of mass atrocities. He also concluded from his experience that there was a general feeling that a legal gap existed, especially in the area of extradition and mutual legal assistance.

Two further key notes were held. First by H.E. Mr. **Fred Teeven**, *Dutch State Secretary of Security and Justice,* who reminded everyone that justice begins at home. Speaking from his experience as a former Public Prosecutor involved in international crime cases, State Secretary Teeven stated that the successful investigation and prosecution of international crimes depends, not only on technical assistance and exchange of best practices, but on mutual legal assistance in criminal matters and extradition; as much of the evidence in these cases is found outside the prosecuting State. He suggested that the existing legal framework in this regard is incomplete and these issues should be dealt with. Treaties such as the UN Convention Against Torture, the UN Transnational Organized Crime Convention and the UN Convention against Corruption all contain extensive provisions for extradition and mutual legal assistance in criminal matters which can serve as a model.

Following this address, *the State Secretary for Justice of Slovenia*, H.E. Mr. **Boštjan Škrlec** made an intervention. Also speaking from his experience as State Prosecutor, State Secretary Škrlec indicated that a legal gap indeed exists in this area. He indicated that greater cooperation in international criminal matters from States would lead to fewer instances of impunity. Using state of the art mechanisms found in other conventions could bring the international legal framework for war crimes, crimes against humanity and the crime of genocide to the same level of cooperation for the crimes of torture and corruption.

Interactive discussion

The participants concluded that there is a legal gap which, according to most of them, creates legal and practical obstacles for an adequate international cooperation: for both extradition and mutual legal assistance.

There was a consensus that the nature of the legal gap merits further exploration in light of the shared view that there should not be any safe havens in respect of international crimes and that the system to deal with these crimes should be as efficient and as effective as possible. Against this backdrop it was felt that a further exploration should be conducted to identify areas where the international legal framework for inter-State cooperation should be enhanced.

In that exploration, the following (non-exhaustive) areas should be addressed and developed:

Jurisdiction

- Jurisdiction and criminalisation should focus on ICC crimes, without precluding participation to the system of States not party to the Rome Statute.
- In some States, national judiciaries take a very formal approach to cooperation in general, rendering cooperation very difficult in the absence of a clear legal instrument. Other States are able to take a more flexible and informal approach to cooperation.
- The need to deal with *ne bis in idem* as it applies between States
- The need to deal with *aut dedere aut judicare* between States: either prosecution or extradition
- Need for clear 'forum rules'[1]

Mutual Legal Assistance

- Encourage / allow participation of authorities of a requesting State in the execution of their own requests in the requested State
- The tranfer of cases to another jurisdiction (transfer of criminal proceedings)
- Freezing of assets
- The need for a network of known, coordinating authorities in each State

Extradition

- The need for effective and efficient procedures
- Look at current effectiveness – or lack of it – of existing international treaties;
- Look at grounds for refusal to extradite

[1] Procedural prescriptions of the requesting State to the executing authorities of requested State to enhance usability as evidence.

On the way forward

- It was generally felt that a significant issue has been identified, which needs to be explored further in the interest of making the international criminal justice system more effective and efficient.
- In order to move forward, broader support should be sought from States coming from the different parts of the world.
- While not all States require the same level of formality for international legal cooperation, many of them do require it, which makes this an important element of making national investigations and prosecutions of mass atrocities more effective and avoiding safe havens.
- It was also noted that enhancing mutual legal assistance is not only essential for the investigation and prosecution of international crimes but is also an effective way to exchange best practices, know-how and expertise.
- A report of the meeting will be issued.
- The international calendar of events will be used to inform and develop support for the project.
- A side-event at the ASP appears to be a good opportunity to involve more States in this exploratory process.
- A second expert meeting will be held in the course of next year to further explore the challenge in more detail.

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Annex I - Expert Meeting Participants

Speakers

- Hon. Justice Silvia Alejandra Fernández de Gurmendi (ICC)
- Siri Frigaard (Chief Public Prosecutor at Norwegian National Authority for Prosecution of Organised and Other Serious Crime)
- Gérard Dive (*Coordinateur fédéral de la coopération judiciaire belge avec les juridictions pénales internationals*)
- Sam Muller (HiiL – Director)
- H.E. Mr. Fred Teeven (Dutch State Secretary of Security and Justice)
- H.E. Boštjan Škrlec (State Secretary for Justice of Slovenia)

Moderators

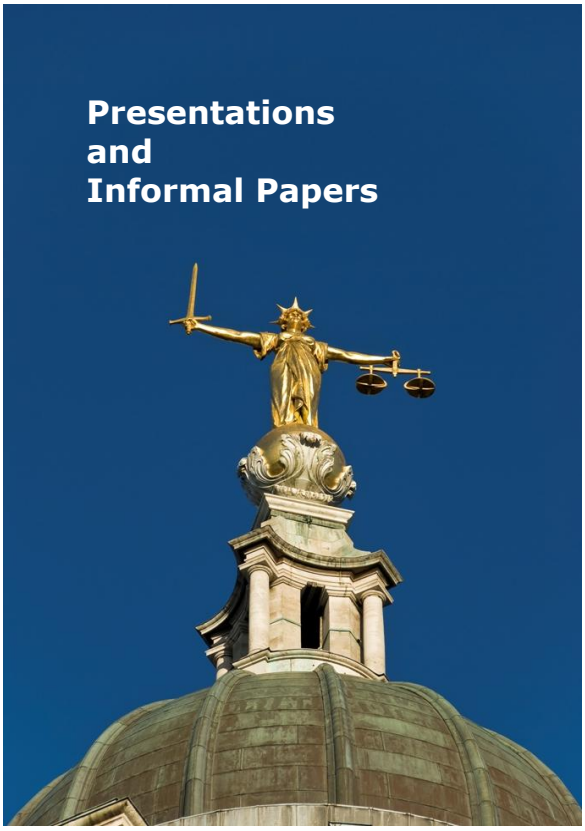
- Kanbar Hossein Bor (British Embassy – Foreign & Commonwealth Office – Legal Adviser & Head of International Law Section, United Kingdom)
- Thomas Henquet (Ministry of Foreign Affairs – Senior Jurist, The Netherlands)
- Christian Karstensen (Ministry of Foreign affairs – Head of Section International Law, Denmark)
- Christian Nygård Nissen (Ministry of Foreign Affairs – Adviser, Denmark)
- Marko Rakovec (Ministry of Foreign Affairs, Slovenia)

Experts

- Clare Barry (Canadian Mission to the European Union – Counsellor International Criminal Operations, Canada)
- Frank Cimafranca (Philippine Embassy – Minister/Consul-General, The Philippines)
- Raúl Comelli (Embassy of the Argentine Republic – Counsellor, The Argentine Republic)
- Wietske Dijkstra (Netherlands)
- Antonio Dimate (Embassy of Colombia – Chargé d'affaire, Colombia)
- Gérard Dive (Belgian Justice Ministry – Federal Coordinator, Belgium)
- Aurélia Devos (*Tribunal de Grande instance, Paris – Substitut du Procureur*, France)
- Yolande Dwarika (South African Embassy – Legal Counsellor, South Africa)
- Siri Frigaard (National Authority for Prosecutor of Organised Crime – Director and Chief Public Prosecutor, Norway)
- David Kendal (Ministry of Foreign Affairs, Denmark)
- John Kim (United States Embassy – Legal Counsellor, USA)
- Chantal Joubert (Ministry of Security and Justice, The Netherlands)
- Sam Muller (HiiL – Director)
- Matevž Pezdirc (European network of Contact points in respect of genocide crimes against humanity and War Crimes – Secretariat Coordinator, European Genocide Network; Slovenia)
- Lars Plum (Special International Crime Office – Deputy State Porsecutor, Denmark)
- Yoshiki Ogawa (Embassy of Japan in the Netherlands – First Secretary, Japan)
- Anna Richterová (Eurojust – Deputy National Member for the Czech Republic, Czech Republic)
- Eva Alexandra Schreuder (Ministry of Foreign Affairs – Policy Officer, The Netherlands)
- Cary Scott-Kemmis (Embassy of Australia – Second Secretary (Legal), Australia)
- Boštjan Škrlec (Ministry of Justice – State Secretary, Slovenia)
- Quirien van Straelen (Ministry of Security and Justice – Policy Officer, The Netherlands)
- Jacob Struyker Boudier (Ministry of Security and Justice – Senior Legal Advisor, The Netherlands)
- Hannu Taimisto (Ministry of Justice – Director, Finland)
- Maarten van der Vlugt (Netherlands National Prosecutor's Office – Special Legal Officer for International Crimes, The Netherlands)
- Birgitte Vestburg (Special International Crime Office – State Prosecutor, Denmark)
- Monika Volkhausen (Federal Office of Justice – Desk Officer, Germany)
- Deborah Walsh (Crown Prosecution Service – Deputy Head, United Kingdom)
- Elin Widsteen (Ministry of foreign Affairs of Norway – Advisor Legal Department, Norway)
- Nadia Zed (Crimes against Humanity and War Crimes Section of the Department of Justice – Counsel, Canada)

Representatives of Civil society, Ad-Hoc International Tribunals and the ICC

- David Donat Cattin (Parliamentarians for Global Action – Director)
- Brenda Hollis (Special Court for Sierra Leone – Prosecutor)
- Stefanie Kueng (Parliamentarians for Global Action – Programme Officer)
- Susanna Mehtonen (Amnesty International – Legal Officer)
- Phakiso Mochochoko (International Criminal Court – Director of the Jurisdiction, Complementarity and Cooperation Division)
- Deborah Ruiz Verduzco (Parliamentarians for Global Action – Senior Programme Officer)
- Jürgen Schurr (Redress – Legal Advisor)
- Helge Elisabeth Zeitler (European Commission – DG Justice, Criminal Law Policy Officer)


Presentations
and
Informal Papers

A Legal Gap?

Getting the evidence where it can be found: Investigating and prosecuting international crimes

22 November 2011 | The Hague Institute for Global Justice, Sophialaan 10, The Hague | The Netherlands

Keynote Address | Judge Silvia Alejandra Fernández de Gurmendi

The Hague, November 2011

Ladies and gentlemen,

I thank the organisers for inviting me to address this meeting. I welcome this opportunity to meet again with ancient friends and colleagues with whom we have shared experiences during the negotiation of the legal framework of the ICC and in the early pioneer years of the establishment of the ICC.

I am honoured to address this meeting on "the responsibility of states in the fight against impunity for international crimes". This is a very appropriate and timely subject at a time where there is a growing recognition that the ICC and other international tribunals can only deal with a handful of cases in a given situation and greater emphasis is placed on the responsibility that states have no only to cooperate with the investigations and prosecutions by the Court but also to investigate and prosecute themselves.

I thought it would be useful to recall where we come from, and how our approach has developed in the first 10 years of operations of the Court, shifting the focus from action by the Court to an emphasis on a shared responsibility between the Court and states.

II. THE CONCEPT OF SHARED RESPONSIBILITY

Judge Pikis of the ICC articulated the idea of "shared responsibility" in his separate and partly dissenting Opinion on the Appeals decision relating to the issuance of warrants of arrest against Lubanga and Ntaganda in the DRC situation of 2006. He characterized the relationship between the ICC and States Parties as a system of "shared responsibility". He described the system as follows:

"the Preamble underlines the duty of every Member state to bring to justice everyone responsible for the crimes penalized by the Statute. If a State is either unable or unwilling to carry out this duty, the case becomes admissible before the International Criminal Court with a corresponding duty placed upon its organs to exercise its criminal jurisdiction, the Prosecutor to investigate and prosecute and the Court to try the case under the provisions of the Statute"

"States Parties are enjoined to exercise the jurisdiction entrusted to them. If they do not, a corresponding duty is cast upon the Court to investigate and prosecute and try the persons liable for the commission of one or more crimes punishable under the Statute"[1]

The concept of shared responsibility is an appropriate manner of encapsulating the the current system of justice for international crimes. In light of the experience gained in the last past years, I believe that this

[1] *Lubanga and Ntaganda*, Appeals Chamber, Judgment on the Prosecutor's Appeal against Warrants of Arrest, Article 58", 13 July 2006, Separate and Partly Dissenting Opinion of Judge Georghios M.Pikis, paragraph 31.

concept now encompasses more that an "*either or*" scenario, in which either the State exercises its duty or the Court does it and the States cooperates with the Court. The concept, in my view, implies for states the duty of engaging in a cooperative interaction with the Court that would include, at some point, the concurrent exercise of jurisdiction in the same situation.

There is now a growing recognition that the complementarity principle enshrined in the Rome Statute not only serves as a rule for the distribution of competencies and resolution of conflicts between the Court and states. The principle lays the foundation of a broader system of justice under which the Court and domestic jurisdictions assist and reinforce each other.

This new approach has a lot of appeal as it translates a concept of a system of justice where all actors, national and international, interact in a joint effort against impunity. But what does this mean in practice?

III. THE FOCUS ON ACTION BY THE COURT ITSELF

The focus on the exercise of jurisdiction by the Court itself prevailed during the negotiating process of the Rome Statute and during the early years of the Court.

The International Criminal Court, similarly to the ad hoc tribunals for former Yugoslavia and Rwanda was created on the basis of concurrent jurisdiction with states. But, while the ad hoc tribunals were granted primacy over domestic systems, the ICC was created as a last resort Court on the basis of the complementarity system according to which the Court will only investigate and prosecute cases when states fail to carry out genuine investigations and prosecutions of the same cases at the domestic level.

Later developments ended up narrowing the differences between the systems of the tribunals and the Court. Both ad hoc tribunals had to deal with amendments of their mandates that narrowed their jurisdictional reach to the most serious crimes, together with an imposition of dates for the completion of their procedures by the Security Council. As a consequence they adopted procedures and developed strategies for a division of labour with states concerned which included a transfer of cases to national courts and subsequent monitoring of domestic proceedings as well as cooperation with national prosecutors and the provision of expert advice to judicial authorities.

This later practice of the ad hoc tribunals also demonstrated that the notions of primacy and complementarity were not mutually exclusive and that a cooperative relationship with national jurisdictions could be key to reducing the impunity gap.

But at the time of the negotiations it was not anticipated this would happen and primacy of international jurisdictions over the domestic systems appeared to many of us as a crucial element of a strong institution.

However, the system finally enshrined in the Statute did not recognized primacy to the Court or the States "per se". It simply stated that investigations and prosecutions of states would be a bar to admissibility of the cases before the ICC unless the Court determined the State was unable or unwilling genuinely to investigate or prosecute. By this doing, the system reaffirmed the primary jurisdiction of states for international crimes but granted the power of making the final determination on the genuineness of the domestic proceedings.

In addition, the Preamble of the Rome Statute recalled that it is the duty of States to exercise its criminal jurisdiction over those responsible for international crimes.

The complementarity system enshrined in the Rome Statute, achieved by consensus after laborious negotiations, was generally considered to strike a proper balance between opposing views. Still, many of us left the Rome Conference with the feeling that the complementarity provisions, which failed to recognize primacy to the international court, were a necessary but regrettable concession to state sovereignty.

Internationalism vs. national sovereignty was the underlying tension of the discussions when designing the system. The prevailing paradigm at the time was one of confrontation between the Court and States in the exercise of jurisdiction.

This paradigm was, in my view, very much influenced by the human rights narrative in which states are typically perceived as being either the ones committing the violations or shielding the perpetrators or simply unwilling to intervene when other states commit violations.

This vision also influenced the discussions on the trigger mechanisms of the jurisdiction of the Court and explains the insistence of many states and non governmental organizations to grant *proprio motu* powers to the Prosecutor to initiate investigations and prosecutions on its own initiative. It was argued that, in light of the experience in the field of human rights, states would be reluctant to present complaints involving crimes in the territory of another state. Unless the Prosecutor could start investigations on his of her own initiative, the Court might not be able to exercise jurisdiction as needed.

Understandably, in light of this negative or at least sceptical vision of States in relation with the combat of impunity, during the negotiations and the first years of the activities of the Court, states and organizations focused on the Court´s own role and responsibility in the fight against impunity.

Even before the election of judges and the Prosecutor, hundreds of communications on alleged crimes within the jurisdiction of the Court had already been received by the Court. The election of the judges and Prosecutor in 2003 increased the expectations even further. States and civil society were eager for the Court to start a case.

IV. SELF REFERRALS

And the cases came, brought by way of referrals of situations by the states where the crimes had been committed. By the end of 2003 the Prosecutor received the first referral of a situation by Uganda for crimes committed in its own territory by the Lord Resistance Army. This referral was followed by other referrals by the Governments of Democratic Republic of Congo and Central African Republic, also for crimes committed in their respective territories.

These so called "self referrals" surprised many as it was in contradiction of the vision of States in confrontation of the Court. Although some celebrated these self referrals as a welcome signal of trust in the new institution, other criticised these referrals for various political and legal reasons.

From a legal perspective, self referrals raised two main controversies:

One controversy on State inaction vs. Inability and unwillingness. Some have argued and continue to argue that under the complementarity regime, the Court can assert jurisdiction only if a state is unwilling or unable to investigate or prosecute an alleged crime itself.

This manner of describing complementarity posits "unwillingness" and "inability" as the indispensable requirements for admissibility. Under this interpretation, the inaction by states is not enough to make a case admissible before the Court.

Others have pointed out, however, that Article 17 expressly provides not a one-step test based on unwilling or unable criteria, but a two-steps test, the first explicit question of which is whether a state is investigating or prosecuting the case or has done so). The test of unwillingness or inability only comes into place when the first question is answered in the affirmative.

The other controversy raised by the self referrals relates to the possibility of waiver of jurisdiction by the Court. Could the State relinquish is duty to exercise of jurisdiction in favour of the Court? It was argued that self referrals amounted to a waiver of jurisdiction that was incompatible with the duty of states to investigate and prosecute.

In the Katanga case, the Trial Chamber confirmed the validity of the self referral indicating that

"if a State considers that it is more opportune for the Court to carry out an investigation or prosecution, the State will be complying with its duties under the complementarity regime, if it surrenders the suspect to the Court in good time and cooperates fully with the Court in accordance with Part IX of the Statute".[2]

The Appeals Chamber gave an answer to both controversies by clarifying that

"inaction on the part of a State having jurisdiction (that is , the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court , subject to Article 17 (1) (d) of the Statute[3]

"A State may, without breaching the complementarity principle, refer a situation concerning its territory to the Court if it considers it opportune to do so, just as it may decide not to carry out an investigation or prosecution of a particular case"

"…the general prohibition of a relinquishment of jurisdiction in favour of the Court is not a suitable tool for fostering compliance by States with the duty to exercise criminal jurisdiction."[4]

The Appeals Chamber has thus confirmed the view that a cooperative approach between States Parties and the ICC in the form of self–referrals is consistent with the complementarity scheme under Article 17 and that it furthers the Statute's object and purpose of ending impunity for international crimes.

This clarifies that the State can indeed refer a matter to the ICC instead of investigating and prosecuting domestically. These initial referrals of situations of the Court by States in whose territories the alleged crimes were committed have contributed to the questioning of the traditional ideological mindset of sovereign states in confrontation with the Court.

In parallel, the principle of complementarity, initially understood as a barrier, has increasingly been perceived as an opportunity for the Court and States to join their efforts to combat impunity. New concepts,

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[2] *Katanga*, Trial Chamber II decision entitled "Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)", 16 June 2009, paragraph 79.
[3] Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, page 3.
[4] Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, page 34.

such as "positive complementarity" or "reverse cooperation" to be provided from the Court to States have been coined to describe this new approach to the problem.

V. REVERSE COOPERATION AND POSITIVE COMPLEMENTARITY

The increasing realization that the Court is likely to deal with a small universe of the crimes committed has encouraged a deeper reflection on acceptable ways and means for the Court to promote national investigations and prosecutions in order to share the burden and to maximize the impact of its work. How much should and could the Court do itself to remedy the lack of capacity or lack of motivation of the State concerned.

The possibility for the Court to cooperate with states finds its legal basis, inter alia, in article 93 (10) of the Statute.

Under this provision, the Court may, upon request, cooperate with and provide assistance to a state conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the law of the requesting state. Such assistance or "reverse cooperation" is defined broadly in Article 93 (10), which provides a non exhaustive list of the forms of assistance envisaged.

The cooperation that the Court can provide is of a limited nature as it does not appear to involve the functions of assessing, reforming or strengthening the domestic systems, functions that might be essential for a particular state to exercise jurisdiction in practice.

In the Report of the Bureau of stocktaking regarding Complementarity, positive complementarity is defined as referring to all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis.

In accordance with this report, the actual assistance should as far as possible be delivered through cooperative programmes between states themselves, as well as through international and regional organizations and civil society. Such assistance rendered under positive complementarity can broadly be divided into three categories, legislative assistance, technical assistance and capacity building with regard to domestic judicial systems and thirdly, assistance with construction of physical infrastructure.

The role of the organs of the Court, as envisaged in this report of the Court is limited. It is not envisaged that the activities will entail additional resource for the Court, nor should the Court become a development organization or an implementing agency. The Court is seen as a catalyst of direct State to state assistance and indirect assistance through relevant international and regional organizations and civil society, with the view of strengthening national jurisdictions.

In the report it is however recognized that there may be scope for the Office of the Prosecutor to engage in certain capacity building activities within existing resources and without compromising its judicial mandate.

The resolution on complementarity that emerged from the Review Conference also recognized the need for the "enhancement of international assistance to effectively prosecute perpetrators of the most serious

crimes of concern to the international community at the national level."[5] The concrete initiative launched to this end was to give the Secretariat of the ASP a mandate "within existing resources" "to facilitate the exchange of information between the Court, State Parties and other stakeholders, including international organizations and civil society , aimed at strengthening domestic jurisdictions."[6]

It remains to be seen how this exchange of information will be done in practice. In any case it is clear that there is a growing recognition that organs of the court, within the scope of their mandate and resources, states, directly and through others, have responsibilities, a shared responsibility, to support and enhance mutual efforts to combat impunity

[5] ICC Assembly of States Parties, Resolution on Complementarity (Advance copy), ASP Doc. RC/Res.1, adopted by consensus June 8, 2010, available at http://www.icc cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1- ENG.pdf, paragraph 3.
[6] Resolution on Complementarity, paragraph 9.

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22 November 2011 | The Hague Institute for Global Justice, Sophialaan 10, The Hague | The Netherlands

Keynote Address | Siri Frigaard

The Hague, November 2011

Ladies and gentlemen,

1. THE IMPORTANCE OF FIGHTING IMPUNITY

It is recognized internationally that to fight impunity for the most serious crimes, proceedings are essential, and also that all states should be willing to participate in this effort. If an alleged perpetrator has sought refuge in a third country, the state should extradite the person if this is a possibility, and if not, the state should start a criminal proceeding against him.

But also, it is recognized that war crime proceedings are both complex and difficult, resource intensive and expensive, especially when they are carried out outside the country where the crimes were committed.

When a national jurisdiction, a so-called third country, has to start such an investigation, most of the investigation will have to be performed in other countries. Mutual legal assistance is therefore necessary to enable prosecutors and investigators in gathering and providing evidence in order to prosecute the perpetrators.

2. THE NORWEGIAN SYSTEM

Like some other countries, Norway established in August 2005 a special prosecution authority that is responsible for the investigation and prosecution of these cases. The office consists of 6 prosecutors and they have exclusive jurisdiction in Norway for handling these criminal cases. This special prosecution office also have the task of prosecuting organized crimes, cyber crime and sexual abuses of children on the net, all crimes that normally have international links. In addition the office is responsible for prosecuting the cases investigated by the Security Police, like cases of terrorism.

In 2005, a team of investigators also was established, but within the police organisation. They are responsible for the investigation of the cases of war crimes, crimes against humanity and genocide in the whole country. The team consists of 12 including eight investigators, and they are all being trained in the investigation of these cases.

3. THE WORK OF THE SPECIAL UNITS IN NORWAY

Since the establishment of these two units, more than 200 complaints have been filed. So far investigations have been opened in 23 cases and we have also been working with 4 requests for extradition from other countries. Of these 23 cases, 15 have been closed due to lack of evidence. At the moment we are prioritizing the investigation of cases involving alleged perpetrators from Rwanda, Sri Lanka and Afghanistan. The other two cases relates to Sierra Leone and Bosnia & Herzegovina. In addition we have been extraditing 3 suspects, one to Serbia, one to Bosnia & Herzegovina and one to Kosovo. We are working

with one extradition case to Rwanda, and on the 18 November this year, the Supreme Court decided that the conditions for extradition were met in that case.

The case related to Bosnia & Herzegovina was the first case presented in court. The investigation started in 2006 and the final decision was taken by the Supreme Court only in 2011. The convicted Bosnian got a sentence of 8 years.

To be able to investigate and prosecute this case, the investigators and the prosecutor were having extensive legal assistance from many countries, especially from the Balkan countries. We were issuing a high number of rogatory letters asking for witness interviews and voluntary witness statements, search of premises, seizure of evidence, and summoning of witnesses to give evidence in Court in Norway, or to give evidence through video-link from Bosnia, Serbia, Sweden and Australia. When it comes to resources spent, only the expenses for interpreters were close to €590 000. In addition the investigators had about 30 trips to the Balkan countries.

In this case we received excellent legal assistance from the different countries that we were working with. Without this legal assistance we would have been unable to prosecute the case and to get a conviction.

The cases we are prioritizing at the moment are involving serious crimes committed in Rwanda, Sri Lanka and Afghanistan.

To collect relevant evidence to be able to issue an indictment in these cases, we are totally dependent on legal assistance from the countries mentioned, and also from other countries where potential witnesses are staying. No witness has so far been found in Norway, and more or less all the investigation and the evidence collected are therefore on the basis of rogatory letters asking for legal assistance.

In order to receive the legal assistance that we are in need of we have been and still are, preparing and sending out through different channels quite a number of rogatory letters to different countries, like for instance Bosnia, Croatia, Serbia, Albania, Sri Lanka, Rwanda, Nigeria, Bolivia, USA, Canada, Belgium and so on. At the moment we are also working with rogatory letters to more African countries, like for instance Zambia.

4. THE CHALLENGES

So far the legal assistance that we have received on the basis of rogatory letters has been to our satisfaction. But we have also been facing some challenges both legal and practical.

First of all, some countries require a legal base, a formal agreement or a treaty, for providing any judicial assistance. Other states have a more flexible or open approach and will provide a range of assistance without a treaty. Norway is one of those countries, like for instance also Sweden, that will provide judicial assistance of different types and to provide guidance for foreign authorities that wish to make a request for assistance from Norway, also with countries with whom we do not have an bilateral or multilateral treaty. The same goes for extradition. We are able to extradite a person without a bilateral or a multilateral treaty. That is why we are able to extradite the requested suspect to Rwanda, if the Ministry of Justice decide on doing so, even if we have no treaty with Rwanda.

We have been sending rogatory letters for legal assistance to both countries with which we have treaties, and to countries with which we have no treaties. Even if it is possible to obtain legal assistance with countries with whom we have no treaties, the challenge we are facing is that the forwarding process

normally takes much longer time compared to the time it takes to get an answer from countries with whom we have contact on the basis of a treaty. If there is either a bilateral treaty or a multilateral convention, the country in question also have a duty to give an answer to the request.

We have experienced that it has taken more than 6 months to get an answer from some countries with which we had no treaty - from one country we even never got an answer.

In order to try to speed up the requests and to get an answer, we have been trying to find and use personal contacts, and asking them to try to follow up the requests that we have been forwarding. We have also been using the Norwegian embassies to make the contact for us, which in one case turned out to be most successful.

This is of course one way to do it, but one is dependent on connections. The disadvantage with this is that people are changing positions and new ones are taking their places, and connections get lost.

Another challenge is that it is of value to have knowledge about the mutual legal assistance requirements of the particular state one is dealing with in order to achieve and obtain the legal assistance that is required.

For many prosecutors who do not deal regularly with cases of an international dimension the initial task of finding out how and what assistance they can receive is daunting. Further, there is for many a fear of the unknown, the legal systems of other countries are different, procedures are different, and language is often a barrier.

It is normally neither a domestic priority to help the other countries legal systems to be effective. But mutual legal assistance on the basis of a treaty or convention means working together with other systems and is also an obligation to react that is not present when the assistance is not treaty based.

If there is a multilateral convention between states, not only the forwarding procedure, but also the knowledge of the provisions will provide a framework within which international mutual legal assistance can operate in a more efficient way.

Also a multilateral treaty can give possibilities to appeal against a refusal to execute or grant a mutual legal assistance request. A refusal might in some cases affect the outcome of the investigation.

5. EXTRADITION

I have already mentioned that so far we have been extraditing three suspects, one to Serbia and one to Bosnia & Herzegovina, and the third one will be transported to Kosovo this week. All three cases had to got through both The First Instance Court, The Court of Appeal, and finally to The Supreme Court. The conditions for extradition were met in all three cases.

In Norway it is up to the Ministry of Justice to take the final decision to extradite an offender or not, after the court has found that the conditions according to the Norwegian law are met. In the two cases concerning Serbia and Bosnia & Herzegovina, the Ministry expressed that we had a duty to extradite when the conditions for extraditing were present. These two extraditions were treaty based, and the process in the Ministry was quite speedy.

The current extradition case that we are working with is not treaty based. We have no bilateral treaty or multilateral convention with Rwanda. The courts, including the Supreme Court, has ruled that the conditions

for extraditions are met, but as we have no treaty with Rwanda we are not obliged to extradite the person in question. It will be up to the Ministry of Justice to decide whether or not to extradite him. In case they decide to so, it will most probably be on the bases of an agreement between the two countries based on reciprocity.

Let me also mention an example from East Timor. In 2003 a number of Indonesian citizens, including military officers and a former Minister of Defence, were indicted for crimes against humanity by the international prosecution unit in East Timor, established by the UN. These indictees are still at large in Indonesia and they have not faced a trial due to the fact that there was no treaty or multilateral convention regulating extradition between Indonesia on the one hand, and the UN or East Timor on the other.

6. HOW CAN THE WORK BE MORE EFFICIENT

In working with cases concerning war crimes, crimes against humanity and genocide, we need to make both the mutual legal assistance and the extradition procedure more efficient.

Increasingly effective mutual legal assistance is a key part of successful domestic prosecutions. But to be successful in that work means that we also need to develop confidence, trust, tolerance, adaptability and understanding of each others legal systems.

We need flexible and permissive legislation; we need treaties or agreements, knowledge, and also good contacts. In mutual legal assistance thorough and detailed preparation are the key to success.

To increase the effectiveness of the prosecutorial function in providing timely and effective technical assistance, treaties or multilateral conventions would be an advantage, and even more so if they are ratified by all countries.

HiiL National law in a global society

Government of the Netherlands

A Legal Gap?

Getting the evidence where it can be found: Investigating and prosecuting international crimes

22 November 2011 | The Hague Institute for Global Justice, Sophialaan 10, The Hague | The Netherlands

Keynote Address | Secretary Fred Teeven

The Hague, November 2011

Ladies and gentlemen,

You can discuss at length whether and in which cases applies the legal adage *aut dedere aut judicare*, which means: extradite or prosecute.
You can also just look at the actual possibilities of investigating and prosecuting international crimes and how your available tools and existing framework could be improved. This is something you do, not because there is an obligation to do so, but because tolerating individuals suspected of having committed grave violations of international humanitarian law on one's territory undermines the Rule of Law, in one's country... in the world. This is – in short – what the Netherlands has been doing the last decade, using all the available means they have at their disposal.

At the end of the 1990s, there was public dismay when the press related stories of a Dutch market place where war victims had encountered one of their torturers. Pioneers of the public prosecutor's department boldly started to investigate suspects of international crimes living here, who thought they had found a safe haven. These pioneers of international justice in a national setting explored ways to bring these individuals to justice.

At the same time, the whole of the international community created a permanent international criminal court. I want to believe that we as States all agreed back in 1998 in Rome that the crimes embedded in the Rome Statute are the most serious crimes of international concern and should be judged.

This International Criminal Court was created on the premise that it remains the primary responsibility of States to deal with perpetrators of genocide, crimes against humanity and war crimes. One could say that in this way, a closed system of law enforcement for these crimes was created that changed the way the international community perceived international justice: from primacy of international justice to complementarity. International justice is therefore the primary responsibility of States.

This is an important step because it reminds us all that Justice begins at home. With this realisation comes the acknowledgment that delivering Justice at home effectively cannot be achieved without States assisting one another.

And this brings me back to the experience of the Netherlands in the investigation, prosecution and adjudication of international crimes. The Netherlands considers it to be of primary importance that suspects of international crimes are brought to justice. These cases should preferably be investigated and prosecuted by the State within whose jurisdiction the offences were committed.

However, this is not always possible for a number of reasons. This is why the Netherlands is willing to take on this responsibility if the authorities of the States from which these suspects have fled are not able to prosecute international crimes within their national jurisdiction, using the means available to them.

The special teams of the Netherlands Public Prosecution Service and the National Bureau of Criminal Investigation have investigated and prosecuted – and continue to do so – not only Dutch perpetrators (businessmen accused of aiding and abetting). They also concern themselves with perpetrators originating from several countries who are currently residing in the Netherlands: Congo, Afghanistan, Sri Lanka and several (former) Rwandan nationals. Our prosecutors and investigators have considerable experience in cooperating with the judicial and police authorities of a number of States. I speak from experience as a former Public Prosecutor.

In our opinion the successful investigation, prosecution and adjudication of genocide, crimes against humanity and war crimes at the national level, depend not only on technical assistance and exchange of best practices. They also depend on mutual legal assistance in criminal matters and extradition. This is because it is the nature of these crimes that witnesses and perpetrators do not necessarily stay in the State in which the crimes have been committed. In the Netherlands, for instance, much of the evidence (if not most) in our cases against two of our nationals (van Anraat and Kouwenhoven) was to be found outside the Netherlands.

Also, it is in the nature of these crimes that perpetrators – for a number of reasons - cannot always be brought to trial in the country where the crimes have been committed. All of the national cases the Netherlands has tried in the last few years have involved extensive mutual legal assistance in criminal matters with a wide array of States with which we had never previously cooperated, including Rwanda, Afghanistan, Liberia, Sierra Leone and Japan.

In the course of the years, after having extensively explored possibilities within the existing national and international legal framework, we have asked ourselves whether we as national authorities have the best tools at hand to obtain the evidence where it is to be found. We have the Genocide Convention: no provisions on mutual legal assistance and extradition there. We have the Geneva Conventions and their additional Protocols. We have the UN Convention against Torture. We have the UN Enforced Disappearances Convention.

In general, the existing international legal framework for extradition and mutual legal assistance in criminal matters in the investigation, prosecution and adjudication of the most serious crimes of international concern is incomplete. The only exceptions are the UN Convention Against Torture and the UN Enforced Disappearances Convention.

For these crimes, as well as for **transnational organized crimes and corruption**, a more detailed framework exists. Treaties such as the UN Convention Against Torture, the UN Transnational Organized Crime Convention and the UN Convention against Corruption all contain extensive provisions for extradition and mutual legal assistance in criminal matters and extradition.

So could we not use these modern top notch conventions for the investigation, prosecution and adjudication of the most serious crimes of international concern?
We try, sometimes….But more often than not it becomes clear that it costs a lot of legal imagination to adjust the definition of the offences committed to fit into the definitions of the treaties at hand. For the most serious crimes of international concern for which States have primary responsibility, the international legal framework for extradition and mutual legal assistance in criminal matters seems underdeveloped.

Where we stand

This is why the Netherlands, together with Belgium and Slovenia, are organising this expert meeting. In this way, we want to take stock of the existing international legal framework and, with your expert participation in the discussion, discover ways to improve the mechanisms of extradition and mutual legal assistance for these crimes.

I trust we will have a fruitful discussion today and I look forward to work with you all in bringing the discussion a step further.

A Legal Gap?

Getting the evidence where it can be found: Investigating and prosecuting international crimes

22 November 2011 | The Hague Institute for Global Justice, Sophialaan 10, The Hague | The Netherlands

Keynote Address | Gérard Dive

The Hague, November 2011

Ladies and Gentlemen,

Since the adoption of the Security Council's resolution creating the ICTY and the ICTR, the international community has taken key steps in order to fight against impunity with regards to grave violations of IHL.

The adoption of the Rome Statute in 1998, its entry into force in 2002, the establishment of the Court itself and the beginning of its activities in the following months and then the Review Conference in Kampala last year already able to take stock of the first years of experience of the Court, testify of the tremendous importance of this new engagement.

But the Court and its system are based on a key-stone principle – the principle of complementary referred to in paragraph 10 of the Preamble of the Rome Statute and its Article 1. And this principle could not be successful to fight adequately against impunity if, in the reality, either for legal or practical reasons, States – at national level – are note able to investigate, prosecute and conduct trials respectful of the principle of fair and equitable trial.

The existing and developing practice in this field has already shown the place taken by international cooperation in order to properly accomplish this purpose. Crimes of genocide, crimes against humanity and war crimes are not – at very rare exceptions – offences committed on one sole State, with all perpetrators, commanders, victims and witnesses being all nationals of this State, all of them staying on the territory of this State after the offences being committed and all pieces of evidence being found on this territory. Prosecuting this kind of crimes is - may I say - *per se*, a task partially, if not essentially dependant from inter-States legal mutual assistance and on rules of extradition.

Therefore my intervention will concentrate on the first hand, on the existing framework of legal mutual assistance and extradition with regards to crimes of genocide, crimes against humanity and war crimes, and on the other hand - taking into account the legal and practical necessities to ameliorate the present situation - on a list of provisions to be adopted in order to fulfill the legal and practical gaps that we can contemplate.

1. What do we have?

In order to adequately take into account the existing conventional instruments which could be use in our exercise, I propose first to examine the basic treaties which established the definition and the obligation to prosecute grave violations of IHL. After this we will have a look to treaties dealing with other international offences which could, either constitutes such a grave violation of IHL, but only in a specific context (here I think about the 1984 Torture convention and the recent treaty on enforced disappearance), or treaties

dealing with offences in close relation with grave violations of IHL (here we can for instance think about the transnational organized crime convention).

It is obvious that some regional treaties and bilateral treaties could be useful in our exercise, but they have the double serious disadvantage not be based on universal definitions and rules and to be limited in their effectiveness to the only States parties to them. For this double reasoning, we will disregard them for our analysis.

Our analysis of the treaties just mentioned will take into account three groups of provisions relevant for our purpose which is to increase the international capacities at national level to fight against impunity for crimes of genocide, crimes against humanity and war crimes.
A first category of provisions is composed by rules offering a common definition of the crimes and the basic tools and duties to establish at a pure national level in order to prosecute them: incrimination of the offences (*nullum crimen sine lege, nulla poena sine lege*), obligation to prosecute at national level; personal, territorial/extraterritorial jurisdiction; etc. This first category will be called "jurisdiction".
The second category includes adequate provisions to extradite, if the prosecution could or has to be dealt with by another State's judicial authorities. We will call this second category "extradition".
The third category of provisions encompasses any useful tool for mutual legal assistance. We will call this last category "legal mutual assistance".

1.1. Treaties incriminating the crimes under examination

We have to state immediately that our exercise will by limited to only two of the three crimes under examination (the crime of genocide and war crimes), since the crime against humanity is of a customary nature. Its modern definition has been first codified in the ad hoc Tribunals' Statutes, and jurisprudential developments have been taken into account in definition given by article 7 of the Rome Statute. But no treaty exists on international basis to organise extradition and mutual legal assistance for this crime.

With regards to the crime of genocide and war crimes, the situation is partially different.

1.1.1 The crime of genocide

The crime of genocide has a treaty basis since the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948).

With regards to the first category of provisions abovementioned, called "jurisdiction", the 1948 Convention gives the definition of the crime (article II and III) and underlines the necessity for establishing adequate penalties (article V). But it includes very limited rules for prosecution (article VI) establishing only territorial jurisdiction and mentioning the potential jurisdiction of an international tribunal to be created.

The second category of provisions that we have called "extradition" is even more deficient: while the 1948 Convention excludes the crime from those extradition could be refused on the basis that they could be considered as political offences, the treaty itself states in article VII that when extradition is granted it must be done in accordance with national laws and treaties in force. This means clearly that the Genocide convention itself provides for no provisions permitting or organising extradition.

The third category of provisions related to mutual legal assistance is totally ignored. Here the legal vacuum is absolute.

1.1.2 War crimes

For war crimes, we can rely upon more conventional instruments: mainly the Geneva Conventions (1949) and their three Additional Protocols (1977 and 2005), The Hague Convention (1954) and its two Additional Protocols (1954 and 1999). This multiplicity of instruments and difference in ratification status is a first basic disadvantage of this multiplication of sources of law.

In addition, here also gaps and deficiencies have to be recorded.

In order to give some examples, without the ambition to be exhausted due to the limited character of the present exposé, we can list the following remarks:

- With regards to the first category of provisions ("jurisdiction"), some of the existing war crimes are of a customary nature and not covered by the scope of any of the prelisted conventions. In addition, these conventions contain no uniform rules on extraterritorial jurisdiction
- With regards to the second category, the Geneva system established the principle *aut dedere aut judicare*, but the sole Second Protocol to The Hague convention indicates that it could serve as an extradition treaty.
- With regards to mutual legal assistance, all treaties abovementioned are extremely rare. None of them go beyond general engagement to provide for traditional legal assistance.

1.2. Other related treaties

Could we take some other treaties in consideration to reach our goal?

Three international instruments must be mentioned and pave the way for steps forwards: the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading
Treatment or Punishment (1984), the International Convention for the Protection of all Persons from Enforced Disappearance (2006) and the United Convention against Transnational Organized Crime (2000).

The two first (Torture and Enforced Disappearance) incriminate and organise both extradition and legal mutual assistance for crimes which could constitute a crime of genocide, a crime against humanity or a war crime when committed in a specific context. But their respective scope overlaps only in a very marginal manner with the entire spectrum of the crimes of genocide, crimes against humanity and war crimes.

The third treaty – Transnational Organized Crimes Convention – has the same advantage as the Enforced disappearance Convention, with the double inconvenient that it does not deal with grave violations of IHL, but crimes which could be time to time interrelated, and that it does not enjoy yet universal ratification.

Why are these three treaties relevant for our analysis?
Because the first one – the Torture Convention – is almost universally ratified and contained any useful provisions falling under our category "jurisdiction" and the one called "extradition", and two others contain the most modern list of extradition and mutual legal assistance provisions the international community has approved upon recently.

Therefore, if we have to do something, we can use texts based on already agreed language in order not to reinvent the wheel and to take on board already approved provisions in similar or parallel matters.

Now that we have identified what we have and how important are the conventional gaps, we can examine the second and last part of this presentation: what we need?

2. What do we need?

Before proposing a list of provisions to be taken into consideration during our debates this afternoon for each of the categories we have previously established: "jurisdiction", "extradition" and "legal mutual assistance", it would be useful to remind us why these provisions need to be adopted in a new instrument in order to permit extradition and legal mutual assistance.

The answer is of a double character: a legal one and a practical one. For some States, it is just not possible at all to give effect to a request for cooperation coming from another State without a treaty based provision. It is worth mentioning the case of extradition. For instance Belgium, like other countries influenced by the continental law regime is not able to extradite someone to another country without having a treaty permitting this and being into force between the two relevant States. This is also true in main cases of protection of witnesses at the request of another State or for provisional transfer of person in custody for testifying purposes.

But the modern States' cooperation practice with regards to the prosecution of grave violations of IHL demonstrates that without a treaty, inter-States cooperation (especially mutual legal assistance) is extremely rare and time consuming, while – when a treaty exists – everything could become possible and will at least be thoroughly examined.

Having answered the question "why" doing something, we can propose a list of provisions answering the "what to do" question.

For this purpose, I will just offer a list of matters to be covered for each of the three categories of provisions abovementioned.

2.1. "Jurisdiction"

1. Incrimination (definition based on existing broadly accepted definition)
2. Penalties
3. Criminal jurisdiction, including extraditional jurisdiction
4. (absence of) Statute of limitation
5. *Ne bis in idem*
6. training of professional personnel

2.2. "Extradition"

1. *Aut dedere aut judicare*
2. Preliminary investigation and custody
3. Extradition
4. Grounds of refusal for extradition, surrender – prohibition to expel, return or render
5. Non admissibility of grounds of refusal for extradition (political offences)

2.3. "Mutual legal assistance"

1. General provisions on legal mutual assistance

2. Designation of a central authority for cooperation
3. Transfer of persons in custody (testimony, identification, etc.)
4. Freezing, seizure and confiscation
5. Transfer of criminal proceedings
6. Criminalization of obstruction of justice
7. Protection of witnesses
8. Assistance and protection of victims
9. Training of professional personnel
10. Gratis personnel

A Legal Gap?

Getting the evidence where it can be found: Investigating and prosecuting international crimes

22 November 2011 | The Hague Institute for Global Justice, Sophialaan 10, The Hague | The Netherlands

Keynote Address | Boštjan Škrlec

The Hague, November 2011

Ladies and Gentlemen, dear Colleagues,

It gives me great pleasure and honour to gather with you today at this important debate, which lays the foundations for establishing an effective international legal framework for cooperation in criminal matters, the final goal of which is to ensure the efficiency of investigations and prosecution of international crimes. These crimes are not just a concern of individual States but represent a serious threat to the whole humanity and represent a threat to the international peace and security. It is thus our fundamental duty to combat them with resolve and efficiency. I would like to extend my deep appreciation to our Dutch colleagues for organising this event in light of the great importance of the topics discussed.
Acknowledgment that the core international crimes, such as genocide, crimes against humanity, war crimes, and other most serious crimes, represent a serious threat to the international legal order and international peace, they are of concern to the whole international community. Therefore we must consider national, as well as, supranational measures enshrined in international Treaties to combat impunity for these crimes. Let me stress. The most serious crimes are a matter of concern of the international community as a whole and must not remain unpunished; therefore efficient prosecution through both national law and strengthened international cooperation must be ensured. The aim of our today's discussion is exactly to achieve these two goals.

First, we have to look at the tools that we already have in place today to address these crimes. We can see that in the past decades there was a remarkable progress achieved in the field of international criminal justice. We have established several international criminal tribunals and we can notice that more and more States decide to try international criminals before their courts. The cornerstone of international criminal justice was without any doubts the adoption of the Rome statute of International Criminal Court, first permanent international criminal court in human history. The Court is now up and running and we are expecting first judgments to be issued in the near future. The Rome Statute had also many positive effects on national criminal jurisdictions for international crimes. Many states have amended their national legislation to comply with the Rome Statute.
However, our job is by far not yet finished. The provisions of the Rome Statute fall short of providing sufficient legal basis for efficient inter-state cooperation, especially in respect to exchanging data, transferring criminal proceedings and offering mutual legal assistance. This is a serious shortfall, as it is the States that bare a primary responsibility to try international criminals (Principle of Complementarity). The Rome Statute clearly states that investigation, prosecution and exchange of data concerning genocide, crimes against humanity, war crimes, and aggression, shall remain the responsibility of national authorities, unless provisions of international law apply to them. Although some treaties, such as the UN Convention against Transnational Organised Crime (2000) and the UN Convention against Corruption, contain a few provisions relating to international cooperation in investigating and prosecuting such crimes, these general provisions fail to offer a complete solution and are in practice, hard to apply.

We have achieved further progress on regional level. For example, within the EU, pursuant to Council Decision 2002/494/JHA, we have created a network of contact points for strengthened cooperation between national authorities in cases of persons responsible for genocide, crimes against humanity and war crimes. The aim of adopting this document was to enable law enforcement authorities in the EU Member States to cooperate as effectively as possible in the field of investigating and prosecuting persons accused of committing or taking part in genocide, crimes against humanity or war crimes, as defined in the Rome Statute.
However, at the same time we should bear in mind the fact that international crime has no respect for boundaries and that a legal framework is not limited solely to the regions, such as the EU, but much broader. It is therefore needed to enable more efficient cooperation in such matters on a global level. It is important for states to transcend the meaning of sovereignty in judicial matters in cases of prosecution of the most severe international crimes and establish close cooperation in combating such international crimes. Of course, waiving judicial sovereignty is a sensitive political question it is not an easy decision of a State. We should build on the awareness that efficient prosecution of core international crimes must be provided for the sake of common benefit. Efficient prosecution of these crimes unavoidably demands from States to transcend a part of their sovereignty to the international community. These is a part of contemporary understanding of responsible sovereignty, sovereignty is therefore also a responsibility The EU Member States have shown this commitment and the cooperation of EU Member States in criminal matters can serve as an example of good practices, which can be applied to cooperation between states in the broader international arena.

As a former state prosecutor I know that clear legal grounds and simple and efficient exchange of trustworthy information is crucial for a effective criminal prosecution. Therefore I would particularly like to express my satisfaction with the proposal for promoting the use of mutual legal assistance and unification of conditions for extradition. I am convinced that through the formation of such legal rules, cooperation among practitioners will be simplified and criminal prosecution in the field of international criminal law will become much easier, if not just only possible at all. Conclusion of ad hoc agreements in each separate case is a lengthy and difficult exercise that is usually avoided by practitioners. Initiative discussed today, to create a sound legal basis of a permanent nature that would enable States, and in particular prosecutors, to immediately start cooperation in criminal matters with other States concerning international crimes, and to set provisions which would provide clear rules concerning extradition, is without any doubts extremely useful and deserves our close attention. Let me remind that the International Community has in the past already started the discussion on this issue in 1973 and made a first step by adopting UNGA Resolution 3074 on Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. We should now engage to bring this important issue to its successful conclusion by providing a binding global legal document for cooperation in criminal matters concerning core international crimes.

As a practitioner, I am also very pleased to see that the proposal dedicates special attention to witness protection. Effective witness protection is an important message to those involved to cooperate in the prosecution of offenders without fear of potential revenge and intimidation. For this purpose it is necessary to provide rules which will enable witnesses to give evidence in a way that ensures the absolute safety of persons willing to cooperate in criminal procedures. In practice this is of paramount importance.

There is still much to say on this issue, however, let me conclude here by expressing Slovenia’s full support to the notion discussed today and we congratulate the Dutch Government for starting this important initiative. Received invitation is a sign to us that our past engagements on these issues were right and noticed by the international community. As well as the Netherlands, Belgium and other countries, Slovenia

has also always strived for efficient prosecution of persons responsible for serious violations of human rights and for the rights of the victims of such atrocities. Let me thus once again express my personal satisfaction with the cooperation of experts who strive to develop new mechanisms for extradition and mutual legal assistance related to international crimes. I am convinced that the initiative will convey most added values to those who in practice deal with the prosecution of offenders in the field of international criminal law.

I wish you a successful continuation of discussion this afternoon and I thank you for your attention.

A Legal Gap?

Getting the evidence where it can be found: Investigating and prosecuting international crimes

22 November 2011 | The Hague Institute for Global Justice, Sophialaan 10, The Hague | The Netherlands

A Legal Gap in the International Legal Framework Concerning the National Adjudication of International Crimes?

Background Paper by The Netherlands

1. Introduction

The Netherlands is committed to the effective investigation and prosecution of international crimes (genocide, war crimes and crimes against humanity) at the national level. National adjudication of international crimes is an essential part of the system of law enforcement created by the Rome Statute of the International Criminal Court. One could say that the international community created a *comprehensive* system of law enforcement with the Rome Statute, in which States and the Court act together to end impunity. As a principle, suspects of international crimes should be prosecuted within the national legal system of States willing and able to do so. Because suspects of these crimes will travel to any country they feel they will be safe in, all States must work together, cooperate, to make sure these crimes do not remain unpunished.

With the adoption of the Rome Statute, the States Parties, among other commitments contained in the Statute, recognized "that such grave crimes threaten the peace, security and well-being of the world," affirmed "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation," recalled "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes," and emphasized "that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." In this sense, it could be said that the Rome Statute created a *comprehensive* system of law enforcement for the adjudication of international crimes in which States and their national authorities play an essential role. The Statute itself, however, addresses cooperation between the International Criminal Court and States. It is not a framework for cooperation between States. The international framework for cooperation between States in the area of the investigation and prosecution of genocide, war crimes and crimes against humanity is composed of a number of older conventions: the Genocide Convention of 1948 and the Geneva Conventions of 1949 with its additional protocols.

The authorities of the Netherlands have been investigating and prosecuting suspects of these crimes since the end of the 1990's. These investigations all concerned crimes that had been committed abroad, for the most part by suspects which had afterwards sought refuge in the Netherlands.[1]For these investigations, as for all criminal investigations, seeking and collecting evidence is a crucial part of the criminal proceedings.

[1] To date, the Netherlands has prosecuted 7 suspects in 5 different situations: DRC, Afghanistan, Rwanda, Liberia/Sierra Leone, Iraq (see the last yearly rapport of the Ministry of Justice, TK 2008–2009, 31 700 VI, nr. 124). In two cases, the investigation and following prosecution concerned Dutch citizens accused of aiding and abetting war crimes. One defendant has been sentenced to 15 years imprisonment (Frans van Anraat, LJN BG4822, 30 June 2009; http://zoeken.rechtspraak.nl/ResultPage.aspx); the other has been acquitted, appeal at the Netherlands Supreme Court pending.

Evidence in these cases, however, is for the most part not found on Dutch territory. The competent Dutch authorities, as their colleagues from other countries involved in these types of investigations, may need to collect evidence on the territory of the States where the crimes have taken place. To this aim, the international legal framework of mutual legal assistance in criminal matters is essential.

The existing international legal framework does not, however, seem well adapted for the investigation, prosecution and adjudication of these crimes at the national level in cases where the evidence is to be found on the territory of another State.

2. A Legal Gap?

For effective investigation, prosecution and adjudication of international crimes at the national level, States must seek the evidence where it lies. Because in these cases evidence by definition is usually found on the territory of other States, cooperation and mutual legal assistance in criminal matters is essential. The international framework for extradition and mutual legal assistance in criminal matters for the investigation, prosecution and adjudication of international crimes as genocide and war crimes is, however, composed of a patchwork of older conventions concluded at a time where experience in the investigation and prosecution of these crimes was scarce and where the focus was primarily on the codification of substantive law, not on procedural cooperation matters.

The Genocide Convention (1948) and the Geneva Conventions (1949) do not contain such specific provisions. For countries needing a treaty basis for extradition and certain forms of mutual legal assistance, this situation makes effective investigation, prosecution and adjudication of international crimes difficult. This situation is in contrast with treaties such as the UN Convention on Transnational Organized Crime (TOC), which do contain modern provisions on extradition and mutual legal assistance criminal matters, can be of some help when the investigated crimes fall within the scope of the convention[2] but are not well adapted to the situation in which these particular international crimes have been committed.
The Genocide Convention. In the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, the Contracting Parties undertake to "enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide." The Convention states further that a person charged with the crime of genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." Concerning extradition, the Convention states that the crime of genocide "shall not be considered as political crimes for the purpose of extradition" and the Contracting Parties *pledge* themselves in such cases "to grant extradition in accordance with their laws and treaties in force." The Convention does not contain any obligation regarding prosecution and extradition, nor does it provide for any international legal framework for States to grant each other extradition or to give each other legal assistance in criminal matters. For the crimes of genocide, the international legal framework for extradition and mutual legal assistance in criminal matters is deficient.
The Geneva Conventions and their additional protocols. The legal framework of the Geneva Conventions does contain a general obligation for the prosecution and extradition of the crimes falling within the scope of the Conventions. "(…) Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance

[2] For the scope of this treaty crimes must have been committed by a 'criminal organization' in a 'transnational' context and "relating directly or indirectly to the obtaining of a financial or other material benefit."

with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case."[3]

Only Additional Protocol 1 (applicable to crimes committed in international armed conflicts) contains some specific provisions for mutual legal assistance in criminal matters: "1. The High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol. 2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1 of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred. 3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters." (art. 88). Therefore, war crimes committed in non-international armed conflicts are not covered by this provision. The international legal framework for extradition and mutual legal assistance in criminal matters for this category of crimes is only partial.

Crimes against humanity. For crimes against humanity there is to date no international convention providing for extradition or mutual legal assistance in criminal matters. For this category of crimes, the international legal framework for extradition and mutual legal assistance in criminal matters is non existent.

The international framework for States investigating and prosecuting the crimes under the jurisdiction of the International Criminal Court is formed by a patchwork of partly outdated treaties. This when at the same time, under the Rome Statute, each State has the "duty" "to exercise its criminal jurisdiction over those responsible for international crimes," because "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." For States to effectively fulfill this duty to exercise criminal jurisdiction, they must rely on international cooperation in criminal matters. The Netherlands would like to take stock of the existing international legal framework, together with like-minded States, with a view to enhance and improve the mechanisms of extradition and mutual legal assistance for these crimes.

3. State of the Art International Legal Framework

As stated earlier, cooperation between States in the prosecution of international crimes is indispensable to give true meaning to the principle of *aut dedere aut judicare*. Within the international community the focus has shifted, in more recent years, from the codification of substantive law to procedural law as well. More extensive forms of international cooperation in criminal matters have increasingly been the subject of international conventions. This shift in focus can be seen, for instance, in the Torture Convention of 1984 where provisions on extradition and legal assistance are incorporated. More recent conventions as the United Nations Convention against Transnational Organized Crime (UNTOC) of 2000, the Convention against Corruption (2003) and the Convention on Enforced Disappearance (2006) provide for a comprehensive legal framework for the international cooperation in criminal matters.

Torture. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1985) contains both provisions on the '*aut dedere aut judicare*' rule and provisions on mutual legal assistance in criminal matters. "The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of

[3] Art. 49 GC (I), 50 GC (II), 129 GC (III) and 146 GC (IV).

prosecution" and in article 7 "States Parties shall afford one another the greatest measure of assistance in connection with civil proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings." In this sense the crimes covered by the Convention are imbedded in an effective international legal framework.

Convention against Transnational Organized Crime / Convention Against Corruption. The United Nations Convention against Transnational Organized Crime (2000) and the Convention Against Corruption (2003) both contain extensive provisions with relation to extradition and mutual legal assistance in criminal matters. They provide for a framework for the most modern forms of mutual legal assistance as joint investigations and special investigative techniques. They also provide for guidelines for basic requests for mutual legal assistance. The crimes covered by these conventions are also imbedded in an effective and modern international legal framework with provisions specifically aimed at the investigation and prosecution at the national level.

4. Conclusion

For the crimes falling under the jurisdiction of the International Criminal Court there is no such international legal framework aimed at the international cooperation in criminal matters between States for the investigation and prosecution of these crimes at the national level. At the same time, States are under the 'duty' to prosecute these crimes at the national level, the jurisdiction of the International Criminal Court being 'complementary' to that of States.

The Netherlands seeks dialogue with other States to discuss the manner in which this framework could be enhanced and improved to the level of the most modern international instruments. In this sense, a multilateral treaty on international cooperation in criminal matters with respect to these crimes could be a way forward. It is time to bring the international legal framework for international cooperation with respect to the crime of genocide, war crimes and crimes against humanity to the same level as the legal framework for crimes as torture, organized crime, corruption and enforced disappearances.

A Legal Gap?

Getting the evidence where it can be found: Investigating and prosecuting international crimes

22 November 2011 | The Hague Institute for Global Justice, Sophialaan 10, The Hague | The Netherlands

A Legal Gap in the International Legal Framework Concerning the National Adjudication of International Crimes?

Second informal background Paper by The Netherlands

1. Introduction

The Netherlands, like many other states, is committed to the effective investigation and prosecution of the core crimes under international law (genocide, war crimes and crimes against humanity) at the national level. Such national action is an essential building block of the system of law enforcement created by the Rome Statute of the International Criminal Court. To this end, it is indispensible that States cooperate closely. To enable such cooperation, the Netherlands has proposed to discuss how to improve the existing international legal framework.

In our earlier background paper, we have discussed the need for enhancing the existing international legal framework mutual legal assistance in criminal matters (see informal background paper 1).The aim of this paper is to provide further input to this discussion. The draft provisions in the annex hereto concern the following issues: criminalisation of the core crimes, aut dedere aut judicare, preliminary investigation and custody, extradition, mutual legal assistance, confiscation, transfer of criminal proceedings, criminalisation of obstruction of justice and protection of victims and witnesses. The draft provisions are based on, and inspired by, similar provisions in the UN Convention Against Torture [1984], UN Convention on Transnational Organized Crime [2000], the UN Convention Against Corruption [2004] and the International Convention for the Protection of All Persons from Enforced Disappearance [20 December 2006].

The provisions in these conventions appear to reflect the state-of-the-art and they are very broadly accepted. It is emphasised, however, that the draft provisions in the annex are merely intended as a starting point for the discussion and do not constitute a draft for a convention. We welcome any comments, including on the following two questions.

Question 1:

Are the draft provisions in the **Annex** a good basis for further discussion?

Question 2:

To further this discussion and to assess whether establishing a new international legal framework is feasible, is it helpful to organise a group of national experts from across the world? Would your State be interested to be represented in such a group?

Annex 1

Article #

Crimes

[**note**: reference to the crimes could be made in a number of manners, for example:
(i) include the respective definitions from the Rome Statute or
(ii) refer to the relevant provisions in the Rome Statute]

Article #
Criminal Jurisdiction

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article # in the following cases:
    1. When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
    2. When the alleged offender is a national of that State;
    3. When the victim was a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article #

Aut dedere aut iudicare

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any [crimes under this Convention] referred to in article X is found shall in the cases contemplated in article X, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article X, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article X.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article X shall be guaranteed fair treatment at all stages of the proceedings.

Article #

Preliminary investigation and custody

1. Upon being satisfied, after an examination of the information available to it, that the circumstances so warrant, any State Party in whose territory a person suspected of having committed a crime under this Convention is present shall take him or her into custody or take such other legal measures as are necessary to ensure his or her presence. The custody and other legal measures shall be as provided for in the law of that State Party but may be maintained only for such time as is necessary to ensure the person's presence at criminal, surrender or extradition proceedings.

2. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, to the representative of the State where he usually resides.

3. A State Party which has taken the measures referred to in paragraph 1 of this article shall immediately carry out a preliminary inquiry or investigations to establish the facts.

Article #

Extradition

1. For the purposes of extradition between States Parties, the crimes under this Convention shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such a crime may not be refused on these grounds.

2. The crimes under this Convention shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

3. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of the crimes under this Convention.

4. States Parties that make extradition conditional on the existence of a treaty shall:
    a. At the time of deposit of their instrument of ratification, acceptance, approval of or accession to this Convention, inform the Secretary-General of the United Nations whether they will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and
    b. If they do not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this Article.

5. States Parties that do not make extradition conditional on the existence of a treaty shall recognize crimes under this Convention as extraditable offences between themselves.

6. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

7. Where a person whose extradition is sought for the purposes of prosecution, is a national or resident of the requested State Party, extradition may be subject to the condition that the person is returned to the requested State Party in order to serve the sentence imposed as a result of the trial or proceedings for which the extradition of the person was sought.

8. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national or resident of the requested State Party, the requested Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting Party, consider the enforcement of the sentence that has been imposed under the domestic law of the requesting Party or the remainder thereof.

9. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

10. Extradition shall not be refused, unless the requested State Party has, where appropriate, consulted with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

11. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

Article #

Mutual legal assistance

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the crimes under this Convention.

2. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:
    a. Taking evidence or statements from persons;
    b. Effecting service of judicial documents;
    c. Executing searches and seizures, and freezing;
    d. Examining objects and sites;
    e. Providing information, evidentiary items and expert evaluations;
    f. Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
    g. Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
    h. Facilitating the voluntary appearance of persons in the requesting State Party;
    i. Any other type of assistance that is not contrary to the domestic law of the requested State Party.

3. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to crimes under this Convention to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

4. The transmission of information pursuant to paragraph 3 of this Article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

5. The provisions of this Article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

6. Paragraphs 7 to 25 of this Article shall apply to requests made pursuant to this Article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 7 to 25 of this Article in lieu thereof. States Parties are strongly encouraged to apply these paragraphs if they facilitate cooperation.

7. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to crimes under this Convention may be transferred if the following conditions are met:
    a. The person freely gives his or her informed consent;
    b. The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

8. For the purposes of paragraph 7 of this Article:
    a. The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;
    b. The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;
    c. The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;
    d. The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

9. Unless the State Party from which a person is to be transferred in accordance with paragraphs 7 and 8 of this Article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

10. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

11. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally, but shall be confirmed in writing forthwith.

12. A request for mutual legal assistance shall contain:
    a. The identity of the authority making the request;
    b. The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;
    c. A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
    d. A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;
    e. Where possible, the identity, location and nationality of any person concerned; and
    f. The purpose for which the evidence, information or action is sought.

13. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

14. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

15. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

16. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

17. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

18. Mutual legal assistance may be refused:
    a. If the request is not made in conformity with the provisions of this Article;
    b. If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;
    c. If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;
    d. If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

19. Reasons shall be given for any refusal of mutual legal assistance.

20. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requested State Party shall respond to reasonable requests by the requesting State Party on progress of its handling of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

21. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

22. Before refusing a request pursuant to paragraph 18 of this Article or postponing its execution pursuant to paragraph 21 of this Article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

23. Without prejudice to the application of paragraph 9 of this Article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

24. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

25. The requested State Party:
    a. Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;
    b. May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

26. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this Article.

Article #

Freezing, seizure and confiscation

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:
    a. Proceeds of crime derived [crimes under this Convention] or property the value of which corresponds to that of such proceeds;
    b. Property, equipment or other instrumentalities used in or destined for use in the [crimes under this Convention].

2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or

confiscated property covered in paragraphs 1 and 2 of this article.

4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

7. For the purpose of this article each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.

9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.

10. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

Article #

Transfer of criminal proceedings

1. States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of a crime under this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

Article #

Criminalization of obstruction of justice

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
    a. The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the

production of evidence in a proceeding in relation to the commission of crimes under this Convention;

b. The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of crimes under this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public officials.

Article #

Protection of witnesses

1. Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:
    a. Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;
    b. Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

4. The provisions of this article shall also apply to victims insofar as they are witnesses.

Article #

Assistance to and protection of victims

1. Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation.

2. Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences under this Convention.

3. Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.