We live in a time where war crimes and crimes against humanity still occur on a regular basis. Along with genocide, these are the crimes the world has too often vowed to never again accept. In this context, an important recent initiative to strengthen the international legal framework needed for states to prosecute the perpetrators of such crimes in their national courts has gone relatively unnoticed. In April 2013, several states proposed in the Commission on Crime Prevention and Criminal Justice of the United Nations Office on Drugs and Crime (UNODC) in Vienna to open negotiations on a multilateral treaty on mutual legal assistance for genocide, crimes against humanity, and war crimes (core crimes). These are “the most serious crimes of concern to the international community as a whole.”[1] The primary responsibility to prosecute these crimes lies with states.[2] Unlike many other crimes, however, they are not subject to detailed treaty provisions on mutual legal assistance, including extradition, between states. As a consequence, the prosecution of these crimes in national courts has often been hindered by the lack of an international legal framework for cooperation between states. This Insight describes the current lack of detailed treaty provisions regarding mutual legal assistance for the core crimes, how this gap has often hindered national prosecutions of these crimes, and how the recent initiative proposes to fill this gap.

The Current International Legal Framework

The treaty framework regulating mutual legal assistance for genocide, crimes against humanity, and war crimes is limited and outdated. This is because the Genocide Convention and the Geneva Conventions date from the 1940’s, when it was not yet customary to conclude multilateral treaties with detailed provisions on mutual legal assistance. The Genocide Convention, adopted in 1948, requires States parties “to grant extradition in accordance with their laws and treaties in force,” but lacks more detailed provisions on mutual legal assistance.[3] The four Geneva Conventions of 1949 stipulate an obligation to prosecute or extradite for grave breaches, which only apply in international armed conflicts, but not for other war crimes.[4] Crimes against humanity are not regulated by any general multilateral treaty, though some crimes against humanity such as torture are...
subject to specific treaty regimes. The Rome Statute of the International Criminal Court addresses cooperation between the International Criminal Court and States but is not a framework for cooperation between States *inter se*.

More recent conventions such as the United Nations Convention against Transnational Organized Crime (2000), the Convention against Corruption (2003), and the Convention on Enforced Disappearance (2006) do provide for a comprehensive legal framework for international cooperation in criminal matters. Thus, international law in its current state contains detailed treaty provisions on mutual legal assistance for such crimes as computer-related forgery[5] (/print/1542#_edn5) but not for genocide, most crimes against humanity, and most war crimes. Bilateral extradition and assistance treaties can fill this gap only to a small degree, since the national investigation and prosecution of international crimes often require cooperation between states that do not have a regular working relationship in the judicial field and thus no such bilateral treaties.

**Mutual Legal Assistance for Core Crimes in Practice**

The current lack of adequate treaty provisions regarding mutual legal assistance for the core crimes has in practice often prevented, complicated, or delayed national prosecutions of these crimes. Some countries, such as Canada and The Netherlands, are bound by their national law to extradite only on the basis of a treaty. The absence of relevant treaty provisions precludes extradition of core crimes suspects no matter how willing the state is to cooperate. As recently as 2012, the government of The Netherlands noted that the lack of a relevant treaty basis poses an insurmountable obstacle to extradition for crimes against humanity since the Dutch constitution requires a treaty basis for extradition.[6] (/print/1542#_edn6)

Apart from extradition, mutual legal assistance requiring any form of coercion is also allowed only on the basis of a treaty in The Netherlands and other countries with a similar approach to international cooperation in criminal matters. For such states, obliging an unwilling witness to be interviewed, wiretapping, searching a home, or simply obtaining information from a bank or another company is not possible at the request of another (investigating or prosecuting) state unless there is a treaty basis for doing so.[7] (/print/1542#_edn7) In the absence of a multilateral treaty regulating international legal assistance for the core crimes, such countries often cannot perform these important functions to assist other countries in their investigation and prosecution of the core crimes.

Additionally, for countries that are not constitutionally bound to refuse requests for international cooperation in the absence of a relevant treaty basis, that absence can seriously delay, complicate, or even prevent cooperation. Professor Neumann noted in 1951 in the *American Journal of International Law* that the lack of relevant treaty provisions made the extradition of war criminals “extremely difficult, if not impossible.” He concluded that “under present legal conditions it is almost impossible to obtain the extradition of a fugitive war criminal from a neutral state, even if the neutral wishes to co-operate” and that “the remedy obviously lies in better international extradition treaties and agreements concerning the future treatment of war criminals and international terrorists.”[8] (/print/1542#_edn8)

Since 1951, the international community has concluded more than ten treaties regulating international cooperation against international terrorism. Yet, for war criminals and genocidaires, the situation is by and large the same as in 1951. Since then, great efforts have been made towards improving cooperation of states with international courts and tribunals, but no significant progress has been made to improve cooperation between the states whose primary task it is to prosecute these crimes.

A review of international practice in the investigation and prosecution of core crimes shows that this lack of adequate treaty provisions regarding judicial cooperation has indeed often provided an obstacle in practice, contributing to delays or even failure to prosecute core crimes suspects. In many cases, the absence of a relevant treaty basis is only one of various obstacles inhibiting adequate interstate cooperation. Sometimes, it is even a welcome excuse for a requested state not willing to cooperate rather than an insurmountable obstacle. Thus, it should be emphasized that in the following cases, more impediments to international cooperation existed than can be discussed here.

- In 1974, Bolivia’s Supreme Court turned down France’s extradition request for Klaus Barbie, citing the lack of an applicable extradition treaty. Barbie had been convicted *in absentia* in France for war
crimes committed in the Second World War. It would be almost ten years before Barbie was eventually expelled to Cayenne in 1983 and subsequently retried in France.[9] (/print/1542#_edn9)

- Ethiopian strongman Mengistu was convicted of genocide in Ethiopia in absentia in 2006. Both Zimbabwe, where Mengistu lives after having fled Ethiopia, and South Africa, where he visited, have turned down Ethiopian extradition requests and cited the lack of an applicable extradition treaty as a reason for doing so.[10] (/print/1542#_edn10) Already in 1994, Human Rights Watch had noted that hundreds of Ethiopian political and military officials, including the most culpable human rights violators of the Mengistu regime, had fled to countries which did not have extradition treaties in force with Ethiopia, and recommended the conclusion of extradition treaties as a necessary measure to achieve accountability for the period that is known in Ethiopia as the Red Terror.[11] (/print/1542#_edn11)

- Numerous extradition requests from the states making up the former Yugoslavia have been denied or severely delayed by other countries. Among the reasons cited in public reports are both the lack of an extradition treaty and the application of a bilateral extradition treaty which presented obstacles to extradition such as the non-extradition of nationals or a limitation to ordinary crimes for which the statute of limitations had lapsed.[12] (/print/1542#_edn12)

- In 2002, Indonesia denied extradition requests from East Timor for numerous Indonesian citizens who were alleged to have committed crimes against humanity in East Timor in 1999, citing the lack of an extradition treaty.[13] (/print/1542#_edn13)

- Rwanda has met negative replies on many extradition requests for suspects of its 1994 genocide. While in most cases various impediments to extradition played a role, some refusals merely referred to the absence of an applicable extradition treaty.[14] (/print/1542#_edn14)

The absence of a comprehensive treaty framework for international cooperation in the prosecution of core crimes contrasts with an apparent broad international consensus—found mainly in soft law instruments—that such cooperation is necessary and warranted:

- In 1973, General Assembly resolution 3074 laid down principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, declaring inter alia that states shall co-operate and assist each other in investigating and prosecuting these crimes, including by granting extradition.

- The International Law Commission’s 1996 draft code of crimes against the peace and security of mankind contained an obligation to extradite or prosecute for, inter alia, genocide and crimes against humanity.[15] (/print/1542#_edn15)

- The Rome Statute of the ICC, adopted in 1998 and now signed by more than 150 states, in its preamble affirms 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.” As the Assembly of States Parties to the Rome Statute has unequivocally affirmed most recently in November 2013, the need for effective measures at the national level and enhanced international cooperation in this preamble refers primarily to prosecutions by states themselves.[16] (/print/1542#_edn16)

- In July 2013, the International Law Commission’s Working Group on the Obligation to Extradite or Prosecute observed “important gaps in the present conventional regime governing the obligation to extradite or prosecute which may need to be closed,” noting in particular the absence of relevant treaty provisions in relation to most crimes against humanity, war crimes other than grave breaches, and war crimes in non-international armed conflict, as well as the “rudimentary regime” of the Genocide Convention.[17] (/print/1542#_edn17)

More recently, initiatives for a new treaty have emerged. In April 2013, at the twenty-second session of the Commission on Crime Prevention and Criminal Justice of the United Nations Office on Drugs and Crime in Vienna, several states proposed strengthening international mutual legal assistance for...
genocide, crimes against humanity and war crimes, including the possibility of drafting a multilateral treaty to that end. There was, however, no consensus to adopt a resolution to that effect due to an apparent disagreement about the suitability of the Commission on Crime Prevention and Criminal Justice as the appropriate forum for this initiative. In November 2013, at the twelfth session of the Assembly of States Parties to the Rome Statute, the subject was again on the table. This time, some forty states made a joint statement in which they called for the opening of negotiations on a “Multilateral Treaty for Mutual Legal Assistance and Extradition in Domestic Prosecution of Atrocity Crimes (crimes of genocide, crimes against humanity and war crimes).” In this statement, the states involved call it their responsibility to address the “outdated and insufficient international procedural legal framework” pertaining to the prosecution of the core crimes in national courts. They also call on all other states to join their initiative.

Conclusion
There seems to be a longstanding international consensus, expressed predominantly in soft-law instruments such as those cited above, that states should cooperate in the investigation and prosecution of the core crimes. At the same time, treaty provisions regulating that cooperation between states for genocide, war crimes, and crimes against humanity are limited and outdated.

Practice shows that a multilateral treaty on mutual legal assistance for genocide, crimes against humanity, and war crimes could provide an important strengthening of the international legal framework needed to prosecute the perpetrators of such crimes.

For some states, such a treaty is a necessity to offer coercive international cooperation, including extradition, since their national law precludes it in the absence of a relevant treaty. For all states, a modern international legal framework for judicial assistance is bound to enhance the promptness and effectiveness of that assistance. Even where a requested state is unwilling, rather than unable to cooperate, the presence of an international legal framework at least denies it an easy excuse not to cooperate. It can also provide a discourse for states to engage on cases where otherwise impunity would prevail. For example, the case of Hissene Habré, in which Senegal and the African Union are now taking extraordinary efforts to bring justice to the victims of political killings and systematic torture allegedly committed by Habré during his rule in Chad, shows how successful such engagement between states on the basis of international law can be.

It is to be expected, and welcomed, that the initiative to work towards a new treaty regulating judicial cooperation in core crimes cases will continue in the UN and other international fora over the next few years.

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Some caveats are in order regarding these examples of international practice. First, a broad overview of international practice on the basis of public reports is bound to reproduce the errors that are inevitably found in such reports. Second, as said above, the presence or absence of an applicable treaty is only one of many factors deciding whether effective international cooperation, including extradition, takes place. Third, we should realize that the problem has a far wider impact than can be learned from publicly reported cases, since international practice in international criminal law enforcement often remains out of the public eye. All in all, it is clear that the absence of a treaty framework in practice has complicated the prosecution of core crimes suspects in many different countries on different continents—even if we realize a margin of error applies here and various other factors play a role in the cases reported.


Links: