

A horizontal Treaty on Cooperation in International Criminal Matters: The next step for the evolution of a comprehensive international criminal justice system?

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Abstract

This paper addresses the intersection between two key concepts in international criminal justice, namely cooperation and complementarity. While it is recognised that domestic courts carry main responsibility for ensuring accountability for the commission of international crimes, there appears to be gaps in two areas. First, international law does not make provision for a comprehensive obligation to investigate and prosecute such crimes. Second, there is no comprehensive and robust interstate cooperation obligation, necessary to ensure successful domestic investigations and prosecutions. The paper assesses two initiatives designed to fill these gaps, and considers their strengths, weaknesses and the possible synergies between them.

1 Statement of the issues

The evolution of international law from a state-centred system, obsessed with the preservation of sovereignty, to a system concerned with the human condition has accelerated the development of such fields of international law as international human rights law and international criminal law.¹ International criminal law centres around the Rome Statute of the International Criminal Court (hereinafter the 'Rome Statute' and the 'ICC')² which seeks to improve the human condition by promoting justice and accountability, and by preventing impunity.

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¹On the evolution of international law see generally Tladi 'South African lawyers, values and the new vision of international law: The road to perdition is paved with laudable goals' 2008 (33) *SAYIL* 167.

²The 1998 Rome Statute of the International Criminal Court.

Efforts to strengthen international criminal justice have thus far focused on the ICC. Two principles in particular have received much attention in discussions on strengthening the ICC. The first of these, the principle of complementarity, postulates that domestic courts have primary jurisdiction over international crimes and that the ICC has jurisdiction only in the absence of national proceedings.³ Cooperation, the second principle, is a key principle of the Rome Statute system because without the cooperation of states the ICC cannot function.⁴

Although the ICC is the central piece of the evolving system of international criminal justice – the glue that holds the system together – the system cannot develop its full potential without enhancing the capacity of states to bring perpetrators of international crimes to justice. Efforts at enhancing the capacity of national jurisdictions to contribute to the fight against impunity have tended to focus on the availability and effectiveness of national legislation.⁵ In other instances, capacity building, both in terms of prosecutorial and investigative techniques and tools, has been the focus of complementarity.⁶ Nonetheless, the existence of an international legal framework is just as fundamental in improving and enhancing national level action against impunity for international crimes. The Rome Statute itself is not sufficient as an international legal framework.

The purpose of this article is to assess the prospects for a comprehensive convention aimed at facilitating national level action against the alleged perpetrators of international crimes. In particular, the article will consider two recent initiatives aimed at achieving conventions to enhance national level action in relation to international crimes. The first of these is the initiative by Belgium, The Netherlands and Slovenia for a convention on mutual legal assistance with

³The preamble of the Rome Statute affirms that prosecution for the most serious crimes 'must be ensured by taking measures at the national level and by enhancing international cooperation'. It also emphasises that the International Criminal Court 'shall be complementary to national criminal jurisdiction'. See Nouwen *Complementarity in the line of fire: The catalysing effect of the International Criminal Court in Uganda and Sudan* (2013).

⁴See, eg, Bert Swart 'General Problems' in Cassese, Gaeta and Jones (eds) *The Rome Statute of the International Criminal Court: A commentary (Volume II)* (2002) (Cassese, Gaeta & Jones) 1589, who described the ICC as a 'giant without arms and legs who needs artificial limbs to walk and work'. See also Ciampi 'The obligation to cooperate' in Cassese, Gaeta and Jones (eds) 1607. See further Swart 'Arrest and Surrender' in Cassese, Gaeta and Jones (eds) (2002) at 1640. See also Tladi 'The ICC decisions on Chad and Malawi: On cooperation, immunities and Article 98' 2013 (11) *J of International Criminal Justice* 199. Tladi 'When elephants collide it is the grass that suffers: Cooperation and the Security Council in the context of the AU-ICC dynamic' 2014 (7) *African J of Legal Studies* 378.

⁵On the principle of complementarity and national implementation legislation in Africa see Stone and du Plessis 'The implementation of the Rome Statute of the International Criminal Court (ICC) in African countries' available at <http://www.issafrica.org> (accessed 2014-07-21).

⁶See, eg, essays in Bergsmo (ed) *Active complementarity: Legal information transfer* (2011).

respect to Rome Statute crimes (hereinafter the 'BSN initiative').⁷ The second initiative concerns the study by the International Law Commission (hereinafter the 'ILC') of crimes against humanity.⁸ Both initiatives have, at their core, interstate cooperation as a central feature. The article begins by making the case that there are gaps in the international legal framework in relation to national level action against alleged perpetrators of international crimes. The case is made by considering the provisions of the Rome Statute and other international law relevant to national level action. I then describe, in turn, the salient aspects of the two initiatives. Finally, I consider the possible synergies between the two initiatives before offering some concluding remarks.

2 Legal gaps: national level action

While both initiatives proceed from the premise that there is a need for greater national level action, both initiatives recognise the important role, albeit complementary, of the ICC in the international criminal justice system. The ILC syllabus for a crimes against humanity project, for example, notes that the ICC 'will remain a key international institution for prosecution of high-level persons who commit this crime.'⁹ Similarly, the Declaration on the BSN Initiative refers to the ICC's role to investigate and prosecute perpetrators where states are unable or unwilling to do so.¹⁰ The Rome Statute system is thus central to both initiatives. However, both initiatives proceed from the assumption that there are legal gaps in two specific areas of national level action, namely the obligation on States to establish and exercise jurisdiction and the duty to cooperate between States. I proceed now to evaluate these assumptions.

2.1 *Obligation to exercise national jurisdiction*

While both initiatives affirm the importance of the Rome Statute, both recognise that an effective international criminal justice system depends mainly on effective domestic investigation and prosecution. The ILC syllabus, for example, while recognising the centrality of the Rome Statute and the ICC, observes that 'the

⁷See Declaration on International Initiative for Opening 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) (on file with author). See also for a more detailed discussion *A legal gap? Getting to evidence where it can be found: Investigating and prosecuting international crimes*, Report of the Expert Meeting, The Hague (2011-11-22) (on file with author).

⁸See Murphy 'Crimes against humanity' in International Law Commission *Report on the work of its sixty-fifth session* (6 May to 7 June and 8 July to 9 August 2013) General Assembly Official Records Sixty-eighth Session Supplement No. 10 (A/68/10) (Annex B).

⁹See para 11 of ILC Crimes against humanity (n 8).

¹⁰See Declaration on International Initiative (n 7).

ICC does not have the capacity to prosecute all persons who commit crimes against humanity, [and that] effective prevention and prosecution of such crimes' has to take place primarily in national systems.¹¹ Similarly, the BSN Declaration begins by stating that '[i]t is first and foremost States' responsibility to uphold and implement the conventions criminalising the crime of genocide, crimes against humanity and war crimes'.¹²

The idea that the prosecution of international crimes should take place principally in national systems echoes the spirit of the Rome Statute embodied in the principle of complementarity. In its preamble, the Rome Statute recalls 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes' and to this end it emphasises 'that the International Criminal Court established under [the Rome Statute] shall be complementary to national criminal jurisdictions'.¹³ The importance of complementarity under the Rome Statute is equally borne out by the statements from the various organs of the ICC. In February 2012 for example, then Prosecutor-elect of the ICC, Ms Fatou Bensouda, stated that one 'of the main principles of the Statute is that all Parties commit to investigate, prosecute and prevent massive crimes when perpetrated within their own jurisdiction'.¹⁴ She continues that States Parties accept 'their primary responsibility to investigate and prosecute' and that 'should they fail' in this responsibility 'the ICC can independently decide to step in'.¹⁵ In a similar vein, the President of the ICC, Judge Sang-Hyun Song, contrasted the ICC with the *ad hoc* tribunals created by the UN Security Council by referring to complementarity.¹⁶ He states that the ICC was designed 'from the ground up with the relationship between States and the Court in mind'.¹⁷ In this system 'the ICC is a court of last resort' and 'the primary responsibility for investigation and prosecution of Rome Statute crimes lies with the states'.¹⁸ Importantly, Judge Song stresses that 'this is both a *right* and a *responsibility* of each state'.¹⁹ States Parties have also, in the annual resolutions

¹¹Para 11 of the ILC Crimes against Humanity (n 6)

¹²See Declaration on International Initiative (n 7)

¹³See Preamble of the Rome Statute, paras 6 and 10.

¹⁴Bensouda 'The Rome Statute ten years on: Where to from here for the ICC?' Lecture at the Melbourne University Law School.

¹⁵*Ibid.*

¹⁶Song 'The International Criminal Court: A global commitment to end impunity', presentation at Bilgi University, Istanbul (2013-05-22).

¹⁷*Ibid.*

¹⁸*Ibid.*

¹⁹*Ibid.* Emphasis added.

on complementarity, consistently recalled the 'primary responsibility of States to investigate and prosecute' serious international crimes.²⁰

From the perspective of complementarity, the primary legal gap is that while the Rome Statute provides for the primacy of national jurisdiction, it does not require States Parties, as a legal obligation, to prosecute Rome Statute crimes. The jurisdiction of the ICC itself, including the conditions for its exercise, is established in the Rome Statute.²¹ However, under the Rome Statute, complementarity serves only as bar – an admissibility requirement – to the exercise of jurisdiction by the ICC. Article 17 of the Rome Statute, for example, provides the Court 'shall determine that a case is inadmissible where', *inter alia*, the 'case is being prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to genuinely carry out the investigation or prosecution'.²² The Rome Statute addresses, in great detail, the inadmissibility aspects of complementarity, including for example, descriptions of what is meant by unwillingness,²³ inability,²⁴ and how the admissibility of a case, including admissibility on the grounds of complementarity, can be challenged.²⁵ Moreover, these aspects of admissibility have been developed in the jurisprudence of the ICC.²⁶

Although the Rome Statute provides that the ICC is complementary to national systems, and establishes an elaborate admissibility regime based on complementarity, it does not, by its terms, establish national jurisdiction nor does it require States Parties to establish national jurisdiction over Rome Statute

²⁰See, eg, preambular paragraph of the ICC Assembly of States Resolution on Complementarity, ICC-ASP/12/Res.4, 27 November 2013.

²¹See arts 5, 12 and 13 of the Rome Statute of the International Criminal Court.

²²See art 17 of the Rome Statute of the International Criminal Court.

²³Article 17(2) of the Rome Statute states that in determining unwillingness the Court should consider whether the proceedings were or are being undertaken, whether there has been unjustified delay in the proceedings which in the circumstances will be inconsistent with an intention to bring the person to justice, or the proceedings are not conducted independently or impartiality.

²⁴Article 27(3) provides that in order to determine inability the Court shall consider whether 'due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony' or is otherwise not able to carry out proceedings.

²⁵Article 19 of the Rome Statute.

²⁶See, eg, *The Situation in Libya: In the Case of The Prosecutor v Saif-al-Islam Gaddafi and Abdullah Al-Senussi, Public redacted Decision on the Admissibility of the Case against Abdullah Al-Senussi* (No. ICC-01/11-01/11), 11 October 2013 paras 66-67. See also *The Situation in Libya: In the Case of The Prosecutor v Saifal-Islam Gaddafi and Abdullah Al-Senussi, Public redacted Decision on the Admissibility of the Case against Saif-al-Islam Gaddafi* (No ICC-01/11-01/11) paras 199-218. See also *Situation in The Republic Of Kenya: In the Case of The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Public Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute* (No ICC-01/09-02/11) 30 May 2011, paras 49-66.

crimes.²⁷ This is counter-intuitive given that domestic criminalisation is essential for effective complementarity.²⁸ However, even though the provisions of the Rome Statute do not require, as a legal obligation, the establishment of national jurisdiction over Rome Statute crimes, those States that have domesticated the Rome Statute have tended to establish national jurisdiction over Rome Statute crimes.²⁹ This may suggest that states assume the existence of an obligation to criminalise. Moreover, at times it appears that the organs of the Court also assume the existence of a 'responsibility' on the part of States Parties to exercise jurisdiction. In the statement referred to above, the Prosecutor of the ICC clearly labels the commitment by States Parties to prosecute as a 'responsibility'.³⁰ Of course, in a legal sense, the word 'responsibility' does not have the same connotation (other than in the context of the secondary rules of State responsibility) as an 'obligation' or a 'duty'. However, the President of the Court in his statement quoted earlier seems to go beyond moral responsibility in his description of the commitment to assert and establish jurisdiction over Rome Statute crimes.³¹ Having described the commitment as both a duty and a right, he continues to state that 'states parties to the Rome Statute have an *obligation* to ensure that their national justice systems are capable of conducting proceedings into alleged' Rome Statute crimes.³²

The notion that there is a legal obligation to establish jurisdiction has also found its way into judicial practice. In the *Kenya admissibility* case, the ICC Pre-Trial Chamber stated that in addition to having the right to exercise jurisdiction over Rome Statute crimes, states 'are also under an existing duty to do so as

²⁷Although the preamble of the Rome Statute declares that serious international crimes 'must not go unpunished' and that their 'effective prosecution must be ensured by taking measures at the national level', this is not followed up by an obligation in the operative text of the Rome Statute.

²⁸See Ambos 'Crimes against humanity and the International Criminal Court' in Sadat (ed) *Forging a Convention for Crimes Against Humanity* (2011) Sadat 295-296. For a list of Rome Statute domestic implementation legislation, as well as draft legislation, see www.iccnw.org/?mod=romeimplementation&idudctp=10&show=all#10 (accessed 2014-06-01).

²⁹See, eg, s 4(1) Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (South Africa); s 4(1) of the International Criminal Court Act 27 of 2011 (Mauritius); s 6 of the International Crimes Act, 2008 (Kenya); s 7 (Genocide), s 8 (Crimes against humanity) and s 9 (War crimes) in the International Criminal Court Act of 2010 (Uganda). A similar trend is evident in the national legislation of non-African states. See, for example, Sub-Divisions B, C and D of the International Criminal Court (Consequential Amendments) Act 2002 (Australia), ss 6, 7 and 8 of the Act to Introduce the Code of Crimes against International Law of 26 June 2002 (Germany) and s 4(1) of the Crimes against Humanity and War Crimes Act 2000 (Canada). See, however, Act 65 of 15 June Relating to the Implementation of the Statute of the International Criminal Court in Norwegian Law (Norway) which does not contain a provision criminalising Rome Statute crimes, and which focuses instead on cooperation.

³⁰See statement of Prosecutor Fatou Bensouda (n 14).

³¹See Statement of President Song (n 16).

³²*Ibid.* Emphasis added.

explicitly stated in the Statute's preambular paragraph'.³³ Similarly, the North Gauteng High Court of South Africa held that South Africa was under an obligation 'imposed both in terms of international law and South African law' to investigate and prosecute Rome Statute crimes.³⁴ On appeal, the Supreme Court of Appeal based the obligation to initiate investigations solely on South Africa's domestic implementation legislation and not on the Rome Statute – perhaps an indication that the higher Court does not share in the view that the Rome Statute obliges the exercise of jurisdiction.³⁵ The *Kenya admissibility* case, likewise, is open to the interpretation that it is not the Rome Statute that obliges the establishment and exercise of jurisdiction. Rather, the *Kenya admissibility* case could be read as an affirmation of the *assumption* in the Rome Statute that general international law (prior to the Rome Statute) imposed such an obligation, hence the phrase 'an existing duty'.³⁶ At any rate, it would be difficult, on the basis of the text of the Rome Statute, to sustain the assertion that the Rome Statute itself imposes an obligation to exercise jurisdiction over Rome Statute crimes. Indeed not all States implementing the Rome Statute have made the policy choice of establishing jurisdiction, which suggests that under the Rome Statute the establishment of jurisdiction is not seen as a legal obligation.³⁷

The analysis above suggests that while States have, in some cases, enacted legislation to establish jurisdiction over international crimes, there does not exist an obligation under the Rome Statute to establish national level jurisdiction over such crimes. There is, of course, an obligation under the Genocide Convention to enact 'the necessary legislation to give effect to' the Convention and to 'provide effective penalties for persons guilty of genocide'.³⁸ While a purely literal reading of this provision would not necessarily imply an obligation to prosecute, such a

³³Decision on the Application by the Government of Kenya Challenging the Admissibility, para. 40.

³⁴*South African Litigation Centre v National Director of Public Prosecutions*, 2012 10 BCLR 109 (GNP), at para. 15.

³⁵*National Commissioner of the South African Police v Southern African Human Rights Litigation Centre* 2014 2 SA 42 (SCA). See for discussion Tladi 'Introductory Note to National Commissioner of The South African Police Service and National Director Of Public Prosecutions v Southern African Human Rights Litigation Centre (South African Supreme Court Of Appeal)' 2014 *ILM* (forthcoming).

³⁶Decision on the Application by the Government of Kenya Challenging the Admissibility, para. 40. The preambular paragraph at issue *recalls* that there is a duty to exercise jurisdiction, rather than seeking to establish such a duty. Whether the assumption in the preambular provision is accurate can only be determined by an assessment of state practice and whether such practice is accepted by states as law.

³⁷See, eg, Act 65 of 15 June Relating to the Implementation of the Statute of the International Criminal Court in Norwegian Law (Norway). The Norwegian Act, by its terms, applies to cooperation between Norway and the ICC.

³⁸Article V of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).

literal interpretation would probably not be consistent with the rules of interpretation under international law.³⁹ Nonetheless, the Genocide Convention's requirement for criminalisation at national level, important as it is, is rather rudimentary. For example, while Article V of the Genocide Convention clearly requires States Parties to exercise jurisdiction,⁴⁰ there is no obligation to exercise universal jurisdiction.⁴¹ There is similarly an obligation under the Geneva Conventions to punish perpetrators of war crimes.⁴² However, this obligation is not extensive and applies only to war crimes in international armed conflict and, in particular, to grave breaches,⁴³ leaving unaccounted for war crimes in non-international armed conflict. Given the necessity of the exercise of national jurisdiction for the effectiveness of the international criminal justice system, the lack of a legal obligation on States to establish jurisdiction for international crimes is a legal gap that could potentially be filled by the two initiatives under consideration.

2.2 Interstate Cooperation

The second potential legal gap relates to cooperation and is also linked to complementarity. Effective complementarity requires not only the criminalisation of international crimes but the ability to effectively investigate and prosecute. An essential element for effective investigation and eventual successful prosecution of international crimes is cooperation.⁴⁴ Reflecting this importance, the Rome

³⁹Under art 31(1) of the Vienna Convention on the Law of Treaties, the terms of a treaty are not to be given a purely literal meaning, but must be given their ordinary meaning, in context and in the light of the object and purpose of the treaty.

⁴⁰See also art VI of the Genocide Convention (n 38).

⁴¹Article VI of the Genocide Convention (n 38) provides that a person charged with Genocide shall be 'tried by a competent tribunal of the State of the territory of which the Act was committed ...'

⁴²See art 49 of the First Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field, art 50 of the Second Geneva Convention for the Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art 129 of the Third Geneva Convention Relative to the Treatment of Prisoners of War and art 146 of the Fourth Geneva Convention Relative to the Protection of Persons in Times of War. These provisions provide for an obligation to 'enact legislation to provide for effective penal sanctions for persons alleged to have committed [...] grave breaches', 'to bring such persons, regardless of nationality, before its own courts,' or to extradite them. The provisions further provide parties to take necessary measures for the suppression of grave breaches.

⁴³On the continuing significance of the distinction between grave breaches and other war crimes see Öberg 'The absorption of grave breaches into war crimes' 2009 (91) *International Review of the Red Cross* 163.

⁴⁴See Olson 'Re-enforcing enforcement in a specialised convention on crimes against humanity, inter-state cooperation, mutual legal assistance, and the *aut dedere aut judicare* obligation" in Sadat (ed) *Forging a convention for crimes against humanity* (2011) at 523 *et seq*. See also Frigaard, Keynote Address, 'A legal gap? Getting the evidence where it can be found: Investigating and prosecuting international crimes', 22 November 2011, who, explaining Norway's experience in

Statute creates an elaborate cooperation regime to promote the effectiveness of the ICC.⁴⁵ As a general obligation, the Rome Statute provides that States Parties shall 'cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'.⁴⁶ The Statute lists various forms of cooperation that a state is obliged to provide such as the identification of persons, the taking of evidence, the questioning of any person, service of documents, execution of searches and seizures, the freezing of assets and the catch all phrase 'any other type of assistance which is not prohibited by the law of the requested State'.⁴⁷ Without question the most important form of cooperation provided for in the Statute is the obligation to cooperate in the arrest and surrender of persons under an ICC arrest warrant.⁴⁸ In addition to specifying the content of the obligations, the Rome Statute also lays down the various procedures that should be followed in effecting the general duty to cooperate.⁴⁹ The importance of cooperation in the Rome Statute system is annually reaffirmed by the State Parties which stress 'the importance of effective and comprehensive cooperation ... to enable the Court to fulfil its mandate'.⁵⁰ The Assembly of States Parties has also developed fairly robust, although largely ineffective, mechanisms for countering non-cooperation.⁵¹

The importance of cooperation for the Rome Statute system is also reflected in the fact that all domestic legislation implementing the Rome Statute includes a robust cooperation regime.⁵²

While the Rome Statute creates a rather elaborate and comprehensive regime which is by and large given effect to by States Parties in their domestic system, this regime is only vertical in nature, that is, it only applies between the ICC and State Parties. This sentiment is reflected in President Song's assertion that the ICC was designed 'from the ground up with the relationship between

prosecuting international crimes in Sierra Leone and Bosnia and Herzegovina, states 'to be able to investigate and prosecute [these cases], the investigators and prosecutor were having extensive, legal assistance from many countries.'

⁴⁵Tladi 'When elephants collide' (n 4); Tladi 'ICC decisions on Chad and Malawi' (n 4).

⁴⁶Article 86 of the Rome Statute.

⁴⁷Article 93(1) of the Rome Statute.

⁴⁸Article 91 of the Rome Statute.

⁴⁹See, eg, Arts 87, 91 and 96 of the Rome Statute.

⁵⁰Paragraph 3 of the ICC ASP Resolution on Cooperation, ICC-ASP/12/Res.3, 27 November 2013.

⁵¹See Assembly Procedures Relating to Non-Cooperation in Annex to ICC ASP Resolution on Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/10/Res.5.

⁵²See, for example, ss 8 to 32 of the Implementation of the Rome Statute Act (South Africa) ss 21 to 31 of the International Criminal Court Act of Mauritius (n 29); ss 20 to 151 of the International Crimes Act (Kenya) (n29); ss 20 to 80 of the International Criminal Court Act (Uganda) (n 29); ss 23 to 124 of the International Criminal Court Act, 2006 (Trinidad and Tobago) and generally International Criminal Court Act 41 of 2002 (Australia) (n 29).

States and the Court in mind.⁵³ The Rome Statute does not include a horizontal obligation for States to cooperate *inter se* in the investigation and prosecution of international crimes.⁵⁴ The only provision for possible interstate cooperation relates to cases of competing requests, that is, those cases where the ICC has made a request for cooperation from a State Party and, at the same, another State, whether a party to the Statute or not, has made a similar request.⁵⁵ It is thus not surprising that the implementing legislation of States Parties similarly does not make provision for interstate cooperation. Yet even national level prosecution of international crimes could benefit from interstate cooperation. Interstate cooperation is of particular importance in cases where the forum state – the state where the investigation and prosecution is taking place – is not the place where the crime occurred.⁵⁶ In the context of the Rome Statute which is based on complementarity and on the notion of national systems exercising jurisdiction, interstate cooperation would greatly increase the capacity of states to investigate and prosecute international crimes.

As with the duty to enact legislation to criminalise international crimes, the Geneva and Genocide Conventions' requirement for cooperation is, at best, uncomprehensive and rudimentary. The First Protocol to the Geneva Conventions provides that the Parties 'shall afford one another the greatest measure of assistance in connexion with criminal proceedings' in respect of grave breaches.⁵⁷ Protocol I also contains a duty to cooperate in matters of extradition.⁵⁸ As with the duty to exercise jurisdiction, this duty applies to grave breaches only and only in the context of international armed conflict. More importantly, the duty lacks precision and does not address, for example, specifics related to the implementation of the duty, such as the types of assistance that are covered as well as the modalities for providing that assistance. Although the Genocide Convention provides for a qualified duty to extradite 'in accordance with their laws and treaties in force',⁵⁹ it does not provide a general duty to cooperate.

There is thus clearly a legal gap with respect to interstate cooperation. The Rome Statute, though based on the idea that domestic systems have the primary responsibility to exercise jurisdiction, does not create the obligation of interstate

⁵³Presentation by President Song (n 16).

⁵⁴See Ferdinandusse 'Improving inter-state cooperation for the national prosecution of international crimes: Towards a new treaty?' 2014 (18)5 *ASIL Insights* available at www.asil.org (accessed 2014-07-22).

⁵⁵Article 90 of the Rome Statute.

⁵⁶Olson (n 44) where 'inter-State cooperation' is described as 'the linchpin for effective enforcement.'

⁵⁷Article 88(1) of the 1977 First Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I).

⁵⁸Article 88(2) of Protocol I to the Geneva Conventions (n 42).

⁵⁹Article VII of the Genocide Convention (n 38).

cooperation necessary to give effect to effective national investigation and prosecution. Neither is there a sufficiently comprehensive interstate cooperation framework in other sources of international criminal law. There are many examples of lack of cooperation serving as an impediment to national prosecution in instances where the existence of a legal framework for cooperation may have facilitated cooperation.⁶⁰ This legal gap could effectively be filled by the two initiatives under discussion.

3 The international law commission's project on crimes against humanity

3.1 *The nuts and bolts of the proposal*

In 2012, during the Sixty-Fourth Session of the International Law Commission, Sean D Murphy, a member of the Commission, proposed that the ILC study the topic of crimes against humanity.⁶¹ On 18 July 2014, during its Sixty-Sixth Session, the Commission placed the topic of crimes against humanity on its current work programme and appointed Sean Murphy Special Rapporteur for the project.⁶² According to his proposed work plan, Murphy intends for the Commission to complete its work on the topic and adopt a full set of Draft Articles on first reading by the end of 2016.⁶³

The project proposal is premised on the assumption that, of the three main international crimes, namely, crimes against humanity, genocide and war crimes, only crimes against humanity has not been the subject of a major global treaty, with the basic obligations to criminalise and to cooperate.⁶⁴ While the Geneva

⁶⁰Ferdinandusse (n 54) lists many examples, including the attempts by Ethiopia to secure the extradition of Mengistu from Zimbabwe (and even South Africa) and negative requests to Rwanda's requests for the extradition of some suspects in relation to the 1994 genocide.

⁶¹See ILC Crimes against Humanity (n 8).

⁶²The process of placing topics on the agenda of the ILC is a rather complex and sometimes long process. The first step, which involves investigating the legal and theoretical merits of the topic for codification and progressive development, is placing the topic on the long-term programme of work. The topic of Crimes against Humanity was placed on the long-term programme of work during the ILC's Sixty-Fifth Session (July 2013).

⁶³The Commission normally adopts a preliminary text which is then submitted to the General Assembly for comments (this practice is referred to as 'adoption on first reading'). After first reading, states are given time to study and comment on the text, after which the Commission adopts the final text on the basis of the comments on the preliminary text (this is known as 'adoption on second reading').

⁶⁴See para 1 of the ILC Crimes against humanity (n 8).

Conventions and Protocol I exist for war crimes⁶⁵ and the Genocide Convention exists for the crime of genocide,⁶⁶ there is no comparable regime for crimes against humanity.⁶⁷ The ILC sees the study of crimes against humanity, and the elaboration of a convention, as a key missing piece in the international criminal justice system.⁶⁸ The ILC has a history of work in this field, including the 1996 Draft Code of Crimes.⁶⁹ The Draft Code, for example, provides that States 'shall take such measures as may be necessary to establish ... jurisdiction over' international crimes.⁷⁰ The Draft Code also provides for a duty to extradite or prosecute persons alleged to have committed international crimes.⁷¹ The ILC topic extradite or prosecute *aut dedere aut judicare* had also been on the agenda of the ILC since 2005, but in 2014 the ILC decided to discontinue the project by providing a final report without producing any Draft Articles.

The ILC topic would define crimes against humanity 'for the purposes of the Convention'. According to the ILC proposal, the definition of crimes against humanity will be 'as it is defined in the Rome Statute'.⁷² The Convention would oblige states to criminalise crimes against humanity in their national law in a manner that would harmonize the definition of the crime across national legal systems.⁷³ Further, the ILC would propose that States exercise jurisdiction not only over acts committed on its territory or by its nationals 'but also with respect to acts by non-nationals committed abroad who then turn up in the Party's territory'.⁷⁴ Thus, the envisioned ILC Draft Convention would require states to exercise universal jurisdiction if the accused person is in its territory. This type of universal jurisdiction, requiring only the presence of the accused in the territory of the forum after the commission of the alleged offence, is also envisaged in

⁶⁵See, eg, 1949 Geneva Convention Relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; 1949 Geneva Convention Relative to the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; 1949 Geneva Convention Relative to the Treatment of Prisoners of War; 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (n 42). See also 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts.

⁶⁶Genocide Convention (n 38).

⁶⁷See para 1 of the ILC Crimes Against Humanity (n 8).

⁶⁸Paragraph 3 of the ILC Crimes against Humanity (*op cit* n 8).

⁶⁹ILC 1996 Draft Code of Crimes against the Peace and Security of Mankind with commentaries.

⁷⁰Draft art 8 of the 1996 Draft Code of Crimes.

⁷¹Draft art 9 of the 1996 Draft Code of Crimes.

⁷²Paragraph 8 of the ILC Crimes against humanity (*op cit* n 8).

⁷³Paragraph 8 of the ILC Crimes against humanity (*op cit* n 8).

⁷⁴*Ibid.*

other instruments such as the Convention proposed by the Crimes against Humanity Initiative.⁷⁵

Additionally, the ILC would propose 'robust inter-State cooperation by the Parties for the investigation, prosecution, and punishment of the offence, including through mutual legal assistance and extradition, and recognition of evidence.'⁷⁶ Presumably, the specific legal obligations in this regard would be based on the types of provisions currently found in existing treaties on such matters. The types of assistance that could be covered under an ILC draft Convention could include, for example, assistance in the taking of evidence, service of judicial documents, execution of searches, providing information and the tracing of the proceeds of crime.⁷⁷ Perhaps the central element of the ILC project will be an obligation to prosecute or extradite, *aut dedere aut judicare*.⁷⁸ The *aut dedere aut judicare* obligation, broadly stated, obliges a state to prosecute offenders present in its territory or, if it is unable or unwilling to do so, to extradite the offender to a state that is willing to do so.⁷⁹

The ILC proposal recognises that comparable conventions on other crimes have 'focused only on these core elements'.⁸⁰ The proposal, however, notes that the ILC could decide to go beyond these elements and consider other elements.⁸¹ It is here that there is a possibility for the ILC to identify elements that could contribute to prevention, such as the establishment of cooperative early warning systems and capacity building. On the decision of the ILC to include the topic on its current agenda, Amnesty International, issued a public statement welcoming

⁷⁵See art 9(1) of the Whitney R Harris World Law Institute Crimes Against Humanity Initiative Proposed Convention on the Prevention and Punishment of Crimes against Humanity, in Sadat (ed) at 359. This type of universal jurisdiction is similarly imposed in s 4(3) of South Africa's Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. See also *National Commissioner of the South African Police Service v South African Human Rights Litigation Centre* (n 35) paras 50 *et seq*.

⁷⁶Paragraph 8 of the ILC Crimes Against Humanity (n 8).

⁷⁷A catalogue of the types of assistance are contained in Annex 3 of the Proposed Convention on the Prevention and Punishment of Crimes against Humanity (n 75). See also, for discussion, Olson (n 44) 336 *et seq*.

⁷⁸Paragraph 8 of the ILC Crimes against Humanity (n 8)

⁷⁹See for discussion *Questions Relating to the Obligations to Extradite or Prosecute (Belgium v Senegal)* ICJ Reports 2012, 422. See also Report of the Working Group on the Obligation to Extradite or Prosecute (*Aut dedere Aut Judicare*), International Law Commission Report on the Work of its Sixty-Fifth Session (6 May to 7 June and 8 July to 9 August 2013) General Assembly Official Records Sixty-eighth Session Supplement No. 10 (A/68/10) (Annex A). On the history of the concept see Olson (n 44) 324 *et seq*. See also art 9 of the Proposed Convention on the Prevention and Punishment of Crimes against Humanity (n 75).

⁸⁰Paragraph 8 of the ILC Crimes against Humanity (n 8).

⁸¹*Ibid*.

the decision and calling on the ILC to include additional elements in its Draft Convention such as 'full reparations' and exclusion of immunities.⁸²

3.2 Challenges and hurdles

The ILC is a good forum from which to produce a text on which states can base a final convention on the domestic criminalisation and interstate cooperation in respect of Rome Statute crimes, including crimes against humanity. The ILC's working methods, involving detailed study of state practice and international law, will promote a high quality instrument which, while progressively developing the law, will be consistent with the myriad of laws and arrangements currently in place. Furthermore, while ILC members are independent legal experts skilled in the crafting of such an instrument, they assess the annual reactions by States in the Sixth Committee of the UN General Assembly to the ILC's ongoing work, thereby allowing adjustments to take account of State preferences where possible. This notwithstanding, the ILC's decision to study this topic is not without its challenges and detractors. The challenges are both institutional and substantive.

Institutionally, because of the working methods of the ILC, which requires that every Draft Article be extensively supported by doctrine, state practice and other sources of international law, the ILC's consideration of topics often takes an inordinate amount of time.⁸³ However, as noted above, the ILC proposal envisions that this topic will take a considerably shorter period of time due, in part, to 'the existence of analogous conventions, as well as a considerable foundation derived from the existing international criminal tribunals'.⁸⁴

On a more substantive level, questions have been raised, both by members of the Commission and States in the General Assembly, about possible conflicts between the ILC product and the Rome Statute. The statement of the Nordic countries during the General Assembly debate on the report of the Law Commission, for example, stressed that the ILC's consideration of this topic must not lead to the opening up of debate on language agreed under the Rome

⁸²Amnesty International Public Statement on the Initiative to Draft New Convention on Crimes Against Humanity: New Chance to Strengthen Fight Against Impunity, 18 July 2014 (on file with author).

⁸³The ILC worked on the topic of the Responsibility of States for Internationally Wrongful Acts from 1954 and only produced the Draft Articles on the Responsibility of States for Internationally Wrongful Acts in 2001. The Draft Articles on the Law of Treaties was similarly a product of work spanning about seventeen years.

⁸⁴Paragraph 17 of the ILC Crimes against humanity (n 8).

Statute.⁸⁵ The statement of The Netherlands was more direct and went to the heart of the problem. The representative of The Netherlands stated that what was required was 'an international instrument that would cover all the major international crimes, including crimes against humanity'.⁸⁶ Implicit in this statement is that by not covering genocide and war crimes, the ILC project risked fragmenting and making ineffective the very international cooperation regime that is desired. These issues had been raised by this author within the ILC and, to this end, the 2013 report of the Commission states that the 'view was expressed that the consideration of the topic in the syllabus should have taken a broader perspective, including the coverage of all core crimes'.⁸⁷ As noted above, the ILC syllabus responds to this by noting that war crimes and genocide have been the subject of their own comprehensive treaties regimes.⁸⁸ However, as illustrated above, neither the Genocide Convention nor the Geneva Conventions comprehensively provide for the obligation to exercise jurisdiction or to cooperate.⁸⁹ As the statement by South Africa suggests, 'the deficiency identified in the Rome Statute concerning [interstate obligations] was not particular to crimes against humanity and applied to all the serious crimes'.⁹⁰

4 Belgium, Slovenia and the Netherlands initiative

4.1 *The nuts and bolts of the BSN Initiative*

Unlike the ILC proposal, the BSN initiative has a much broader scope of application and encompasses not only crimes against humanity, but also genocide and war crimes. The BSN initiative is anchored in a declaration, which

⁸⁵See Statement of Mr Fife (Norway), during the Sixth Committee of the General Assembly deliberation, Summary Records of the 17th Meeting during the 68th Session of the General Assembly (A/C.6/68/SR.17), para. 38. See also statement of Mr Macleod (United Kingdom), Sixth Committee of the General Assembly deliberation, Summary Records of the 18th Meeting during the 68th Session of the General Assembly (A/C.6/68/SR.18).

⁸⁶Ms Lijnzaard (Netherlands), Sixth Committee of the General Assembly deliberation, Summary Records of the 18th Meeting during the 68th Session of the General Assembly (A/C.6/68/SR.18), para 37.

⁸⁷See Chapter XII, Other Decisions and Conclusions of the Commission, International Law Commission *Report on the Work of its Sixty-Fifth Session* (6 May to 7 June and 8 July to 9 August 2013) General Assembly Official Records Sixty-eighth Session Supplement No. 10 (A/68/10) para 170.

⁸⁸Para 1 of the ILC Crimes against humanity (n 6).

⁸⁹See Ferdinandusse (n 52)

⁹⁰Mr Joyini (South Africa), Sixth Committee of the General Assembly deliberation, Summary Records of the 18th Meeting during the 68th Session of the General Assembly (A/C.6/68/SR.18), para 56.

currently has 40 adherents including four from Africa.⁹¹ The Declaration highlights that if complementarity 'is to be truly effective, it is essential that states are able to cooperate practically, [sic] in providing judicial assistance and – if the need arises – extradition of the accused'.⁹² The Declaration then stresses that for this to happen, an effective legal framework is necessary but that the current conventional framework does 'not address judicial assistance and extradition in modern terms and norms'.⁹³ The Declaration commits its adherents to addressing these gaps through 'a procedural multilateral treaty on mutual legal assistance and extradition to cover this gap'.⁹⁴

The BSN initiative does not necessarily foresee a new definition for crimes against humanity, war crimes and genocide but rather intends to rely on the definition of these crimes in the Rome Statute. The report of the Expert meeting of November 2011, organised by the initiators of the project, notes that the reference to the crimes could be made either by including 'the respective definitions from the Rome Statute' or to 'refer to the relevant provisions in the Rome Statute'.⁹⁵ Instead of defining the crimes, the BSN initiative seeks to focus primarily on interstate cooperation. The Convention foreseen by the BSN initiative, according to its authors, is to be 'based on upon existing procedural provisions from more recent treaties on mutual legal assistance'.⁹⁶ The initiative catalogues areas of cooperation such as extradition, mutual legal assistance, taking of evidence, protection of witnesses, search and seizure amongst many others.⁹⁷

In addition to these core procedural obligations of interstate cooperation, the BSN initiative would also require the establishment of jurisdiction over crimes against humanity, war crimes and genocide.⁹⁸ In addition to the more traditional basis of jurisdiction, territory and nationality, the BSN initiative, like the ILC project, also foresees the exercise of universal jurisdiction 'where the alleged

⁹¹The four African states are Malawi, Senegal, Seychelles and South Africa. See Declaration by International Initiative for Opening 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) (on file with the author).

⁹²*Ibid.*

⁹³*Ibid.*

⁹⁴*Ibid.*

⁹⁵See Annex 1 of *A legal gap? Getting to evidence where it can be found: Investigating and prosecuting international crimes*, Report of the Expert Meeting (n 7).

⁹⁶See Explanatory Note by Argentina, Belgium, Slovenia and The Netherlands, Towards a Multilateral Treaty for Mutual Legal Assistance and Extradition for Domestic Prosecution of Atrocity Crimes (Crimes Against Humanity, War Crimes and Crimes of Genocide) (on file with the author).

⁹⁷*Ibid.*

⁹⁸See Annex 1 of *A legal gap? Getting evidence where it can be found: Investigating and prosecuting international crimes*, Report of the Expert Meeting (n 7).

offender is present' is in its territory.⁹⁹ At the heart of the BSN initiative, as with ILC project, is the *aut dedere aut judicare* principle.¹⁰⁰

4.2 Challenges and hurdles

The BSN initiative, more than the ILC topic, is expressly meant to operate as complementary to the Rome Statute, that is, almost as an implementing agreement to the Rome Statute provisions on complementarity. In other words, the BSN initiative is borne primarily from the recognition of the gap in the Rome Statute system, and the initiative is aimed at filling this gap.¹⁰¹ There is thus a conscious effort on the part of the BSN initiative to be faithful to the Rome Statute. This explains, in part, the reluctance to provide an independent definition of the crimes.

The BSN initiative's attachment to the Rome Statute, while valuable and useful, creates a dilemma for the proponents. The proponents are espousing a universal convention to ensure maximum reach. The Declaration by the sponsor states, for example, asserts that the convention eventually adopted 'would be open to all States interested in enhancing their capacity to nationally prosecute these international crimes'.¹⁰² This is in recognition of the fact that while the 122 States Parties to the Rome Statute constituted a significant number, there is a large number of States outside the Rome Statute whose adherence to the envisioned convention would be important to closing the impunity gap. When coupled with the fact that many States Parties may decide, for a wide range of reasons, not to join the mutual legal assistance convention, the reach of any instrument developed under the framework of the Rome Statute is significantly reduced.¹⁰³ This has created a dilemma about the forum within which to pursue the BSN initiative.

The proponents of the initiative have identified various forums as possibilities within which to pursue the mutual legal assistance convention. The first natural forum to consider is, notwithstanding the issue of the limited membership identified above, the Assembly of States Parties of the ICC. There is no reason, at least not as a matter of law, why an instrument developed within the framework of the Rome Statute cannot be open to all States, including States not party to the Rome Statute. However, under the current political climate, in particular the AU ICC relations, an instrument explicitly designated as a Rome Statute

⁹⁹*Ibid.*

¹⁰⁰*Ibid.*

¹⁰¹Declaration by International Initiative for Opening Negotiations on a Multilateral Treaty for Mutual Legal Assistance and Extradition in Domestic Prosecution of Atrocity Crimes (n 7).

¹⁰²*Ibid.*

¹⁰³The recent political climate surrounding the AU ICC politics may certainly have an impact on the adherence by ICC States Parties to a Convention developed under the Rome Statute.

supplementary instrument – whether the term Protocol, Implementing Agreement or Supplementary Convention is used or not – might cause even some States Parties, especially from Africa, not to ratify the said instrument. In the same vein, States not party to the Rome Statute with objection to the ICC (such as India which objects in principle to the relationship between the ICC and the Security Council), might decide not to join an instrument under the Rome Statute, developed within the framework of the Assembly of States Parties, due to the institutional linkage with the Rome Statute. It is thus not surprising that the option of pursuing this instrument within the framework of the Assembly of States Parties is not seriously being considered by the proponents of the BSN initiative.¹⁰⁴

The options being seriously considered by the proponents are the Commission on Crime Prevention and Criminal Justice in Vienna and the General Assembly of the United Nations. In 2013, Belgium, Slovenia and The Netherlands had proposed that the Commission on Crime Prevention take up the matter of the convention on mutual legal assistance. The idea, however, was rejected and it was not even placed on the agenda. While there may have been states who had substantive reasons for rejecting the initiative, for most states (including South Africa, which is a co-sponsor), the issue was one of forum. Some states took the view that the Commission on Crime Prevention was concerned not with international crimes of the Rome Statute type, but rather with the transnational crimes. While the main co-sponsors still see the Commission on Crime Prevention as the best forum from which to address this issue, the objection that it is the wrong forum will likely prove difficult to overcome. Given the challenges of using the Commission on Crime Prevention or the Assembly of States, the General Assembly of the United Nations seems to be the most promising forum. Some proponents, however, are concerned that the General Assembly is overly politicised and that there are states likely to transpose their hostility towards the ICC to any discussions about mutual legal assistance for international crimes. Moreover, since the ILC is a subsidiary organ of the General Assembly, the General Assembly might be reluctant to inscribe on its agenda the consideration of a subject which is already being considered by the ILC.

5 Synergies between the two projects

The ILC and BSN initiatives are both aimed at filling an important gap in the international criminal justice system by providing for an obligation to establish jurisdiction over relevant crimes and putting in place a robust interstate

¹⁰⁴During a meeting held on 31 March 2014, the only options identified by the proponents were the Commission on Crimes Prevention and Criminal Justice in Vienna and the General Assembly (Sixth Committee). See Minutes of Strategic Meeting with Supporting States, held on 2014-02-31, The Netherlands Ministry of Foreign Affairs, The Hague (on file with the author).

cooperation regime, including an *aut dedere aut judicare* obligation. A treaty, whether flowing from the ILC project or the BSN initiative or a combination, would enhance possibilities for effective complementarity.

At first glance, the ILC topic and the BSN initiative are mutually exclusive and in competition. After all, it is difficult to see how conventions flowing from these two initiatives could simultaneously flourish (in terms of ratification and impact). The success of the BSN initiative is likely to mean the irrelevance of the ILC topic. The mutual legal assistance and *aut dedere aut judicare* provisions would, in all likelihood, be similar if not identical in content. Since crimes against humanity would already be covered under the BSN initiative, the value added by the ILC topic would be questionable at best. Conversely, it could be argued that if the ILC topic succeeds, the value added by the BSN initiative would be diminished, as it would just enhance the regimes that already exist in the Genocide and Geneva Conventions. Nonetheless, given the rudimentary framework established by the Geneva and Genocide Conventions, a treaty that addresses crimes against humanity should be the preferred option.

Although the ideal goal would be to pursue a convention that addresses all three crimes, there is value in pursuing both projects. First, from a substantive perspective, the detailed study of work that goes into ILC projects provides the best option for a legally solid convention, drawing on the vast materials available, including judicial decisions, state practice and other treaties covering comparable provisions. The BSN initiative, on the other hand, as a state-centred process, will help galvanise the support of states for a global convention on the mutual legal assistance for these crimes, including crimes against humanity. There may therefore be value in pursuing both the ILC and BSN initiatives.

There is another, more strategic reason, for supporting both initiatives. The problem of forum is likely to continue to prove a stumbling block for the BSN initiative. The ILC topic, on the other hand, already has a forum and work on the topic has already begun. It is true that the ILC topic is substantively more limited than the BSN. However, the ILC topic would, on finalisation be submitted to the General Assembly for consideration by States. If the General Assembly were to decide to negotiate a convention on the basis of this text, states could propose expanding the scope of the convention to cover also genocide and war crimes in a way that captures the essence of the BSN initiative. If States were inclined to extend the ILC treaty to war crimes and genocide there is no reason why the Rome Statute definitions could not be transposed into the new treaty. Moreover, the nuts and bolts of the interstate cooperation mechanism for crimes against humanity established in the ILC topic could easily be applied to any expanded treaty.

6 Conclusion

While the International Criminal Court is at the centre of the international criminal justice system, it is domestic systems that have the primary responsibility for carrying out investigations and prosecutions for international crimes. Yet, the international criminal justice system does not have a sufficiently well-developed legal framework to facilitate domestic prosecution, and lacks the presence of a well-developed interstate cooperation system. The BSN and ILC initiatives to develop mutual legal assistance instruments for international crimes should be welcomed as important contributions to enhancing complementarity.

It is hoped that States, as they engage with both processes, will not only support them, but seek to strengthen them. In particular, States should ensure that at a minimum any convention that flows from either the BSN or ILC project should contain certain key elements. First, the convention should establish an obligation to criminalise the relevant crimes. Second, the convention should contain an obligation to extradite offenders wanted for such offences if it decides not to prosecute (the *aut dedere aut judicare* obligation). Finally, the convention should contain a detailed regime on interstate cooperation.