

PURSUING THE PERPETRATORS OF INTERNATIONAL CRIME BEYOND NATIONAL BORDERS: IS THE RECENT LJUBLJANA-THE HAGUE CONVENTION A 'SHOT IN THE ARM' OR 'REINVENTION OF A WHEEL'?

Muruga Perumal Ramaswamy
Faculty of Law, University of Macau

Abstract: Impunity is categorically recognised as one of the major obstacle in seeking justice and reparations by the victims of international crimes and serious violations of human rights. Instances of impunity are some of the major challenges facing effective enforcement of international criminal law. The prevalence of impunity dissuade efforts and hopes in making perpetrators accountable and as the fear of consequences dwindle, it may actuate the repetition of the crime. Impunity also triggers serious adverse effects on communities recovering from conflicts in achieving essential changes aimed at creating an egalitarian and a peaceful co-existence in the future. It fuels abuse of power and undermines trust in the rule of law and related institutions. Impunity in several forms is prevalent across various nations around the world and unlike the popular belief is not limited to conflict and war torn countries. Measures aimed at preventing and eliminating impunity have taken several forms. However, the paper argues that community of nations cannot get complacent with the existing normative resources fighting against impunity and should constantly be on vigil to identify and patch loopholes that perpetrators could take advantage to seek impunity. It argues that the success of any initiative to fight against impunity will be highly dependent

on enhancing effective ‘international cooperation’ and ‘mutual assistance’, given the major limitation that it has so far been primarily an agenda of bilateral or regional cooperation without attracting the traction of the wider international community. The paper identifies the pioneering features of the recent international regime established under the Ljubljana-The Hague Convention and argues that its potential to fight impunity should gain a greater significance. The paper systematically assesses major normative standards emerging from the new Convention to determine their effectiveness in promoting international cooperation to fight against impunity and highlights how its specific legal standards could fill the lacuna in international criminal cooperation.

Key Words: International Crimes, Impunity, International Cooperation, Limitations, Ljubljana-Hague Convention.

1. Introduction

Despite the successful establishment of the international courts and ad hoc tribunals, as well as the categorical recognition of expanding criminal jurisdiction of national courts in the form of extra territorial and universal jurisdictions, challenges continue to remain in rendering international criminal justice. Instances of impunity are some of the major challenges facing effective enforcement of international criminal law. Impunity is categorically recognised as one of the major obstacle in seeking justice and reparations by the victims of international crimes and for serious violations of human rights. The prevalence of impunity not only dissuade efforts and hopes in taking initiatives aimed at making perpetrators accountable, but has the potential to motivate the very commission of the underlying crime itself. As the fear of consequences dwindle, it may actuate the repetition of the crime. Impunity also triggers serious adverse effects on communities recovering from conflicts in achieving essential changes aimed at creating an egalitarian and a peaceful co-existence

in the future¹. It fuels abuse of power and undermines trust in the rule of law and related institutions. Numerous adverse socio-economic consequences resulting from impunity like triggering deep divisions among social and ethical groups, inhibiting reconciliation, propelling corruption, stifling social and economic progression, and causing indeterminate damage to different strata of the society are well documented by studies and commissions of inquiries². Studies have also highlighted a wide array of ramifications resulting from the prevalence of impunity ranging from psychological consequences to environmental degradation³.

Impunity in several forms is prevalent across various nations around the world and unlike the popular belief, it is not limited to conflict and war torn countries. Similarly, impunity is not limited to countries where there are authoritarian rule or weak governments that do not have effective control of the entire territory. Although, impunity in a narrow perspective particularly in relation to the commission of international or other serious crimes could be traced more in the above countries, impunity in a broader sense is found to exist among different nations across the world, including in the developed and democratic states. For example, the 'Atlas of Impunity' published by Eurasia Group in 2023 adopting a holistic approach in defining impunity revealed various degrees of impunity existing in 163 countries that formed part of their study. The Eurasia quantitative

¹ See Susan Opatow, (2002), "Psychology of Impunity and Injustice: Implications for Social Reconciliation" in Cherif Bassiouni (ed.), *Post-Conflict Justice*, Leiden: Brill-Nijhoff, 201.

² For example, see a study on economic consequences of impunity M.B. Gordon, et.al. (2009), "Crime and punishment: the economic burden of impunity" 68 *Eur. Phys. J. B* 133.

³ For one of the earliest studies on the psychological impact see Diana Kordon, (1991) "Impunity's Psychological Effects: Its Ethical Consequences" 17 *J Med Ethics* 29.

study assessing impunity with reference to five extensive attributes in a scale 1-5 identified the existence of high overall impunity score of above 2.5 in seventy seven countries, a score between 1 to 2.5 among sixty nine countries and only seventeen countries below the score of 1. Although, the five attributes assessed under the study referred to the broader aspects of conflicts and violence, human rights abuse, governance without accountability, economic exploitation and degradation of environment without a specific focus on international crimes, the Eurasia study exemplifies that most countries face concerns of impunity at some degree. Such a finding prompts the argument that international initiatives aimed at eliminating impunity should transcend beyond egregious violation of international criminal law and seek to prevent impunity across the board and in particular those related to attributes like 'conflicts and violence' and 'human rights abuse' that have direct nexus to the international crimes.

Measures aimed at preventing and eliminating impunity have taken several forms. First and foremost, certain theories of criminal jurisdiction and its wider adoption among national states in asserting jurisdiction transcending beyond crimes committed within their territories is a crucial element in fighting impunity. In particular, the extension of territorial jurisdiction beyond land territory, asserting jurisdiction based on theories relating to personality or nationality, expansion of extraterritorial jurisdiction, and exercise of universal jurisdiction can all be cited as potential theoretical foundations relevant to the fight against impunity. Secondly, categorical recognition of international crimes as well as creation and functioning of ad hoc international criminal tribunals and International Criminal Court (ICC) are no doubt some of the most important international initiatives that have a distinct dissuading effect upon impunity. Thirdly, bilateral or regional extradition treaties have served as important instruments preventing impunity of perpetrators of crimes fleeing a jurisdiction.

In addition to some of above cited examples, various other

international initiatives that play a crucial role to curtail impunity could be cited. However, the community of nations cannot get complacent with the existing normative resources fighting against impunity and should constantly be on vigil to identify and patch loopholes that perpetrators could still take advantage in seeking impunity. In this regard, it is crucial to realize that the success of any international initiative to fight against impunity will be highly dependent on effective 'international cooperation' and 'mutual assistance' and any perceived limitation or loophole in the related legal spheres should gain the attention and priority of the international community. Despite some of the substantive international initiatives that have the potential to fight against impunity discussed earlier, the focus on enhancing criminal cooperation and mutual assistance has primarily been in the frontier of bilateral or regional cooperation without attracting the traction of the wider international community.

It is in the above context, the pioneering role of the recent initiative of the international community under the auspices of the government of Slovenia aimed at developing an exclusive international regime to promote international cooperation to fight impunity against international crimes gains a greater significance⁴. Despite the pious purpose and ambitious agenda, a closer scrutiny of the important normative standards and obligations resulting from the resulting treaty regime is an indispensable exercise to determine whether the essential features of the emerging regime are capable of addressing impunity distinct from existing bilateral or regional initiatives. The present paper aims at systematically assessing the major normative standards emerging from the Ljubljana-The Hague Convention to critically determine their effectiveness in achieving the major objective and purpose of the regime in promoting international cooperation to

⁴ For a historical account of the fight against impunity see Cherif Bassiouni, (2000), "Combating Impunity for International Crimes", 71 U. Colo. L. Rev. 409.

fight impunity and how its specific legal standards could fill the lacuna of the period before the Convention, which was mainly characterized by bilateral or regional cooperation measures.

2. Fundamental values and motivations moulding the legal framework

In aspiring to develop an exclusive multilateral framework promoting international cooperation to deter impunity, the Ljubljana - The Hague Convention rests on certain basic values and principles, which arguably are indicative of the fundamental pillars upon which its comprehensive legal framework is built upon⁵. Despite the diversity in criminalization among different national jurisdictions, the scope of application of the Ljubljana - The Hague Convention is chosen to focus on certain international crimes that are the most serious crimes of concern of the international community with an aim to prevent impunity for anyone committing such crimes. The drafters of the Convention are of the strong conviction that fighting impunity related to these crimes is indispensable to promote peace and stability, serve justice and uphold the rule of law, which values should dictate the interpretation of the specific provisions of the new Convention. While categorically recognising that this is an important initiative in international law development to fight against impunity for international crimes, the preamble of the Convention clearly acknowledges the role of other pertinent existing sources including customary international law and various other multilateral treaty regimes in the field of international humanitarian law and international criminal law, which arguably is a stark reminder that any obligations

⁵ For a comprehensive set of UN principles pertaining to combating impunity see Frank Haldemann and Thomas Unger (ed.), (2018), *The United Nations Principles to Combat Impunity*, Oxford: Oxford University Press.

arising under the present Convention should be read in the light and spirit of the existing customary law and legal standards enshrined in those explicitly acknowledged list of treaty instruments⁶.

The new Convention also reinforces the significance of the existing rights and obligations of states including their responsibilities under the general international law and its other specialized fields like humanitarian and human rights law as well as refugee law. Beyond the emphasis of the rights of the states, the Convention explicitly recognises the rights of various persons including the victims and witnesses of a crime falling within its purview. The right of the accused for a fair treatment during entire criminal proceedings is also equally avowed. For effective criminalization of acts of international crime, the Convention underscores the importance of the facilitation of the process of investigation and prosecution of such crimes. In this regard, the role of both domestic efforts and international cooperation based on international obligations as well as domestic law are equally emphasised.

With a clear realization that the above two processes in the context of international crimes would transcend beyond national boundaries of a single state⁷, the Convention acknowledges the indispensability of international co-operation for an effective implementation of the two processes at a domestic level. As a consequence, it concludes that the underlying goal of enhancing international co-operation can only be achieved through the consolidation of the international legal

⁶ The key pre-existing treaty instruments specifically acknowledged by the Ljubljana - The Hague Convention includes Genocide Convention, the four Geneva Conventions and additional protocols on international humanitarian law, as well as the ICC Rome Statute.

⁷ The Convention delineates the potential of foreign presence of people of interest like suspects and witnesses as well as the evidential materials or assets that are critical for carrying out the said processes.

framework for cooperation, which the Convention seeks to provide. To dissuade potential concerns of such consolidation of international cooperation obligations impinging upon national sovereignty, the Convention recites the relevance of pertinent international law principles of sovereign equality, territorial integrity and non-intervention. Finally, it is important to note that in the pursuit to strengthen the international legal framework governing international cooperation to fight against impunity, the Convention attaches the primary responsibility upon states to investigate and prosecute international crimes by imposing a mandate on them to enact relevant legislative provisions and undertake necessary executive measures to discharge such responsibility.

3. The core legal standards and principles constituting the Convention

The fundamental objective of the Convention to promote international cooperation in criminal matters is primarily aimed at combating impunity for three specific crimes namely genocide, crimes against humanity and war crimes. However, the objective of the Convention is not limited to facilitating international cooperation only with regard to the three crimes but also in applicable circumstances to a broader category of ‘other international crimes’. This dual narrative arguably balances the intention to prioritize the fight against impunity with regard to the three specific crimes and yet extend the utility of the Convention to a broad category of other international crimes in circumstances where State Parties may choose the application of the Convention. The preponderance of the fight against impunity with regard to the three crimes can also be substantiated by the fact that the Convention has chosen to provide a comprehensive definition of the three crimes in all plausible elaborate terms. Moreover, the Convention’s definitions of the three crimes are not just reproduction from an existing legal instrument, but derived from a variety of legal sources to ensure that the scope

of the definitions is presented in its broadest form to facilitate the indubitable application of the Convention⁸. With regard to these crimes that are specifically listed and defined, the application of the Convention is categorially mandated. In addition, the Convention also provides for the possibility for the State Parties to extend its application to crime(s) that are listed in any of the annexes to the Convention in relation to any other State Party, which has notified the intention to extend the application of the Convention to the same crime(s)⁹. Finally, the Convention also contemplates an optional application of the Convention with the agreement of the State Parties to certain conducts when a prescribed set of conditions are met. The prescribed conditions require that the conduct referred by a State Party requesting cooperation should amount to a crime of genocide, crime against humanity, war crime or crimes of aggression, torture and forced disappearance under international law and domestic law of the requesting State Party and the conduct in question constitutes an extraditable offence under the domestic law of the requested State Party.

⁸ For example, among the three specific crimes defined, the definition of 'war crimes' being defined in broadest terms is derived from multiplicity of sources including the relevant humanitarian law Geneva Conventions of 1949, laws and customs governing international armed conflicts under the general international law, as well as norms governing non-international armed conflicts. See Article 5(4) (a-f) of the Ljubljana-The Hague Convention 2023.

⁹ The Ljubljana-The Hague Convention 2023 contains four annexes expanding the acts defined as war crimes by the Convention. See Annexes A-E. In addition, three distinct annexes additionally adds acts that will constitute as crimes of torture, forced disappearance and aggression respectively. See Annexes F-H.

Firstly, in defining the crime of genocide, while the definition accentuating the crucial component of intention to eliminate certain groups partially or fully, chooses to delineate a range of specific acts, the commission of which will constitute the crime. It is important to note that such acts are not limited to killings, but also other pertinent acts that could exacerbate genocidal effects on any group like causing serious harm to body or mind, infliction of conditions of life aimed at physical destruction, imposition of birth preventive measures and forcible transfer of children from the group. The crime against humanity is also defined to enlist a range of specific acts that are carried out as part of a known widespread or systematic attack upon civilians. Such acts also transcend beyond murder to include notable ones like acts of extermination, enslavement, deportation, forced transfers, illegal imprisonment, torture, rape and various grave forms of sexual violence, persecution of groups on various grounds prohibited under international law, forced disappearance, apartheid and other similar inhuman acts. The Convention does not stop in just enlisting the above acts but also goes on to define most of the acts in specific details to remove any potential ambiguity as to when an enlisted act in question will categorically amount to a crime against humanity. The drafters of the Convention deserve due credit for an elaborate narration of the constituting elements of the core of the enlisted acts, as it will serve as an useful reference for the pragmatic application of the Convention. Its utility will be discernible in achieving the more elusive element of international cooperation, especially when State Parties have to face a range of individual diverse cases involving transboundary investigation and prosecution.

The Convention takes a two pronged approach in defining war crimes namely those that could result in international armed conflict and those arising in the context of a non-international armed conflict. It is further categorized into three subsects namely those specifically arising from the breach of Geneva Conventions of 1949, those that result from the violations of other relevant laws and customs applicable to international armed conflict within the broader

international law framework and those that arise from the breach of laws governing non-international armed conflict. The three subjects consists of different lists of specific acts, the commission of which will constitute a war crime. While the acts in relation to the violation of the Geneva Conventions forming part of the first subject includes generic scenarios like wilful killing and inflicting serious injury, torture or inhuman treatment, unwarranted and illegal destruction or appropriation of property, unlawful confinement or deportation, hostage taking as well as certain illegal acts targeted at prisoners of war, the second subject is enumerated with a much longer list of acts covering a range of persons in a war setting.

The second subject consists of twenty five distinct acts inflicting upon diverse set of people, objects and places including persons hors de combat, civilian population, civilian objects, personnel and objects involved in humanitarian assistance or peace keeping, natural environment, undefended places or dwellings that do not form part of military objectives, population of occupied territories, buildings dedicated to non-military purposes like education, religion, hospitals etc., persons in power of an adverse party, individuals or nationals of a hostile party, certain enemy property and individuals of a hostile army, belligerent nationals of a hostile party and minor children below the age of fifteen. Although, the list in the second subject reiterates various typical criminal acts arising in the context of an international armed conflict, the systemic furnishing of them in a coherent order at one single sub-article of the Convention would certainly serve as a ready reckoner in determining the application of the Convention to an investigation or prosecution in question.

The third subject pertaining to non-international armed conflict enlist acts in violation of the common article 4 of the four different Geneva Conventions of 1949 against non-combatants and persons hors de combat, including violence, mutilation, murder, torture, cruel treatment, outrages on personal dignity, humiliating and degrading treatment, hostage taking, and extra-judicial sentencing

and executions¹⁰. In addition, the Ljubljana-The Hague Convention provides a list of a dozen different acts that are carried out in violation of the other international laws and customs governing non-international armed conflicts, which will also constitute a war crime. Those acts include four categories of intentional direct attacks on a range of people, personnel, objects and places that typically are not directly taking part of hostilities, pillaging, rape, forced pregnancy or prostitution, sexual slavery, and other forms of sexual violence, conscripting minor children below fifteen into armed forces or engaging them in hostilities, forced displacement of people, treacherous killing or wounding a combatant, declaration of 'no quarter will be given' constituting refusal to take surrendering combatants as prisoners, subjecting an adversary to physical mutilation or scientific experiments endangering their life or health, and destruction or seizure of adversary property without necessity.

As in the case of international armed conflicts, it is evident that the Ljubljana-The Hague Convention also provides a very comprehensive sets of lists of acts that will constitute a war crime in the context of a non-international armed conflict. These lists will serve as a clear frame of reference in determining the duties to extend international cooperation for any investigation or prosecution arising in the context of an internal conflict. To enhance the effectiveness of these lists, the Convention mandates each State Party to ensure that the crimes governed by the Convention indeed constitute a crime under its domestic law and are sanctioned by suitable penalties. However, it is relevant to note that despite the comprehensive enlistment, the Convention seeks to balance the needs of maintaining law and order in internal conflicts. The said balance is achieved by the conspicuous

¹⁰ However, the above acts are confined to non-international armed conflicts albeit with the exclusion of internal disturbances and tensions such as instances of riots or sporadic violence. See Article 5 (4) (d) of the Ljubljana-The Hague Convention 2023.

exclusion of internal disturbances and tensions from the purview of certain provisions of the Convention as well as upholding the prerogative of national governments in maintaining internal law and order and defending the unity and territorial integrity of their state in specific contexts. Finally, it also imposes a blanket prohibition that all crimes governed by the Convention should not be considered as political crimes or associated crimes or motives.

Despite providing a comprehensive set of definitions of the crimes governed under the Convention, it proscribes any interpretation of such definitions from limiting or prejudicing other definitions of crimes under existing or developing rules of international law¹¹. In addition to the primacy provided to the existing or developing international law rules, the Convention also paves way for the State Parties to apply other existing agreements between themselves (in the place of the Convention) if such application will facilitate the cooperation with regard to any subject matter falling within the scope of the Convention. These subservient provisions of the Convention demonstrates its devout intention to serve the objective of fighting impunity from international crimes in the best possible manner even if it warrants the restraint in the application of the provisions of the Convention. However, at the same time, in cases where the Convention becomes applicable, it mandates a State Party to assert criminal jurisdiction in a comprehensive set of circumstances including crimes committed within its territorial jurisdiction or on board of aircrafts or vessels under its state registration, when the alleged offender is its national or stateless but its habitual resident, when the victim is its national, and when an alleged offender is physically present in its territory who is not extradited or surrendered to others for standing trial. Although the Convention proclaims a general principle

¹¹ Indeed, this proscription is not just limited to the definitions of crime under the Ljubljana-The Hague Convention 2023 but also all the provisions of the Convention.

of cooperation, whereby State Parties are only required to execute cooperation requests according to their domestic laws, it forbids subjecting the underlying crimes to which the Convention applies to any statute of limitation in contravention of international law.

The State Parties are required to recognize the right of any person to complain about the crimes governed under the Convention and to follow-up such complaints with prompt and impartial examination and other subsequent measures. Upon the examination, the State Party in whose territory the suspect is present is required to take the suspect into custody or take other relevant legal measure¹², followed by a preliminary inquiry of the facts of the case. If that suspect is a national of another state or is a stateless person, the State Party taking custody or relevant legal measure is required provide assistance to the suspect in communicating with the representative of the suspect's national state or state of habitual residence respectively. In addition to this obligation to assist, the State Party taking custody should also directly notify the relevant State Party of which the suspect is a national or habitual resident, about the custody, the findings of the preliminary inquiry and the intention to exercise jurisdiction. The Convention also imposes the obligation '*Aut dedere, aut iudicare*' (obligation to extradite or prosecute), where by the State Party in whose jurisdiction the suspect of the crime is found is required to submit the case of initiating prosecution unless it decides to extradite or surrender the suspect in relevant circumstances of the case. Moreover, such State Party is also required to maintain certain standards of evidence in prosecution and conviction of the suspect and guarantee fair treatment to the suspect at all stages of the criminal proceedings. Finally, in addition to the obligation to apprehend, prosecute and punish individuals

¹² This obligation is subject to a limitation that such custody or legal measure be continued only for a period necessary for the institution of criminal, extradition or surrender proceedings. See Article 13(1) of the Ljubljana-The Hague Convention 2023.

committing the crimes, the Convention recognizes the need for imposing criminal, civil or administrative liability and appropriate sanctions upon legal persons, in the event of their participation in those crimes. This extension of obligations to incriminate associated legal persons demonstrate the determination of the makers of the Convention to only deter the commission of international crimes but also rule out any involvement of powerful entities that may serve as potential abettor of the such crimes.

There are also other unique features of the Convention that calls for attention and are arguably characterizes the Ljubljana-The Hague Convention as a modern day international legal instrument. One of those features pertains to the personal data protection obligations imposed upon State Parties under the auspices of the Convention, which is untypical for any criminal law instrument to address, let alone one focused on international crimes¹³. The Convention includes some standard data protection mandates that are imposed on a State Party requesting data transfer like prohibition of use of data outside the purpose of transfer or other incompatible purposes, prohibition of transfer to any third state, obligation to abide by special conditions imposed by the requested State Party, obligation to provide appropriate protection against certain accidental, unlawful or unauthorized handling, access or processing of personal data, and the obligation of erasure or anonymization of data.

The Convention also imposes some common obligations on both

¹³ However, a general European Union initiative in this regard should be noted. See EU Directive 2016/680 on the protection of natural persons with regard to the processing of personal data for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016L0680> (accessed on 25 May 2025).

the requesting and requested State Parties like the obligation to transfer accurate personal data to each other, obligations of consultation, notification, correction and deletion in certain circumstances, obligations towards any concerned person to access, rectify or erasure of personal data in permitted circumstances, and obligation towards any concerned persons to seek effective remedy for violation of data protection obligation imposed by the Convention. However, two important caveats regarding the data protection obligations are worth noting namely a) although the Convention mandates that a concerned person should be informed about the transfer of personal data about that person and the purpose of transfer, the said information need not be furnished if it would be prejudicial to the purpose and object of the Convention and b) despite the recognition of a general obligation of a requested State Party to transfer personal data, the same may be refused if such a transfer is prohibited under the domestic law of the requested State Party or there are valid reasons to believe that the legitimate interest of the data subject will be adversely affected.

On the one hand, it is plausible that these extensive data protection obligations could raise concerns of potential delays in information sharing among State Parties, however any such concerns should be seen in the light of certain balancing provisions of the Convention seeking to expedite information sharing. In this regard, it is crucial to note that the Convention provides for a spontaneous sharing of information by a State Party to another State Party even in the absence of a request in order to facilitate the later to undertake or conclude criminal inquiries and proceedings or formulate a letter requesting the information in accordance the Convention¹⁴. Finally, with regard to the practical question of bearing the cost of executing any request

¹⁴ Albeit subject to various requirements and restrictions imposed upon the State Party to which information is so transferred without its request. For details see Article 17 (2-5) of the Ljubljana-The Hague Convention 2023.

for cooperation emanating under the Convention, a balance is sought to be achieved by sharing the cost between requesting and requested State Parties in specifically defined circumstances. Interestingly, while a prescribed list of costs is sought to be paid or reimbursed by the requesting State Party, the ordinary cost of executing a request under the Convention is to be generally borne by the requested State Party and the specific cost of transportation of a sentenced person to a State Party that will administer the sentence should be borne by such an administering State Party.

4. Distinctive Cooperative Features Designed to Fight Impunity.

Three major features of the Ljubljana-The Hague Convention 2023 contribute to the objective of achieving effective international cooperation to fight impunity from international crimes. Detailed set of obligations are enshrined in the Convention to achieve a) mutual legal assistance, b) extradition and c) transfer of sentenced persons. In addition, there are two special set of provisions, namely one establishing relevant central authorities and facilitating effective communication among State Parties and another seeking to protect specific type of individuals like victims of a crime and witnesses and experts in related criminal proceedings. The above five issues constituting the majority of the focus of the Convention and the crucial obligations relating to each of them as well as its unique characteristics needs a closer scrutiny to determine the effectiveness of the legal framework developed under the Ljubljana-The Hague Convention 2023.

4.1 Measures Manifesting a Balanced Mutual Legal Assistance Framework

The mechanism for mutual legal assistance is arguably the most important contribution emerging from the Convention, as it covers

numerous specific elements of assistance systematically, that were erstwhile not addressed comprehensively in a single multilateral instrument. Moreover, the Convention upholds its potential role to serve as the legal basis for mutual legal assistance even in circumstances where a State Party requires the provision of such assistance conditional upon the existence of a treaty and a State Party requesting assistance has not concluded any such a treaty¹⁵. At the very outset, it warrants the State Parties to provide mutual legal assistance in the widest form in general, and to the fullest extent possible in cases involving the liability of a legal person, for the purpose of investigations, prosecution and related judicial proceedings in relation to the crimes to which the Convention becomes applicable. These two fundamental obligations obviously set the emergence of the legal principle of cooperation in very broad terms, which will be a very useful tool in interpreting various specific obligations of mutual legal assistance under the Convention in the event of any disagreement between State Parties.

The obligation to provide mutual legal assistance indeed translates to serve a wide range of purpose under the Convention, which evidences its uniqueness in establishing a pioneering international legal framework seeking cooperation for fighting impunity in a whole range of fields, where there did not exist any comprehensive multilateral regime. While some of the fields or types of mutual legal assistance that could be sought under the Convention be seen as typical in instances of mutual cooperation in criminal matters, the others are arguably ground-breaking¹⁶. For example, taking of evidence or statement, examination of objects and sites, giving information and providing items of evidence and expert evaluations, execution of searches, seizure and confiscation, serving of judicial documents, providing

¹⁵ See Article 29 of the Ljubljana-The Hague Convention 2023. See also Matanat Asgarova, (2021) *op.cit.*

¹⁶ See the Ljubljana-The Hague Convention 2023, Article 24.

original or copies of documents, data and records, facilitation of voluntary appearance of persons in a requesting State Party or to transfer a detained person on a temporary basis, and to take protective measures towards victims of crimes, witnesses and their rights could be seen as typical in instances of mutual legal assistance. However, the types or fields like use of special investigation techniques, conduct of cross-border observations, constitution of joint investigation teams and inclusion of an open purpose provision namely providing 'any other type of assistance' compatible with the laws of requested State Party are arguably some of the most innovative elements of mutual legal assistance features seen in the Convention.

While the Convention prescribes the procedure and supporting documents for seeking the request for mutual legal assistance to enable the requested State Party to ascertain the authenticity of the request, it mandates the requested State Party to generally maintain confidentiality on various aspects of the request. The requested State Party also has the right to seek additional information if it considers that the information furnished by the requesting State Party in the first instance are insufficient. While submitting the request for mutual legal assistance, the requesting State Party could also seek provisional measures to preserve evidence, maintain an existing situation or protect legal interests that are endangered. Despite the prescriptions to substantiate a request for mutual legal assistance through submission of initial documentation and furnishing of additional information, the requested State Party could still refuse to provide the assistance sought and the Convention categorically identifies the permissible grounds upon which such refusal could result. The Convention takes a notable approach in this regard by prescribing a set of specific grounds of refusal¹⁷ and at the same time mandating due consideration to principles of human rights and fundamental

¹⁷ For the specific grounds of refusal recognized under the Convention see Article 30 (1) (a-j).

freedom emanating from both domestic and international law. To limit the potential adverse impact the grounds of refusal may have on assistance seeking, the Convention embeds a possible safeguard measure, whereby the requested State Party is obliged to consult the requesting State Party to explore whether the assistance could still be granted based on imposition of certain terms and conditions upon the requesting State Party to comply.

If the request is granted, a general obligation is imposed on the requesting State Party, whereby the information or evidence shared as part of the request are barred from being transmitted or used for purposes other than for which the original request was made, unless the consent of the requested State Party is obtained to that effect. The Convention also prescribes relevant provisions governing the execution of a request for mutual legal assistance, which is mainly aimed at ensuring that the request is executed in consonance with the domestic law of the requested State Party and the request is carried out expeditiously. At the same time, it also provides for a dual possibility of a requesting State Party seeking an express request when necessary or the requested State Party postponing a request to avoid any potential interference with any ongoing investigation, prosecution or court proceedings¹⁸. After the prescription of legal standards governing the request and provision of mutual legal assistance in general, the Convention furnishes individual provisions governing specific types or fields of legal assistance. The types of mutual legal assistance for which separate individual provisions are prescribed includes depositions of persons, hearings through video conferencing, facilitation of appearance of persons in a requesting State Party,

¹⁸ For a systematic study of potential problems that may arise in providing mutual legal assistance in the situations of absence of a treaty between states see Matanat Asgarova, (2021) “Problems of the Non-Treaty Based Mutual Legal Assistance on Criminal Cases between the States” 1 Law Rev. Kyiv U.L. 294.

transfer of detainees on a temporary basis, transmission of evidences, permission and facilitation of special investigative techniques, assistance for the conduct of covert investigation, establishment and operation of joint investigation teams, authorization and assistance for conducting cross-border observations, cooperation for confiscation of proceeds of crime or property, facilitation of restitution, and disposal of confiscated assets.

Albeit a closer scrutiny of the above individual provisions revealing numerous innovative features promoting international cooperation as well as safeguards balancing the diverse interest of different stakeholders, a detailed discussion of the same should be deferred for another paper in the interest of space. However, two additional measures introduced by the Convention regarding mutual legal assistance calls for a special attention before moving to the issue of cooperation in matters of extradition under the Convention is examined. Firstly, in relation to some of the most innovative elements of mutual legal assistance features mentioned earlier, the Convention has established clear standards governing criminal and civil liability of officials involved in related operations like cross-border observations, covert and joint investigations, and use of special investigative techniques. Laying down of liability standards demonstrates the Convention drafter's foresight of sensitivity of the underlying cooperative operations and the potential risks of civil and criminal injury that could result. Moreover, it also evidences their anticipation of the preventive role such standards could play in dissuading any official disregard to the rights of any stakeholders, while undertaking such sensitive and untypical mutual legal assistance operations. Secondly, arguably one of the cornerstone provisions having an overarching effect in supplementing the purpose and spirit of the mutual legal assistance is the specific provision recommending the State Parties to consider the possibility of transfer of proceedings for purpose of prosecution when such a transfer would serve the interest of proper administration of justice in cases involving multiple jurisdictions.

4.2 Cooperative Measures in Facilitation of Extradition

Request for extradition in relation to the crimes to which the Convention becomes applicable and the presence of a person sought by a State Party within the territory of a requested State Party are the essential requirements for the application of the provisions governing extradition under the Convention. However, the Convention recognizes some *de minimis* rules namely a) the crime in question for which extradition is sought should be punishable offence by at least one year of imprisonment in both the requested and requesting State Parties, and b) in cases where the person sought is already convicted and sentenced to prison in a requesting State Party, the minimum remaining duration of the sentence to be served should be six months. The Convention also establishes itself as the legal basis for extradition in similar lines with the mutual legal assistance discussed earlier, whereby if a requested State Party mandates the existence of an extradition treaty with the requesting State Party to process the extradition, then the Convention shall be deemed to serve that role¹⁹. In as much providing the substituting role for itself, the Convention also recognizes certain concrete grounds of refusal of extradition. These grounds are interestingly presented in two distinct sets namely the circumstances in which extradition should necessarily be refused (mandatory grounds) and the circumstances, which may result in a refusal of extradition (discretionary grounds).

The four mandatory grounds that will trigger a refusal of extradition pertains to serious concerns like requests made for untenable purposes like intention to prosecute on the basis of a

¹⁹ For certain consequences of absence of an extradition treaty see Vesna Stefanovska, (2016) “Extradition as a Tool for Inter-State Cooperation: Resolving Issues about the Obligation to Extradite”, 2 *Journal of Liberty and International Affairs* 38.

person's race, religion, gender, colour, sexual orientation, political belief, etc, concerns relating to the potential punishment by death penalty as a consequence of the extradition, concerns of the risk of torture or other prohibited treatments or punishment, and possibility of denial of fair trial or flagrant violation of fundamental human rights etc resulting from extradition, and the passing of a final judgement by a court of the requested State Party on the same criminal conduct of a person whose extradition is sought. The ten discretionary grounds based on which a refusal of extradition may result pertains to a mixed set of circumstances like risk of certain types of punishments being imposed on a person sought, person sought is a person to be tried by a competent international court or tribunal, existence of a final judgment on the same criminal conduct of the person sought already rendered by an international or court of another State, etc. Although, this set of discretionary grounds in comparison with the first set of mandatory grounds of refusal generally involves relatively less serious concerns, certain grounds like the opinion of the requested State Party that the execution of an extradition request could prejudice its sovereignty, security, public order or other essential interests are bound to create serious concerns and the likelihood of the requested State Party refusing extradition under such circumstances is almost certain²⁰. Nevertheless, it is pertinent to note that the Convention also recognizes the possibility of a requested State Party imposing certain terms and conditions as necessary for the requested extradition to be honoured in the event of its contemplation to refuse or postpone the extradition.

Once the extradition is granted, a general rule of speciality is triggered, whereby the Convention proscribes the requesting state from initiating proceedings, sentencing or detaining the person extradited for any prior crime other than for which that person

²⁰ See Article 51 (2) (j) of the Ljubljana-The Hague Convention 2023.

was extradited²¹. Interestingly, at the same time the Convention recognizes the possibility of alteration of the description of the crime charged during the criminal proceedings albeit subject to the condition that the altered description would still constitute an extraditable crime. Re-extradition to a third state is forbidden unless consent to that effect is sought from the requested State Party. The Convention also permits the refusal of extradition on the grounds of nationality, however, subject to the condition already noted namely the obligation of '*Aut dedere, aut iudicare*'. Any extradition request is required to be in writing to enable the establishment of authenticity along with necessary supporting documents and the requested State Party is the obliged generally to keep the fact and substance of the request confidential.

In the event of any conflicting extradition requests made by more than one State Party or competent international criminal court or tribunal, the requested State Party is empowered to make its extradition decision with due regard to any of its binding international obligation on 'primacy of jurisdiction' or in the absence of such an obligation, to a set of relevant circumstances prescribed by the Convention²². Although a requesting State Party is permitted to may a request for provisional arrest of the person sought to be extradited to ensure the presence of that person at the extradition proceedings, it is encouraged to take into account all periods of detention during the execution of the extradition request while determining the total period of detention when ultimately imposing the punishment for the crime during the final custodial sentence or detention order.

The Convention prescribes practical procedures for the surrender of the person after a request for extradition is granted and permits

²¹ For certain permitted exceptions in this regard, see Article 52 (1) (a) and (b) of the Ljubljana-The Hague Convention 2023.

²² See Article 58 (2) of the Ljubljana-The Hague Convention 2023.

the handing over of any related property during the surrender that could serve as evidence or is a result of proceeds of the crime in question. The Convention even addresses the potential situations of the need to transit extradited persons or persons in the processes of being extradited through the territory of another State Party, which demonstrates its drive to lay down comprehensive provisions addressing all facades of international cooperation to facilitate extradition aimed at preventing impunity. The pious intention to promote the objective is further heightened by the incorporation of an interesting pragmatic and efficacious rule, whereby the requested State Party is permitted to grant an extradition through a simplified extradition procedure, if the person sought consents to the extradition and the extradition in question is not manifestly precluded by its domestic law.

4.3 Terms Governing Transfer of Sentenced Persons

As a third major cooperative measure, the Convention recognizes the possibility of transfer of any person sentenced for the covered crime in a State Party to another State Party for serving the sentence. Although such a transfer could generally be requested by the Sentencing State Party or the receiving (administering) State Party, it is also possible for the sentenced person to express interest in being transferred. In any case, the transfer can be effected only upon the satisfaction of five specific conditions namely 1) the sentenced person is a national of the administering State Party, 2) the judgment relating to the sentence is final, 3) the remaining period left in the sentence that is yet to be served is not less than six months²³, 4) the sentenced person or a legal representative consents to the

²³ However, an exception in this regard is recognized by the Convention, whereby a transfer could still be made in cases where the remaining unserved sentence period is less than six months albeit subject to the agreement of involved State Parties. See Article 67(4) of the Ljubljana-The Hague Convention 2023.

transfer, when either the sentencing or administering State Party deems it necessary due to the age or body or mental condition of the sentenced person and 5) both the sentencing and administering State Parties consent to the transfer. Like in cases of mutual legal assistance and extradition, the present Convention contemplates its role as providing the required legal basis, when a transferring State Party mandates a treaty with a requesting State Party to effectuate the transfer but the same is absent²⁴.

Interestingly, the Convention not only prescribes the requirements for transferring sentenced persons but also creates an obligation upon the sentencing State Party to provide information about the substance of Convention governing such a possibility. Moreover, both the sentencing and the administering State Parties are obliged to inform each other in the event of the sentenced person has expressed an interest in being transferred to the respective state and ultimately inform the sentenced person about the outcome of the request for transfer. The Convention prescribes detailed provisions on how the relevant requests and replies can be made under the Convention along with details of the supporting documents that needs to be enclosed. As discussed earlier, although the consent of a sentenced person is one of the core requirements to effectuate a transfer and subsequent administration of a sentenced person, such a consent is dispensed with by the Convention under two special circumstances. Firstly, the consent to transfer of a sentenced person to an amenable administering State Party is not required, when the sentenced person is subjected to an expulsion or deportation order or

²⁴ For an analysis of the legal issues arising in the context of the transfer of sentenced persons in a bilateral treaty setting see Jamil D Mujuzi, (2012), “Analysing the Agreements (Treaties) on the Transfer of Sentenced Persons (Offenders/Prisoners) between the United Kingdom and Asian, African and Latin American Countries” 20 *Eur. J. Crime Crim. L. & Crim. Just.* 377.

other similar measures resulting from the sentence or a consequential administrative decision in the sentencing State Party. Secondly, the transfer of administration of the sentence to an amenable State of nationality does not require the consent of the sentenced person, when the sentenced person has fled or returned to the State of nationality being aware of the impending criminal proceedings or the issuance of the judgement in those proceedings against that person in the sentencing State Party.

If a transfer is carried out in accordance with the provisions of the Convention, a range of legal effects that could entail for the sentencing State Party and the administering State Party are systematically laid out, which are crucial to avoid any overlap or conflict of responsibilities between the two State Parties that are directly involved in the transfer of a sentenced person. In addition to establishing a general clarity to the situation resulting from the transfer, the relevant provisions also provide pragmatic guidance to both State Parties regarding how the transfer impacts or imposes specific obligations on their respective parts. The administering State Party is generally bound by the legal nature and duration of the sentence, as imposed by the sentencing State Party, for the purpose of continued enforcement after the transfer. However, the administering State Party is permitted to make some adjustment to the sanction imposed by the original sentence without aggravating the same in certain circumstances like its domestic law mandating such adjustments.

The administering State Party could also choose to undertake a conversion of sentence following its domestic legal procedures and fulfilling the conditions prescribed by the Convention in this regard. At the same time, the right to undertake a review of the judgement related to the sentence remains the exclusive prerogative of the sentencing State Party and the administering State Party is obliged to terminate the enforcement of a sentence, if the sentencing State Party informs of any decision or measure that ceases the enforceability of that sentence. The Convention also imposes a continued duty upon the

administering State Party towards the sentencing State Party requiring the furnishing of updated information relating to the enforcement of the sentence. Finally, as in the case of extradition discussed earlier, the Convention establishes pertinent provisions addressing a range of practical issues that would potentially arise in circumstances of transit of sentenced persons.

4.4 Authorities, Communication and Protection of Persons

Two essential elements for effective functioning of the core features of the Convention aimed at enhancing cooperation pertains to the establishment of central authorities in each of the State Parties as well as creation of channels for communication and contact points. The Convention mandates the designation of one or more central authorities in every State Party to facilitate the sending and receiving of requests and information as part of the cooperation the Convention seeks to achieve. Such central authorities are also designated with the role of encouraging prompt and proper execution of the requests made under the auspices of the Convention. Finally, a consultative role is also contemplated for these central authorities on matters pertaining to the application of the Convention whenever a consultation is sought by one or more State Parties. State Parties are also provided with the option to declare that requests under the Convention be addressed through diplomatic channels and/or International Criminal Police Organization. To enhance the efficiency of the communication about the execution of the requests made, the State Parties could also designate single points of contact within their competent authorities. The modern outlook of the Convention, which could also enhance the efficiency of the underlying cooperation, can be seen in its recommendation that the transmission of requests, information or communication related to the Convention be carried out using secured electronic means with the agreement of the relevant State Parties and after due regard for the need to protect confidentiality and ensure authenticity.

Finally, in seeking to protect certain persons like victims, witnesses and experts, who constitute a very pertinent group of people for the purpose and functioning of the Convention, a specific set of provisions governing the definitions, protection and proclamation of rights is incorporated in the Convention. In defining victims, it is interesting to note that the Convention transcends beyond natural persons subjected to harm and innovatively comprehends certain types of organizations or institutions sustaining direct harm to their property dedicated to certain prescribed purposes²⁵. One of the bedrock provisions that arguably will play a most effective role in the functioning of the fundamental features of the Convention is the one prescribing protection for various key persons pertinent for the purpose and operation of the Convention.

State Parties are mandated to take protective measures against potential acts of retaliation or intimidation or ill treatment to victims and witnesses along with their relative or representatives, experts and any other persons, participating or cooperating in the process of investigation, prosecution or other proceedings governed by the Convention. The Convention also provides some indicative measures of protection like establishment of procedures pertaining to physical protection, relocation, non-disclosure or limited disclosure

of identity or location, safe deposition, physical and psychological well-being, as well as safety and privacy. The modern oversight of the Convention is again evident in its provision that prescribes the use of communication technologies to implement relevant safety measures. Finally, the Convention also categorically proclaims

²⁵ The property subjected to harm should pertain to purposes like education, art, science, religion or charity, or related to historic monuments, hospitals as well as objects and placed used for humanitarian cause. See Article 81 (1) (b) of the Ljubljana-The Hague Convention 2023.

certain rights of victims including right to reparation for the harm suffered that comprehends elements like restitution, compensation or rehabilitation in appropriate circumstances. As part of the right, the State Parties are required to establish relevant procedures to enable victim participation and presentations for consideration at the suitable stage of the related criminal proceedings.

5. Concluding Remarks

The select review of the fundamental features of the Ljubljana-The Hague Convention 2023 in this paper reveals various important insights that merits an objective assessment to determine the extent it could be considered as a distinct development in the international fight against impunity. Several findings in this regard are worth noting. First and foremost, it is well evident that the comprehensive treatment of issues promoting cooperation on the three major aspects of mutual legal assistance, extradition and transfer of sentenced persons in a multilateral instrument in itself is a major achievement, under circumstances when they were typically a subject matter of limited regional or bilateral regimes. Moreover, at times when the major challenges faced in successfully seeking perpetrators of international crimes prove to be the most formidable challenge for international criminal cooperation, the legal framework established by the Convention has the potential to fill the void, if adopted widely. In this regard, the paper's focused analysis of the select fundamental values and motivations moulding the legal framework as well as the core legal standards and principles constituting the Convention reveals its strength in successfully incorporating a strong foundation that will withstand any challenges arising in the practical enforcement and future interpretation of the core obligations aimed at enhancing international cooperation to fight impunity.

In particular, the initiative of the Convention in providing comprehensive definitions of the three international crimes and related acts should not be seen as a reinvention of the wheel, as the analysis

reveals that the definitional provisions and the list of apposite acts are systematically elaborated to bring the necessary clarity for efficient functioning of the major features of international cooperation sought under the Convention. Additionally, the sensitivity to the existing or future rules of international law and attribution of primacy to such rules reveal the pious intention of the makers of the Convention to fill the gaps and not to disturb the tranquillity of any existing legal order. Moreover, the reinforcement of some of the basic traditional obligations like '*Aut dedere, aut iudicare*' demonstrates the determination of the Convention to derive and consolidate from existing normative standards in promoting its objective in establishing comprehensive international cooperation to fight impunity. At the same time, the paper also reveals the design of the Convention adapting to modernity through the pioneering incorporation and recognition of data protection obligations and provisions motivating the use of electronic means in the legal framework governing international cooperation.

The fine balance that the Convention seeks to achieve is also visible in the elaborate provisions governing three substantial features of mutual legal assistance, extradition and transfer of sentenced persons. In as much as semblance could be seen in the legal standards laid by the Convention governing each of the three features and various comparable regional or bilateral legal instruments on the same matters, the significant value the Convention adds should be recognized. In particular, bringing all the three distinct features within a single multilateral legal framework subjected to a common set of basic principles and values aimed at promoting a unified goal of fighting impunity from international crimes should enhance the utility of specific provisions of the Convention addressing each of the three features. Moreover, the contemplated establishment of central authorities along with the measures aimed at enhancing the communication between State Parties should strengthen the basic infrastructure and the mechanism promoting cooperation. The conviction of the Convention to secure the protection of involved

persons and reassert some of their rights demonstrates the drive to create ideal conditions to secure the success of the contemplated cooperative mechanism.

Despite the evident uniqueness of the Convention, the concentration of state signatories to the Convention so far being mainly those that have embraced the ICC regime, in itself should not be seen as a setback in the acceptance of the Convention. Given the pioneering nature and features of the Convention, it is important to recognize the complexity and sensitivity of the underlying issues addressed by the Convention, which will naturally take its own time for achieving a wider acceptance among states. Given the scope of the Convention that transcends beyond international courts and tribunals and aims to facilitate national courts seeking to prosecute and punish international crimes, the potential utility of the the Ljubljana-The Hague Convention 2023 for individual states interested in proactive pursuit of perpetrators of international crimes should be much higher than any other comparable legal regimes that exist. Moreover, the utility of the Convention in promoting other international criminal law initiatives like those of International Law Commission (ILC) work on crimes against humanity and the ICC should also be equally recognized at times when the world is increasingly been threatened with scourges of war.