THEMIS COMPETITION

Semi-final A

International cooperation in criminal matters

French Team - École Nationale de la Magistrature

François CHEVANCE, Marion COLIN, Marianne DESPIERRE

EUROPEAN COOPERATION IN CORE INTERNATIONAL CRIMES
CLOSING THE IMPUNITY GAP

"A day will come when you, France, Russia, Italy, England, Germany, all of you, nations of the continent, without losing your distinct qualities and your glorious individuality, will closely melt into a superior entity, and will establish European fraternity. (...) A day will come when there will be no more battlefield, only markets opening to business, and minds opening to ideas."

Victor HUGO, 21st August 1849, during the Congress for Peace

At a time when Euroscepticism has found a place in the political arena, Hugo's call for the establishment of "European fraternity" might appear as an outdated, utopian dream. Criticism of European institutions has come to a peak over the last few years, embodied by populist organisations and nationalist ambitions. Sympathizers of these movements have pointed out the flaws in multilateral cooperation and highlighted the need for States to reaffirm their sovereignty in the international area. However, in the field of international criminality, a unilateral approach is more than insufficient, and leads to the greatest pitfall of all: impunity. Cooperation is, therefore, the key.

The Rome Statute, creating the International Criminal Court, affirms no less in its Preamble: «The most serious crimes of concern to the international community as a whole must not go unpunished and (…) their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation"[1]. Even if dealing with international criminality could concern a vast number of situations, some crimes are distinguished as "core international crimes"[2], due to the fact that they are not only committed against the victims, or the State, but against Humanity as a whole. Described as the "common border stone for all cultures"[3], core international crimes are filled with this symbolism.

Apart from this symbolism, the generic term of "core international crimes" refers to specific technical infractions, according to a classic distinction of international criminal law: crimes against humanity, genocide and war crimes.

It may be noted that other international offences, either against people, such as acts of torture, forced disappearances and sexual assault, or against the environment, like acts of pollution and destruction of habitat, are not considered in themselves as "core" crimes, although they can

---

1 Rome Statute of the International Criminal Court, 17 July 1998

2 Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States, QP-05-14-102-FR-C, The Hague, November 2014, p. 4, online: <**https://goo.gl/CJZHfm** > [2014 Strategy]

3 Mireille DELMAS-MARTY, Le monde de l'éducation, July-August 2001: *"Crime against humanity is the common border stone for all cultures. The mission of human rights is also to preserve this future humanity, these future generations, so that this humanity remains a promise.*"

form part of the constitutive elements of such crimes. Core international crimes all have the similar requirement of a specific contextual element.

On the one hand, such crimes have to be committed under certain circumstances, linked with the intention of the perpetrators[4], a broader organisation[5] or the political situation[6]. Even if the Rome Statute of 1998 states specific elements in that extent, national legislations often come up with their own interpretation, adding specific conditions, such as the French requirement for a "concerted plan" as an element of a crime against humanity and genocide[7].

On the other hand, core international crimes are mostly perpetrated by authorities, officials or leaders of non-official armed groups, without whom these acts would not have such an impact on national ground. The targets of international justice are not field soldiers but instigators at the highest level. This is why political hindrance is a crucial issue in this matter, and international cooperation a primary necessity.

This cooperation can show multiple aspects, which ought to combine to ensure that the perpetrators of such crimes are brought to justice. States' joint efforts can either refer to theoretical or operational assistance[8], both being essential to investigate and prosecute[9]. Mutual legal assistance is then distinguished from other broader forms of cooperation. For instance, common reflection on the great principles of the conduct of the criminal trial or the sharing of a common training on core international crimes are crucial advances in this field. Nevertheless, if sharing information, good practices and technical abilities is at the heart of any cooperation, intervening in the field to collect evidence and testimonies or to arrest perpetrators is much more problematic. Since boundaries limit to a certain extent foreign intervention on a State's soil, dialogue between States is the solution.

This is how European cooperation shows its undeniable specificity. Geographically speaking, European states share the same issues concerning core international crimes, due to the mobility of the perpetrators on the continent, taking advantage of the disappearance of border control (for instance, people responsible for crimes committed in the former Yugoslavian territory). Legally speaking, European legislation is a useful practical tool in the fight against core international crimes.

---

4 Rome Statute, *supra* note 1, article 6: Genocide acts must be committed *"with intent to destroy, in whole or in part, a national, ethnical, racial or religious group"*

5 Rome Statute, *supra* note 1, article 7: Crimes against humanity must be committed *"as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack"*

6 Rome Statute, *supra* note 1, article 8: War crimes require an international or non-international armed conflict

7 French Criminal Code, article 211-1 and 212-1

8 Claude LOMBOIS, Droit pénal international, Dalloz, 2e edition, 1979, p. 635, distinguishing help by "cogestion" from help by "assistance"

9 Michel MASSÉ, Une nouvelle dimension de la coopération judiciaire en matière pénale : la coopération "verticale", RSC 2002 p. 884

Indeed, the history of European construction and International criminal justice follows the same pattern, both being reactions against the atrocities committed during World War Two. International conventions on criminal matters[10] have been adopted within the United Nations Organisation, affirming the will of the parties to bind together in order to prevent such events from occurring. They stand alongside European legislation, originating from the European Communities[11] as well as the Council of Europe[12]. The European Union has perpetuated this momentum, in its will to create a common area of freedom, security and justice[13]. Likewise, the need for the creation of specific international criminal tribunals[14], followed by a general international criminal court[15], accompanied the development of the jurisdiction of the European Court of Human Rights and of the Court of Justice of the European Union. Therefore, Member States can claim the application of principles of international criminal law[16]. Moreover, European tools are applicable to the fight against core international crimes. Traditional "mutual legal assistance" (MLA) measures show their consistency with the need for a supple, simplified and operational response to such crimes. From the investigations to effective prosecution and eventually sentence enforcement, European procedures are founded on the principle of mutual recognition, based on mutual trust. For instance, the European Arrest Warrant (EAW), created in 2002[17], is not a specific implement to fight core international crimes, but can be used efficiently to do so.

Thus, multilateral action appears to be the only realistic means of achieving ambitious goals in the fight against impunity. More than that, it is also the most efficient way to strike the right

---

10 For instance: General Assembly on the United Nations, Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by the General Assembly of the United Nations, 9 December 1948.

11 For instance: Treaty establishing the European Economic Community, 25th March 1957: *"Resolved to strengthen the safeguards of peace and liberty by establishing this combination of resources, and calling upon the other peoples of Europe who share their ideal to join in their efforts"*

12 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4th November 1950, Preamble: *"Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms"*

13 For example, the Stockholm Programme adopted by the Council of the European Union on December 2, 2009, established the framework for EU action on the issues of citizenship, justice, security, asylum, immigration and visa policy for the period 2010–2014.

14 United Nations Security Council, Res. 827, May 25th 1993, for the International Criminal Tribunal for former Yugoslavia (ICTY); Res. 955, November 8,1994, for the International Criminal Tribunal for Rwanda (ICTR).

15 Rome Statute, *supra* note 1

16 For instance: International Court of Justice, 20th July 2012, Belgium vs Senegal, Hissène HABRE's case interpreting the obligation to prosecute or extradite (art. 7 of the 1984 Convention against Torture), *"extradition was an option offered to the State by the Convention, whereas prosecution was an international obligation under the Convention, the violation of which was a wrongful act engaging the responsibility of the State."*

17 Council framework decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States, 13th June 2002 : *"(...) the formal extradition procedure should be abolished among the Member States in respect of persons who are fleeing from justice after having been finally sentenced and extradition procedures should be speeded up in respect of persons suspected of having committed an offence"*

balance between the urge to expand this fight and the constant respect of human rights and fundamental liberties. Current policies must be designed with a permanent view to this equilibrium, in order to assert their legitimacy; as demonstrated by historical examples, unilateral action is almost always subjected to endless debates[18], especially when prosecution justified by the safeguard of humanity bends the usually applicable rules.

Despite this historical construction, the fight against core international crimes is still topical. In 2017 alone, specialised national units publicly investigated, prosecuted or brought to justice 126 suspects, and 13 have already been convicted[19].

In the same way, 2018 will be a transitional year. As trials are continuously coming before international and national jurisdictions[20], celebrating the 20th anniversary of the Rome Statute creating the ICC and the 70th anniversary of the creation of the qualification of genocide[21] allows Member States to review evolutions in this field. The commemorations for the 24th anniversary of the Rwandan genocide, which started on 6th April, recall the atrocities committed during this period, and emphasise the need for their perpetrators to be brought to Justice.

The fight against core international crimes is also renewed by the questions surrounding acts of terrorism. Could such crimes, committed by armed groups, be prosecuted under this qualification instead of terrorism? The tension between efficiency and symbolism[22] is at stake, as the standard of proof is different: the threshold that prosecution must meet with crimes of terrorism is much lower than for core international crimes. To this extent, treating international terrorism as a "new crime against humanity", without combining qualifications, would paradoxically increase impunity and hinder prosecution.

Questions on European cooperation concerning core international crimes must be asked in terms of potency. Does the specificity of European tools in this field ensure added value for an efficient repression of such crimes? Has the cooperation model grown enough? Are the European Union institutions a strength or a weakness for prosecution?

---

18 For instance: about Klaus BARBIE's French trial, see: Jean-François LACHAUME, Annuaire français de droit international - année 1984, online <http://www.persee.fr/docAsPDF/afdi_0066-3085_1984_num_30_1_2640.pdf>, p. 939 §67: *"Barbie was maintaining that the conditions of his delivery to French authorities and his detention in France would be marred with nullity because resulting from a disguised extradition"*

19 Trial International, Make way for Justice #4 - Momentum towards accountability - Universal Jurisdiction Annual Review 2018, March 2018, online: <https://redress.org/wp-content/uploads/2018/03/UJAR_2018.pdf>

20 For instance: The appeal trial on the NGENZI et BARAHIRA case will start at the Criminal Court of Paris (Cour d'assises de Paris), from 2nd May to 6th July 2018.

21 Genocide Convention, *supra* note 10

22 François MOLINS,, Terrorist attacks : New Crimes Against Humanity ?, Colloquium « 70 years after Nuremberg – Judging the Crime against Humanity», September 30, 2016, (see online, https://goo.gl/ncDpur): *"One cannot exclude the use of the qualification of crime against humanity, but this use must be limited to the cases where it is with no doubt constituted and combined with the qualification of act of terrorism. (…) The interest of the use of the qualification of crimes against humanity lies mainly, if not exclusively, in the symbolism attached to these crimes"*

On the one hand, European cooperation represents an accomplished model for the rest of the world, alternating between "union" and "unity". Among Member States, dialogue is strong, giving the sentiment of a real symbiosis between potentially different legislations. Towards third countries or institutions, a European common front gives a unique interlocutor, simplifying procedures. On the other hand, European cooperation is continuously developing. As new hurdles grow in the quest to end impunity, new tools are created to avoid them.

Thus, while European cooperation represents an undeniable added-value in the fight against core international crimes (I), the model is still developing (II).

I – European cooperation: added-value in the fight against core international crimes

Europe does not stand by itself, isolated from the rest of the world. Therefore, confining cooperation to European borders would jeopardise the conduct of effective investigations and prosecutions of core international crimes. Bearing this in mind, the Council of the European Union has highlighted the importance of ensuring "consistency and coherence between its instruments and policies in all areas of its external (B) and internal (A) action in relation to the most serious international crimes"[23].

A. Cooperation within Member States: the idea of a European public order

The idea of a "European public order" is being affirmed within the European arena. International law considers that the fight against core international crimes constitutes *jus cogens* norms, which are opposable to all States in the sense of barring *erga omnes*[24]. Accordingly, international tribunals have stated that *"most norms of international humanitarian law, in particular*

[23] Article 8 of Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court, OJL 76/56

[24] The Genocide Convention (articles 1, 5 and 6); Four Geneva Conventions of 1949 (GC I, Article 49; GC II, Article 50; GC III, Article 129; GC IV, Article 146) and the three Additional Protocols (AP I, Article 85); The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (Article 28) and its Second Additional Protocol (Article 17(1)); The International Convention for the Suppression and Punishment of Apartheid of 1976 (Article 4) ;The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (Article 5(2) and Article 7(1)); The Rome Statute (Recitals 4, 6 and 10 of the Preamble, Article 1); The International Convention for the Protection of all Persons from Enforced Disappearances of 2006 (Articles 3, 4, 6 and 9(2)); Customary international law

those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or jus cogens*, i.e. of a non-derogable and overriding character."*[25]

According to the International Court of Justice (ICJ), the *erga omnes* attribute of the fight against core international crimes refers to the obligations of a state towards the international community as a whole[26]. This position has been reasserted by the International Criminal Tribunal for the former Yugoslavia[27].

If the idea of such universal norms can be challenged at a worldwide level, Europe is at the forefront of the fight against impunity for those committing core international crimes. Not only was the European Union rooted in the urge to prevent such crimes from being committed in Europe ever again, but European countries have also developed a whole framework both in the countries themselves and in terms of cooperation aiming to prosecute those crimes. Thus it is possible to speak about a "European public order" when it comes to the prosecution of such crimes.

As a consequence, the European Union called on Member States to increase cooperation between national units, and thus to maximise the ability of law enforcement authorities in different Member States to cooperate effectively in the field of investigation and prosecution of alleged perpetrators of serious international crimes[28].

The principle of Universal jurisdiction. Usually, States have jurisdiction over crimes, which have been committed on their territory or by or against their citizens. However, some international crimes are so serious that they constitute offences against all humankind, and trigger universal jurisdiction. Therefore core international crimes can be prosecuted regardless of where the crimes have been committed or the nationality of the perpetrators and the victims.

Universal jurisdiction laws have been adopted by several European countries allowing them to prosecute such crimes[29]. However, the criteria triggering such universal jurisdiction may vary from one State to another. Universal jurisdiction in Europe is not monolithic and surprisingly

---

[25] ICTY, The Prosecutor v/ Kupreskic and al., IT-95-16-T, Judgment, 14 January 2000, § 520. ICTY, The Prosecutor v/ Anto Furundzija, IT-95-17/1-T, Judgment, 10 December 1998, § 153-156; ICTR, The Prosecutor v/ Clément Kayishema and Obed Ruzindana, ICTR-95-1, Judgment, 21 May 1999, § 88

[26] ICJ, Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment of 5 February 1970, § 33

[27] ICTY, The Prosecutor v/ Drazen Erdemovic, IT-96-22-T, Sentencing judgment, 29 November 1996, § 64: "*One of the purposes of punishment for a crime against humanity lies precisely in stigmatising criminal conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole*."

[28] Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, *[The Genocide Decision]*

[29] For example French Code of Criminal Procedure, article 689-11; Loi n° 95-1 du 2 janvier 1995 (crimes committed in ex-Yougoslavia since 1991); Loi n° 96-432 du 22 mai 1996 (crimes committed in Rwanda in 1994)

enough many core international crimes cases are being prosecuted on the ground of classical jurisdiction.

The emergence of specialised units in Europe. The primary obligation to investigate and prosecute perpetrators of core international crimes lies with national jurisdictions. In this regard, specialised units are the concrete expression of the states' determination to fight impunity.

The creation of specialised units answered the need of European countries to comply with their obligations resulting from the European Convention on Human Rights, while investigating core international crimes. The complexity of investigating these cases arose from many factors such as the threshold to be met, unusual investigation techniques and a new set of applicable laws as well as the distance of the investigated events, sometimes committed many years previously in foreign countries with unknown cultural backgrounds, and so on and so forth. However, the European Court of Human Rights has judged that the complexity of investigating crimes committed in Rwanda did not overlook the length of the proceedings and therefore condemned France for violation of article 6 of the Convention[30].

Thus the European Union, recommending the establishment of "war crimes units" composed of specialised staff, largely promoted the emergence of specialised units throughout Europe[31]. To date, nine of the Member States of the European Union have established War Crimes Units: Belgium, Croatia, Denmark, France, Germany, the Netherlands, the UK and Sweden. Some other Member States of the European Union have specialised staff who work on the investigation and prosecution of international crimes: Finland, Lithuania, Poland and Latvia. In addition, some States have semi-specialised staff who, while not working solely on international crimes, nonetheless possess specialised knowledge[32]. These specialised units greatly facilitate cooperation in the field, enabling the identification of both counterparts and commonly shared good practices.

Thus, European cooperation intervenes through the European institutions and bodies. The European Union supports national authorities through its Justice and Home Affairs (JHA).

The Genocide Network. In 2002, the Council of the EU established a European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war

---

30 European Court of Human Rights, Second Section, Case of Mutimura v. France, Application No. 46621/99, Judgment, 8 June 2004

31 The Genocide Decision, *supra* note 28

32 Comprehensive list at : <http://www.eurojust.europa.eu/Practitioners/Genocide-Network/Pages/members.aspx>

crimes[33]. Since 2011, the work of the Genocide Network has been facilitated by the Genocide Network Secretariat, hosted by Eurojust in The Hague[34]. The Genocide Network meets twice a year and brings together prosecutors, police investigators and other experts from all Member States. In addition to national authorities from Member States and their counterparts from Canada, Norway, Switzerland and the USA, the Network also liaises with representatives of the European Commission, Eurojust, the International Criminal Court and *ad hoc* international criminal tribunals, the International Committee of the Red Cross, Interpol, and civil society organisations. Outside the European Union, states are only observer states, but they participate in the confidential meetings, where sensitive information is shared.

The aim of the Genocide Network is to ensure close cooperation between national authorities in investigating and prosecuting core international crimes. The Genocide Network offers a unique forum for practitioners to meet, discuss and exchange information, best practices and experience, and cooperate and assist each other in investigating and prosecuting persons responsible for core international crimes. In 2014, the Genocide Network issued a unique public document, summarising the work and the issues raised by the prosecutions of core international crimes in Europe[35].

Cooperation with immigration services. Furthermore, in order to enhance effective cooperation in the field, the Council has stressed the need to enhance cooperation with immigration services[36]. The number of third State nationals coming from countries where core international crimes have been committed and who are seeking asylum within the European Union has significantly increased in recent years through visa applications or as applicants for international protection (*i.e.* asylum applicants). Therefore, cooperation with immigration services is essential to ensure the fight against impunity. Cooperation must be at a European level, as this immigration flow is transnational, passing through several European countries. In this regard, European institutions provide different means in order to facilitate the identification of perpetrators, victims and witnesses.

In this respect, the European Asylum Support Office (EASO) launched the EASO Exclusion Network on 27-28 February 2017 working on the exclusion of refugees according to Article 1F of

---

33 Council Decisions 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes; The Genocide Decision, *supra* note 28

34 Article 25a of the EUROJUST Decision, as amended by Council Decision 2009/426/JHA of 16 December 2008, OJ L 138/14 of 4 June 2009; Establishment of the Network Secretariat in 2011

35 2014 Strategy, *supra* note 2

36 The Genocide Decision, *supra* note 28

the 1951 Refugee Convention ("1F Network")[37]. This exclusion clause is entangled with the notion of core international crimes and cooperation with this network is of the essence when it comes to prosecuting perpetrators.

Cooperation with mechanisms for the recovery, freezing and seizing of assets. From another perspective, the idea that humanitarian conflicts, and more particularly grave violations of human rights, are in great part caused or facilitated by money driven decisions is widely endowed[38]. Therefore, prosecutions can also target the economic benefits retrieved as a result of the perpetration of those crimes in order to combat them. To that aim, recovering, freezing and seizing assets mechanisms are especially interesting. The Camden Assets Recovery Inter-Agency Network (CARIN) provides a global network of practitioners and experts to enhance mutual knowledge on methods and techniques in the area of cross-border identification, freezing, seizure and confiscation of the proceeds from, and other property related to, crime[39].

For deepened cooperation, the Network recommends that the group grows both within and outside the European Union.

B. Cooperation beyond European limits: a common front in the face of impunity

Most of the time, prosecution of core international crimes by European countries requires cooperation with the countries where crimes have been committed, as witnesses, victims and perpetrators may be third State nationals and are often to be found in different jurisdictions. Such cooperation can be protracted, complex and difficult. In this regard, national prosecutors rely entirely on the goodwill of third state countries as investigations cannot be conducted independently and require mutual legal assistance mechanisms. Moreover there are no means to coerce a state unwilling to cooperate. Hence, supranational bodies can fill gaps allowing states to access information that would not be accessible otherwise.

---

[37] The exclusion clauses enumerated in Article 1F(a) of the 1951 Convention operate to disqualify persons from the benefits of refugee status with respect to whom there are serious reasons for considering that they have committed a crime against peace, a war crime, or a crime against humanity.

[38] Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime: *"The main motive for cross-border organised crime is financial gain. This financial gain is a stimulus for committing further crime to achieve even more profit. Accordingly, law enforcement services should have the necessary skills to investigate and analyse financial trails of criminal activity. To combat organised crime effectively, information that can lead to the tracing and seizure of proceeds from crime and other property belonging to criminals has to be exchanged rapidly between the Member States of the European Union."*

[39] CARIN is an informal network of practitioners from 53 jurisdictions and 9 international organisations. It is linked to similar asset recovery networks in southern Africa, Latin America and Asia Pacific.

Cooperation with international criminal tribunals and courts is organised both at European Union level[40] and national level[41].

The landscape of international tribunals and courts is very diverse and each court has a specific mandate. For instance, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were *ad hoc* tribunals created by a resolution of the Security Council of the United Nations acting under chapter VII of the United Nations Charter. The United Nations Mechanism for International Criminal Tribunals (MICT) continues the mandates of ICTY and ICTR[42]. Other international criminal tribunals resulted from the conclusion of an agreement between a state and the United Nations General Assembly such as the Special Court for Sierra Leone (SCSL) in 2002, the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 2001, and the Special Tribunal for Lebanon in early 2007. New bodies are currently emerging offering new perspectives of cooperation with European States. For example, the Special Criminal Court in the Central African Republic (SCC), a "hybrid" tribunal, was established on 3 June 2015 and is expected to launch investigations in early 2018. Moreover, in December 2016, the UN General Assembly decided to bypass the Security Council and set up an International, Impartial and Independent Mechanism (IIIM) to assist in the investigation and prosecution of those responsible for the most serious crimes under international law committed in the Syrian Arab Republic since March 2011[43].

The issue of complementarity with these international tribunals is crucial as it will set out the mode of cooperation with European States and entities. While the ICTR and the ICTY required primary jurisdiction, the ICC, according to the *Rome Statute*, is "complementary to national criminal jurisdictions"[44].

At first sight, national states appear to have broader possibilities to investigate core international crimes than international courts, given their proximity to crime scenes, witnesses and victims and the understanding of the cultural context and the language, among other specificities. However, when exercising active and passive personality jurisdiction or universal jurisdiction, European States do not benefit from such ties with the crime base. Therefore, cooperation with

---

40 Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, 10 April 2006; COUNCIL DECISION 2011/168/CFSP of March 21, 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP; Council note of July 12, 2011, ref. 12080/11.

41 French example: LOI n° 2002-268 of February 26, 2002 regarding cooperation with the ICC; LOI n°2010-930 of August 9, 2010, adapting criminal law to the institution of the ICC.

42 For the MICT missions, see online: <http://www.unmict.org/en/about/functions>

43 United Nations, General Assembly, 19th December 2016, online: <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_71_248.pdf>

44 Rome Statute, Preamble and article 1, *supra* note 1

international tribunals proves to be an incredible asset, when not the only possibility to address those crimes.

Indeed, international tribunals have broad powers to investigate core international crimes. For instance, the International Criminal Court Prosecutor has the possibility to collect and examine evidence, request the presence of and question persons being investigated, victims and witnesses, seek the cooperation of any State or intergovernmental organisation or arrangement in accordance with its respective competence and/or mandate, enter into such arrangements or agreements, not inconsistent with the Rome Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organisation or person. The Prosecutor can also agree, at any stage of the proceedings, not to disclose documents or information that he has obtained on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents, and take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence[45].

Chapter IX of the Rome Statute even allows the Prosecutor to execute a request directly on the territory of a State *"where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed"*[46]. Under no circumstances could a national prosecutor investigate on a third State territory without its consent and in violation of its national sovereignty.

Cooperation with United Nations bodies. The same benefits may be retrieved from cooperation through Mutual Legal Assistance requests with the United Nations and their multiple bodies, such as the United Nations Security Council, the General Assembly, commission of inquiries, sanctions committees, fact finding missions, United Nations special representatives, peacekeeping missions, various United Nations agencies such as The United Nations Children's Fund (UNICEF), the Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations High Commissioner for Refugees, the United Nations Human Rights Council (UNHRC), or entities such as the United Nations Entity for Gender Equality and the Empowerment of Women, also known as UN Women, and so on and so forth. Information can be

[45] Rome Statute, *supra* note 1, article 54(3)
[46] Rome Statute, *supra* note 1, article 99 (4)

shared by all these bodies in order, notably, to help national justice bring perpetrators before the courts.

Cooperation through Interpol. Created in 1923, Interpol is the world's largest international police organisation, with 192 member countries. It enables police to work together to fight international crimes. Interpol describes itself as "a unique position to lead and reinforce ongoing efforts to assist law enforcement authorities, international criminal tribunals and national prosecution services to fight genocide, war crimes and crimes against humanity"[47]. Since 2014, Interpol has tasked a dedicated unit to focus on war crimes, genocide and crimes against humanity.

Interpol offers its support through different mechanisms. Firstly, it provides operational support by facilitating access to Interpol's services, technical tools, resources and expertise in the area. It also shares information and coordinates international investigations. Secondly, Interpol organises training. Thirdly, it is willing to build partnerships in order to develop cooperation[48]. Finally, the War Crimes and Genocide unit coordinates information sharing amongst member countries and international partners. It also assists national and international partners with the analysis and sharing of evidence and intelligence related to war crimes, genocide and crimes against humanity.

II – European cooperation: a developing action plan against core international crimes

While European criminal cooperation has been constantly improved to ensure that all perpetrators have to face justice, in many instances it is still a very complicated process (A). The path towards efficiency is therefore far from complete and several steps could be taken to improve the current situation (B).

A. Facing difficulties: impunity as a tangible threat

Cooperation to ensure the efficient prosecution of core international crimes is widely deemed crucial. However, there is some ambiguity in the priority level of this prosecution, as is currently illustrated by the Syrian situation which can be dealt with through two lenses: terrorism or

[47] INTERPOL War crimes and genocide sub-directorate, Project sheet, March 2015, online: <https://www.interpol.int/content/download/19403/174964/version/15/file/WCG_projectsheet_2015-03_EN_LR.pdf>

[48] INTERPOL International Expert Meeting on Genocide, War Crimes, and Crimes against Humanity

core international crimes. Furthermore, the fight against such crimes is combined with the difficulties of operational cooperation, coming from two main factors: the diversity of procedural and material criminal law and the practical issues raised by the implementation of international cooperation.

The complexity of the legal framework in material law First of all, the very definition of core international crimes can vary between Member States, and is often different from the one chosen in the Rome Treaty. For example, the French requirement for a "concerted plan" in order to find someone guilty of a crime against humanity[49] is a higher level of organisation than laid down by the Rome Statute definition[50]. Furthermore, some Member States even lack part of what should be comprehensive legislation on core international crimes. Lacking incrimination can be problematic because this may prevent a country not only from prosecuting these crimes, but also from cooperating with other states. For example, Austria lacked a specific incrimination for war crimes and crimes against humanity until January 1st 2015, while Italy still does not have one for crimes against humanity. Meanwhile, Denmark and Italy only incriminate war crimes when committed by or against their army.

The criminal responsibility of corporations and business persons for serious international crimes is also problematic since not all countries admit their criminal responsibility. While many European countries now allow for their prosecution, Germany does not for example. Furthermore, the requirements for the conviction of corporations vary from state to state. To obtain the cooperation of a country against an entity that cannot be prosecuted for the crime at home is obviously problematic.

The complexity of the legal framework in procedural law. The divergence between Member States can be a hindrance to efficient prosecution. One important difficulty in the fight against core international crimes is convicting their perpetrators with the full respect of human rights law, even for those who can be deemed to be their biggest violators. All Member States are bound by the European Convention on Human Rights (ECHR) and most of its additional protocols. History shows that some flexibility used to be admitted in order to bring perpetrators of such crimes to justice. The London Agreement of August 8, 1945 would not be replicated today. Indeed, while

[49] French Criminal Code, article 212-1

[50] Rome Statute, *supra* note 1, article 7.1, requiring a *« widespread or systematic attack »*

Article 7§2 of the ECHR provides for some leeway[51], the Court has held that this is only a *"contextual precision"*[52] applicable only to Second World War crimes, and not to any other.

Moreover, statutes of limitations also vary from state to state. While core international crimes are often not subjected to any statute of limitations[53] on grounds that they are an attack on humanity as a whole, war crimes in France are subjected to a thirty-year limitation[54].

While the issue of evidence collecting is particularly stringent, ECHR jurisprudence is very firm and applies to all means of evidence collecting**.** First, evidence collection from third party States must not be obtained by a violation of the convention, which is a possibility especially when cooperation extends to countries not bound by it[55]. Furthermore, while the Court initially did not judge itself to be competent in the matter, denying any control of the actions of one Member State perpetrated on a non-member State's territory[56], this position has changed. The court has admitted the extraterritorial application of the ECHR[57], unless the military operation is under United Nations' control. European cooperation can therefore seem limited by the practical difficulties of investigation, if it is not backed by the United Nations.

The difficult implementation of cooperation. On top of the complexity of the legal framework, many practical difficulties are shared amongst European States in prosecuting core international crimes. They are mostly addressed during Genocide Network meetings, but are still to be resolved. Most of these difficulties are a consequence of the distance between the places where these crimes are being committed and the States where the perpetrators are being prosecuted, empowered by universal jurisdiction laws. This extension of competence can therefore be difficult to invest fully. Most of the time, crime scenes are inaccessible to law enforcement units of such countries due to safety reasons or the unwillingness of "hosting States" to grant access to their territories and allow investigations to take place. Furthermore, current cooperation tools are insufficient to solve this difficulty.

Indeed, what may seem easy in one state territory, such as gathering and transferring evidence from the ground to the courts, or forensics, is particularly challenging if the goal is to

---

51 It excludes behaviour which *« was criminal according to the general principles of law »* from the scope of the non-retroactivity principle.

52 ECHR judgment of July 18, 2013, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC] - 2312/08 and 34179/08.

53 *Ibidem*, article 29

54 French procedural criminal code, article 7

55 ECHR, September 25, 2012, El Haski v. Belgium – 649/08 : violation of article 3 of the Convention by the use of testimonies obtained through potential ill-treatments of a third person by the state of Morocco.

56 ECHR, December 12, 2001, Bankovic and al. vs Belgium and al. & ECHR, May 31, 2007, Behrami vs France

57 ECHR, GC, March 29, 2010, Medvedyev and al. vs France & cf. ECHR, GC, July 7, 2011, Al Jedda vs UK and Al Skeini vs UK

prove the use of chemical weapons in Syria, for example, where little cooperation on the ground is expected.

Moreover, core international crimes cases relying on proof in a broad context, or the fact that many perpetrators do not have a formal and documented chain of command linking them to the crimes, means that testimonies are often the sole evidence available to the prosecution. The protection of witnesses who are out of reach of prosecuting states and afraid of potential reprisals is difficult. The length of the proceedings can also discourage witnesses, who are often interviewed several times by investigators to assess the veracity of their story, then deposed and required to be present at trial.

Finally, the immunity of State officials can be a serious impediment in the fight against impunity. The importance of interpreting restrictively potential immunity has been stressed repeatedly[58], but the fact remains that such immunity is binding under international law, and can protect against any attempt at prosecuting a suspect for an extended period of time. This has been reaffirmed by the International Court of Justice in a case against Belgium, where a warrant was issued against the Foreign Affairs Minister of the Congo[59]. On a national level, the French Supreme Court came to a similar conclusion60.

The last practical hindrance may be the priorities chosen by the actors of judicial cooperation. Currently, the focus seems to be mostly on the fight against terrorism. This fight includes targeted killing by some Member States abroad of potential perpetrators of core international crimes. Meanwhile, the prosecution may choose, as illustrated by France, to charge returning fighters on terrorism charges only. While this charge can also lead to heavy sentencing and show that the objective is to avoid returning fighters committing terrorist attacks in Europe, one of the consequences is less public visibility for the fight against core international crimes.

Therefore, international cooperation is a necessity but is still fraught with difficulties. While defence rights and procedural constraints are unavoidable and constitute a necessary limit to the action of judicial authorities, there are still many ways to improve the common fight against impunity.

---

[58] 2014 Strategy, *supra*, note 1, p. 26 : *« Where possible tensions exist between immunity and individual criminal responsibility, investigative, prosecutorial and legal assistance authorities must play their role in ensuring that the rules on international immunity are applied properly, thus ensuring [...]that immunity is not misused to unduly protect individuals from being held criminally responsible for the perpetration of the gravest crimes. »* (14th meeting, 17-18 April 2013)

[59] ICJ, February 14, 2002, Case concerning the arrest warrant of 11th April 2000 (Democratic Republic of the Congo vs Belgium, YERIODIA Case. §58 *"The Court […] has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity".*

[60] Cass. Crim., March 13, 2001, °00-87.215, Published: M. KADHAFI Case

B. Finding solutions: efficiency as an ultimate goal

The goal of European cooperation is to reduce, when possible, the aforementioned impediments. While this was a priority in the Stockholm Programme adopted in 2009 by the European Council for the period 2010-2014, improvements are only made possible by frequent reaffirmation of the commitment of the EU. Progress in cooperation remains for some in implementation, and therefore will soon be fully operational. However, some other programmes still seem to be quite distant.

Firstly, apart from new tools, improved efficiency in cooperation could be found in the use of existing possibilities.

Joint investigation teams are a European cooperation tool based on an agreement between the competent authorities – both judicial (judges, prosecutors, investigative judges) and law enforcement – of two or more States, established for a limited duration and for a specific purpose, to carry out criminal investigations in one or more of the involved States. They constitute one of the possibilities of cooperation beyond mutual legal assistance. Joint investigation teams are therefore possible, following article 13 of the 2000 Mutual Legal Assistance Convention, and have been implemented by Council Framework Decision 2002/465/JHA. However, they have never been used for investigations of core international crimes. The use of this technique, specific to the European Union, could make prosecution more efficient.

Europol. Some evolution also shows that the fight against such crimes has been reinforced recently by the new Europol Regulation, which came into force in May 2017[61]. Indeed, since the 1995 Europol Convention, there was no specific mention of core international crime in its scope of competence. This has finally been corrected by the new Regulation, showing that the use of all available tools at European level has not always been a given in this area. The creation of a special Analysis Project (AP CIC) is also part of the new Europol Regulation. This has the potential to simplify and encourage collective action and cooperation within the European Union in the field of core international crimes, by allowing the identification of specific links between crimes or patterns of criminality, using resources in a more rational way and enhancing the communication of

[61] Regulation 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.

information between law enforcement authorities or extending the support given to judicial authorities.

European Investigation Orders. Increased efficiency may also be expected with the entry into force of the European Investigation Order (EIO)[62], based on mutual recognition. Unlike the mutual legal assistance approach, the EIO has the advantage of representing a supple, comprehensive and broad-scope instrument, responding to the Stockholm request for a simplification of the evidence-gathering system[63]. It has several advantages[64] for the fostering of cooperation, for example by limiting refusal motives and imposing strict deadlines in order to reduce the delays induced by international cooperation.

Good practices. Finally, other ways for better cooperation can be found in more flexible tools such as good practices. For example, the Office of the Prosecutor of the International Criminal Court and the French prosecutors from the war crimes and crimes against humanity specialised unit have agreed to add in each mutual legal assistance request sent to France special "wording" allowing the French authorities to use any information found during these investigations in their own investigations or prosecutions[65]. Such practices, in addition to proving to be very efficient, do not require any new piece of legislation. Drawing on this, one could imagine the extension of such a practice to every cooperation request to European States issued by any international criminal court. Thus allowing them to take steps to ensure that wrongdoings exposed on their territories in connection with core international crimes are being prosecuted.

Secondly, new tools can be designed to reinforce EU action.

The European Public Prosecutor's Office. On 12th October 2017, the regulation establishing the European Public Prosecutor's Office (EPPO) was adopted by the 20 Member States which are part of the EPPO enhanced cooperation. This institution will be in charge of investigating, prosecuting and bringing to justice the perpetrators of offences against the Union's financial interests. It will bring together European and national law enforcement efforts to counter

---

62 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, online: <https://goo.gl/T31UK3 >

63 For a dissident voice : Catherine HEARD and Daniel MANSELL, denouncing a "one-size fits all" approach to cross-border investigations and evidence-sharing" in "The European Investigation Order: Changing the face of evidence-gathering in EU cross-border cases", Fair Trials International, online <https://goo.gl/96a74S >

64 European Commission, Press release, As of today the "European Investigation Order" will help authorities to fight crime and terrorism, Brussels, 22nd May 2017, online: <http://europa.eu/rapid/press-release_IP-17-1388_en.htm>

65 Interview with Aurélia Devos, Head of the unit for crimes against humanity and war crimes, Prosecution Office France, 21st March 2018

European fraud. The option to extend its competence to serious international crimes has been discussed but not approved. There again, the particular structure of the European Union could be exploited to foster even greater cooperation and coordination than today. The goal of a "European public order" would justify such an extension.

The further development of specialised units. As acknowledged by the recommendation of the Genocide Network in its 2014 Strategy[66], efficient cooperation requires efforts both within each Member State and in the relationship between Member States. Recommendations for Member States include setting up dedicated units to investigate and prosecute core international crimes. This measure could greatly improve cooperation by letting units have usual interlocutors they trust and with whom they are used to working. This is especially pertinent in the situation prevailing in Syria and Iraq, where domestic jurisdictions stand on the front line in combatting impunity, given the hindrance of the United Nations Security Council, which prevents the referral of the situation to the International Criminal Court, and the intervention of its teams.

A new Treaty on Mutual Legal Assistance. Moreover, on a broader scope, initiative for a new Treaty on Mutual Legal Assistance and Extradition for domestic prosecution of core international crimes[67] has been suggested by some, to foster international cooperation. Indeed, the fact that several states have recently decided to withdraw from the Rome Statute, most recently the Philippines[68], following the launch of a preliminary examination of the situation in the country, is worrying. Furthermore, the Rome Statute was never universally adopted, which is why a more supple tool, not creating a specific jurisdiction which can be accused of being unfair, could enhance cooperation between many countries.

New models of cooperation between the European Union and other international Entities. There are many tools developed between Member States which allow the concept of new models of cooperation between the European Union and other international entities. Modes of cooperation then become unlimited and centred on the need for efficiency.

On an operational level, the possibilities of international agreements are multiplied, beyond mutual legal assistance and information exchanges. For instance, the European Union could cooperate with the International Criminal Court, using the European Investigation Order as a

---

[66] Conclusions of the 23rd meeting of the Network for investigation and prosecution of genocide, crimes against humanity and war crimes, The Hague, 25-27 October 2017 ; online: <https://goo.gl/WpGJzW >

[67] DIENG Adama, special adviser of the United Nations Secretary General on the Prevention of Genocide, Keynote address at the 2013 Assembly of the State parties, New-York <http://www.iap-association.org/getattachment/Conferences/Annual-Conferences/Annual-Conference-2015/Wednesday-16-September-2015/20AC_SIGM_SB_Annex2.pdf.aspx>

[68] ICC Press Release, March 20, 2018 : "ICC Statement on The Philippines' notice of withdrawal: State participation in Rome Statute system essential to international rule of law"

substitutional tool instead of international rogatory letters. Investigations in Syria might also be simplified by action on the ground by Joint Investigation Teams, led by the III Mechanism.

From a more theoretical point of view, European cooperation is a select arena for the perpetuation of good practices in the prosecution of core international crimes. National specialised units are once again an ideal training platform. They can receive information from already established international jurisdictions, as well as transmit them to the newest organisations[69]. Cooperation at European level then leads to a more global standardisation.

The Paris Declaration. Finally, while several countries have decided to part ways with the International Criminal Court, international criminal justice has proven its value numerous times and is one of the ways to win the fight against impunity. The Paris Declaration[70] signed in 2017 by many members or former members of international tribunals calls for a more efficient international criminal justice. It emphasises the importance of specific procedures and new ways to work. Indeed, while these tribunals judge few cases, their scale requires more flexibility to avoid lengthy proceedings and congestion. Moreover, the proceedings should be carried out by judges independently of their background in civil or common law, sharing a similar ethic that could be formalised in a code of conduct. To that end, as underlined by §31 of the Declaration, the representatives recommend the promotion of "*the continuous education of Judges and Legal Officers, including through partnerships with national academies for the training of Judges"*. Therefore, efficient international cooperation should entail early cooperation in the initial as well as continuing training of judges. This type of initiative illustrates once again a new aspect of cooperation between European States and international courts and tribunals.

These proposals, among many others, show that the European cooperation model is continuously developing in the field of core international crimes. This supple, adaptable pattern is essential to prevent and deter a diverse, borderless and hidden criminality. Even if the system has its flaws, the interest of European cooperation also lies in its capacity to call itself into question, and its ability to evolve towards better practices.

---

69 For example, the ENM has recently organised an unprecedented training session aimed at all the judges and prosecutors of the Special Criminal Court in the Central African Republic, see online: <http://www.enm.justice.fr/?q=actu-23janvier2018_L-ENM-forme-les-magistrats-de-la-Cour-penale-speciale-en-Centrafrique>

70 Paris Declaration on the Effectiveness of International Criminal Justice, Paris, 16th October 2017

BIBLIOGRAPHY

I – Institutional publications

The Stockholm Programme, Council of the European Union, 2nd December 2009

Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States, QP-05-14-102-FR-C, The Hague, November 2014

INTERPOL War crimes and genocide sub-directorate, Project sheet, March 2015

INTERPOL International Expert Meeting on Genocide, War Crimes, and Crimes against Humanity

Report of the Security Council, United Nations, General Assembly, 19th December 2016

European Commission, Press release, *As of today the "European Investigation Order" will help authorities to fight crime and terrorism*, Brussels, 22nd May 2017

Paris Declaration on the Effectiveness of International Criminal Justice, Paris, 16th October 2017

Conclusions of the 23rd meeting of the Network for investigation and prosecution of genocide, crimes against humanity and war crimes, The Hague, 25-27 October 2017

II – Doctrine

Claude LOMBOIS, Droit pénal international, Dalloz, 2e edition, 1979

Jean-François LACHAUME, Annuaire français de droit international - année 1984

Michel MASSÉ, Une nouvelle dimension de la coopération judiciaire en matière pénale : la coopération "verticale", RSC 2002 p. 884

François MOLINS, Actes de terrorisme: nouveaux crimes contre l'humanité ?, Colloque « 70 ans après Nuremberg – Juger le crime contre l'humanité », 30th September 2016

Iryna GREBENYUK, *Pour une reconstruction de la justice pénale internationale. Réflexions autour d'une complémentarité élargie*, Thesis, Paris Panthéon-Sorbonne, 8th December 2016

III – Works issued by non governmental organisations

Trial International, Make way for Justice #4 - Momentum towards accountability – Universal Jurisdiction Annual Review 2018, March 2018

IV – Newspaper articles

Mireille DELMAS-MARTY, Le monde de l'éducation, July-August 2001

Catherine HEARD and Daniel MANSELL, The European Investigation Order: Changing the face of evidence-gathering in EU cross-border cases, Fair Trials International