



Cooperation and complementarity:

A new impetus for
**international
justice**

Report edited by
Joël Hubrecht and Antoine Bernard

 Institut des Études
et de la Recherche
sur le Droit et la Justice

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List of abbreviations used

- **ASP**—Assembly of States Parties.
- **AU**—African Union.
- **CAR**—Central African Republic.
- **DACG**—Directorate for criminals affairs and pardons.
- **EAC**—Extraordinary African Chambers.
- **ECCC**—Extraordinary Chambers in the Courts of Cambodia.
- **ENM (France)**—École nationale de la magistrature (National School for the Judiciary).
- **EUAA**—European Union Agency for Asylum.
- **ICC**—International Criminal Court.
- **ICJ**—International Court of Justice.
- **ICT**—International Criminal Tribunal.
- **ICTR**—International Criminal Tribunal for Rwanda.
- **ICTY**—International Criminal Tribunal for the former Yugoslavia.
- **IIM**—Independent, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011.
- **JIT**—Joint Investigation Team.
- **JSI**—Joint Structural Investigation.
- **KSC**—Kosovo Specialist Chambers.
- **MICT**—Mechanism for International Criminal Tribunals.
- **MLA**—Mutual Legal Assistance Initiative, now known as the Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes of May 26, 2023.
- **NGO**—Non-Governmental Organization.
- **OCLCH (France)**—Office central de lutte contre les crimes contre l’humanité et les crimes de guerre (Central Office for Combatting Crimes against Humanity and War Crimes).
- **OTP (ICC)**—Office of the Prosecutor of the International Criminal Court.
- **PNAT (France)**—Parquet national antiterroriste (National Anti-Terrorism Prosecutor’s Office).
- **SCC (Central African Republic)**—Special Criminal Court of the Central African Republic.
- **SDG**—Sustainable Development Goals.
- **UN**—United Nations
- **Unitad**—United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL.

Foreword

This document is the result of a reflection led by the Réseau Coopération Complémentarité (Cooperation and Complementarity Network) during a series of discussions conducted throughout 2022. The project was initially conceived in 2021 under the auspices of the Institut des hautes études sur la justice (IHEJ) (Institute of Advanced Studies on Justice) as part of its International Criminal Justice and Transitional Justice programme, led by Joël Hubrecht, currently head of studies and research at the Institut des études et de la recherche sur le droit et la justice (IERDJ) (Institute for Studies and Research on Law and Justice), with the support of Antoine Bernard, director of advocacy and assistance at Reporters Sans Frontières (RSF) (Reporters Without Borders), lecturer at the School of International Affairs at Sciences Po Paris (PSIA), and, at the time of the launch of the reflection group, associate researcher at the IHEJ.

They were commissioned with leading discussions and writing this report. The report was supported and subsidized by the Rights, State Reform, and Fragilities Unit at the Democratic Governance Mission of the French Ministry for Europe and Foreign Affairs (MEAE). During an exploratory phase in 2021, initial contact was made with members and leading figures of a number of jurisdictions in order to ascertain interest in the project, to identify issues for further study within the network, and to test working hypotheses.

In January 2022, the IHEJ merged with the Mission de recherche Droit et Justice (MRDJ) (Law and Justice Research Mission) to form a new GIP (groupement d'intérêt public, or public interest group) under the name Institut des études et de la recherche sur le droit et la justice (IERDJ) (Institute for Studies and Research on Law and Justice). The initial project has continued unchanged within the new structure.

In its construction, the network¹ was designed to be progressive and inclusive. To foster a spirit of trust and dialogue on subjects that may have sensitive and confidential aspects, discussions within the network were held according to the Chatham House Rule. To make it easier for members to speak out and participate in open, collective debate, it was left open to them whether to participate in an institutional or a personal capacity. In all cases, the opinions and analyses expressed are those of their authors and do not imply any commitment on the part of their respective institutions.

Similarly, in order to ensure that discussions were organized with a view to maximizing quality and participation, the choice was made to focus, in the initial phase, on a limited number of situations considered emblematic of certain key themes, namely the situations in Ukraine, the Central African Republic, the Syrian Arab Republic, and Kosovo. These situations cover a range of world regions, contexts, and temporalities (former conflict, exit from conflict, ongoing conflict, non-international conflict, inter-state conflict, international conflict) and a variety of jurisdictions and justice mechanisms (the International Criminal Court, hybrid jurisdictions, national prosecutors and judges).

The points of view expressed in this study are the product of a synthesis of plural and sometimes divergent expertise and opinions, and do not necessarily reflect those of the institutions whose members took part in the network's discussions. On behalf of the IERDJ, the authors of this report would like to thank all those who agreed to take part in this research group, as well as the Rights, State Reform, and Fragilities Unit at the Democratic Governance Mission of the French Ministry for Europe and Foreign Affairs (MEAE) for its support and the grant awarded to this project.

1. See the list of members who took part in these discussions in the appendix.

Introduction

“We need new legal tools in this world in transition in which we find ourselves, a world of fragmented and incomplete globalization,” declared Mireille Delmas-Marty in June 2016, highlighting the theme of complementarity as a lever for the “transformation of the legal order.”² In January 2020, at the fifth Journées de la Justice Pénale Internationale, speaking on the theme of “The Principle of Complementarity: The Future of International Criminal Justice?” Julian Fernandez and Olivier de Frouville emphasized the extent to which “the future of international criminal justice depends upon the ability of all parties to innovate and to design legal and practical solutions to better respond to old problems (lack of cooperation, relationship to time, expectations of victims, resource availability, etc.), but also to face new challenges.”³

For some years now, the development and implementation of complementarity has been viewed as a fundamental way to respond to the disappointing record of the International Criminal Court, as well as to the crisis of the international order and multilateralism. Russia’s invasion of Ukraine on February 24, 2022, and the other international tensions it has exacerbated, as well as the new alliances and transformations that have resulted from it, confirm the relevance of this approach, which, today more than ever, has become the mainspring of a new impetus for international criminal justice.

The issues of complementarity and cooperation are inextricably linked. Given the evolving nature and multiple interpretations of complementarity, participants in the Réseau Coopération Complémentarité emphasize the need to consider the two issues together (although they are the subject of two separate working groups within the Assembly of States Parties to the Rome Statute), taking all aspects of them into account. In addition to prioritization and arbitration in respect of jurisdictional competence (“vertical” complementarity), complementarity depends upon greater cooperation between the Court and the situation state (so-called “positive” complementarity), between states parties and the Court (“expanded” complementarity), and between national actors and jurisdictions (“horizontal” complementarity).

Two major dynamics that are profoundly transforming the field of international criminal justice were highlighted in the discussions of the Réseau Coopération Complémentarité: the increasing “regionalization” of international criminal justice on the one hand, and its “renationalization” on the other. In order to promote the new opportunities opened up by these dynamics while curbing the risks of competition and fragmentation they may pose, it is crucial to locate these dynamics within a framework of renewed and strengthened cooperation. The aim of our network is to promote discussion and reflection between those involved in cooperation and complementarity, principally from the French-speaking world and from judicial systems based on the inquisitorial (continental law) system.

2. Mireille Delmas-Marty, “Complémentarité et gouvernance mondiale,” in *Quelle(s) complémentarité(s) en droit pénal international ?*, edited by Éric Canal-Forgues and Mireille Delmas-Marty (Paris: Éditions A. Pedone, 2017). **Translator’s note:** Unless otherwise stated, all translations of cited foreign-language material in this article are our own.

3. Julian Fernandez and Olivier de Frouville (eds.), *Universalité et complémentarité de la justice pénale internationale* (Paris: Éditions A. Pedone, 2021).

An initial discussion and attempt at synthesis revealed a number of areas for reflection and action which, notwithstanding the diversity of points of view expressed during the discussions, led to the identification of findings and recommendations shared in the 11 following chapters:

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Summary

This collective reflection explores the prospects and new challenges posed by the growing implementation of complementarity as a cardinal principle of the Rome Statute of the International Criminal Court (ICC). According to this principle, states retain primary responsibility for prosecuting and punishing the most serious international crimes, with ICC intervention limited to situations in which states are unwilling or unable to dispense justice themselves.

A number of situations, including those in the Central African Republic and Ukraine, analysed below, demonstrate that the capacity of situation states to act, and even their willingness to do so, may manifest itself only in a limited or partial way, giving rise to unprecedented, complex, and multiform systems of complementarity. The proliferation of legal actors, operating on different scales (national, regional, international), often while the conflict is still ongoing or latent, calls for a rethinking and improvement of tools for cooperation. This document proposes a series of measures and guidelines to achieve this.

While in theory the Rome Statute lays down an obligation for states parties and states that have accepted the ICC's jurisdiction to cooperate with the Court, in practice no sanctions are directly applicable by the Court. In the wake of model cooperation agreements already proposed by the Court in several areas, models for other sectors could be developed (in particular for asset confiscation).

The ICC Office of the Prosecutor has made central to its strategy the development of so-called “positive” complementarity (with the situation state), which is now seen as applying throughout the proceedings and not just at the outset, as well as the development of so-called “expanded” complementarity (with other states parties), with a view to creating partnerships which demonstrate, in the words of Prosecutor Karim Khan, “that we can change the dynamics of judicial cooperation—not only in Ukraine, but everywhere else.”

The network has highlighted a number of challenges, some of them long-standing but which are now presenting themselves in new ways—in particular, the issuing of collective referrals by states parties (Venezuela, Ukraine), which raise questions around selectivity and the independence of jurisdictions. Cooperation agreements with states should also be made possible for the defence, something that can only be envisaged through the creation of Defence Offices at the ICC and as a part of future international criminal tribunals.

The report goes on to consider the need for cooperation between situation states and international partners, with a view to linking justice objectives with sustainable development aid. It calls for support to be distributed along the entire international justice chain, including at the logistical level (prisons and police training). On the other hand, given that the creation of internationalized jurisdictions remains time-consuming and costly, hybridization (bringing together local and international actors) may be reserved for a single body (such as the public prosecutor's office) rather than being systematically extended to a jurisdiction in its entirety.

The strengthening of legal cooperation with neighbouring countries in a given region all too often remains a blind spot, even though the third generation of internationalized jurisdictions, in particular

those created in Senegal in 2013 and in Kosovo in 2015, were set up in cooperation with regional organizations (the African Union and the Council of Europe respectively). This regional dynamic is giving rise to a new, intermediate space of complementarity situated in-between national and international justice. One of the benefits of this is the fostering of cooperation through more homogeneous and functional procedural models, in particular those derived from Romano-Germanic law.

While the report notes that a similarity of methods and legal models facilitates cooperation, it also advocates pursuing and promoting the emergence of new procedural models which, in spite of their different philosophies, combine features of common law and civil law, as in the combination of the guilty plea and the search for the truth. It is thus suggested that we move towards the creation of a genuine case file—if not a single unified file, at least a harmonized one—and ensure better organization of this file with the aid of information technology. We also need to consider how judges are going to be able to analyse the vast quantities of evidentiary data collected today in certain conflict zones. What skills and expertise will they require? Evidence analysis cannot be the preserve of a purely technical-informational approach, and the call for experts in technical fields must be complemented by that of experts in the human sciences in order to enrich understanding of the facts.

The legal vacuum in mutual legal assistance and extradition between many states for the national prosecution of the most serious international crimes may be filled in part if the Ljubljana-The Hague Convention (May 26, 2023) receives the widest possible ratification in 2024. Other tools for cooperation are currently under development, but it should be noted that the internalization of the Rome Statute of the ICC has already led to a historic harmonization of national legislation and the “renationalization” of the prosecution of the most serious international crimes. This has been achieved through the creation of specialized units and services in many states, along with changes in legislation and the involvement of NGOs and victims’ associations. Today, some fifteen states are particularly active in this respect. Developing and strengthening this horizontal complementarity is one of the major objectives of the work of the Réseau Coopération Complémentarité.

This renationalization of the fight against impunity for the most serious international crimes is accompanied by greater openness to external cooperation on the one hand, and new forms of sharing and resource pooling on the other. For example, Eurojust’s mandate on Ukraine has been modified to enable it to centralize, store, and analyse data on international crimes committed in Ukraine. The European Genocide Network, created in 2002 by the Council of the European Union, could become a facilitator and to some extent a forum for discussing models of cooperation and encouraging the creation of similar (but not identical) regional networks in Africa and Latin America.

One of the principal forms of cooperation at the European level is the creation of joint investigation teams (JITs) between two or more jurisdictions. The ICC prosecutor has joined two JITs, one of which seeks to address crimes committed in Ukraine. While JITs are an important tool, particularly in situations involving war crimes and crimes against humanity where it is necessary to identify large-scale, recurring patterns of criminality and complex chains of responsibility, they also entail certain risks and limitations, which are highlighted in this study.

This new impetus in the fight against impunity was also bolstered by the arrival, in 2016 and 2017, of a new generation of independent investigative mechanisms created by the UN to facilitate, both nationally and internationally, the prosecution of violations committed in Syria (IIIM), by Da’esh in Iraq (Unitad), and in Myanmar (IIMM). The International, Impartial and Independent Mechanism for Syria is a pre-judicial body that collects, preserves, and analyses the evidence gathered and acts on at least three complementary levels of cooperation. Its flexibility and the production of tailor-made analytical products suitable for use in a wide variety of jurisdictions have made it a powerful mechanism, albeit one that also raises new questions, particularly in relation to the defence’s access to exculpatory evidence and data management. More broadly, if information is in the hands of regional, multinational, or intergovernmental bodies, access to that information may be more difficult for third-party countries and organizations to secure.

NGOs are also key players, and it is essential to involve them in exchange networks. They too have adopted strategies for cooperation, whether as part of the Coalition for the ICC founded in 1995, or in the context of universal jurisdiction cases brought by several parties. Some have associate partner status (with the Genocide Network, for example). Among other things, they act as a link between the courts and victims and civil society more broadly.

Discussions within the network have highlighted the need to adopt an inclusive vision of justice and of possibilities for improving the treatment of victims (by setting up a Victims' Compensation Commission at the ICC and in internationalized jurisdictions). National jurisdictions dealing with international crimes must in turn adapt and go beyond ordinary criminal treatment to address the needs of overseas and sometimes globally dispersed communities of victims, as well as future generations, by preserving the memory and archives of trials conducted under universal jurisdiction.

A whole other aspect of complementarity therefore remains to be developed, in relation to the challenge of public communication. There is a pressing need to present reliable information in the face of the ever-increasing power of disinformation spread via the internet and social networks, and the accelerated pace of a justice system that is no longer, as at Nuremberg, concerned with post-war justice but rather with wartime justice. Cooperation must not prevent justice systems from taking a step back, maintaining independence, and allowing for a diversity of viewpoints. Distinct phases must be recognized: apart from the trial itself, which should be seen and understood by as many people as possible, more aggressive institutional communication is needed at the investigation stage. These issues have not yet been sufficiently well taken into hand by national judiciaries. In addition, it is important to bring together information on trials held in different countries and jurisdictions.

We should work towards ensuring global visibility for efforts at complementarity and cooperation in order to make the highly diversified field of international criminal justice more comprehensible, not least by promoting the idea of a “Common Area of Justice.”

Antoine BERNARD and Joël HUBRECHT

1.

The Rome Statute: Cooperation and complementarity with the ICC

Mentioned in the Preamble and Article 1 of the Rome Statute,⁴ the principle of complementarity, as the *Commentaire article par article du Statut* reminds us, was “required by states as part of the organization of a renewed fight against impunity” and “rests upon two essential elements which distinguish the Court from any other criminal jurisdiction operating on the international scene. First, states retain primary responsibility for prosecuting and punishing the crimes referred to in Article 5 of the Statute. Second, the Court’s intervention with regard to these same crimes is legally justified only when this responsibility is not fully assumed by the actor responsible, either through lack of will or incapacity. Over and above any obligations they may have under international law, therefore, it would be in the best interests of states to reinforce their international criminal jurisdiction through other established mechanisms of international criminal law.”⁵

The implementation of complementarity, a cardinal principle of the Rome Statute, has profoundly altered the field of international criminal justice and continues to do so today, in particular through the internalization of the Statute into the legislation of some 70 of the 123 states parties. The network calls for active support for the continuation of this process in French-speaking and continental law states (the priority for the network’s activities) and beyond, so that all states parties adopt the appropriate legislation at the national level to enable all the forms of cooperation provided for in Part IX of the Statute to be realized.

A. Cooperation

In theory, Part IX of the Statute sets out an obligation on the part of states parties and states that have accepted its jurisdiction to cooperate with the Court. In practice, however, there are no real sanctions directly applicable by the Court. The Assembly of States Parties and the Security Council remain responsible for enforcing this obligation. While the goodwill of states is to be encouraged, it is no substitute for a clear commitment to cooperate with the Court with regard to investigation and arrest.

In domains where there is no formal obligation for states parties to cooperate, such as the relocation of threatened witnesses, the enforcement of sentences, and the reception of acquitted suspects or accused persons who have been provisionally released, the creation of cooperation agreements is desirable. Model agreements have been drawn up by the Court in three areas (provisional release, release of persons, enforcement of sentences), but further models could be developed for other sectors (such as confiscation of assets). The network could liaise with the Assembly of States Parties (ASP) working group on cooperation and propose models suitable for French-speaking states, particularly those with an inquisitorial trial system.

It should also be made possible for the defence to sign cooperation agreements with states, something that can only be envisaged through the creation of a Defence Office in international criminal tribunals and at the ICC. The Special Tribunal for Lebanon, the only international tribunal to date to have included such a body, autonomous and on

4. “The International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions” (Preamble); “[the Court] shall be complementary to national criminal jurisdictions” (Article 1).

5. Abdoul Aziz Mbaye and Sam Sasan Shoamanesh, “Article 17,” in *Statut de Rome de la Cour pénale internationale: Commentaire article par article*, edited by Julian Fernandez, Xavier Pacreau, and Muriel Ubéda-Saillard (Paris: Éditions A. Pedone, second edition, 2019), 892.

The Rome Statute of the International Criminal Court

The Rome Statute is the founding treaty of the International Criminal Court. It was adopted on July 17, 1998, following a diplomatic conference held in the Italian capital. It came into force on July 1, 2002, following ratification by 60 states. Today, 123 states are party to the Statute and meet in the Assembly of States Parties to vote on the budget, amend the texts, and elect the judges of the ICC.

The Court's jurisdiction is limited to "the most serious crimes of concern to the international community as a whole" committed after the entry into force of the Rome Statute:

- the crime of genocide;
- crimes against humanity;
- war crimes;
- the crime of aggression, added following the first Review Conference of the Rome Statute in June 2010.

Part IX of the Rome Statute, articles 86 to 102, is devoted to international cooperation and judicial assistance. The principle of complementarity, meanwhile, is affirmed in the Preamble to the Statute and is reflected in several articles of Part II on jurisdiction, admissibility, and applicable law, and in Part IX.



Third session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague, Netherlands, September 2004
(© CCO/Wim Van Cappellen/ICC-CPI)

an equal footing with the Office of the Prosecutor, saw the signing of a protocol with the Lebanese government to circumvent the prohibition under Lebanese national law upon lawyers conducting their own exculpatory investigations within the country.

In 2007, the Assembly of States Parties ratified a document containing a comprehensive list of 66 recommendations on cooperation, and subsequently identified seven key priority areas⁶:

1. Enacting the legal mechanisms set in the Rome Statute and setting up effective procedures and structures regarding cooperation and judicial assistance (including in particular the adoption of comprehensive implementing legislation of Part IX of the Statute, which covers the elements of crime, and ratification of the Agreement on the Privileges and Immunities of the Court);
2. Cooperation in support of preliminary examinations, investigations, prosecutions, and judicial proceedings (particularly with the defence);
3. Arrest and surrender;
4. Identification, seizing, and freezing of assets;
5. Cooperation agreements;
6. Diplomatic and public support in national, bilateral, regional, and international settings;
7. Inter-state cooperation in the context of the Rome Statute system.

The financial support provided by the European Commission and other donors, including the Organisation internationale de la Francophonie and individual states parties, is crucial. In particular, it enables the organization of high-level regional seminars and symposia on cooperation, technical meetings with a view to strengthening cooperation, and meetings of legal professionals.

Periodic assessments, feedback, and debriefings would enable us to better adapt proactive action strategies for contexts that are generally constrained and often unfavourable. The Réseau Coopération Complémentarité is prepared to take part in this evaluation and in the work of debriefing.

6. <https://www.icc-cpi.int/sites/default/files/2022-04/66-Recommendations-Flyer-ENG.pdf>.

B. Complementarity

The principle of complementarity is central to the Rome Statute and is mentioned in its Preamble and Article 1, and it is covered in detail in Article 17 as well as in other articles dealing with questions of admissibility (articles 18, 19, and 20). However, it is never defined as such. The scope, limits, and evaluation criteria of this principle have been progressively clarified by the Office of the Prosecutor through its general policy documents, and by the Court's chambers on the occasion of decisions handed down in various cases.⁷ The various versions of complementarity that have emerged over time are not, however, the result of free and open interpretations of the Statute. On the contrary, they are the component parts of a single principle and stem from a deeper and more coherent reading of the Statute.

Although the Office of the Prosecutor's Strategic Plan for 2016–2018 already sought to promote international judicial and police cooperation, this focus takes centre stage in the Office of the Prosecutor's Annual Report of December 2022. The chapter entitled "Building a Hub for Justice: Dynamic Complementarity and Cooperation" describes the new arrangements put in place: "Through the development of new partnerships including Joint Teams with national authorities, the conclusion of agreements outlining new approaches to complementarity, and actions aimed at strengthening the bond between the OTP and domestic authorities through the secondment of national experts, the Office is striving to create a true two-way street for cooperation with national, regional, and international actors."⁸

The pursuit of "positive" complementarity is to be encouraged. In line with the recommendations of the September 2020 independent expert report commissioned by the ASP, we believe that rather than being attached solely to the framework of the preliminary examination, it should be incorporated throughout the procedure, not just at the

beginning. The agreement reached by the Office of the Prosecutor and the Colombian authorities supports this view.⁹

We also welcome the development of "expanded" complementarity, which can take the form of collective referrals by states parties (other than the situation state) to the prosecutor under Art. 14.2. This type of referral has been made in two situations to date: Venezuela and Ukraine. It would be useful to conduct in-depth feedback on these two cases (conditions of the initiative for referral, long-term mobilization, possible effects and unintended counter-effects, etc.).

To avoid any suspicion of political influence, referrals by a group of states parties should be as broad and inclusive as possible.

The strengthening of initiatives by states parties and cooperation with the Court must respect the Court's independence. In order to counter campaigns to discredit the Court, it is essential to establish procedures and mechanisms that can ensure and demonstrate, particularly to public opinion, that respect for this independence is maintained. In this domain, selectivity is a central and sensitive issue.

Therefore, while this configuration resulting from the mobilization for Ukraine offers some very encouraging prospects, it also poses unprecedented challenges. In particular, it is important to point out that the moneys paid into the Court's Trust Funds in 2022 are not earmarked exclusively for investigations into the situation in Ukraine, and that they may be allocated in part to other cases. The European Union, which usually has a very precise framework for the destination and use of its aid, must adapt its procedures to fully respect those decisions left to the discretion of the ICC prosecutor.

7. For determining the admissibility of a case and resolving conflicts of jurisdiction between the ICC and the justice system of a state party whose situation is being examined or investigated by the ICC Prosecutor, several decisions of the Pre-Trial and Appeals Chambers, particularly in the Katanga and Ngudjolo Chui cases in the Democratic Republic of the Congo (appeal lodged by the accused Germain Katanga); Simone Gbagbo in Côte d'Ivoire; Al-Senussi and Gaddafi in Libya; and William Samoei Ruto in Kenya. More recently, on November 10, 2021, the Republic of the Philippines requested that Prosecutor Karim Khan defer the investigation for crimes against humanity that he had opened (for the period 2011–2019) in the context of the "war on drugs" campaign. On January 26, 2023, Pre-Trial Chamber I authorized the Prosecutor's request to resume his investigation into the situation, as the judges, after reviewing the documents provided, were not convinced that the Philippines was conducting appropriate investigations that would justify a deferral of the Court's investigations on the basis of the principle of complementarity. See <https://www.icc-cpi.int/court-record/icc-01/21-56-red>.

8. "Through the development of new partnerships including Joint Teams with national authorities, the conclusion of agreements outlining new approaches to complementarity, and actions aimed at strengthening the bond between the OTP and domestic authorities through the secondment of a range of national experts, the Office is striving to create a true two-way street for cooperation with national, regional, and international actors." <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-05-annual-report-of-the-office-of-the-prosecutor.pdf>, 33.

9. <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20211028-OTP-COL-Cooperation-Agreement-ENG.pdf>.



Headquarters of the International Criminal Court, The Hague, Netherlands (© My Eyes4u/Shutterstock)

Numerous questions also arise in relation to the ICC prosecutor's choice to join the joint structural investigation opened on March 25, 2022, under the aegis of Eurojust, by Ukraine, Poland, and Lithuania. In a public statement, Prosecutor Karim Khan argued that "this kind of partnership shows that it is possible to change the dynamics of judicial cooperation—not only in Ukraine, but everywhere else. National judiciaries have significant capabilities and can enable cheaper and more efficient proceedings. Instead of The Hague being the basis for international criminal justice, we can create a common front of national investigators and prosecutors, national courts, and the ICC, while preserving the independence of each of these institutions" (*Le Monde*, May 14, 2022 ; and *Artsakh.news*, May 15, 2022).

While the ICC Office of the Prosecutor will have access to the pooled documentation, it will not share all elements of this documentation, particularly those relating to investigations into the actions of Ukrainian forces. Nevertheless, this participation, while a strong gesture, also poses a potential risk to its independence.

A country's fragile security context and the state of its judicial system are two major factors limiting the ability of a situation state to cooperate with the Court. The pursuit and achievement of sustainable development aid objectives, in particular Goal 16 of the UN's SDGs ("peace, justice and strong institutions") are decisive here.¹⁰ These initiatives are not part of the "positive complementarity" of the Court and the situation state, but they are a condition of its implementation and a crucial complement to it provided by international and regional organizations and, bilaterally, by states. In this sense, they could be enhanced and taken into account within the broader framework of a strategy of "expanded complementarity."

Apart from development aid policies, cooperation between the situation state on whose soil the crimes were committed and neighbouring countries in the region should be strengthened. This often remains a blind spot, even when these countries share similar legal systems and there is no language barrier between them.

The internalization of the Rome Statute has also led to a historic harmonization of national legislation in terms of the definitions of the three most serious international crimes (excluding the crime of aggression), without however imposing a single, common definition. Some states parties have adopted the Statute's definitions in their entirety. Others, such as France, have kept certain specific features of it, while some states have not signed up to the Statute and have used their own definitions.

It is no easy feat, but a balance must be struck between cooperation based on bilateral agreements and the need to share certain aspects of those relationships with other partners via exchange platforms or cooperation agreements, or via new mechanisms, like the IIIM tasked with facilitating investigations into crimes committed in Syria.

10. <https://www.un.org/sustainabledevelopment/peace-justice/>.

2. Cooperation agreements

The convention resulting from the MLA (Mutual Legal Assistance) Initiative on mutual legal assistance in matters of war crimes, crimes against humanity, genocide, and other international crimes is sure to prove a useful new tool to fill the legal vacuum in mutual legal assistance and extradition between many states for the national prosecution of these crimes.

The core group of states spearheading the MLA Initiative, which came into being in November 2011 following a meeting of experts organized in The Hague by the Netherlands, Belgium, and Slovenia, and subsequently expanded to include Argentina, Senegal, and Mongolia, designed this multilateral treaty to put in place inter-state cooperation mechanisms similar to those found in some existing multilateral treaties. These include modern provisions (for example, on video-conferencing hearings, the temporary transfer of detainees, the protection of personal data) on mutual legal assistance and extradition similar to those found in the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption.

The initiative is in line with the Rome Statute's principle of complementarity, since its Preamble declares that states retain primary responsibility for the prosecution of international crimes and notes the need to improve the effectiveness of investigations and prosecutions of such crimes at the national level. The MLA Initiative operated as an autonomous process outside the UN forum and was open to all states. At the end of 2022, it had the support of 77 states from all around the world, including France.

The draft was proposed in 2023 in the form of a comprehensive tool rather than a complementary one. The convention incorporates the

Multilateral Treaty on Mutual Legal Assistance and Extradition for Domestic Prosecution of the Most Serious International Crimes (MLA Initiative)

With a view to drawing up a treaty on mutual legal assistance, the MLA (Mutual Legal Assistance) Initiative was launched in November 2011 to fill a legal gap in the international legislative framework. Indeed, if existing treaties dealing with the most serious international crimes (such as the Genocide Convention and the Geneva Conventions) contain any provisions at all on mutual legal assistance and extradition, they are very limited and generally outdated.

The Multilateral Treaty on Mutual Legal Assistance and Extradition for Domestic Prosecution of the Most Serious International Crimes was adopted on May 26, 2023, at the conclusion of a diplomatic conference attended by 70 states in Ljubljana (Slovenia). By adopting the definitions of crimes set out in the Rome Statute and placing at its heart the principle of complementarity between national and international jurisdictions, this new treaty follows the logic of the Rome Statute of the International Criminal Court (ICC), while also addressing states that are not party to the Statute. All UN member states can become parties to the planned treaty. The Convention will be open for signature by all states in 2024 for a period of two weeks, at a date yet to be determined, in The Hague.

definitions of crimes from the Rome Statute¹¹ without making direct reference to the Statute (although it is cited in the Preamble alongside other existing provisions under customary international law and multilateral instruments). The diplomatic conference took place from May 15 to 26, 2023 in Ljubljana (Slovenia). Many states supported this ambitious project designed to significantly improve cooperation procedures, particularly with countries that previously had no framework for cooperation in these matters.¹²



11. It adds, however, that “for the purpose of this Convention, the crimes covered by this Convention shall not be considered political crimes, crimes connected with a political crime or as crimes inspired by political motives.” In addition, in its annex, the convention also provides for other criminal acts listed under war crimes, torture, enforced disappearance, and the crime of aggression, which may also be covered in the application of the convention by states making the notification under article 2, paragraph 2.

12. For more information on the conference, see the Slovenian government website: <https://www.gov.si/en/registries/projects/mla-initiative/>. The convention is available in English here: <https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/The-Ljubljana-The-Hague-MLA-Convention-English-v5.pdf>.

Other tools for cooperation are in development via conventional routes. The UN International Law Commission's Convention on Crimes against Humanity, for example, seems to be blocked for the time being by the limits of the UN framework, but it remains a significant project that could help move the discussion towards a common definition.

France is making an active contribution to these negotiations. However, the blockages resulting from its current law on universal jurisdiction have hampered its position. For example, NGOs¹³ have expressed concern that questions regarding problematic or controversial limitations of jurisdiction are not being included in the negotiations. Promoting cooperation through treaties and conventions is fundamental, but we must not limit ourselves to this. States must assume their responsibilities and move forwards on other levels too, in particular bilaterally and with internationalized jurisdictions and pre-jurisdictional mechanisms like the IIIM.



3. The revival of internationalized jurisdictions

Three generations of internationalized jurisdictions have come and gone. The most recent, around 2013–2015, brings to light two notable developments in respect of complementarity and cooperation. On the one hand, while the creation of internationalized jurisdictions was usually reserved for situations that fell outside the ICC's territorial and historical jurisdiction (Sierra Leone, Cambodia, Lebanon, Kosovo), this is not the case with the Special Criminal Court (SCC) of the Central African Republic, created in 2015, at a time when the ICC had two open situations under investigation in the country, which is a state party, covering periods common to the mandates of both jurisdictions.

Here we see a new form of complementarity emerging. We are moving away from competition between models (the permanent court with a universal vocation, largely supported by the Europeans vs. the tailor-made justice of ad hoc tribunals particularly favoured by the United States) towards constructive complementarity between national and international jurisdictions. Our network is paying particular attention to the situation in the CAR, which offers a wealth of lessons to be learned, especially as the ICC's activities in the country had already begun to show signs of a positive complementarity extended to the investigation phase. The justice system in the CAR is a laboratory for multidimensional complementarity (national, hybrid, international), both with the ICC and in relation to mutual legal assistance (between France and the CAR in particular, where it is sustained and mutual).

As the context in the CAR remains tense and fragile, long-term interest and the extent of international investment is sure to prove decisive. The state provides human resources; the international community supplies the bulk of budgetary resources. Financial support often targets only one segment of the judicial chain when it should be

13. <https://www.amnesty.fr/presse/en-effet-et-alors-que-la-france-dit-vouloir-sengager>.



Judges of the Appeals Chamber of the Special Criminal Court of the Central African Republic, February 15, 2023 (© cps-rca.com)

spread across the entire chain, including logistics, prisons, and training for the police (and not just the judiciary).

On the other hand, it appears that the internationalized jurisdictions created in Senegal in 2013 and in Kosovo in 2015 were set up in cooperation with regional organizations: the AU in the former case, the Council of Europe in the latter. This regionalization of international criminal justice, which goes beyond just the way in which the jurisdiction is created, is also a subject of interest for our network insofar as many internationalized jurisdictions (SCC, EAC, ECCC) have adopted a Romano-Germanic law model.

Similarity in methods and legal models facilitates cooperation. In the case of Cambodia, French investigating magistrates were able to travel to the country to interview Duch (the former director of S-21 prison) and gain access to archives. Exchanges are easier and can often be conducted on a simple reciprocal basis. On the other hand, it may be observed that for jurisdictions operating under other rules and practices (e.g., the MICT), cooperation is not so “intuitive” and tends to prove more cumbersome, even when a law of cooperation exists and significant exchanges take place. This should be an argument in favour of strengthening the French-speaking, Romano-Germanic law-inspired space within the international arena (which should not be deserted or weakened—quite the contrary). Although criticized and challenged by the Anglo-Saxon model, the inquisitorial model remains the one used in many states, particularly in Africa, forming a sort of “legal continent” of several dozen countries.

This regional dynamic is giving rise to a new, intermediate space of complementarity between national and international justice (the ICC, the

ICJ, ad hoc ICTs, the MICT, etc.). One of the great benefits of regionalization is that it fosters cooperation through more homogeneous and functional procedural models. Regionalization also makes it possible to share responsibilities that may be too onerous to assume at a domestic level alone, particularly when armed groups move and act on a scale that goes beyond the national framework. The hybrid model of internationalized jurisdictions thus represents a more advanced type of cooperation and complementarity between the national and international levels.

The creation of internationalized jurisdictions remains a lengthy and costly process, and in fact, despite several planned projects (in the Democratic Republic of the Congo, Sri Lanka, and more recently Ukraine), it remains relatively uncommon. However, hybridization might not be extended to a whole jurisdiction but could be reserved for a single body (such as the public prosecutor’s office), an approach that has already been implemented for investigation divisions and evidence depositories.

4. The “renationalization” of international criminal justice through the development of universal jurisdiction or internationalization by cooperation

The creation of the International Criminal Court and its principle of complementarity, which, in case of the failure of a state to address international crimes that have been committed on its soil, enables it to take the place of that situation state in order to ensure the prosecution of those crimes, far from rendering the role of national judges in the fight against impunity optional or redundant, has been on the contrary accompanied by a revival of universal jurisdiction in recent years.

This “renationalization” of the prosecution of the most serious international crimes has been made possible in particular by the creation of specialized units and departments in several states, by changes in legislation, and by the involvement of NGOs and victims’ associations. Today, some fifteen states are particularly active in this respect, handling a large number of cases under this jurisdiction, application of which is based on the seriousness and international nature of the crimes, and thus calls for judgements to be handed down by national courts on behalf of the international community.

In France, developments in this direction were expected, including on the judicial and legislative fronts and on the part of the government.¹⁴ They began to arrive with major decisions handed down by the plenary assembly of the Cour de cassation, convened to re-examine the ruling of November 24, 2021,¹⁵ dismissing the appeals lodged by the defence lawyers of two Syrian nationals in two different cases on the grounds of double criminality and habitual residence.

Universal jurisdiction

In principle, national courts have jurisdiction over crimes committed on their soil, and, under certain conditions, crimes committed abroad, in particular when the perpetrator or victim is of the court’s nationality. In some cases, however, a country’s courts also have jurisdiction over crimes committed abroad by a foreign person against a foreign victim. This is known as “universal” jurisdiction.

Universal jurisdiction applies to the most serious international crimes in countries that have adopted the appropriate legislative framework in line with their international obligations.

When this framework includes a certain number of reservations and conditions, as is the case in French law, jurisdiction is not absolute. In such cases, it is sometimes described as “quasi-universal.”

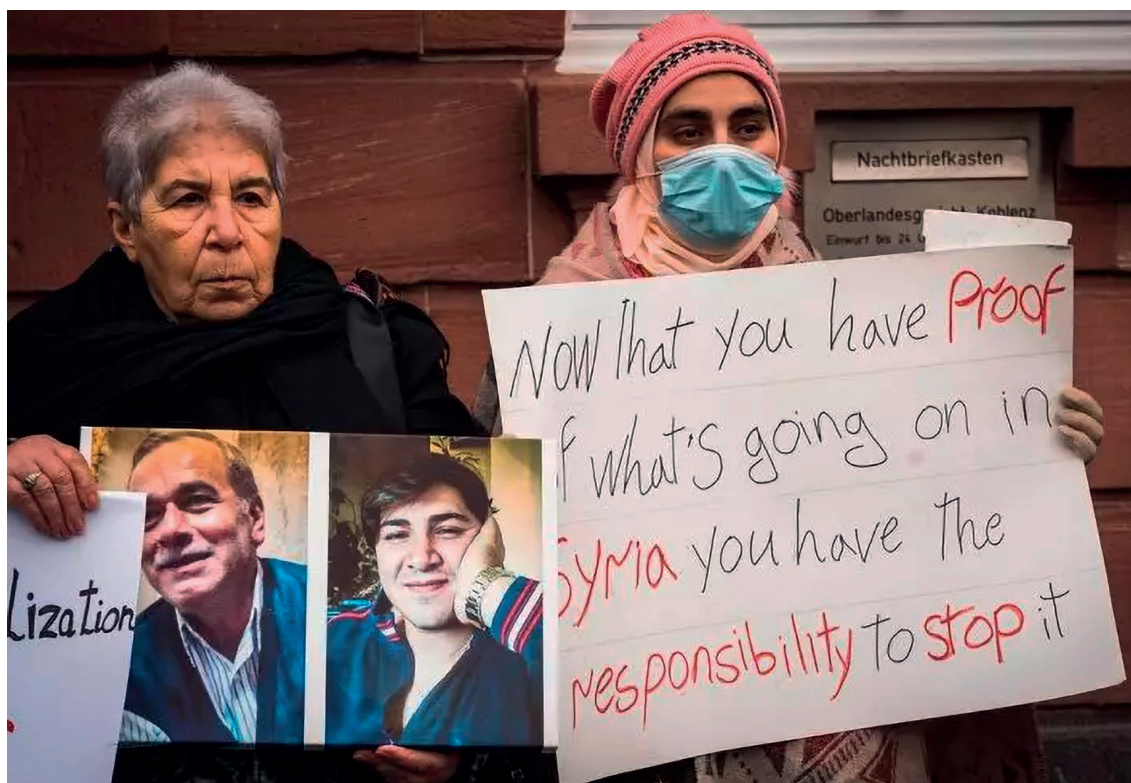


The Paris Courthouse (© P. Gueret/Shutterstock)

On July 6, 2023, following the lead of the Senate, the National Assembly voted to remove the first restriction and to relax the second. It is no longer necessary for the law of the foreign country to describe war crimes and crimes against humanity in exactly the same way as French law in order to initiate proceedings, and the existence of a “sufficient connection with France” replaces the condition of habitual residence.

14. <https://www.diplomatie.gouv.fr/en/french-foreign-policy/international-justice/news/article/jurisdiction-of-french-courts-over-crimes-against-humanity-9-feb-2022>.

15. See the May 12, 2023, decision of the Cour de cassation, in plenary session, which establishes the following: (1) “For there to be double criminality, it is not necessary that the acts covered in France by the offences of crimes against humanity or war crimes be qualified in the exact same way by the laws of the foreign country: it is sufficient if the foreign legislation punishes these acts as common offences such as murder, rape or torture [...]”; (2) “In order for France to be considered as the foreign national’s habitual residence, there must be a sufficient connection between France and this person. The judge must assess this link on the basis of a set of indicators: the duration of the individual’s presence in the country, but also the reasons for their stay, the conditions under which it took place, the manifestations of an intention to reside for an extended period in France, and the existence of family, social, material or professional ties.” <https://www.courdecassation.fr/en/toutes-les-actualites/2023/05/12/press-release-universal-jurisdiction-french-justice-crimes>.



Victims of the Syrian regime leaving the court in Koblenz, Germany, January 13, 2021 (© Bernd Lauter/AFP/Source JusticeInfo.net)

The strengthening of universal jurisdiction therefore does not indicate a retreat from the international in favour of the national, but rather a change in the relationship between the national and international levels. Even so, each retains its own specific features, including strengths and weaknesses, such as the support of a police force for the national level, or the absence of immunity for heads of state for the ICC and internationalized jurisdictions. But it must be said that a set of practices and tools that are now well established internationally remain too costly and complex to be directly imported into or reproduced in every country.

At the trial of two members of the Syrian regime, which took place in Koblenz between 2020 and 2022, the judges emphasized the security of witnesses during the hearings, but their protection after testifying and the threats to their families in Syria were not sufficiently taken into account. Many witnesses decided not to testify, in many cases because of the risks involved or the pressure exerted on their families.

International criminal tribunals have set up systems for protection, translation, interpretation, filming, archiving, and victim participation, via specialized units and divisions usually managed by the court's administrative office. But such

systems are costly. In countries where the justice system is already under-funded for ordinary cases, it is difficult to raise awareness among the public and decision-makers of the importance of universal jurisdiction trials. Hence the importance of cooperation and the creation of tools and mechanisms to increase the efficiency of investigations while pooling some of the related costs.

Although universal jurisdiction is not the most appropriate way of prosecuting a regime's most senior officials (an international court is better placed to do this, in terms of both immunity and the symbolic weight of the judgement), it should not be seen solely as a method for the prosecution of lower profile cases. The Koblenz trial will rightly be remembered for the life sentence handed down to Colonel Anwar Raslan, head of interrogations at Branch 251 of Syria's General Intelligence Directorate, and not that of his subordinate, sentenced to four years' imprisonment for arrests at a roundabout. In a certain sense, then, strategies or a "penal policy" also need to be implemented in universal jurisdiction. Such strategies will be more appropriate if they take into account the options and capacities of other jurisdictions active under universal jurisdiction. Strengthening this horizontal complementarity is one of the major objectives of our network.

5. Exchange platforms: The Genocide Network, Eurojust, and momentum in Ukraine

The renationalization of the fight against impunity for the most serious international crimes has thus been accompanied by a greater openness to external cooperation and to new forms of sharing and resource pooling.

This dynamic may be established through the creation of professional exchange networks, such as the recently launched (in 2021) Eonomie network, which provides forums, e-learning platforms, and a directory for foreign judges and prosecutors trained at the *École nationale de la magistrature* (ENM) (National School for the Judiciary). By encouraging the creation of national alumni associations in partner countries (to date, five African countries: Senegal, Burkina Faso, the Republic of the Congo, Niger, and Egypt), the network aims to “contribute to the emergence of an international community of the judiciary.”¹⁶

Europol: The European Union Agency for Law Enforcement Cooperation

Created in October 1998 and based in The Hague, Europol is a European criminal policing body. It facilitates the exchange of intelligence between national police forces on matters of drug trafficking, terrorism, international crime, and child pornography within the European Union. War crimes, crimes against humanity, and genocide have been part of Europol’s mandate since 2017. On April 25, 2023, the International Criminal Court and Europol signed a working agreement to establish a legal framework enabling the two institutions to strengthen their cooperation and encouraging the exchange of information, knowledge, experience, and expertise.

Shared analysis tools include Core International Crimes, which has been in place at Europol for several years, and the SIENA secure messaging system. These tools require staff training, but they enable all member countries and collaborating third countries to be questioned simultaneously. This avoids multiple referrals and puts in place a single point of collection for responses.

Pooling also avoids the multiplication of respondents, the risk of confusion, and the risk of trauma caused by over-solicitation of victims. For example, when dealing with Ukrainian refugees in France, a coordinated circuit (the DACG, public prosecutor’s offices, the OCLCH, the PNAT) was rapidly established for collecting information from victims present on French territory. The database that was set up as a result may also be useful in France’s collaboration with Ukraine and the ICC. This work of collection could be started upstream and extended via Frontex and Europol. The mobilization around the Ukrainian situation and the experience gathered there offers great potential for innovation and reorganization, and ought to be put to good use in future situations.



Europol buildings, The Hague, Netherlands (© M. Galina/Shutterstock)

16. <https://www.enm.justice.fr/en/actu-26102021-eonomie-new-network-foreign-judges-and-prosecutors-trained-enm>.

Eurojust Agency meeting room, The Hague, Netherlands. © JAKOV Minic/Eurojust



Eurojust: The European Union Agency for Criminal Justice Cooperation

Inaugurated in April 2003 and based in The Hague, Eurojust brings together the judicial authorities of the EU member states (with the exception of Denmark). They work together to combat serious cross-border organized crime.

Eurojust can intervene when crimes involve at least two member or associate states (associate states include Denmark and 13 other non-EU states, including the United Kingdom, the United States, Norway, and Ukraine). In 2021, Eurojust provided financial and/or operational support to 254 joint investigation teams.

Eurojust is made up of prosecutors, judges, and police officers from each participating state.

Following Russia's February 2022 military aggression in Ukraine, Eurojust's mandate was expanded, giving the agency the legal ability to collect, preserve, and share evidence of international crimes.

Eurojust also hosts the Genocide Network, which brings together European experts on war crimes, crimes against humanity, and genocide. To carry out its missions, Eurojust cooperates with other EU bodies such as the European Judicial Network, Europol, the European Anti-Fraud Office (OLAF), and the European Public Prosecutor's Office.

Eurojust has seen its mandate in Ukraine modified to include the centralization, storage, and analysis of data on international crimes committed in Ukraine. This necessitates a modification of its regulations to allow automated storage of all data (photos, wiretaps, satellite images, videos) supplied by states and NGOs. This is a new role for Eurojust, which up to this point had not been a primary agency at EU level for these types of crime, which for twenty years had been handled by the Genocide Network, of which Eurojust is an associate member.¹⁷

From now on, the two European agencies must work together as effectively as possible for investigations underway in member states. One of the benefits that might be afforded by this situation is a strengthening of complementarity between legal domains. After all, there are many connections between the most serious international crimes and financial crimes, terrorism, etc.

Will Eurojust be able to adopt an equally well-developed methodology and resources for war crimes, crimes against humanity, and genocide as it has for the fight against organized crime? The lack of specialized human resources to support all of these initiatives at the European level highlights the need for an ambitious training and development programme at the national level, in order to be able to invest effectively at the international level.

17. <https://www.eurojust.europa.eu/sites/default/files/assets/investigations-and-prosecutions-of-core-international-crimes.pdf>.

The Genocide Network

The European Network for Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes (Genocide Network) was set up in 2002 by the Council of the European Union to enable close cooperation between national authorities in the investigation and prosecution of genocide, crimes against humanity, and war crimes.

EU states are represented in the network by national contact points (prosecutors, investigators, mutual legal assistance officers, etc.). The Genocide Network Secretariat was created in 2011 and is hosted by Eurojust. The network brings its members together twice a year to coordinate ongoing work on the investigation and prosecution of perpetrators of the most serious international crimes.



Photographs of victims of the Tutsi genocide, Kigali Genocide Memorial, Rwanda, April–July 1994 (© Adam Jones, Ph.D./Wikicommons)

The European Genocide Network, created in 2002 by the Council of the European Union, is an essential interface here. It promotes the exchange of information and best practices and highlights topical issues and issues of common interest. The network is not solely intra-European in scope. It includes participants with different statuses, including, in addition to contact points, observer members (the ICC Office of the Prosecutor, non-European states, agencies such as Europol) and associate members (NGOs such as the Coalition for the ICC, the ICRC, the MICT, the KSC, the IIIM, Unitad, the European Union Agency for Asylum, etc.). The list has grown steadily over the years. Moreover, even bodies without associate status may be invited to present their activities in connection with a theme on the agenda.

This broad openness could enable the Genocide Network to become a facilitator and to some extent a forum for discussing models of cooperation (a role it has already begun to play by organizing a thematic meeting in 2014 on the African Union Commission's activities in view of establishing a network of African prosecutors specializing in international crimes).

There is no one single model of cooperation: a network of investigators (such as Unitad) operates differently from a network of jurisdictions. Without seeking to become a coordinating body, or to take on a central interface role that would inevitably be contested (particularly by those who would view it as a “neo-colonial” influence), the Genocide Network could play a supporting role in the creation of similar (though not identical) regional networks in Africa and Latin America, which would then enter into communication with one another. The aim would be to stimulate and deconcentrate exchanges rather than to centralize them. But to become an influential model, the Genocide Network would need to be able to publicize its actions and modes of cooperation more effectively.

6. The creation of joint investigation teams (JITs)

Another form of this “internationalized renationalization” is the creation of joint investigation teams (JITs) involving two or more jurisdictions.

Initially stemming from the Convention on Mutual Assistance in Criminal Matters (Art. 13) signed in May 2000 by EU member states, joint investigation teams enable states to develop common investigation strategies and to share objectives in the fight against cross-border organized crime. These teams bring together judges and investigators from two or more countries within a single entity. The flexibility of this mechanism facilitates the exchange of information, the conduct of joint investigations, and the coordination of criminal prosecutions. Created for a specific case and of a limited duration, they are not intended to become permanent bi- or multinational structures.¹⁸

The Swedish and French judicial authorities set up a JIT to aid in the prosecution of international crimes committed by foreign terrorist fighters (FTFs) against the Yazidi population in Syria and Iraq. Eurojust supported the establishment of this JIT.¹⁹

The Caesar File (which comprises 53,275 photographs exfiltrated from the Syrian regime’s administration, including 28,707 photographs of civilian victims and tortured detainees) gave way, under the initiative of the French Ministry for Europe and Foreign Affairs, to the opening of a joint structural investigation (JSI)²⁰ between Germany and France (the JSI on the French side being placed under the authority of the PNAT, in liaison with the OCLCH). On February 12, 2019, three coordinated arrests were made by French OCLCH gendarmes and German police officers on both territories.

Unlike internationalized jurisdictions, for which such investigations are customary, opening a structural investigation is not a natural step for national jurisdictions. This is particularly true in situations that involve war crimes and crimes against humanity, where it is necessary to detect wide-scale recurring patterns of criminality and to identify complex chains of responsibility.

Other JITs have been set up, two of which, in particular, were joined in 2022 by the ICC Office of the Prosecutor. A JIT on the treatment of migrants in Libya was established in 2018 by Italy, the Netherlands, the United Kingdom, Spain, and Europol. This JIT led to the arrest of fourteen Eritrean human traffickers in Italy and two others in the Netherlands. Several trials for membership of a criminal organization are due to commence in 2023. The ICC’s action could lead to the indictment of the key figures responsible for this trafficking, with the torture and sexual abuse committed against migrants treated as crimes against humanity. By opening an office in Libya, the ICC prosecutor could also facilitate cooperation with the Libyan authorities and on-the-spot investigations.

The ICC prosecutor also joined a second JIT on crimes committed in Ukraine as part of a structural investigation initiated in March 2022 by Lithuania. Under the aegis of Eurojust, at the beginning of 2023 this JIT brought together seven countries—Ukraine, Poland, Lithuania, Estonia, Latvia, Slovakia, and Romania—and the ICC has been involved since April 25, 2022. The United States is not a member but has signed a memorandum of understanding to cooperate with this JIT.

The growing number of JITs bears witness to the value of these types of mechanisms. However, they are not without their limitations. They can come up against disagreements between partners.

18. https://www.eurojust.europa.eu/sites/default/files/assets/joint_investigation_teams_practical_guide_2021_en.pdf.

19. <https://www.eurojust.europa.eu/news/support-joint-investigation-team-sweden-and-france-targeting-crimes-against-yezidi-victims>.

20. The structural investigation is an in-depth investigation which seeks to identify the principal crimes committed in a given situation and their perpetrators. It provides the basis for further investigations.

For example, six JIT member states are behind the creation of the International Centre for the Prosecution of the Crime of Aggression (ICPA), a form of “interim prosecutor’s office” bringing together judges from JIT states whose legislation criminalizes the crime of aggression and which might foreshadow the establishment of a future special tribunal to try this crime. Although Prosecutor Karim Khan was hostile to such a prospect, he took part in the inauguration of the ICPA on July 3, 2023. Whatever judicial option is ultimately taken, it is crucial that it be chosen in agreement with the ICC. To do otherwise would expose a deleterious breach in the united front of collective action.

The other risk, especially when the JIT concerns a structural investigation, is that of getting lost in the sheer mass of crimes committed. The investigation must be sufficiently circumscribed (for example by limiting it to one actor, such as the regime’s intelligence service, or to certain specific acts), and the objective of the investigation must be clearly defined to avoid a dilution of information.

An additional risk is the frustration that can be generated by the fact that the team most advanced in its investigations or which is targeting a more important suspect takes priority over the others. The result should therefore be assessed on a global, not just national, scale, with credit given to all countries involved.

The JIT is a major instrument for facilitating information exchange and procedures for conducting hearings on a partner’s territory without having to make a formal request. It also makes it possible to finance actions (such as operational meetings). While this framework enables information and evidence to be shared and exchanged without having to go through the traditional channels of mutual legal assistance (MLA) or European Investigation Orders (EIOs),²¹ it is still a complex matter to incur expenses as a part of a JIT. On the financial level, it would be useful to make the rules more flexible.

As investigations progress, it should also be possible to reflect regularly upon whether it is still appropriate to continue the JIT, or whether it would be useful to restructure the joint team.

7. The networking of evidence storage and the creation of pre-judicial evidence mechanisms

In 2016 and 2017, new impetus was given to the fight against impunity with the arrival of a new generation of independent investigative mechanisms created by the UN, respectively by the General Assembly, the Security Council, and the Human Rights Council, to prosecute violations committed in Syria (IIIM), by Da’esh in Iraq (Unitad), and in Myanmar (IIMM). While these three mechanisms have different mandates and methods of operation, what they have in common is a mission to gather evidence and prosecute crimes.

The IIIM is a pre-judicial mechanism that collects, preserves, and analyses evidence gathered, and it acts according to at least three complementary levels of cooperation: responding to requests for assistance from the jurisdictions concerned, proactively sharing analytical products with them, and serving as a basis for future prosecutions by a regional or international jurisdiction that might be called upon to deal with the Syrian situation. The aim is not to compete with pre-existing mechanisms, but to use cutting-edge technology to centralize, store, and make accessible the evidence gathered, and to analyse and share it in support of courts, particularly when a national authority is unwilling or unable to do so.

The IIIM’s flexibility is a major asset in its exchanges and its cooperation, enabling it to develop tailor-made analytical products. The IIIM has also developed a “modular approach to case file development” which includes “structural investigation” to identify structures and patterns of recurring crimes, historical, societal, cultural contexts, and various overarching features (*chapeau elements*) of crimes, as well as to analyse elements of the case that make it possible to establish the existence of core crimes and responsibility for

21. For the distinction between JITs, MLA, and EIOs, see the guide produced by Eurojust, or the European e-Justice Portal: https://e-justice.europa.eu/92/%20FR/european_investigation_order_mutual_legal_assistance_and_joint_investigation_teams?init=true.

The International, Impartial and Independent Mechanism (IIIM) for Syria

On December 21, 2016, the United Nations General Assembly adopted resolution A/71/248, establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, more commonly known as “the IIIM” or “the Mechanism.”

Based in Geneva, it shares the documents it collects and produces with the relevant jurisdictions, in response to requests for assistance, or proactively when evidence in the central repository or analysis work produced is identified as relevant to ongoing investigations.

The material it shares can be of various kinds. It may include raw information and collected evidence, analytical products, and case files developed by the IIIM.

Analytical products and case files are prepared to a legal standard that allows jurisdictions to incorporate them into their criminal case files. The IIIM shares its material only with competent jurisdictions that respect the required human rights standards and do not apply the death penalty for the offences in question.

them within the framework of “strategic lines of inquiry,” according to the perpetrators (Da’esh, armed groups, regime entities, etc.) and themes (illegal, chemical, and conventional attacks, including those targeting medical facilities, crimes in custody, etc.). The analytical products developed as a part of these strategic lines of inquiry constitute modular blocks of the structural investigation; they enter the Central Repository and can be shared with jurisdictions according to the needs of their investigations, even before the case has been concluded.

The IIIM’s functions are therefore valuable for several reasons:

- in a context where sources of proof are multiple and dispersed, and where obstacles prevent the referral to or creation of an international jurisdiction, the mechanism makes it possible to preserve these elements of the investigation in the long term with a view to later exploitation;



- it supports proceedings, including those based on universal jurisdiction and before national jurisdictions whose means of access to evidence and conduct of investigations of a structural nature are limited;
- it bridges the gap between judicial use of the evidence gathered and broader transitional justice work for Syrian victims and society.

Unlike a jurisdiction whose processes and judgements can be publicized and promoted in the media, a pre-jurisdictional mechanism has to operate discreetly, given the very nature of the evidence gathered and the phase in which its action takes place (investigation and collation of the case file). The IIIM thus marks a “silent revolution” in the field of cooperation which should be encouraged and supported over the long term, beyond this specific moment of political mobilization and public support.

Potentially beneficial for both national and international jurisdictions, applicable to diverse legal systems, this type of mechanism could respond to a number of other outstanding situations. It could provide many complementary services (evidence protection and analysis, witness protection, support for courts, etc.). Should we not then create a permanent mechanism of this type

Destroyed building, Aleppo, Syria, 2019 (© Shutterstock)



with a more general mandate? A report on this question, including various options, was presented at the G7 summit in June 2022, paving the way for this type of solution.²²

Many questions remain, however. For example, it seems out of the question that such a mechanism could act on its own initiative, but what would be the procedure for its activation? Moreover, if we are not careful, we run the risk of complicating the defence's access to exculpatory evidence, since it would no longer be the prosecutor's office of a given jurisdiction that would be the depository of all the evidence on a given situation.

A way must therefore be devised for giving the defence access to elements that may be useful to it, either by requiring the prosecutor to investigate both sides of the case through these mechanisms, or by giving the defence direct access to corpora such as those of the IIIM. But this raises questions of security and of the approval of primary sources who have rendered some or all of their documents over to the mechanism. In situations where there is an examining magistrate, the ideal situation for the mechanism would seem to be for the latter to relay the defence's request. The support of

the examining magistrate would also be useful in obtaining the consent of the sources.

In practice, the creation of a digital repository also raises the issue of personal data management (which has implications for legal proceedings). This is the case, for example, with Eurojust, which has been given a new remit with the creation of a platform for the collection and analysis of digital data (previously managed by Europol). The UN's regime on personal data is not the same as the EU's.

What will be the added value of creating new databases? As the case of Ukraine tends to demonstrate, we are seeing a situation where proof is a concentrated and collective affair, while actual evidences are becoming increasingly compartmentalized and relocalized. What is emerging is a landscape in which some data will be held by pre-judicial mechanisms, others by national prosecutor's offices, others by international organizations such as Europol, Interpol, or Eurojust. But if information is held by regional, multinational, or intergovernmental bodies such as Europol, what will happen to access to information from countries outside the zone, particularly non-European countries? Won't processing times become farlonger?

Another difficulty is that, since the ICC is not a third-party state but an international organization, it may not be able to make use of information that arrives by way of an inter-state database (although it can draw on data transmitted directly to it by states). A new cooperation agreement will therefore likely have to be drawn up to take this into account.

The framework for cooperation with this type of mechanism also raises difficulties and divergences in treatment. Some states, including Germany, have adopted an "umbrella law" which enables new cooperation with similar mechanisms to be incorporated simply through an exchange of letters. For legal reasons, France has opted to cooperate on a case-by-case basis, as in the case of mutual legal assistance with a foreign jurisdiction. If the mechanism for Myanmar seeks to benefit from the same elements of cooperation as the IIIM, a new convention based on the same model will be required.

22. See also the Oxford University study: <https://www.bsg.ox.ac.uk/research/publications/anchoring-accountability-mass-atrocities>.

8. A new place for the defence

To ensure that justice remains fair and equitable, a part of the unprecedented investment being allocated to investigators must go to the defence.

Equipping the ICC and future international criminal tribunals with a Defence Office on a par with the Prosecutor's Office would give concrete content to Article 10 of the Universal Declaration of Human Rights²³ and afford a real place to the role of the defence in the work of justice, which too often is reduced to the action of the prosecutor alone. Some Anglo-Saxon countries have "Public Defender" offices, and the Special Tribunal for Lebanon has set up a Defence Office whose experience has demonstrated the contribution such a system can make.

In particular, a Defence Office headed by a lawyer recognized by their peers could establish official relations with states, and, like the prosecutor, sign cooperation agreements with them.

Likewise, a Defence Office would provide defence lawyers with the support they need in their role, as well as establishing ethical rules specific to this international mission. This body could also assess the effectiveness of the defence where necessary.

As an independent body, a Defence Office would be the indispensable voice of the defence at all official events organized by the ICC and these internationalized tribunals.

Finally, such an office could also train lawyers in restorative justice. In the words of Maître Jean Boudot, "Acting for the defence means not taking anything for granted that has not passed through the scrutiny of the adversarial process," but it also means to "*advocare*," to be a voice on behalf of the accused, whom the lawyer will meet, get to know, seek to understand, advise, and perhaps help towards making a guilty plea.

Common law provides for guilty pleas, but it reduces the trial to a duel between the prosecution and the defence, with the presiding judge only an arbitrator and the accused having no voice.

Civil law favours the search for the truth by placing the accused at the centre of the trial and inviting them to make their case at length. Guilty plea/search for truth: this is a major point upon which the two systems should be able to come together and harmonize their two procedures, despite their different philosophies. The hybridization of internationalized jurisdictions can help to achieve this.

9. The role of judges in the search for truth

It is suggested that we move towards the creation of a genuine case file—if not a single file, then at least a harmonized one—and towards a better organization of this file with the use of information technology and artificial intelligence. Trial documents should be tagged by place, date, accused, and the constituent elements of each offence.

There is a need to consider how judges will be able to analyse the vast quantities of evidentiary data collected today in certain conflict zones. What skills and expertise will they require, and what should their aim be? "Too much evidence" makes "proof" impossible, and algorithms in themselves cannot deduce the sufficiency of evidence. The digital processing of evidence must not replace the work of judges, whose job it is to bring out the truth in all its complexity. This cannot be the result of a purely technical-computational approach.

To gain a better grasp of conflict situations and cultural contexts with which they have little if any familiarity, judges must be able to call upon experts (in technical fields if necessary, but also in other disciplines, in particular the human sciences) to enrich their legal analysis and help them understand the facts and seek the truth.

23. Art. 10 of the Universal Declaration of Human Rights: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

10.

Cooperation with victims' associations and civil society

Now that, with the implementation of the Rome Statute, all actors, diplomatic and judicial alike, have given official recognition to the presence of victims at international criminal trials, it is time to ensure better treatment for these victims by establishing, at the ICC and other internationalized jurisdictions, a Victims' Compensation Commission, like the one that exists in every judicial court in France, to compensate victims quickly and with dignity, without having to wait until the conclusion of the trial.

The role of NGOs is essential here. They were very active during the negotiation of the Rome Statute, and NGO members of the Coalition for the ICC participate as observers at sessions of the Assembly of States Parties. They are also key players in initiating and monitoring universal jurisdiction proceedings. Many of them have professionalized their investigative methods in order to support victims in these legal proceedings.

Coalitions of NGOs—many of which have already been mobilized since 2013 in respect of Ukraine—have been set up to document crimes (*Ukraine 5 AM coalition* and other initiatives²⁴). The scale of NGO involvement in Ukraine prompted the ICC prosecutor, with Eurojust's support, to publish "Documenting International Crimes and Human Rights Violations for Criminal Accountability Purposes: Guidelines for Civil Society Organizations"²⁵ in September 2022.

Since its inception, the IIIM has benefited from a platform for engagement with Syrian civil society, which has resulted in the provision of documentation archives and evidence from numerous NGOs, but it goes far beyond that. Since November 2022, workshops have enabled civil society actors specializing in the documentation of certain core crimes to explore more advanced forms of support for the work of the IIIM.

In the meantime, as part of its victim/survivor-centred approach, the IIIM has broadened its involvement to include representatives of victims and survivors from various communities. This was formalized in consultations the first of which took place in June 2022. Also as part of its victim/survivor-centred approach, in 2021 the IIIM adopted a strategy on gender issues and an implementation plan for this strategy. A brief version and a technical version of this strategy and plan were made public in October 2022 and are accessible on the IIIM website.²⁶ A strategy on crimes against children is currently being developed, and the IIIM is examining what further efforts it could make to contribute further to the search for missing persons.

All of these commitments, integrated into the Strategic Plan for 2023–2025, complement exchanges with the relevant jurisdictions that interact with the IIIM. NGOs thus appear to be important actors to involve in exchange networks. Some of them are associate partners of the Genocide Network.

While cooperation with the justice system is long-standing and in many respects positive, there can be disparities between jurisdictions and countries. For example, cooperation with Syrian associations when bringing in key witnesses seems to have been easier in the context of the French justice system than that of German justice system. Even if Germany can congratulate itself on having held the first trial of Syrian prison officials in Koblenz, it is regrettable that the trial was conducted as a German trial, without taking sufficient account of the Syrians present in court or living abroad, and even less so the interests of future generations and Syrian historians.

At the start of the trial, not only did the Court reject extended provision of translation for the benefit of the Arab public, but it also refused to allow the trial to be recorded and filmed. Yet, keeping a record of this trial (as was done for Nuremberg) would have been of great importance. In the end, the court learned some lessons from the translation controversy (it provided a copy of the verdict in Arabic on the day it was handed down), but apparently not in regard to the recording of the trial.

24. <https://helsinki.org.ua/en/articles/tribunal-for-putin-is-becoming-more-real/>; <https://helsinki.org.ua/en/articles/ukraine-5-am-coalition-devoted-to-documenting-war-crimes-is-launched-in-ukraine/>

25. https://www.icc-cpi.int/sites/default/files/2022-09/2_Eurojust_ICC_CSOS_Guidelines_2-EN.pdf

26. <https://iiim.un.org/wp-content/uploads/2022/10/Gender-Strategy-Implementation-AbridgedEnglish.pdf>.

While NGOs have adapted their methods and strategies so as to be able to participate fully in the legal field, national jurisdictions dealing with cases of international crimes must also adapt to move beyond ordinary criminal treatment and address communities of victims located overseas, dispersed around the world.

Other forms of justice can also be served. For example, the IIIM can contribute to civil cases, or could assist in the case before the International Court of Justice brought by the Netherlands and Canada for Damascus's failure to comply with its obligations under the Convention against Torture. The IIIM also contributes to the search for missing persons by supporting the mechanism created on June 29, 2023, by the UN to clarify their fate.

The range of different forms that justice may take goes far beyond the courts and includes truth commissions, reparation programmes, reforms, memorial actions, etc. All of these forms, grouped under the notion of "transitional justice," should be linked together so as to avoid their competing with or contradicting one another. This is becoming a decisive issue in a growing number of post-conflict situations—in Colombia and the CAR in particular, two situations to which the Réseau Coopération Complémentarité intends to pay close attention. Here too, much ingenuity and experimentation is needed, in close collaboration with NGOs and civil society actors.

11. Complementarity under construction: The challenge of public communication

aced with the growing power of disinformation on the internet and social networks, there is a pressing need to supply reliable information. Moreover, the information strategy adopted for any given case will have a real impact on the perception of all proceedings opened in respect to a given situation, particularly in the case of trials under universal jurisdiction.

The extensive media coverage of the trial of the two Syrians in Koblenz, owing to the fact that it was also the first trial to condemn the Syrian regime's crimes against humanity, testifies to the potential international scope of a trial held under a national jurisdiction. But the way in which the media latched onto the Koblenz trial—belatedly, and then in a clumsy and partial manner—indicates just how important it is for prosecutors to have a communication policy from the preliminary stage of the proceedings. However, at different stages of the proceedings, this implies different aims and strategies on the part of the judicial authorities (for example, not only to inform the general public, but also to send out signals to potential witnesses and victims).

In Ukraine, we saw the then prosecutor general very quickly adopt a strong communication strategy, as did the ICC prosecutor and also, to some extent, Eurojust and the Europeans. There are lessons to be learned from this which will enable us to establish a new *modus operandi* that is more appropriate and better adapted to the need to constantly produce reliable information capable



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of countering the active and massive disinformation surrounding judicial processes.

Another notable feature here is the far stronger presence of lawyers and prosecutors themselves (Karim Khan for the ICC, former Ukrainian prosecutor general Iryna Venediktova and her successor Andriy Kostin, along with other national prosecutors) in public communication about their activities. Numerous opinion pieces also appeared, some supporting substantial initiatives and reforms,²⁷ in particular around the Ukrainian authorities' initiative to back the creation of an international jurisdiction competent to judge perpetrators of the crime of aggression.

While the ICC must concentrate on commanders and senior officials, the Ukrainian prosecutor's office has chosen to open the war crimes trials of Russian soldiers as quickly as possible (the conviction of sergeant Vadim Shishimarin). With the acceleration of a justice system that is no longer, as at Nuremberg, concerned with post-war justice but rather with wartime justice, it is becoming increasingly necessary to manage the tensions and contradictions generated by the overlapping of different concerns and temporalities: those of institutional construction and consolidation, and those

of the first trials, but then also, as in Ukraine, the analysis of certain crime scenes, which may take a considerable time to complete.²⁸

Without confusing the aggressor and the aggressed, it is also necessary to bear in mind, when developing channels of cooperation with a state, that justice must be impartial and that crimes committed by all forces present must be prosecuted. Necessary cooperation should not prevent the justice system from taking a step back and remaining independent in gathering evidence and elements of crime, even if this is no easy matter, especially in a country still at war and defending itself against aggression. We therefore need to encourage the Ukrainian justice system to address the crimes committed by its own army, which it has undertaken to do. In terms of credibility, this is fundamental.

Managing communication is part of a prosecutor's job—but it is a complicated affair. Different phases need to be distinguished from one another, beyond the trial proper: the investigation, when it is still being conducted in secret; referral to the examining magistrate and the moment when the investigation becomes public; arrest; announcement of the trial; and then the trial itself. The secrecy of the investigation must be preserved, but communication must also be ensured, all the more so in the face of a massive disinformation campaign. There are several levels to this. There can be communication about what the court is doing, how it is operating, and the rules of jurisdiction, without disclosing the substance of the investigations.

Institutional communication is complex. Communiqués issued jointly by the various bodies of a jurisdiction, from the prosecutor to the defence, result in restricted, sanitized communication. There is likely a need for more controlled, institutional communication at the time of the investigation, complemented by communication from the various parties at the time of the trial.

National judges often do not have a good grasp of communication issues, in particular those relating to international crimes that also concern populations in other countries. Aside from a few press conferences or communiqués for major cases, this issue is not being sufficiently taken into account.

27. See in particular the articles by Philippe Sands and Gordon Brown on an ad hoc tribunal for the crime of aggression, and the April 11 article by seven leading figures, including François Roux, Bruno Cotte, and Marcel Lemonde, on proceedings in absentia at the ICC and universal jurisdiction: https://www.lemonde.fr/idees/article/2022/04/11/comment-promettre-la-justice-aux-victimes-du-conflit-en-ukraine-si-l-on-est-in-capable-de-juger-vladimir-poutine-et-ses-chefs-de-guerre-faute-d-avoir-pu-les-arreter_6121617_3232.html; https://www.lemonde.fr/idees/article/2022/03/04/gordon-brown-et-philippe-sands-creons-un-tribunal-penal-special-pour-juger-le-crime-d-agression-commis-contre-l-ukraine_6116144_3232.html.

28. <https://rsf.org/en/exclusive-rsf-investigation-death-maks-levin-information-and-evidence-collected-indicates>.

There are questions of resourcing, but the situation can also be improved by training judges and setting up more proactive accreditation policies for foreign media (in particular those followed by victims' communities).

To a certain extent, easier press access should also benefit civil society organizations, which are an important relay and source of information for the victims and societies concerned. These NGOs often lack in financial resources. Access to the translation services set up by the court for defendants and witnesses would be a real added value for them. This was not available in Germany during the Koblenz trial, where, on top of this, correspondents in the courtroom were only allowed to take notes by hand (no computer, no recordings). Where such prohibitions exist, they severely limit the media coverage and public impact of the proceedings.

Notable progress has been made. In a case concerning crimes committed in Liberia, a Swiss court asked an association to remove court records from its website, even though they had been accessed and widely distributed by local NGOs to the Liberian public. The association lodged an appeal, which it eventually won. The system put in place for the Tutsi genocide trials held in France, with a communication officer from the public prosecutor's office, a press kit, interviews, and accreditation of Rwandan journalists, enabled these trials held at a distance to have a palpable impact back in Rwanda. This demonstrates that, despite the diversity of situations, it would be highly beneficial to organize the sharing of experiences and best practices on this subject.

In addition to best practices, genuine communication strategies need to be devised to provide information, to make long and complex procedures understandable, to reach out to distant populations, and to offset the fragmentation effect of universal jurisdiction trials. In doing so, it will be important to make links between cases and trials in different countries or between the work of different jurisdictions on the same situation. A new form of communication is needed that is appropriate to the credo of complementarity and cooperation, giving substance to the idea of a "Common Area of Justice."

There are also lessons to be learned from the experience of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the work of the Croatian-Bosnian agency Sense, which during the trials was based on court premises and produced a twice-monthly news programme and

documentaries. Following the conclusion of the ICTY, this agency moved to Croatia and became a memorial centre, using its funds to mount exhibitions, and it continues to publicize the evidence and achievements of the ICTY. The development of Sense thus demonstrates a continuity between a first phase of communication on the progress of the trials and a second phase focused on the work of history and memory.

To meet these historical and generational challenges, but also to compensate for the fluctuating interest of the mainstream media, which may drop off because trials are lengthy or succeed one another, or because the news focus shifts to other judicial matters, the evidential, testimonial, and legal content of trials should be archived and exploited over the long term.

International criminal tribunals are taking this in hand by integrating it into their remit, with a department dedicated to the task, supported by the creation of a database accessible on their websites. Not only do national jurisdictions lack the kinds of tools and financial resources allocated to international jurisdictions, they are also adversely affected by the dispersal of trials. An external mechanism or an internationalized network could serve as a platform for gathering and disseminating trials and judgements from national jurisdictions worldwide. For example, the Arabic judgement of the Koblenz trial has been archived by the IIIM. The same could be done for other Syrian trials.

One possible way to extend this ambition to inform, educate, and remember to the entire field of international justice would be to create a permanent exhibition centre on international criminal justice and its history. Such a centre could also host temporary exhibitions on trials held at the ICC and before internationalized and national jurisdictions, and it could act as a forum for exchanges between legal professionals, victims' associations, and researchers. It would thus enable the general public to grasp, in a far more concrete way, the importance of the questions of complementarity and cooperation.

The network's 34 recommendations

Based on the synthesis of reflections and discussions held during the network's four working sessions in 2022, 34 recommendations have been formulated to identify courses of action and issues to be explored in greater depth in order to strengthen the new impetus given to international justice by complementarity and cooperation.

Internalization of the Rome Statute

1

In coordination with the ASP and its partners, in particular the Coalition for the ICC, to launch an awareness-raising campaign among states parties in favour of internalizing the Statute—and, as a particular priority, the Statute's definition of crimes—into national legislation (to date, 70 of the 123 states parties have done so).

Cooperation

2

In coordination with the ASP working group on cooperation and the Court, to propose model voluntary cooperation agreements suitable for French-speaking states, particularly those with inquisitorial trial systems.

3

In coordination with the ASP working group on cooperation and the Court, to organize feedback on the implementation of the 66 recommendations made in 2007 in the seven key areas of cooperation, in order to best adapt proactive action strategies to contexts that are generally constrained and sometimes unfavourable.

4

In conjunction with bilateral cooperations, to further develop the pooling of information and mutual legal assistance through conventional instruments (the May 26, 2023, Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and Other International Crimes; the UN International Law Commission's draft convention on crimes against humanity), evidence processing mechanisms (IIM, IIMM, Unitad, etc.), and networks (Eunomie, the Genocide Network, Eurojust, etc.).

5

To ratify and support the widest possible adoption of the May 26, 2023, Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and Other International Crimes.

6

To make the signing of cooperation agreements with states also possible for the defence, through the creation of a Defence Office along the lines of the one set up for the Special Tribunal for Lebanon.

7

In the context of positive complementarity, through the agreements set up by the ICC and within the framework of bilateral inter-state agreements, to refine cooperation strategies in keeping with the achievement of Goal 16 of the SDGs ("peace, justice and strong institutions") in order to further entrench support for judicial processes in the long term.

8

Beyond development aid policies, to strengthen cooperation between situation states and their neighbouring countries.

Complementarity

9

In line with the recommendations of the September 2020 report by the independent experts mandated by the ASP, to support the Office of the Prosecutor's suggestion to disconnect actions of "positive complementarity" from the preliminary examination framework alone and to include them throughout proceedings.

10

To support the development of “expanded” complementarity, in particular by means of collective referrals, as broad and inclusive as possible, by states parties (other than the situation state) to the Office of the Prosecutor, under Art. 14.2; to organize, in cooperation with the ASP, feedback on the two previous referrals (Venezuela and Ukraine).

11

In coordination with the ICC’s Office of the Prosecutor, to organize a working session with the network on the instruments and best practices to be adopted in order to ensure and publicize the guarantee of judicial independence within the new expanded cooperative frameworks (joint criminal investigation, networks, and partnerships).

Regional dynamics

12

To encourage the emergence of a new intermediary space of complementarity where regional dynamics appear promising, particularly in French-speaking and continental law areas, either through the hybrid model of internationalized jurisdictions or by targeting hybridization at a single body (such as the public prosecutor’s office) rather than a whole jurisdiction.

Universal or extraterritorial jurisdiction

13

To support the revival of universal jurisdiction and the “renationalization” of the prosecution of the most serious international crimes by promoting the creation of specialized units and services in states that do not yet have them.

14

In France, to revise the conditions for jurisdiction over the crimes listed in the Statute so as to bring them into line with those pertaining to crimes of torture and enforced disappearance.

15

In proceedings under universal jurisdiction, the strengthening of arrangements for witness security is a major challenge, particularly in cases involving ongoing conflicts.

Victims

16

To consider setting up a Victims’ Compensation Commission at the ICC and in internationalized jurisdictions, based on the French model of the Commission d’indemnisation des victimes d’infractions (Civi) (Commission for the Compensation of Victims of Offences).

Defence

17

The creation, in the new internationalized criminal tribunals and at the ICC, of a Defence Office, autonomous and on an equal footing with the Office of the Prosecutor, would afford the defence a status and resources almost equivalent to those of the Office of the Prosecutor, which appears necessary in terms of representation and the ability to sign cooperation agreements with states, as well as supervision (ethical rules, monitoring the effectiveness of the defence) and training (technological tools, restorative justice practices, etc.).

Penal policies, judicial communities

18

To design strategies and “penal policies” to be implemented under universal jurisdiction, taking greater account of the options and capacities of other partner jurisdictions active under universal jurisdiction.

19

To contribute to the emergence of an international community of the judiciary by supporting the creation of professional exchange networks (Economie), the organization of meetings and events between international jurisdictions, and the adoption of shared platforms and professional codes.

Investigation, collection, storage and preservation, analysis and provision of evidence

20

To move towards the design and use of shared analysis tools (Core International Crimes, the SIENA secure messaging system, etc.), with an emphasis on staff training at the national and international levels.

21

To optimize the modification of Eurojust's mandate (adopted by the Council of Europe on May 18–19, 2022) by connecting its new missions of evidence storage, analysis, and sharing with the activities of the Genocide Network (of which Eurojust is an associate member), thus reinforcing complementarity between legal fields and providing it with a methodology and means equivalent to those put in place in the fight against organized crime.

22

To consolidate and further promote the key role of the European Genocide Network as an interface at the European level, and to strengthen its extra-European dimension, particularly through associate members and the organization of meetings on themes of interest to non-European partners, with a view to boosting cooperation and the creation of similar regional networks in Africa and Latin America, which would then communicate with each other. The aim is to encourage and deconcentrate these exchanges, without seeking to centralize them.

23

To optimize the creation of joint investigation teams (JITs) between two or more jurisdictions by:

- clearly defining, from the outset, the JIT's limits and objectives in order to avoid information dilution and to prioritize the JIT's actions;
- making it easier for the JIT to operate logistically and financially;
- carrying out regular milestone reviews to define the optimal operational duration for a JIT;
- crediting the results obtained to all partners in the JIT, and not just at the national level.

24

- To support the impetus given to international justice by a new generation of evidence collection, preservation, and analysis mechanisms created by the UN General Assembly and the Human Rights Council (IIIM, Unitad, IIMM), in particular through the development of structural surveys and tailor-made analytical products;
- to identify the under-exploited potential of these pre-jurisdictional mechanisms in terms of pooling and efficiency for prosecutions before international and national jurisdictions,

as well as in the non-criminal field of transitional justice;

- to improve frameworks for cooperation between these mechanisms, states, and national jurisdictions;
- to participate in the design and eventual creation of a permanent mechanism, and to make a long-term commitment to existing mechanisms.

25

To organize and ensure proper access to information held by regional, multinational, or inter-governmental bodies, particularly in Europe, for countries outside the zone. To guarantee, with the consent of sources, the defence's access to exculpatory evidence in cases where one jurisdiction or prosecutor's office is no longer the sole repository of all evidence on a situation.

26

For digital data collection and analysis platforms, to improve the harmonization of practices in terms of respect for the collection and management of personal data (which have an impact on legal proceedings).

27

To promote cooperation with NGOs and NGO coalitions, in particular through associate partner status in networks and mechanisms, where appropriate.

28

To fully take into account the link with other forms of so-called "transitional justice" (truth commissions, reparation programmes, reforms, memorial actions, etc.) and the long-term interests of victims.

Public information, memory

29

To develop genuine information strategies capable of guaranteeing the dissemination of reliable information in the face of the growing power of disinformation on the internet and social networks. It is important for prosecutors to be able to initiate a communication policy right from the pre-trial stage and for judicial bodies to adopt different visions and strategies depending on the stage of the proceedings.

30

To set up training courses for national judges on the challenges of communication which, in the case of universal jurisdiction trials, go beyond the ordinary national framework and face a variety of specific issues: the absence of media coverage or excess coverage in certain circumstances, the constraints of institutional communication, the accelerated pace of justice procedures concerning armed conflicts still in progress, the overlapping of multiple temporalities (political, judicial, institutional), and the need to guarantee the independence, impartiality, and fairness of justice.

31

To take greater account of the populations affected by a situation under consideration in national proceedings under universal jurisdiction, whether they live in the host country or elsewhere, as well as the interests of future generations and historians, whether in terms of organization and access to translation, recording of trials, or accreditation of foreign journalists.

32

To organize, in advance, the transition from a communication strategy to a strategy of archiving and memorialization, based in particular on the experience and best practices of international criminal tribunals (such as the cooperation agreement between the ICTY and the Sense information agency, subsequently transformed into a memorial centre).

33

To develop within these communication strategies a component that links cases and trials in different countries, or the work of a number of jurisdictions on the same situation, and to give substance to the idea of a “Common Area of Justice.”

34

One possible way to extend this ambition to inform, educate, and remember to the entire field of international justice would be to create a permanent exhibition centre on international criminal justice and its history. Such a centre could also host temporary exhibitions on trials held at the ICC and before international and national jurisdictions, and it could act as a forum for discussions between legal professionals, victims’ associations, and researchers. It would also enable the general public to grasp, in a far more concrete way, the importance of the questions of complementarity and cooperation.

Appendix

Participants in the Réseau Coopération Complémentarité in 2022

In 2022, some thirty participants were approached. The initial core group was made up of practitioners and researchers who had dealt with the issues of cooperation and complementarity professionally or in their research. It included:

- **Virginie AMATO**, head of advocacy and program, Coalition for the International Criminal Court (CICC);
- **Olivier BEAUVALET**, judge, international judge at the appeals chamber of the Special Criminal Court of the Central African Republic (SCC), international judge at the Extraordinary Chambers in the Courts of Cambodia (ECCC);
- **Amélie BECQUART**, judge in charge of international criminal justice for the Director of Legal Affairs at the French Ministry for Europe and Foreign Affairs (MEAE);
- **Aurélie BELLLOT**, deputy public prosecutor, head of the Crimes against Humanity and War Crimes Unit of the Parquet national antiterroriste (PNAT) (National Anti-Terrorism Prosecutor's Office);
- **Aurélie BELLON**, head of the Rights, State Reform, and Fragilities Unit at the Democratic Governance Mission of the Ministry for Europe and Foreign Affairs (MEAE);
- **Bruno COTTE**, Académie des sciences morales et politiques, former judge at the International Criminal Court (ICC);
- **Aurélia DEVOS**, first deputy vice-president and president of the 5th Correctional Chamber of the Lille Court of Justice, former head of the Crimes against Humanity and War Crimes Unit of the Parquet national antiterroriste (PNAT) (National Anti-Terrorism Prosecutor's Office);
- **Emmanuelle DUCOS**, judge, adviser to the Paris Court of Appeal, former examining magistrate at the Special Criminal Court of the Central African Republic (SCC);
- **Julian FERNANDEZ**, professor of public law at the Université Paris-Panthéon-Assas (Paris II), Director of the Centre Thucydide, member of the ICC's Advisory Committee on Nominations of Judges;
- **Olivier DE FROUVILLE**, professor of public law at the Université Paris-Panthéon-Assas (Paris II), director of the Centre de recherche sur les droits de l'Homme et le droit humanitaire (CRDH) (Research Center for Human Rights and Humanitarian Law);
- **Philip GRANT**, executive director of TRIAL International;
- **Nicolas GUILLOU**, judge, judge at the Kosovo Specialist Chambers, former member of the independent panel of experts for the ICC review;
- **Sophie HAVARD**, first deputy prosecutor, Crimes against Humanity and War Crimes Unit of the Parquet national antiterroriste (PNAT) (National Anti-Terrorism Prosecutor's Office);
- **Laetitia HUSSON**, coordinator of the Cooperation and Support to Jurisdictions section of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM);
- **Sarah JAMAL**, senior lecturer at the Université Paris-Panthéon-Assas (Paris II);
- **Loren LEPLUS**, Rights, State Reform, and Fragilities Unit at the Democratic Governance Mission of the Ministry for Europe and Foreign Affairs (MEAE);
- **Catherine MARCHI-UHEL**, head of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM);

- **Jean-Pierre MASSIAS**, professor of public law, president of the Institut francophone pour la justice et la démocratie Louis-Joinet (IFJD) (Louis Joinet Francophone Institute for Justice and Democracy);
- **Jean-Philippe REILAND**, general, commander of the Office central de lutte contre les crimes contre l'humanité (OCLCH) (Central Office for Combatting Crimes against Humanity);
- **François ROUX**, lawyer, former head of the Defence Office at the Special Tribunal for Lebanon (STL);
- **Niki SIAMPAKOU**, researcher at the Institut francophone pour la justice et la démocratie Louis-Joinet (IFJD) (Louis Joinet Francophone Institute for Justice and Democracy);
- **Giulia SOLDAN**, head of TRIAL International's International Investigations and Litigation Program;
- **Pascal TURLAN**, independent expert, legal and program director at Project Expedite Justice (PEJ), former international cooperation adviser at the Office of the Prosecutor of the International Criminal Court (ICC);
- **Muriel UBÉDA-SAILLARD**, associate professor of public law at the University of Lille;
- **Alain WERNER**, lawyer, director of Civitas Maxima.

The members would also like to thank **Mazen DARWISH**, lawyer and founder and president of the Syrian Center for Media and Freedom of Expression, for his participation in one of the network's meetings.

Directrice de la publication : Valérie SAGANT

Responsable éditorial : Joël HUBRECHT

Suivi d'édition : Nicole CHÉMALI et Joël HUBRECHT

Conception graphique et maquette : Isabelle CHEMIN

Secrétariat de rédaction : Coralie MANANT

Traduction : Cadenza Academic Translations

Impression : CIN

Cooperation and complementarity:

A new impetus for
international
justice

For some years now, the development and implementation of complementarity has been viewed as a fundamental way to respond to the disappointing record of the International Criminal Court, as well as to the crisis of the international order and multilateralism. Russia's invasion of Ukraine on February 24, 2022, and the other international tensions it has exacerbated, as well as the new alliances and transformations that have resulted from it, confirm the relevance of this approach, which, today more than ever, has become the mainspring of a new impetus for international criminal justice.

This document is the result of a reflection led by the Réseau Coopération Complémentarité (Cooperation and Complementarity Network) gathering leading figures of a number of jurisdictions, universities, NGOs and investigative mechanisms. This collective reflection explores the prospects and new challenges posed by the growing implementation of complementarity as a cardinal principle of the Rome Statute of the International Criminal Court (ICC). The ICC Office of the Prosecutor has made central to its strategy the development of so-called "positive" complementarity (with the situation state) as well as the development of so-called "expanded" complementarity (with other states parties). Major dynamics that are profoundly transforming the field of international criminal justice are highlighted as the increasing "regionalization" of international criminal justice on the one hand, and its "renationalization" on the other. This new impetus in the fight against impunity was also bolstered by the arrival, in 2016 and 2017, of a new generation of independent investigative mechanisms created by the UN to facilitate, both nationally and internationally, the prosecution of violations committed in Syria (IIIM), by Da'esh in Iraq (Unitad), and in Myanmar (IIMM). An initial discussion and attempt at synthesis revealed a number of areas for reflection and action which led to the identification of findings and recommendations shared in this report.

Joël Hubrecht: head of studies and research at the Institut des études et de la recherche sur le droit et la justice (IERDJ) (Institute for Studies and Research on Law and Justice).

Antoine Bernard: director of advocacy and assistance at Reporters Sans Frontières (RSF) (Reporters Without Borders) and lecturer at the School of International Affairs at Sciences Po Paris (PSIA).

Members of the Réseau Coopération Complémentarité (Cooperation and Complementarity Network) for its work in 2022 and 2023:

Virginie Amato, Olivier Beauvallet, Amélie Becquart, Aurélie Belliot, Aurélie Bellon, Bruno Cotte, Mazen Darwish, Aurelia Devos, Emmanuelle Ducos, Julian Fernandez, Olivier de Frouville, Philip Grant, Nicolas Guillou, Sophie Havard, Laetitia Husson, Sarah Jamal, Loren Leplus, Catherine Marchi-Uhel, Jean-Pierre Massias, Jean-Philippe Reiland, François Roux, Niki Siampakou, Giulia Soldan, Pascal Turlan, Muriel Ubéda-Saillard, Alain Werner.

Institut des études et de la recherche
sur le droit et la justice

Courriel

contact@gip-ierdj.fr

Courrier postal

Institut des études et de la recherche
sur le droit et la justice
Ministère de la Justice
13, place Vendôme
75042 Paris Cedex 01

Venir dans nos locaux

47 bis, rue des Vinaigriers
75010 Paris



gip-ierdj.fr