



Brussels, 18 November 2014

15581/14

**GENVAL 70
COPEN 286
DROIPEN 134
EUROJUST 198
ENFOPOL 362
JAI 878
COHOM 156
RELEX 932**

COVER NOTE

From: General Secretariat of the Council
to: Delegations
Subject: Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States

Delegations will find enclosed the "Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States".

The strategy will be presented by the Head of the Genocide Network Secretariat at the GENVAL meeting of 21 November 2014.

**Strategy of the EU Genocide Network to combat
impunity for the crime of genocide, crimes
against humanity and war crimes within the
European Union and its Member States**

The Hague, October 2014

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EXECUTIVE SUMMARY

The European Union (EU) has expressed its commitment to ensuring consistency and coherence of its external and internal policies in the fight against impunity for genocide, crimes against humanity and war crimes ('core international crimes').¹ Within its Justice and Home Affairs (JHA) policy, the EU seeks to support national authorities in the Member States in their investigation and prosecution of these crimes to ensure that the EU does not become a safe haven for perpetrators.²

As part of this commitment, in 2002, the Council of the EU (the 'Council') adopted Council Decision 2002/494/JHA on the establishment of a 'European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes' (the 'Genocide Network' or the 'Network'). The Genocide Network meets twice per year and brings together prosecutors, police investigators and other experts ('contact points') from all Member States. In 2003, the Council adopted Council Decision 2003/335/JHA, designed to increase cooperation between police and prosecution services, thereby maximising the ability of criminal justice authorities in different Member States to cooperate effectively in the investigation and prosecution of alleged perpetrators of core international crimes. The Network fosters the implementation of this Decision by facilitating the exchange of information amongst practitioners, encouraging cooperation between national authorities in different Member States and providing a forum for sharing best practice. Since 2011, the Genocide Network is supported in its work through the Secretariat based in The Hague with Eurojust.

¹ The term 'core international crimes' shall be used throughout this paper to refer to those international crimes encompassed by the mandate of the Network, namely the crime of genocide, crimes against humanity and war crimes. The Network does acknowledge that many of the topics covered in the 'Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States' are also applicable to torture and enforced disappearances as distinctive crimes. Investigation and prosecution of torture and enforced disappearances as separate crimes are an important component of the overall fight against impunity.

² See The Hague Programme: ten priorities for the next five years. The partnership for European renewal in the field of freedom, security and justice, COM 2005, OJ C 236 of 24 September 2005, p.11, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:053:0001:0014:EN:PDF>; and The Stockholm Programme, OJ C 115/1 of 4 May 2010, p. 8, [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XG0504\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XG0504(01)&from=EN).

These EU initiatives are presently the cornerstone of the EU's JHA commitment to the fight against impunity. They provide a crucial contribution in driving forward and supporting efforts in Member States to hold perpetrators of these crimes accountable. Member States are at the forefront of the fight against impunity for these crimes, irrespective of where, by or against whom they were committed. All Member States have ratified relevant international treaties and conventions obliging them to ensure the investigation, prosecution and punishment of perpetrators of core international crimes. Several Member States have followed the EU's recommendation in Council Decision 2003/335/JHA to establish 'war crimes units' composed of specialised staff dealing with core international crimes in the police and prosecution departments of Member States, leading to numerous successful convictions of perpetrators of core international crimes within Member States over recent years and sending an important signal that the EU and Member States do not tolerate impunity for such crimes.

At the same time, more could be done at EU and Member State level to provide for a consistent and effective EU-wide approach to the fight against impunity. As outlined in further detail below, such an approach would foster greater cooperation and information-sharing at national and EU level, the establishment of specialised units in more Member States and greater EU support of national authorities so as to expand the number of Member States actively engaged in the fight against impunity.

Against this background, the contact points of the Network established a Task Force to explore and propose steps for increasing efficiency in combating impunity within the EU.³ The Network further considered that a new instrument, such as an EU Action Plan on Impunity, could be an important tool in encouraging cooperation and development of best practice at national and regional level to enhance investigations and prosecutions.⁴

As a first step, the Network's Task Force drafted this 'Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States' ('Strategy'). All contact points, as well as civil society experts, had an opportunity to provide input based on their expertise and experience. The Strategy is based upon the lessons learned and best practice identified by prosecutors, police investigators and other experts, as well as the discussions and conclusions of sixteen meetings of the Network over the past twelve years.

³ The Network's Task Force is composed of five contact points (three public prosecutors, one police officer, and one MLA officer), holding several meetings and supported by the Network Secretariat.

⁴ See 'Strengthening efforts to combat impunity within the EU and its Member States for serious international crimes – renewed engagement in the field of Justice and Home Affairs', Council of the EU document 16340/13 GENVAL 13, 19 November 2013, and 'Summary of discussions', Council of the EU document 17164/13 GENVAL 87, 4 December 2013.

The Strategy recommends a comprehensive set of measures that EU institutions and Member States should take to support national authorities in combating impunity, holding perpetrators accountable and delivering justice to victims. The Network, through its contact points at national level and the Network Secretariat⁵ at EU level, will use the Strategy as a framework to guide the Network's continued development in the coming years and to advocate for greater EU and Member State engagement. The Network will review and evaluate the Strategy on a regular basis to reflect on-going changes and developments as awareness of the need to combat impunity is heightened.

Accordingly, the objective of this Strategy is two-fold:

1. At EU level, to strengthen the EU's engagement in combating impunity for core international crimes and to provide greater support to Member States. The Secretariat, with the support of contact points, will reach out to relevant institutions and decision-makers to raise awareness of the challenges faced by national criminal justice authorities in investigating, prosecuting and punishing core international crimes and to share best practice in addressing these challenges.
2. At Member State level, to contribute to and, where needed, develop the practice of national authorities in combating impunity at national level by identifying concrete measures that will support national authorities in the investigation and prosecution of core international crimes.

To meet these objectives, the Network will present this Strategy to relevant EU working groups, including the Working Group on General Affairs and Evaluations (GENVAL), with a request that GENVAL work towards eventual JHA Council Conclusions on the EU's and Member States' commitment to combat impunity for core international crimes and thus bring the matter to ministerial attention. The Network will also engage the European Commission with a view to further commitment in its policy to fight impunity. National contact points will, to the extent possible, ensure that the Strategy is communicated to, and discussed with, relevant national decision-makers. Such national level discussions are crucial ways to enhance national capacity to fight impunity and can help encourage Member States to raise the need for further EU engagement within relevant EU *fora*.

The Strategy highlights the different contexts in which Member States are confronted with core international crimes, and the steps taken at EU and Member State level to

⁵ The Genocide Network Secretariat has been established in July 2011 according to Article 25a of the Council Decision 2009/426/JHA on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforce the fight against serious crime. The Secretariat forms part of the staff of Eurojust and functions as a separate unit.

date. The Strategy also outlines the challenges investigators and prosecutors and other authorities experience in investigating, prosecuting and punishing international crimes, and highlights best practice identified in the past to address these challenges. The final section of the Strategy presents a set of measures for improving efficiency and effectiveness of national investigations and prosecutions, along with some complementary recommendations for EU institutions, Member States, National Contact Points and the Network Secretariat.

RECOMMENDATIONS IN BRIEF

For EU institutions:

- Ensure appropriate resources to build the Network as a centre of expertise and promote it both within and outside EU *fora*.
- Reaffirm their commitment to the fight against impunity by assessing additional funding possibilities for the Network and for national authorities to establish specialised units, and for trainings and capacity-building activities.
- Formally evaluate the implementation of the 2002/494/JHA and 2003/335/JHA Council Decisions, and organise an annual hearing on the fight against the impunity within the EU, to take place in the European Parliament.
- Place the topic on the political agenda and recognise that funding is an essential means of enabling national authorities and civil society to effectively coordinate their fight against impunity; develop the understanding of international criminal law and international humanitarian law; and increase public awareness of the necessity of the fight against impunity.
- Amend the mandate of Eurojust and Europol to include core international crimes.
- Prepare an Action Plan on the Fight against Impunity within the EU.

For Member States:

- Review and, if necessary, amend domestic legislation on core international crimes to ensure that it reflects obligations under international law and does not provide undue immunity to individuals.
- Establish specialised units within the prosecution and police and services; and develop a national strategy and national platforms for cooperation in fighting impunity for core international crimes.
- Within their immigration departments, ensure that staff members are suitably trained, best practice is developed, and that the flow of information from immigration to law enforcement authorities is efficient, with a specific obligation to inform law enforcement authorities when confronted with 1F cases.

- Enhance communication between Member States, for example by utilising joint investigation teams (JITs) where appropriate; support the initiative for a global framework of cooperation between Member States.
- Ensure effective exchange of information within state departments, particularly among investigators, prosecutors and the authorities responsible for the supervision of freezing and confiscating assets, trade or travel bans.
- Expand use of the Network and Network Secretariat through the nomination of multiple national contact points with experience and expertise in prosecution, criminal investigation and mutual legal assistance (MLA).
- Integrate victims' perspectives into their investigative and prosecutorial strategies from the outset of a case to ensure the fairness of proceedings and their impact on victims and affected communities, and provide victims with information on their rights and protection arrangements.
- Create public awareness of the necessity of the fight against impunity and the associated investigations and prosecutions of core international crimes.

For National Contact Points:

- Disseminate information on topics discussed by the Network to other members of prosecution and law enforcement services as well as other relevant national authorities, such as immigration services at national level.
- Present information on investigations and prosecutions of those responsible for core international crimes to decision-makers and the general public.
- Act as a point of communication for practitioners and relay information back to the Network.

For the Network Secretariat:

- Facilitate national authorities' efforts by expanding the information-sharing function to allow for increased exchange of best practice, applicable laws, ongoing prosecutions and investigations.
- Assist Member States in the establishment and promotion of specialised units.
- Facilitate cooperation and coordination of efforts to bring perpetrators to justice and offer relevant expertise to national authorities.
- Produce an annual activity report presenting information on investigations and prosecutions of perpetrators of core international crimes.
- Regularly brief Council Working Groups, including the Working Group on Public International Law (COJUR), the International Criminal Court (ICC) sub-area of the public international law Working Group (COJUR-ICC), the **coordinating Committee in the area of police and judicial cooperation in criminal matters (CATS)**, the Working Group on General Affairs and Evaluations (GENVAL), and regional working groups.

CHAPTER ONE: MEMBER STATES AND CORE INTERNATIONAL CRIMES

1.1 Core international crimes as a challenge for the EU and Member States

Approximately two hundred million people lost their lives as a direct or indirect result of collective state-sponsored violence in the twentieth century⁶ and core international crimes have been committed in recent decades across five different continents. Such crimes often occur during periods of armed conflict or civilian crises, involve countless perpetrators, numerous witnesses and hundreds, even thousands of victims, and are characterised by extreme and repeated brutality.

The crime of genocide, crimes against humanity and war crimes are ‘unimaginable atrocities that deeply shock the conscience of humanity’ and are deemed to ‘threaten the peace, security and well-being of the world’.⁷ The development of international criminal law, the establishment of the ad-hoc tribunals in the 1990s, followed by the formation of the ICC, reflect the seriousness of these crimes and the need for a strong reaction against perpetrators of core international crimes. The fight against impunity is not, however, restricted to international establishments, and, in fact, the primary obligation to investigate and prosecute perpetrators of these crimes lies with the Member States.

1.1.1 The link between core international crimes and Member States

Despite the general perception that core international crimes occur far away, experience has shown that these crimes, perpetrators and their assets, victims and witnesses, have real links with Member States. Core international crimes have been committed on the territory of Member States, for example during the Second World War but also in more recent decades. They have also involved Member State nationals, whether as victims or as perpetrators. Another link between core international crimes and Member States arises when third State nationals who have been involved in core international crimes are present in the territory of Member States, whether as a visitor, as an asylum seeker or as a resident.

Territory

The crime of genocide, crimes against humanity and war crimes have indeed been committed within the territory of Member States. National authorities are still confronted with mass atrocities, such as suspected Nazi war criminals from the Second

⁶ A. Smeulers and F. Grunfeld, *International Crimes and other Gross Human Rights Violations: a multi- and interdisciplinary textbook*, Antwerp, 2011, Intersentia, Preface, p. XIIV.

⁷ See Recitals 2 and 3 to the Rome Statute of the ICC.

World War⁸ and by the totalitarian Communist regimes from the Cold War.⁹ The recent accession of Croatia to the EU has also enlarged EU territory where crimes have been committed in past decades and where investigations and prosecutions are ongoing.

Member State nationals

Nationals of Member States can be involved in the commission of core international crimes as perpetrators,¹⁰ victims¹¹ or witnesses, regardless of the geographical location of the crimes. In addition to natural persons, legal persons based in the EU could also be involved in committing, supporting, aiding and abetting or profiting from international crimes perpetrated abroad.¹² Member States can exercise their jurisdiction over perpetrators of these crimes due to the involvement of their nationals as victims or witnesses or the fact that their nationals or companies facilitated the commission of crimes from within EU territory.

Third State nationals

The majority of core international crimes occur in the territory of third States. Nonetheless, perpetrators, witnesses and victims may enter EU territory as visitors through visa applications or as applicants for international protection (i.e. asylum applicants). The latter scenario is particularly relevant, as core international crimes often occur in the context of an armed conflict or as a result of the systematic breakdown of the rule of law and order. Consequently, the people in these affected countries may flee from their home country and enter EU territory. The number of third State nationals who are seeking asylum within the EU has significantly increased in

⁸ See a recent case relating to extradition of a suspected Nazi war criminal between Slovakia and Hungary at <http://www.theguardian.com/world/2013/aug/12/laszlo-csatary-dead-hungary-auschwitz>. [This case has ended due to the death of László Lajos Csatáry](#) on 12 August 2013, <http://www.bbc.com/news/world-europe-23664226>.

⁹ See a recent case relating to conviction of Hungarian ex-minister for 1956 war crimes, available at <http://www.bbc.com/news/world-europe-27398373>.

¹⁰ For example, the Netherlands has investigated and tried two Dutch businessmen suspected of aiding and abetting war crimes committed in Iraq and Liberia, respectively. See <https://www.om.nl/onderwerpen/international-crimes-0/what-cases-have-been/iraq/> and <https://www.om.nl/onderwerpen/international-crimes-0/what-cases-have-been/liberia/>. In some cases, people came to the EU as asylum seekers and later obtained citizenship in a Member State. In this manner, they became citizens between the time of commission of the crimes and becoming a suspect. See also the recent Dutch case against Yvonne N at <https://www.om.nl/onderwerpen/international-crimes-0/what-cases-have-been/rwanda/>.

¹¹ For example, Belgium investigated and tried Major Bernard Ntuyahaga for his involvement in the murder of ten UN peacekeepers during the Rwandan Genocide, available at <http://www.theguardian.com/world/2007/jul/05/rwanda.angeliquechrisafis>. Furthermore, the recent downing of MH17, the civilian airplane, over Ukraine initiated an international investigation for war crimes. The majority of the victims of this alleged crime have been nationals of Member States. See <http://www.reuters.com/article/2014/07/21/us-ukraine-crisis-dutch-idUSKBN0FQ15620140721> and <https://www.om.nl/algemeen/english/@86120/joint-investigation/>.

¹² For example, the Netherlands has investigated the involvement of the Dutch company, Lima Holding B.V., for its apparent involvement in the construction of the Israeli barrier and an industrial site near a settlement on the West Bank, <http://www.om.nl/onderwerpen/internationale/map/concerning/>. Furthermore, Switzerland opened an investigation into the case of Argos Heraeus, one of the world largest gold refiners, for complicity in war crimes and money laundering regarding gold sources from an armed group in Democratic Republic of Congo, <http://www.reuters.com/article/2013/11/04/congo-gold-idUSL5N01P29K20131104>.

recent years, with the number of asylum applications reaching 435 000 in 2013.¹³ Some perpetrators of core international crimes may remain unnoticed throughout this process and thus can successfully complete their asylum application. Others may be refused refugee status for a number of reasons, including Article 1F of the Geneva Convention on the Status of Refugees.¹⁴

Some of the suspects may be extradited to stand trial outside the EU; however, due to the principle of *non-refoulement*,¹⁵ or simply due to a lack of an appropriate legal framework for extradition, some will remain within the territory of Member States. In the latter case, and according to different jurisdictional rules, national authorities are called upon under their international obligations to prosecute alleged perpetrators present or residing on their territory.¹⁶

Another issue that may arise relates to possible questions of immunity for diplomats, government officials or other representatives who might be involved in the perpetration of these crimes.

Finally, the presence of victims and witnesses who are third State nationals entails a responsibility for judicial cooperation with third States or international organisations such as the ICC. Cooperation with other Member States or third States is almost inevitably necessary for the adequate prosecution of alleged perpetrators of core international crimes, as witnesses, victims and perpetrators are often to be found in different jurisdictions. Last, but not least, Member States may have responsibilities to provide protection and/or compensation to victims and/or witnesses.

1.1.2 Who is responsible for investigating and prosecuting these crimes?

¹³ See Eurostat report dated 24 March 2014, available at http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-24032014-AP/EN/3-24032014-AP-EN.PDF.

¹⁴ This article refers to those cases envisaged in Article 1F of the 1954 Geneva Convention relating to the Status of Refugees, which reads as follows:

'F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.'

¹⁵ *Non-refoulement* is a principle of international law that prohibits the direct or indirect removal of refugees to a territory where their 'life or freedom would be threatened on account of [his] race, religion, nationality, membership of a particular social group or political opinion'. The principle does not, however, apply if "there are reasonable grounds for regarding [the refugee] as a danger to the security of the country in which he is [currently located], or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.' The principle is enshrined in Article 33 of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.

¹⁶ The principle of *aut dedere aut judicare* refers to the legal obligation of States to prosecute or extradite persons who commit serious international crimes. See the duty to extradite or prosecute in relation to the crime of torture: Questions relating to the obligation to prosecute or extradite, *See, Belgium v. Senegal, Judgment, ICJ GL No 144, ICGJ 437 (ICJ 2012), 20 July 2012, International Court of Justice [ICJ], available at <http://www.icjci.org/docket/files/144/17064.pdf>.*

The main responsibility for prosecuting the crime of genocide, crimes against humanity and war crimes lies with states. These obligations stem from international treaties¹⁷ and customary law, many of which were solidified in the Rome Statute of the ICC through which the State Parties recognised the obligation to fight impunity of perpetrators of core international crimes. Moreover, the ICC's jurisdiction is restricted to a small number of particular cases, meaning that the onus remains on national authorities to prosecute perpetrators of core international crimes.

With the exception of the ICC, all the *ad hoc* international tribunals were established for a specific situation, and could only prosecute perpetrators involved in that conflict, provided additional criteria were also met. The ICC is the first permanent international court, and while its mandate is less restricted in geographical terms, extending to the territory of all States Parties, a number of other restrictions on its ability to exercise jurisdiction can be found. Firstly, although all 28 Member States are party to the Rome Statute, with only 122 States Parties worldwide,¹⁸ the ICC is not a truly global court. The jurisdiction of the ICC is, further, limited to situations that involve crimes committed

- 1) by a national of a State Party, or
- 2) in the territory of a State Party, or
- 3) if a situation was specifically referred to the ICC by the United Nations Security Council, or
- 4) if a State has specifically accepted the exercise of jurisdiction by the Court with respect to a given crime.¹⁹

In addition, ICC jurisdiction is restricted to crimes that were committed after 1 July 2002;²⁰ to those core international crimes as defined in the Rome Statute (which is not an exhaustive list as recognised by other sources of international criminal law²¹); and in most cases to those perpetrators who are the 'most responsible'.²² Most importantly, the principle of complementarity means that the ICC only assumes jurisdiction in cases where States are unable or unwilling to do so.²³ Effective prosecution must therefore be

¹⁷ See below section 1.2 of this Strategy on the obligations of States.

¹⁸ 122 States Parties as of 17 September 2014. For an updated number, see http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

¹⁹ See Articles 12-13 of the Rome Statute of the ICC.

²⁰ Nevertheless, a State may accept the jurisdiction of the ICC retroactively by filing a declaration in accordance with Article 12(3) of the Rome Statute.

²¹ For example, 21 Member States signed the International Convention for the Protection of All Persons from Enforced Disappearance, and Austria, Belgium, France, Germany, Lithuania, the Netherlands, Portugal and Spain ratified the Convention. Moreover, all Member States have ratified the four Geneva Conventions, imposing a positive obligation to prosecute or extradite, which goes beyond the framework of the Rome Statute.

²² See the ICC Prosecutorial Strategy 2009-2012, para 34, available at <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf>; OTP Strategic Plan 2012-2015, para 22, available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf.

²³ See Article 17(1)(a) of the Rome Statute of the ICC.

ensured by taking measures at national level and by enhancing international cooperation.²⁴ Accordingly, the ICC has or will assume jurisdiction in a very limited number of cases, and States have the duty, first and foremost, to seek, investigate and prosecute those responsible for the commission of core international crimes.

1.2 Obligations of States to investigate and prosecute core international crimes

The obligations of States to investigate and prosecute core international crimes have developed mostly over the last two centuries, and the codification of rules applicable in such conflict situations could be traced back to, *inter alia*, the Saint Petersburg Declaration of 1868,²⁵ the Hague Conventions of 1899 and 1907,²⁶ the Treaty of Versailles 1919, the Charters of the Nuremberg and Tokyo Military Tribunals, the Genocide Convention of 1948 and the Geneva Conventions of 1949 and their Additional Protocols.

The following sources of international law permit, and at times oblige, national authorities to seek out, investigate and prosecute or extradite those responsible for the commission of core international crimes, regardless of where they are committed, and irrespective of the nationality of the perpetrator or the victim:

- The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Articles 1, 5 and 6)²⁷
- Four Geneva Conventions of 1949 (GC I, Article 49; GC II, Article 50; GC III, Article 129; GC IV, Article 146) and the three Additional Protocols (AP I, Article 85)
- The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (Article 28) and its Second Additional Protocol (Article 17(1))
- The International Convention for the Suppression and Punishment of Apartheid of 1976 (Article 4)
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (Article 5(2) and Article 7(1))
- The Rome Statute of the ICC of 1998 (Recitals 4, 6 and 10 of the Preamble, Article 1)
- The International Convention for the Protection of all Persons from Enforced Disappearances of 2006 (Articles 3, 4, 6 and 9(2))

²⁴ Recital 4 of the Preamble to the Rome Statute of the ICC.

²⁵ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November/11 December 1868.

²⁶ Many of the rules contained in the Hague Conventions of 1899 and 1907 in turn reflected provisions from the Lieber Code (1863).

²⁷ In the Advisory Opinion on Reservations on the Convention on Genocide of 28 May 1951, the International Court of Justice held that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation,' conferring the status of customary international law on this Convention and consequently making it binding for all States.

- o Customary international law²⁸

1.2.1 Implementation of core international crimes into national legislation

The national criminal justice systems of the Member States need to be in conformity with their obligations under international treaties and customary international law, as stated above. Without up-to-date national legislation, effective investigations and prosecutions are impaired, and cooperation between Member States is also hampered. For example, one Member State could request MLA for crimes against humanity while the requested Member State could not execute the request due to the absence of these crimes in its penal code.²⁹ Inadequate transposition may result instead in the initiation of trials for crimes with lesser gravity, such as murder. Consequently, trials may in turn be restricted by obstacles such as statutes of limitation or lack of extraterritorial jurisdiction.

War crimes

The implementation of the definition of war crimes into national legislation has been achieved, with 25 Member States defining the scope of the crime, and providing for universal jurisdiction to prosecute the perpetrators present in their territories. However, in one Member State, no definition of war crimes exists under its current national legislation, and in another two the definition is only covered in the Military Criminal Code.³⁰

Crimes against humanity

National penal legislation in three Member States does not provide a definition or reference to crimes against humanity or is not fully compatible with the Rome Statute.³¹

Genocide

²⁸ For a more comprehensive review of the existence of an obligation to prosecute or extradite, see Claire Mitchell, 'Aut Dedere, aut Judicare: The Extradite or Prosecute Clause in International Law.' Annexes 2 and 4 to this paper refer to a number of UN Resolutions that signal the emergence of this principle as a part of customary international law. Available at <http://iheid.revues.org/312>.

²⁹ See reports from Coalition for the International Criminal Court, *Chart on the Status of Ratification and Implementation of the Rome Statute and the Agreement on Privileges and Immunities*, Global Advocacy Campaign for the International Criminal Court, May 2012, available at http://www.iccnw.org/documents/Global_Ratificationimplementation_chart_May2012.pdf, and from Amnesty International, *Universal Jurisdiction – A preliminary survey of legislation around the world – 2012 update*, October 2012, available at <http://www.amnesty.org/en/library/asset/IOR53/019/2012/en/2769ce03-16b7-4dd7-8ea3-95f4c64a522a/ior530192012en.pdf>

³⁰ Austria does not have any legislation for war crimes; Denmark and Italy have only national legislation on war crimes in the Military Criminal Code, which only covers situations involving acts committed by or against their army. See 'Extraterritorial Jurisdiction in the EU: A Study of the Laws and Practice in the 27 Member States of the EU', REDRESS/FIDH, December 2010, available at http://www.redress.org/downloads/publications/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union.pdf and <http://www.legal-tools.org>.

³¹ Austria, Denmark and Italy, *ibid*.

The implementation of the definition of the crime of genocide into national legislation has been achieved in all Member States.

1.3 Challenges to investigating and prosecuting core international crimes

The crime of genocide, crimes against humanity and war crimes present a range of challenges for investigators and prosecutors. Their factual complexity sets them apart from the majority of domestic crimes and in turn leads to unique challenges for investigators, many of which are exacerbated by the fact that investigations are often conducted outside the EU. Accordingly, specialised teams may need to travel to third States to collect evidence, familiarise themselves with crime scenes, or conduct witness interviews. Their legal complexity also presents special challenges to the national authorities seeking to establish jurisdiction and try those responsible for mass atrocities.

1.3.1 Factual Complexity

a. The nature and scale of crimes

Core international crimes often occur on a scale incomparable to the majority of domestic crimes. They may involve hundreds and often thousands of direct victims, multiple perpetrators and a plethora of witnesses. The crimes generally involve extreme and repeated brutality. These factors have a number of implications for investigators.

- Geographical distribution of crimes bases

Most often, core international crimes are composed of an amalgamation of different incidents that occur over a long period of time. They tend to occur across a wide geographic area, often encompassing many villages, towns and regions, and, at times, transcending State borders. In addition, the geographic remoteness of a conflict area often presents various obstacles. In some situations, reaching a witness or victim in a war-torn area is extremely difficult. Identifying, tracing and establishing contact with those individuals has significant logistical and financial implications and poses substantial constraints for the investigators or prosecutors seeking to bring the alleged perpetrators of such crimes to justice.

- Large number of persons involved

Unsurprisingly, crimes of this scale are normally the result of the involvement of a large number of perpetrators. Perpetrators may be state actors, such as the military, police, state officials or civilians, or non-state actors, such as paramilitary or militia groups.

These crimes may have been committed within ‘complex organisational structures that do not fit the model of traditional, hierarchical organisations’.³² Understanding which actors have been involved in committing crimes is of extreme importance in determining the participation of an alleged perpetrator and his position in the criminal structure. In addition to involving a large number of perpetrators, core international crimes often involve a large number of both victims and witnesses.

- Sexual and gender-based violent crimes

The investigation and prosecution of sexual violence and gender-based crimes can be particularly challenging due to the sensitivity of the crimes and the attached social stigma, shame and humiliation of victims and witnesses, the privacy of the crimes, and the likelihood of re-victimisation and further traumatisation during a criminal process. Cases so far have demonstrated the need for skilled investigators and prosecutors with sufficient training and knowledge to ask appropriate and sensitive questions to identify the commission of sexual crimes, and to include all circumstances of sexual violence necessary to ascertain whether the elements contained in the crime of genocide, crimes against humanity and war crimes have been met.³³

b. A fragile, lawless, post-crime environment

Core international crimes may be committed during an armed conflict; as a result of the breakdown of the rule of law and order, suppression of civilian population, in the context of violent discrimination or persecution, or political repression and other scenarios. Such conditions present obstacles to investigations, which may continue even after the conflict or crisis has ceased.

- Government unable or unwilling to cooperate

In such environments, the State in the territory in which the crimes were committed may not cooperate with the investigation, especially if officers of the State are under investigation. Such officers can erect political or legal barriers to impede investigations. For example, national legislation may not permit such investigations, laws may be manipulated by government officers or travel restrictions may be placed upon investigators. In cases in which the government cooperates, other factors may hinder the investigation. For example, the State might not have properly and efficiently functioning public structures or offices, and thus cannot ensure appropriate channels of cooperation and consequent MLA between States.

- Safety concerns

³² ICC Office of the Prosecutor’s Strategic Plan 2012-2015, para 3.

³³ See further Conclusions of the 16th Meeting of the European Network of Contact Points for investigation and prosecution of genocide, crimes against humanity and war crimes, 21-22 May 2014, The Hague, Conclusions 5-8.

States under investigation may be experiencing ongoing armed conflict, or, even if no armed conflict is taking place, reaching certain areas for the purpose of collecting evidence may be extremely difficult or dangerous due to the devastating effects of conflict on the infrastructure of the State, or simply because the State authorities may not be in control of parts of its territory. Some areas may contain unexploded bombs, mines, or other forms of munitions. Ensuring the safety of persons connected with the investigation, prosecution and trial of alleged perpetrators of core international crimes (investigators, prosecutors, defence attorneys, judges, witnesses, victims, interpreters and the perpetrator(s)) involves prior preparation and resources. Comprehensive investigative planning and security threat assessments to determine the safety considerations for the conduct of an investigation are crucial steps to minimise this risk.

- Identification of witnesses and victims

Population registers are often destroyed, lost, conducted improperly in times of conflict or are simply non-existent. Furthermore, many witnesses and victims, and often the perpetrators themselves, flee the region because of the fragility of the security situation or fear of repercussions. These situations pose significant obstacles to identifying and locating witnesses and victims, maintaining contact with them, finding the connections between them and linking them to the crime base. Some national authorities have tried to encourage those victims and witnesses entering their territory to report their experiences of crimes during the immigration process.³⁴ To ensure that the investigation of a core international crime is conducted in a comprehensive manner, taking the statements of all affected parties and all available evidence into consideration, cooperation between the authorities of the States involved, and in particular between the immigration, law enforcement and prosecution authorities of the Member States, are necessary steps to help identify relevant witnesses.

- Support and protection of victims and witnesses

The investigating and prosecuting authorities are often faced with specific issues in relation to victims and witnesses, and should be guided by the ‘*do no harm*’ principle. Victims or witnesses may be afraid of repercussions if they testify against the alleged perpetrators.³⁵ Suspects who have substantial influence in the conflict areas might exert pressure on persons who could testify against them. In addition, care should be taken to ensure that victims and witnesses receive adequate psychological support to protect them from re-victimisation. Further challenges can be encountered in relying on expert

³⁴ For example, German immigration officials ask asylum seekers coming from Syria to complete a form that asks whether they have witnessed any war crimes, and, if so, to provide details. See Human Rights Watch, ‘The Long Arm of Justice: Lessons from specialised war crimes units in France, Germany and the Netherlands’, September 2014, p. 10, http://www.hrw.org/sites/default/files/reports/IJ0914_ForUpload.pdf.

³⁵ For example, in the Mpambara case, the Dutch authorities were contacted by a witness who reported feeling scared after being approached by relatives of the accused. See Human Rights Watch ‘The Long Arm of Justice: Lessons from specialised war crimes units in France, Germany and the Netherlands’, September 2014, p. 49-50, http://www.hrw.org/sites/default/files/reports/IJ0914_ForUpload.pdf.

witnesses as well as in identifying and locating reliable and credible witnesses. Due to logistical or other reasons, testimony is sometimes given by means of videoconference, without all of the advantages of live testimony. Moreover, due to the nature of some societies or unavoidable recognition, maintaining the confidentiality of investigations in the field is often difficult. These problems are exacerbated when the victims, witnesses and/or their families are residing outside of the Member States. The challenges in providing protection in those circumstances require a comprehensive risk assessment from the outset of the investigation.

In addition to providing support and protection of victims and witnesses, national authorities have other obligations, such as allowing victims to participate in proceedings and providing access to other rights, such as legal representation, protection and support, as well as reparation.³⁶ Providing such support can be challenging, however, particularly in relation to victims residing abroad. Providing adequate support may require authorities to put in place a communication strategy at the outset of a case and to offer outreach activities in relation to ongoing investigations and trials, with a view toward informing victims about proceedings and their rights and encouraging them to come forward.

- Temporal implications

By their nature, investigations and prosecutions are conducted after the events occur, but in the case of the crime of genocide, crimes against humanity and war crimes, investigations and prosecutions may take place after several years or even decades. Core international crimes are not normally statute-barred. For this reason, proceedings can take place as long as perpetrators are alive. However, with the passage of time between the commission of the crime and the investigation, difficulties in gathering reliable evidence increase as well. For example, forensic evidence might be lost or contaminated, archives destroyed and witnesses' memories may be more prone to mistakes.

c. Nature of the information

- Volume of information and case management

On the one hand, investigators are faced with a lack of 'smoking gun'-type evidence due to various factors, such as the time that has elapsed between the perpetration of the act and its investigation, the existence of multiple perpetrators, or the lack of a record of, for example, an order linking the perpetrator to the crime scene. On the other hand, investigators may be faced with an overwhelming quantity of potentially relevant

³⁶ See Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and European Commission Guidance Document on transposition and implementation of Directive 2012/29/EU, December 2013.

information that can benefit the investigation. Consolidating and managing such vast amounts of information require skilled professionals, translators and investigators, as well as available administrative and other resources. Investigators are also faced with various sources of information that might be used as evidence. This information may be: 1) public, such as the media, internet (e.g. YouTube, Facebook), reports of intergovernmental organisations, NGOs and other international organisations; 2) restricted, such as from various national or international intelligence services; or 3) international and national documents with restricted access from, for example, police investigations or immigration services. Although both public and restricted information might serve as sources of potential evidence for court proceedings, the volume of this information, as well as its management and review, presents a challenge for investigators and prosecutors.

- Interpretation and translation

Finding neutral, available and reliable interpreters in a conflict area may prove problematic. In some cases, the language spoken by the local population or by the parties involved might be extremely rare or spoken exclusively by one group involved in the conflict.³⁷ Furthermore, given the factual complexity of such cases, a high volume of potentially relevant documentation might also need to be translated.

- The importance of witness testimonies

Since perpetrators of core international crimes often do not leave traceable documentary information or records, witness testimonies are a vital element in building a successful case against a perpetrator. In such cases, however, investigators are often faced with such issues as traumatising of witnesses, witness tampering or re-victimization, and credibility. Witness fatigue may also pose significant problems, particularly if witnesses have previously provided their accounts multiple times and to various actors (humanitarian workers, NGOs, media, international investigators, etc.). In addition, witnesses may suffer from memory loss or confusion due to memories fading after a long period of time.³⁸ As a result of the complexities that are characteristic of witness and victim testimony in such cases, investigators of core international crimes must have the necessary training to be able to effectively conduct interviews or interrogations. Furthermore, investigators must recognise the need to explore other forms of evidence, such as documentary or forensic evidence.

³⁷ For example, in relation to the Eritrean–Ethiopian War, the Permanent Court of Arbitration was faced with statements that were taken after four layers of translation. See ‘Litigating War: Mass Civil Injury and the Eritrea–Ethiopia Claims Commission’, Sean D. Murphy, Won Kidane, Thomas R. Snider, p. 86.

³⁸ For example, Argentina and Guatemala only recently started investigations into mass atrocities committed in their territory, despite the fact that the atrocities were committed in the 1980s. Baltic States are investigating crimes committed in the 1950s, at the beginning of the Soviet occupation. Investigations and prosecutions in both the ICTY and in national level courts are ongoing for crimes committed in the former Yugoslavia during the early 1990s. Similarly investigations and trials for crimes committed during the 1994 Rwandan genocide are still to be conducted.

d. Logistical challenges

- Number of potential investigations and prioritisation

The national criminal systems of the Member States are frequently faced with a significant number of suspected perpetrators of core international crimes. An insufficient number of trained officers, inadequate resources or limited administrative capacity might hamper the effectiveness of numerous parallel investigations. The competent authorities therefore often need to prioritise their ongoing efforts and focus on initiating trials of suspects against whom a sound case can be made. Such prioritisation may be based on a number of factors, such as the available resources and the amount of evidence and relevant information available.

- Workspace

Investigations often take place on unfamiliar geographical terrain, a situation that may cause various logistical obstacles. To prepare a trip properly, an investigator of core international crimes committed in a third State needs to have prior knowledge of the climate, weather conditions, road infrastructure and other accessibility problems that might be encountered and to understand the impact these factors may have on the evidence collected. Intensive preparations may be required for investigations in unfamiliar areas, such as vaccinations against diseases, specialised electrical equipment, and other specialised kit.

- Specific expertise

Trials of suspected perpetrators of core international crimes always require a broad understanding of additional fields of expertise in addition to the applicable legal framework. Both prosecution and defence teams usually resort to bringing expert witnesses to testify on the specifics of a given conflict. Investigators, prosecutors and judges alike need to be familiar with other relevant fields, such as military organisation and structures, operations and various forms of weaponry, mines or munitions, ballistics and forensics, as well as the geopolitical and sociocultural factors that play a role in the development of violent conflicts. In addition, competent authorities should have access to expert knowledge in the fields of police, security, politics and history in relation to the State in which the crime occurred.

- Society

The local population in the conflict area where the crimes were committed often features a different or unfamiliar culture, set of values or patterns of behaviour. Moreover, core international crimes are often perpetrated by or against actors who belong to different groups with contrasting political or economic views and different cultural, ethnic and historical characteristics. Investigators, prosecutors and judges

alike need to have a genuine understanding of such societal factors to ensure the safe and proper handling of such cases.

- Lack of instruments for judicial cooperation

Investigators and prosecutors are often faced with a lack of judicial instruments and consequent absence of a legal basis for MLA and extradition with third States. In such situations, the competent national authorities, at best, need to rely on *ad hoc* cooperation agreements (depending largely on the political will of foreign States and significant investment of time and resources), or, at worst, are not able to cooperate at all.

1.3.2 Legal complexity

- Contextual elements

In addition to establishing the objective (*actus reus*) and subjective (*mens rea*) elements of a core international crime, providing evidence of specific contextual elements is also necessary.³⁹ For example, to prove that crimes against humanity were committed, evidence must be provided that the crimes were part of a widespread or systematic attack against a civilian population, while for war crimes, evidence must be provided to show that the crime was committed in the context of an international or non-international armed conflict.

- Effective implementation

Under the principle of complementarity enshrined in the Rome Statute, the primary jurisdiction to investigate and prosecute suspected perpetrators of the crime of genocide, crimes against humanity and war crimes is given to the States Parties. As already discussed, this responsibility of all States to bring the perpetrators of core international crimes to trial derives from a set of international obligations much broader than those enshrined in the Rome Statute. The proper functioning of the system of complementarity, however, requires appropriate implementation of obligations under the Rome Statute so as to enable national authorities to conduct trials in accordance with established norms of international criminal law. What complementarity means in practice is that States Parties must not only criminalise Rome Statute crimes as crimes under national law, but must also ensure that they have adequate implementation of notions such as command and superior responsibility, and provide the relevant rules on jurisdiction, penalties, immunity from jurisdiction, and statutes of limitation, in conformity with international law. National implementation of norms of international law sometimes proves inadequate in fulfilling international

³⁹ See in relation to the crimes listed in the Rome Statute of the International Criminal Court, Elements of Crimes of the International Criminal Court, ICC-ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

obligations, hampering fulfilment of all State obligations with regard to cooperation in criminal matters or investigation and prosecution.

- International immunities

Certain public officials, such as Heads of State or Government, Ministers of Foreign Affairs, accredited diplomats, staff of international organisations⁴⁰ and members of official missions may be immune from criminal jurisdiction in particular circumstances.⁴¹ Where possible tensions exist between immunity and individual criminal responsibility, investigative, prosecutorial and legal assistance authorities must play their role in ensuring that the rules on international immunity are applied properly, thus ensuring that persons who are immune from the exercise of national criminal jurisdiction are not unlawfully arrested or detained, and conversely that immunity is not misused to unduly protect individuals from being held criminally responsible for the perpetration of the gravest crimes.⁴²

The commission of the crime of genocide, crimes against humanity and war crimes cannot be accepted as being part of any official duties. With the lack of clarity on national level and different decisions in similar situations, the issue of international rules on immunity presents an area of uncertainty and lack of legal predictability. The status of immunities for certain public officials for the crime of genocide, crimes against humanity and war crimes is still not very well defined.

- Establishing linkage of alleged perpetrator

Proving the linkage between the alleged perpetrator and the crime base is a necessary step in establishing individual criminal responsibility for persons who were involved in a core international crime. In addition to direct perpetration, international criminal law recognises other modes of criminal liability for core international crimes. Thus, liability for such crimes could emerge both from the direct commission of a given act and from different methods of indirect participation depending on the national criminal justice system of the State investigating and prosecuting the crime. The distance between the person who planned or ordered the commission of such crime and the place where the crimes were actually committed results in a number of challenges for both investigators and prosecutors. The existence of a *de facto* position of superiority not substantiated by records or other evidence is another

⁴⁰ See Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15, 13 February 1946, Articles V-VII.

⁴¹ See Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 I.C.J. However, this immunity ceases to exist once the person is no longer performing one of the mentioned functions. See also Decision of the Swiss Federal Criminal Court, 25 July 2012, available at: <http://www.trial-ch.org/en/activities/litigation/trials-cases-in-switzerland/khaled-nezzar-algeria-2011.html>. See also Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15, 13 February 1946, Articles V-VII.

⁴² The Network has discussed the issue of international rules relating to international immunity and national practices in this respect at the 14th meeting, which took place on 17-18 April 2013.

complication faced by justice systems, as the chain of command in modern warfare often runs simultaneously among administrative, political, law enforcement and military structures.

- Various sources of law

In addition to the rules contained in national criminal codes, investigators, prosecutors and judges need to observe other sources of law, such as international criminal rules, including both treaties and customary law, international humanitarian law and human rights law, as well as various secondary sources, such as the jurisprudence of courts in other jurisdictions, the jurisprudence of international courts (such as the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) the International Criminal Tribunal for Rwanda (ICTR); the International Court of Justice (ICJ), the ICC, and doctrine. Building a successful case thus requires vast knowledge of those sources and their application, whether to an international or an internal armed conflict, and a very sound level of expertise by the investigating and prosecuting authorities at national level.

CHAPTER TWO: COMMITMENT TO FIGHT IMPUNITY WITHIN THE EUROPEAN UNION AND ITS MEMBER STATES

2.1 At EU level

The EU is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, including the need to end the culture of impunity and to investigate and prosecute those responsible for committing the crime of genocide, crimes against humanity and war crimes.

The EU has proved its strong dedication to external actions in this area, particularly through its cooperation with the ICC;⁴³ the European Union policy on human rights;⁴⁴ and the 2013 Joint Staff Working Document on advancing the Principle of Complementarity.⁴⁵ These documents, however, promote the continuance of the fight against impunity at the international level, and focus on third States, with less attention paid to the internal dimension of EU policy. The EU has demonstrated its commitment to tackling these crimes internally through the establishment of the Network in 2002⁴⁶ and the Network Secretariat in 2011.⁴⁷ In addition, Council Decision 2003/335/JHA called on Member States to increase cooperation between national units, and thus to maximise the ability of law enforcement authorities in different Member States to cooperate effectively in the field of investigation and prosecution of alleged perpetrators of serious international crimes.⁴⁸ Article 2 of the above-mentioned Council Decision determines that Member States shall take the necessary measures to inform law enforcement authorities of the presence of alleged perpetrators and to ensure exchange of information between national law enforcement and immigration authorities. Furthermore, the EU has highlighted the importance of cooperation among Member States, third States and international tribunals, along with the importance of consistency and coherence in its instruments and policies.

⁴³ See, e.g., Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court, OJ L 76/56 of 22 March 2011, and its Action Plan of 12 July 2011 (Council doc 12080/11).

⁴⁴ See, e.g., the Joint Communication of the European Commission and the High Representative of the EU for Foreign Affairs and Security Policy, *Human Rights and Democracy at the Heart of EU External Action – Towards a more effective approach*, COM (2011) 886, p. 16; EU Strategic Framework on Human Rights and Democracy and the EU Action Plan on Human Rights and Democracy of 25 June 2012 (Council doc 11855/12); Council Decision 2012/440/CFSP of 25 July 2012 appointing the EU Special Representative for Human Rights, OJ L 200/21 of 27 July 2012.

⁴⁵ SWD (2013) 26 of 31 January 2013.

⁴⁶ Council Decision 2002/494/JHA of 13 June 2002, OJ L 167/1 of 26 June 2002.

⁴⁷ Article 25a of the Eurojust Decision, as amended by Council Decision 2009/426/JHA of 16 December 2008, OJ L 138/14 of 4 June 2009.

⁴⁸ Council Decision 2003/335/JHA of 8 May 2003, OJ L 118/12 of 14 May 2003.

In the Stockholm Programme, the European Council invited the EU institutions:

*to continue to support and promote Union and Member States' activity against impunity and to fight against crime of genocide, crimes against humanity and war crimes; in that context, promote cooperation between the Member States, third countries and the international tribunals in this field, and in particular the International Criminal Court, and develop exchange of judicial information and best practices in relation with the prosecution of such crimes through the European Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes.*⁴⁹

In addition, Article 8 of Council Decision 2011/168/CFSP:

*commits the EU to ensuring that there is consistency and coherence between all its instruments and all its policies in matters that concern the international crimes with the ICC's jurisdiction. Crucially, when doing so, the Decision commits the European Union to ensuring that such consistency and coherence exists not only in its external action, but also in respect to its internal measures.*⁵⁰

Further efforts in strengthening the internal aspect of EU policy in the fight against impunity will ensure credibility and comprehensiveness of its external dimension and transitional justice policy.

2.1.1 The role of the Network

The Network was established to ensure close cooperation between the national authorities in investigating and prosecuting the crime of genocide, crimes against humanity and war crimes. Its first meeting was held in November 2004, although the Network Secretariat was not established until 2011. The Network is currently the only body in the EU with the mandate to support the efforts of Member States and facilitate coordination of their activities in the fight against impunity for the perpetrators of core international crimes, and hence has a pivotal role in ensuring the EU's commitment to fighting impunity in the internal arena.

National authorities are represented in the Network through National Contact Points - prosecutors, investigators, and MLA authorities who deal with the investigation and prosecution of core international crimes at national level. In addition to national authorities from Member States and their counterparts from Canada, Norway, Switzerland and the USA, the Network also liaises with representatives of the European Commission, Eurojust, the ICC and *ad hoc* international criminal tribunals, the International Committee of the Red Cross, Interpol, and civil society organisations.

Meetings held twice per year allow practitioners to exchange operational information, knowledge, problem-solving techniques and practical examples. The meetings are divided into

⁴⁹ OJ C 115/1 of 4 May 2010, p. 8.

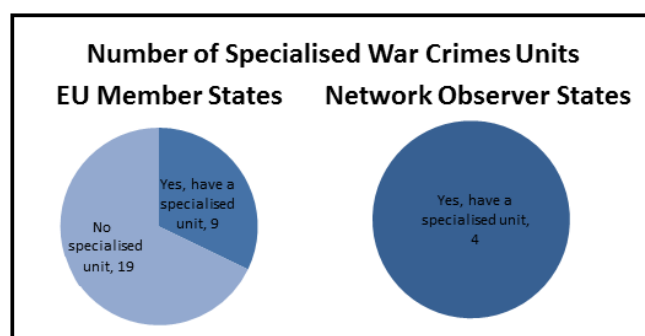
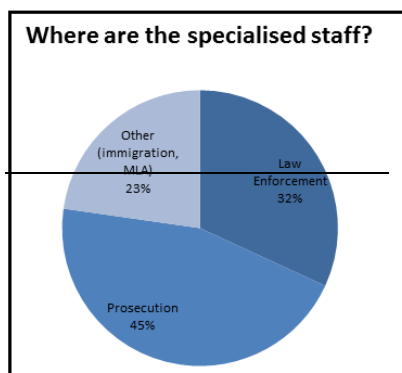
⁵⁰ Article 8 of Council Decision 2011/168/CFSP.

two sessions. The open session involves the extended Network, with National Contact Points and other representatives as described above. The closed session is held solely for National Contacts Points and their counterparts from Observer States, thus creating a confidential environment for the exchange of operational information on ongoing investigations and requests for extradition relating to core international crimes. The closed session helps to build trust and mutual cooperation between investigators and prosecutors from all Member States as well as between practitioners and representatives of other organisations working in this field. Furthermore, the Members of the Network benefit from the non-public part of its website, the so-called Restricted Area, which serves as a platform for information-sharing and access to documents pertinent to the Network’s mandate.

As a result of the meetings, the Network has developed a body of knowledge on pressing issues related to its field of competence. The Network and its Secretariat have subsequently produced expert papers on a number of topics, such as cooperation between immigration authorities, law enforcement and prosecution services; witness support and protection; and the criminal responsibility of legal persons. As a platform for practitioners, the Network is devoted to supporting national authorities by answering practical and legal questions regarding the investigation and prosecution of core international crimes over which Member States have criminal jurisdiction, regardless of where these crimes have been committed. Despite its limited resources, the Network has established itself as an informal focal point on fighting impunity in the EU and is in a position to act as a best practice model for the development of similar networks in other regions. In this respect, the Network has already served as a model for the development of an African Union network of specialised prosecutors on core intentional crimes, and with sufficient support may continue to act as a role model for future regional networks. In the future, it may be yet more important that African and EU networks closely cooperate, exchange information and address issues of common concern.

2.2 At Member State level⁵¹

Significant progress in bringing perpetrators to justice has been made in recent years, thanks to initiatives by some Member States



Network contact points to collect up-to-date figures relating to both the number of units across different departments within national authorities, and also about the locations of these units in the Member States. The responses were collated by the Network and are presented below.

to establish specialised teams of police, prosecutors and MLA officers. Dedicated units specialised in dealing with core international crimes have been established within the police and/or prosecution services in Belgium, Croatia, Denmark, France, Germany, the Netherlands, the UK and Sweden.⁵² Dedicated units can also be found in Norway, Switzerland, Canada and the USA, which participate as observer states within the Network. In other Member States, such as Finland, Lithuania, Poland and Latvia, specialised staff works on core international crimes, albeit not in a dedicated war crimes unit. In addition, some Member States' staff do not work solely on core international crimes, but nonetheless possesses specialised knowledge about these crimes. Dedicated staff with specialised knowledge is of great benefit to the investigation and prosecution of core international crimes. Further improvements have been achieved by the increased sharing of best practice, experience and facilitation of cooperation through the Network, resulting in the successful prosecution of many perpetrators of the crime of genocide, crimes against humanity, war crimes and crime of torture in certain Member States.

⁵² For a more comprehensive overview of the practice of units specialised in the investigation and prosecution of core international crimes, *see* 'Strategies for the effective investigation and prosecution of serious international crimes: The Practice of Specialised War Crimes Units', REDRESS and International Federation for Human Rights, available at http://www.redress.org/downloads/publications/The_Practice_of_Specialised_War_Crimes_Units_Dec_2010.pdf.



Dedicated units and the number of staff within the different services

	Specialised War Crimes Unit	Law enforcement	Prosecution	Other services (MFA, MLA officers, immigration officers)
Austria		0	0	0
Belgium	✓	5*	4*	4 MLA
Bulgaria		0	0	0

Croatia	✓	Restricted information	36 + state attorney advisors	11*
Cyprus		0	0	0
Czech Republic		0	0	0
Denmark	✓	5*	3*	3*
Estonia		0	0	0
Finland		2*	1*	0
France	✓	10	2 + 3 investigating judges	
Germany	✓	10 + 16*	7	24*
Greece		0	0	0
Hungary		0	0	0
Ireland		0	0	0
Italy		0	0	0
Latvia		0	1	0
Lithuania		0	18*	0
Luxembourg		0	0	0
Malta		0	0	0
Netherlands	✓	25-30	5.5	1 MLA 25 1F immigration staff
Poland	✓ ⁵³	0	87 prosecutors (+11 historians)	0
Portugal		0	0	0
Romania		0	0	0
Slovakia		0	0	0
Slovenia		0	0	0
Spain		0	0	0
Sweden	✓	8	6	0

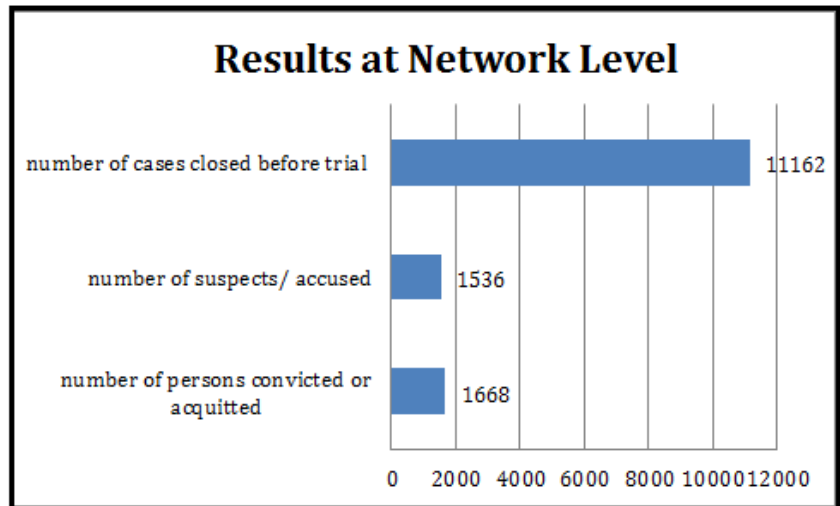
⁵³ Polish Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation (as a prosecution unit) is conducting investigations concerning Nazi and Communist crimes, and other crimes that are classified as genocide, war crimes and crimes against humanity committed against Polish nationals in the period between September 1939 and July 1990. All other crimes that are classified as genocide, war crimes and crimes against humanity are conducted by the Public Prosecutor's Offices.

United Kingdom	✓	20	13	8
Norway	✓	14	6	
USA	✓	10	11	
Canada	✓	9*	30	50*
Switzerland	✓	0	4*	0

*semi-dedicated staff – i.e. also involved in dealing with other crimes.

2.2.1 Results at Member State level and the Network members

The achievements of the Member States in bringing perpetrators to justice are impressive, considering the limited attention and resources invested in prosecuting this type of crime on the domestic front. For Member States not prosecuting on the principle of territorial jurisdiction, the benefits of specialised units are even more obvious. The motivation and personal commitment of individuals working in this field have often superseded available resources and lack of priority for these crimes. The Member States have so far concluded a total of 1 607 cases in relation to core international crimes and are currently investigating another 1 339 cases from all over the world.

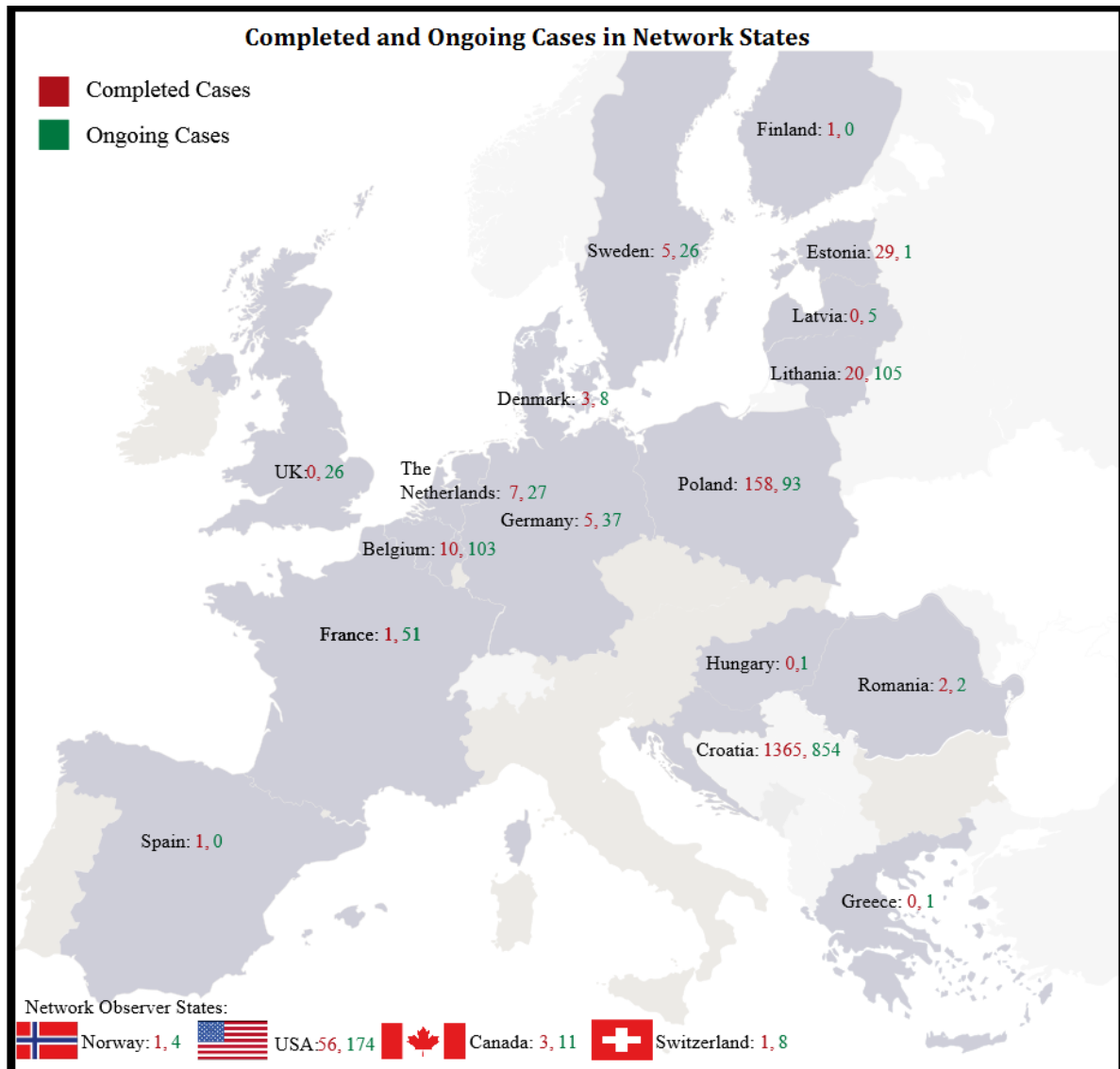


The figures presented in the table below show the number of investigations and prosecutions for core international crimes for differing time periods according to available data in each Member State. The general time period for the data was from 2002 onwards; however, due to variations in documenting and archiving cases as well as differences in implementing international law into national legislation, some other time frames are also used. In relation to extradition requests, Member States in general need to review these cases according to the principle of *aut dedere aut judicare* and consequently consider substantive, procedural and jurisdictional issues.

Cases in EU Member States	
Completed Cases	1607
Ongoing Cases	1339

The relatively large number of cases closed prior to trial is the result of the problems inherent in the investigation and prosecution of core international crimes. While highlighting the

difficulties faced by national authorities, this number also emphasizes the significant accomplishment demonstrated by the current figure of 1 607 completed cases.



Investigations and prosecutions

State	Time period (if other than 2002 onwards)	Number convicted/acquitted persons	Number of suspects accused/currently under investigation or trial	Number of cases closed before trial	Received extradition requests
Austria		0	0	0	0
Belgium ⁵⁴		10	103	88	25

⁵⁴ Numbers relate to cases and not suspects, while numbers of received extradition requests do not include requests from international criminal jurisdictions.

Bulgaria		0	0	0	0
Croatia	1991-Dec 2013	1365	854	1265	Data unavailable
Cyprus		0	0	0	0
Czech Republic		0	0	0	0
Denmark	Since 1995	3	8	254	5
Estonia	Since 1995	29	1	15	0
Finland		1	0	0	1
France		1	51	11	Data unavailable
Germany	1988-2002	4		108	Data unavailable
	2002-2014	1	37	13	19
Greece		0	1	0	0
Hungary		0	1	3	Data unavailable
Ireland		0	0	0	6
Italy		0	0	0	1
Latvia		0	5	0	0
Lithuania	Since 2011	20	105	53	0
Luxembourg		0	0	0	0
Malta		0	0	0	0
Netherlands		7	27	8	9
Poland	Since 2000	158	93	9285	1
Portugal		0	0	0	0
Romania	2013 onwards	2	2	0	0
Slovakia		0	0	0	0
Slovenia		0	0	0	0
Spain		1	0	5	40
Sweden		5	26		Between 3 and 8 cases
United Kingdom	2012- 2014	0	26	18	6

Norway		1	4	17	5
USA ⁵⁵	2003-2013	56	174		Data unavailable
Canada		3	11	10	9
Switzerland		1	8	12	5 per year
All Observer States		61	197	39	19
All EU		1607	1339	11123	118
All Network (EU plus Observer States)		1668	1536	11162	137

CHAPTER THREE: SET OF MEASURES TO SUPPORT NATIONAL INVESTIGATIONS AND PROSECUTIONS OF CORE INTERNATIONAL CRIMES

The measures included in this strategy are derived from a thorough examination of measures and policies already in place in various Member States. They are composed of best practice, recommendations from past Network meetings, the work of a group of experts, and extensive consultations with partners, the ICC, scholars, civil society and other stakeholders. They are not presented in order of priority. Rather, the Network that these measures are complementary and, as such, Member States and the EU should take all of these measures into consideration when establishing an effective framework for the fight against impunity.

The Network emphasises further that the measures highlighted in this Strategy are not an exhaustive list of measures that the EU and Member States should take to fight impunity effectively. The legal and factual complexities involved in the investigation and prosecution of core international crimes will require Member States to take additional measures to reflect the circumstances of specific cases. As this Strategy will be evaluated regularly, other measures not highlighted here might therefore be included in future versions of the Strategy.

⁵⁵ In the USA, the criminal statutes for core international crimes became effective at various times (for example, the crime of torture became effective in 1994, war crimes in 1996, recruitment of child soldiers in 2008, etc.). As such, in cases where violations occurred prior to the criminal statute becoming effective, the authorities pursued criminal proceedings for immigration fraud violations, among other applicable charges, to prosecute perpetrators.

Measure 1: Establishing, advancing and promoting specialised units

Context: Dedicated or specialised units, dealing exclusively with cases of core international crimes, have already been set up in a number of countries. Among the Member States, the Netherlands, Denmark, Belgium, Germany, France, Sweden, the UK and Croatia have such units either within criminal investigation and/or prosecution authorities. The desirability of the creation of such structures was also indicated by the Council, stating that Member States should:

*ensure that law enforcement authorities and immigration authorities have the appropriate resources and structures to enable their effective cooperation and the effective investigation and prosecution of genocide, crimes against humanity and war crimes.*⁵⁶

Specialised units include officers trained in the field of identification, investigation or prosecution of the crime of genocide, crimes against humanity, war crimes, the crime of torture and enforced disappearance.⁵⁷ A multidisciplinary approach would also involve experts from other fields, such as historians, sociologists, diplomats, anthropologists, specialists in financial investigations and asset recovery, as well as specialists in military matters. They possess specialised knowledge of international and national law and can handle the specific challenges in the investigation and prosecution of core international crimes. Results achieved in Member States with specialised units prove that structured cooperation and the creation of dedicated units with no additional tasks immensely facilitate the identification, investigation and prosecution of alleged perpetrators of core international crimes who are present on EU territory.⁵⁸ The creation of specialised structures also allows for the gradual gaining of experience as well as retention of that knowledge, best practice and lessons learned within the same unit. Even when Member States do not normally experience large inflows of persons coming from conflict areas or have so far not experienced cases of this type of criminality, a specialisation of prosecutors for core international crimes should be established.

Recommended steps: A number of concrete steps should be taken at national and, to some extent, EU, level to enable Member States to establish, or further advance, specialised units:

⁵⁶ Council Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes, 2003/335/JHA, Official Journal 118/12, 14 May 2003.

⁵⁷ Specialised units often also have competence over torture and enforced disappearances, as these crimes can constitute crimes against humanity and war crimes, but can also be prosecuted as distinctive international crimes. In the latter case, the prosecution has an increased opportunity for a successful outcome.

⁵⁸ Between the late 1990s and 2010, 18 out of a total of 24 international crime convictions involved investigations and prosecutions carried out by specialised units; see REDRESS and FIDH, *The Practice of Specialised War Crimes Units*, p. 18. In France, a new unit of police and prosecutors, established in January 2012, has made significant progress to address a backlog of core international crimes cases, some of which were 20 years old. In its first two years, it has secured one conviction, completed an investigation into two suspects who are expected to face trial in 2015, and initiated ten new investigations. See articles by Delphine Carlens and Nicolas le Coz in REDRESS, *EU Update on International Crimes*, July 2013, <http://www.redress.org/downloads/publications/2013-June-Legal-update.pdf> and July 2014, <http://www.redress.org/downloads/1407euupdate.pdf>.

(a) Member States should be establishing specialised units and/or ensure staff specialisation on all levels

- ❖ Dedicated units on all levels (law enforcement, prosecution and other services such as immigration, MLA authorities and Ministry of Foreign Affairs) are beneficial in ensuring specialisation, expertise, cooperation and exchange of information on national level. Member States that do not yet have specialised units may seek inspiration and guidance from other Member States in which such units have already been established. In addition, Member States should ensure that units are adequately resourced and staffed, and that staff receives regular and adequate training.

(b) Establishment of national task force on impunity to ensure cooperation and collaboration of specialised units

- ❖ Member States can ensure effective and meaningful collaboration between specialised units within the immigration, police and prosecution services through the establishment of a national task force on impunity.
- ❖ The establishment and functioning of the specialised units may furthermore be embedded in a national strategy on fighting impunity for core international crimes.

(c) Network should assist Member States in the establishment and promotion of specialised units

- ❖ The Network should assist Member States in the establishment of such units, providing information on the existence and operation of specialised units elsewhere, and facilitate relevant cooperation in the establishment of specialised units.

Measure 2: Avoiding safe havens through improved identification of cases and case-relevant information

Context: The experience of national authorities within the Network has demonstrated the importance of information provided by immigration authorities to investigation/prosecution services. Immigration authorities present one of the EU's entry points and play a crucial role in initial identification and location of suspects who are entering or are present on EU territory. Immigration authorities similarly are ideally placed to obtain information on witnesses and victims of core international crimes. The practical and/or legal possibility for criminal justice authorities to have access to specific files and information from immigration authorities for the purposes of identification of alleged perpetrators, victims and potential witnesses greatly enhances the effectiveness and efficiency of the competent national investigation and prosecution authorities.

Recommended steps: A number of concrete steps can be taken at national and, to some extent, EU level to use the potential of immigration authorities to contribute to

combating impunity through the identification of potential cases and case-relevant information:

(a) Immigration authorities should receive adequate training

- ❖ Member States should ensure that immigration authorities are adequately trained and acquainted with the general factual and legal complexities of core international crimes in relation to 1F cases, as well as providing an understanding of the factors that are relevant in a particular conflict area.
- ❖ The European Asylum Support Office (EASO) is ideally placed to provide such capacity-building support to the national authorities in collaboration with the Network and immigration authorities with experience in the matter. EASO should ensure that relevant modules are included in its training material and activities.⁵⁹

(b) Access by criminal justice authorities to immigration authorities' data should be improved

- ❖ Immigration officers should be required to indicate specific reasons for refusing asylum requests, in addition to providing legal grounds for doing so. The reasons provided increase the possibility for relevant law enforcement authorities to identify suspects or witnesses. If applied consistently, this will allow authorities to match potential links between suspects and witnesses, subject to technical means at national level and data protection legislation.
- ❖ Immigration authorities should ensure that relevant information is searchable according to specific criteria so as to facilitate collection of information on core international crimes. These should include the date of entry, the exact place of origin, profession of the individual (including, for example, the function or level held in the army, or the name of the authority for whom the individual was working) and conflict area from which a person comes.

(c) Member States should adopt an integrated approach between immigration and law enforcement authorities⁶⁰

- ❖ Member States should put in place a more 'integrated approach' among immigration, police and prosecution authorities as such approach will improve the position of Member States' authorities in the fight against impunity. Such approach should oblige immigration

⁵⁹ See EASO's website, 'What we do' at <http://easo.europa.eu/about-us/tasks-of-easo/training-quality/>.

⁶⁰ In the conclusions of the 13th meeting of the Network (7-8 November 2012), and based on the questionnaire 'Access to immigration files and data by investigation and prosecution services', participants noted that no common approach among the Member States regarding the duty to report 1F cases to law enforcement and prosecution authorities exists. The conclusions further stressed that some Member States have a strong, integrated approach to ensuring that 1F cases are reported, which the Network considers to be a recommended practice that should be followed to ensure close collaboration and better identification of perpetrators, witnesses and victims of international core crimes.

officers to inform law enforcement authorities when confronted with 1F cases.⁶¹ Network contact points have pointed out that a specific obligation to exchange information on possible suspects is needed to ensure automatic information flow.⁶² Furthermore, such an approach could also provide for the flow of information on victims and potential witnesses of core international crimes, subject to the concerned individual's consent.⁶³

(d) Responsibility and involvement of legal persons in core international crimes

- ❖ Legal persons can be involved in core international crimes by supporting, aiding, financing, abetting or profiting from these crimes.⁶⁴ To ensure accountability of legal persons and closure of the impunity gap in this area, national authorities should approach identification of cases and possible investigations from the perspective of human rights violations, illegal exploitation of natural resources amounting to the crime of pillage within war crimes, or ensure cumulative prosecution for alternative criminality, such as money laundering and violation of embargo rules. This approach is particularly pertinent for the five Member States that do not provide for criminal responsibility of legal persons in their domestic law.⁶⁵

(e) Member States should match notices of internationally wanted persons with national population registries

⁶¹ The Netherlands, Poland and Sweden are the only Member States that have adopted legislation specifically obliging the immigration authorities to report the existence of 1F cases. Such a practice exists in Belgium and Estonia. In addition, such reporting obligations are in place in Norway, Canada and Switzerland, which are observer States to the Network.

⁶² For example, in the Netherlands, a specialised 1F unit within the immigration authorities automatically transfers a file that involves a 1F case to the Prosecution Office. Upon review of the file, the Prosecution Office takes a decision on whether to forward the case to the specialised unit within the Dutch Police for investigation. In Canada a formal structure exists in which the departments participating in the national war crimes programme (immigration authorities, police and the Department of Justice) meet on a regular basis to assess all new allegations received in any departments and to determine, by utilising established criteria, which department should have custody of the file. Typically, files with the most serious allegations are assigned to the police departments for investigation, while less serious allegations are transferred to the immigration departments. The practice of cooperation between the immigration authorities and law enforcement/prosecution services in the Netherlands and Canada, as well as in Belgium and Norway, prove that structured cooperation facilitates the identification and consequent investigation and prosecution of alleged perpetrators of core international crimes who are present on EU territory.

⁶³ For example, the German immigration department asks asylum seekers coming from Syria to complete a form which asks whether they have witnessed any war crimes, and, if so, to provide details. See Human Rights Watch, 'The Long Arm of Justice: Lessons from specialised war crimes units in France, Germany and the Netherlands', September 2014, p. 10, http://www.hrw.org/sites/default/files/reports/IJ0914_ForUpload.pdf. [Denmark enacted legislation in 2008 to allow the prosecution authorities access to immigration files concerning groups of persons who had arrived from conflict areas so as to identify possible suspects, or for use in ongoing investigations to identify victims and witnesses of core international crimes.](#)

⁶⁴ Forms of involvement of corporations and business persons in committing core international crimes can usually be seen by illegal exploitation of natural resources in developing countries in which the revenue is used to buy weapons that consequently lead to massive human rights violations or core international crimes. Another modality is by selling or renting specific equipment or products (such as chemical precursors or surveillance tools) to dictatorial regimes or military groups that use the items to commit core international crimes. See 'Criminal responsibility of corporations and business persons for serious international crimes', background paper for the 15th Network meeting (29-30 October 2013), Genocide Network Secretariat.

⁶⁵ Bulgaria, Germany, Greece, Latvia and Sweden.

- ❖ National authorities usually check international wanted persons' notices, such as the INTERPOL Red Notice, when foreigners attempt to enter their territory. Member States should, in addition, ensure that national authorities regularly check INTERPOL Red Notices against population registers of persons already present or residing in the territory of a Member State. Periodic review of existing notices or warrants by national authorities would ensure that the EU does not become a safe haven for fugitives responsible for the commission of core international crimes.

Measure 3: Putting in place a system of effective cooperation

Context: Facilitated cooperation in relation to core international crimes among the immigration, law enforcement, prosecution, MLA, financial and intelligence authorities of a Member State, as well as cooperation with civil society, is a necessary step towards closing the impunity gap within the EU. A multidisciplinary approach and cooperation among units responsible for terrorism, organised crime, financial crime, embargo violations, money laundering, the illegal trade in diamonds and other natural resources, wildlife trafficking, etc., and core international crimes are essential, as criminals are generalists, not specialists, and therefore illegal activities that generate profit must be given a particular focus. In addition, consultations with non-governmental organisations on national level or within the Network advance this objective by exchange of information, knowledge, skills and expertise.

Recommended steps: A number of concrete steps should be taken by Member States, the EU and by Network Contact Points to ensure effective cooperation at national level:

- (a) Multidisciplinary approach, financial investigations, asset recovery and violation of international sanctions to support the fight against impunity
- ❖ Investigations of core international crimes should be complemented by financial investigations and asset recovery. The importance of financial investigations and asset recovery should be seen as providing compensation for victims, additional forms of evidence, disrupting criminal enterprises and acting as a deterrent.
- ❖ Cooperation among units dealing with organised crime, illegal trade in natural resources, supervision of financial restrictions, violations of international sanctions, and trade or travel bans can enable national authorities to gain information and consequently result in a trial for a crime of lesser gravity in which evidence available to the prosecution authorities would not sufficiently support a conviction for involvement in core international crimes, but clearly indicates the commission of other crimes in connection with core international crimes (e.g. handling the proceeds of crime or money laundering).
- ❖ All stakeholders should receive appropriate training in recognising the importance of including financial investigations as part of the criminal investigations. Existing tools such as the Camden Asset Recovery Inter-Agency Network (CARIN) can be utilised.

(b) Exchange of information between the immigration authorities of several Member States

- ❖ Member States should facilitate the exchange of knowledge, best practice and information among immigration authorities across Europe for the investigation of suspects of core international crimes.
- ❖ A network structure of immigration authorities responsible for 1F cases similar to the Genocide Network should be set up to contribute to creating synergies and cooperation, and ensure a harmonised approach in addressing suspects, victims and witnesses of core international crimes.⁶⁶

(c) Nomination of multiple Network Contact Points with experience and expertise

- ❖ Member States should ensure that Contact Points appointed to the Genocide Network are adequately experienced, appointed for a substantial period of time, and consistently attend Network meetings.
- ❖ Furthermore, the nomination of multiple Contact Points, including representatives of both prosecution and law enforcement authorities, as well as MLA authorities, further serves to increase the exchange of expertise, experience, outstanding issues and relevant information.

(d) Contact Points to build contact with their partners at national level

- ❖ Contact Points of the Network could increase awareness and sensitivity about the Genocide Network and its activities by disseminating information on topics discussed by the Network to other members of law enforcement, prosecution and immigration services at national level.
- ❖ Network Contact Points are furthermore in a position to collect information from these services and relay the information back to the Network, for example about recent legal developments, areas of concern and operational challenges.
- ❖ Network Contact Points should coordinate with Ministry officials representing their Member States in other EU bodies, particularly the Working Group on General Affairs and Evaluations (GENVAL), the Coordinating committee in the area of police and judicial cooperation in criminal matters (CATS), and the International Criminal Court sub-area of the public international law working group (COJUR-ICC), thus facilitating a consistent and coherent approach to combating impunity on national and regional level, both in internal and external policy.
- ❖ Network Contact Points should also ensure an exchange of information and cooperation with national ICC focal points, who are most often associated with the Ministries of Foreign Affairs rather than the police or prosecution offices and Ministries of Justice.

(e) Member States could establish and promote a national task force on impunity

- ❖ Member States could foster the above national level cooperation through the formation of national task forces on combating impunity. Regular meetings of national task forces would

facilitate the two-way communication between National Contact Points and their counterparts in other Member State institutions.

(f) Establishment of ‘community involvement panels’ in Member States

- ❖ National authorities may consider setting up ‘community involvement panels’ at national level to ensure the coordination of activities between relevant national authorities and representatives of civil society. Such panels facilitate open information exchange and discussion of cooperation issues, allow national authorities closer contact with NGOs working with victims and witnesses and allow exploration of remedies as well as outreach to communities on activities and results.

(g) Member States should consider using JITs

- ❖ Member States should consider using JITs to investigate and prosecute core international crimes. JITs offer significant added value to law enforcement authorities in Member States, in light of the support of Eurojust, Europol and the funding by the EU. JITs can help to avoid duplication of work and costs; save personal and financial resources; provide a legal basis for swift and flexible exchange of information; and limit the number of times witnesses and victims need to be called upon to testify.

(h) The need for a global framework of cooperation among States

- ❖ A global framework of cooperation among States is required to resolve the challenges arising from the lack of a mechanism for judicial cooperation among States.
- ❖ EU institutions and Member States should further support the initiative proposed by the Netherlands, Belgium, Slovenia, Argentina and Senegal, which endeavours to resolve the gap in cooperation in criminal matters. Support for this proposal should be put forth in all regional and global *fora* to facilitate national authorities in cooperating with third States on MLA and extradition.

⁶⁶ Such a network already exists among the UK, the USA, Canada, Australia and New Zealand.

(i) Sharing of information on fight against impunity at national and EU level

- ❖ Information on the results of investigations and prosecutions of those responsible for the commission of core international crimes should be presented to decision-makers as well as to the general public. National efforts could be complemented by updates provided at European level through the Network Secretariat.⁶⁷
- ❖ Such periodic reports on recent developments to the authorities involved in the decision-making and legislative process ensures that challenges encountered by the relevant authorities responsible for the identification, investigation and prosecution of alleged perpetrators are taken into consideration with a view to further legislative and administrative amendments, as necessary.

Measure 4: Ameliorating legislation relating to investigation, prosecution and MLA

Context: The ability of Member States to investigate and prosecute core international crimes depends on the comprehensive implementation into national legislation of the obligations under international treaty and customary law prohibiting core international crimes. The existence of such legislation is similarly of vital importance in facilitating MLA.

Recommended steps: A range of steps are available to Member States to ensure that their domestic legislation is in conformity with their obligations under international treaties and customary international law:

- (a) Ensuring the existence of comprehensive and up-to-date national legislation on ‘core international crimes’**
- ❖ Where required, Member States should amend existing legislation to ensure that their domestic legislation reflects their obligations under customary international law and treaty law pertaining to core international crimes.⁶⁸
- ❖ Member States should ensure that their respective legislation provides for the definition of core international crimes in accordance with international standards and for an exercise of extraterritorial, including universal, jurisdiction over those crimes.

⁶⁷ In relation to periodic reporting to the European Parliament, *see* Article 3, Council Decision 2002/494/JHA.

⁶⁸ *See above:* Chapter One, Section 1.2, ‘The obligation of States to investigate and prosecute’.

- ❖ Member States should furthermore ensure that domestic legislation provides for notions such as command or superior responsibility and includes the relevant rules on the irrelevance of superior order defences and statutes of limitation.

(b) Ensuring that national legislation and practice regarding international immunities does not unduly protect individuals

- ❖ Member States and national authorities must play their roles in ensuring that immunities do not unduly protect individuals from being held criminally responsible for the perpetration of core international crimes.⁶⁹
- ❖ Member States should develop national guidelines in line with international standards and clarify this area of law applicable to relevant Ministries and criminal justice authorities.⁷⁰
- ❖ The Network could assist in preparing a compilation of existing best practice and defining the scope of rules on international immunity. Such guidelines could be used as a reference by national authorities in cases of uncertainty about the status of foreign officials suspected of committing core international crimes.

Measure 5: Building the Network as a centre of expertise and promoting it both within EU *fora* and globally

Context: The Network plays a pivotal role in ensuring the EU's commitment to fighting impunity within its internal area. The future expansion and progression of the Network is dependent upon the resources assigned to the Network Secretariat. Further support would allow the Network Secretariat to advance the fight against impunity in a number of ways.

Recommended steps: Several measures could be taken by the Network itself, subject to an increase in resources, to build the Network as a centre of expertise and to promote it both within EU *fora* and globally:

(a) Inter-state information-sharing should be strengthened

- ❖ The Network's inter-state information-sharing function should expand, allowing for increased information exchange on, *inter alia*, applicable national and international law, relevant procedures, knowledge of ongoing prosecutions or investigations, available evidence or relevant witnesses, facilitating the efforts of the national authorities in bringing alleged perpetrators to justice and allowing the Network to develop as a focal point for the fight against impunity within the EU.

⁶⁹ The Network has discussed the issue of international rules relating to international immunity and national practices in this respect at the 14th meeting, which took place on 17-18 April 2013.

⁷⁰ In the Netherlands, the Advisory Committee on the Issue of Public International Law was tasked with the preparation of recommendations on the immunity of foreign officials in relation to core international crimes. The guidelines have been accepted by the Dutch government and thus enable application of all relevant national authorities in case of uncertainty as regards the status of foreign public officials or representatives. See <http://www.cavv-advies.nl/Publications>.

(b) Network reporting and collaboration with other EU institutions and relevant actors should be strengthened

- ❖ The Network Secretariat should prepare an Annual Activity Report, outlining Member States' efforts to combat impunity, which could be presented to relevant EU institutions to keep them abreast of relevant developments within the EU.⁷¹ This report would increase awareness of the problems faced by the relevant national authorities and serve as an impetus to fill the existing gaps and overcome legislative deficiencies.
- ❖ The Network Secretariat should produce expert papers on various issues relating to investigations and prosecutions of core international crimes, identifying cooperation and MLA improvements, as well as reporting on legal and practical developments related to EU or international law.⁷²
- ❖ The Network Secretariat's cooperation with other national, regional and international actors should be expanded. Active communication and cooperation with a number of NGOs that are supporting the fight against impunity, discussions with regional organisations such as the African Union, representatives from the ICC and *ad hoc* tribunals, representatives of the International Committee of the Red Cross and INTERPOL, among others, result in a more comprehensive approach towards closing the impunity gap.

Measure 6: Renewed commitment of the EU

Context: Although the EU has demonstrated significant support for the fight against impunity, scope for it to renew its commitment and provide further assistance remains. Its political commitment to this fight is not reflected post-Stockholm Programme. Placing the topic of impunity of perpetrators of core international crimes back on the agenda would be of great benefit in raising awareness, increasing capacity for coordination and supporting national authorities' investigations and prosecutions.

Recommended steps: Several measures could be taken by EU institutions to increase support in the fight against impunity:

- ❖ The European Commission should assist in the fight against impunity by formally evaluating the implementation of Council Decision 2002/494/JHA and Council Decision 2003/335/JHA in the Member States, as provided for in the Stockholm Programme. This

⁷¹ Article 3, Council Decision 2002/494/JHA.

⁷² Further thoughts and recommendations for the development of the Network can be found in the report of Human Rights Watch, 'The Long Arm of Justice: Lessons from specialised war crimes units in France, Germany and the Netherlands', September 2014, pp. 86-90, at http://www.hrw.org/sites/default/files/reports/IJ0914_ForUpload.pdf.

evaluation may highlight areas for improvement and could provide valuable guidance for the Network and its Secretariat.

- ❖ The mandates of Eurojust and Europol should be extended to include core international crimes, thereby allowing these organisations to work with the Network to maximise support for national authorities.⁷³
- ❖ The European Union should consider preparing, or provide resources for the preparation of, an Action Plan on the Fight against Impunity within the EU, which would be an important tool in encouraging cooperation and development of best practice at national and regional level to enhance investigations and prosecutions of core international crimes.
- ❖ The European Parliament's Civil Liberties, Justice and Home Affairs (LIBE) Committee, in collaboration with the Human Rights Committee, should hold an annual hearing in the European Parliament on the 'Fight against Impunity within the European Union.'
- ❖ The European Commission should assess additional funding possibilities to support national authorities in the establishment of specialised units.
- ❖ The EU should ensure funding possibilities for training and capacity building, including possibilities for projects and training programmes for law enforcement, prosecutors, MLA officers and judges within the European Judicial Training Network (ETJN) or the European Police College (CEPOL), with a focus on international humanitarian law and international criminal law.

Measure 7: Capacity building and raising awareness among the relevant national authorities

Context: Many Member States still experience difficulties due to the lack of experts with specialised expertise in core international crimes. Specialised training for persons working with perpetrators or victims of core international crimes is essential. EJTJN, EASO and CEPOL are examples of platforms that could be used to facilitate knowledge-sharing and training for practitioners in the fight against impunity on the level of the Member States.⁷⁴

⁷³ The extension of crimes for which Eurojust and Europol might have competence in the future is proposed in the new draft Eurojust and Europol Regulations. The list also includes crime of genocide, crimes against humanity and war crimes. Subject to negotiations and upon adoption of the new Regulations on Eurojust and Europol, the material scope of their competences would be extended to cover core international crimes. As a consequence, the Network, Eurojust and Europol should associate their mandates and their tasks so as to maximise support to practitioners in investigating and prosecuting core international crimes. The three bodies should be able to work in parallel within their respective mandates so as to best advance the position of the EU in the fight against impunity. The proposals are available on <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0173:FIN:EN:PDF> and <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0535:FIN:EN:PDF>.

⁷⁴ For example, the European Asylum Support Office has produced two detailed 'Country of Origin Reports' on Afghanistan: 'Insurgent strategies — intimidation and targeted violence against Afghans', Dec. 2012, http://easo.europa.eu/wp-content/uploads/192143_2012_5967_EASO_Afghanistan_II.pdf, and 'Taliban Strategies – Recruitment', July 2012, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/european-asylum-support-office/bz3012564enc_complet_en.pdf.

Recommended steps: Several measures may be taken to increase specialised training within Member States, which will in turn help to bridge the gap created by the current problems of lack of training and specialised personnel within the Member States.

(a) Ensure training on issues of asylum, judicial and police cooperation

- ❖ Staff working in the identification, investigation and prosecution of suspected perpetrators of core international crimes requires specialised training to attain knowledge of the factual and legal complexities of the crime, the context in which it was committed and the various sources of applicable law.
- ❖ The creation of specialised educational institutions or programmes with a focus on the prosecution of core international crimes would also help bridge the gap created by the current problems of lack of training and specialised personnel within the Member States. Tailored training programmes also need to be developed for defence lawyers, legal representatives of victims and judges in cases of core international crimes.

(b) Support from specialised expertise

- ❖ National authorities should consider requesting support from organisations that are specially trained in the investigation of the crime of genocide, crimes against humanity and war crimes and serious human rights violations, such as Justice Rapid Response (JRR).⁷⁵

(c) European day against impunity for core international crimes

- ❖ An initiative to dedicate a special event to commemorate the victims of core international crimes and to raise awareness and promote the fight against impunity could be established at EU level, similar to the Europe-wide Day of Remembrance for the victims of all totalitarian and authoritarian regimes, EU Anti-Trafficking Day, and the World Day for International Justice. Such an event would increase awareness of the problems inherent in bringing those responsible for the perpetration of core international crimes to justice.

Measure 8: Rights, support and protection of victims and witnesses of core international crimes

Context: Victims and witnesses of core international crimes present specific issues for the investigating and prosecuting authorities. Safety concerns, the risk of traumatisation, and the need for legal representation in proceedings mean that national authorities need to pay

⁷⁵ JRR is an inter-governmental facility that provides rapid deployment of criminal justice professionals from a stand-by roster. These experts are specially trained in the investigation of the crime of genocide, crimes against humanity and war crimes and serious human rights violations. For more information, visit <http://www.justicerapidresponse.org/>.

particular attention to the involvement of victims and witnesses in investigations and prosecutions.

Recommended steps: Notwithstanding the challenges involved, a number of measures should be taken by national authorities to address the rights and needs of victims and witnesses.

(a) Prosecution strategies should include a strategy for adequate outreach to victims

- ❖ Member States should have clear rules regarding outreach and communication efforts for victims in relation to ongoing trials or investigations. Such efforts should also include integrating victims' perspectives and their rights into investigation and prosecution strategies.

(b) National authorities should provide information on victims' rights and protection arrangements

- ❖ Victims of core international crimes should be sufficiently informed whether the jurisdiction of an investigating State provides for victims' participation in such proceedings. Similarly, information should be provided on available arrangements for witness protection in such cases.
- ❖ Member States must also ensure that an appropriate level of protection is provided against threats, traumatisation and re-victimisation in cases in which a victim is brought as a party to such proceedings, or to testify against their persecutors. Such procedures should provide victims with the basic level of protection accorded by the Directive establishing minimum standards on the rights, support and protection of victims of crime.⁷⁶

⁷⁶ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315.