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***War Crimes Units:
Legislative, Organisational and
Technical Lessons***

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This report, along with a compilation of other resources relevant to the investigation and prosecution of international crimes in Ukraine, is available in electronic format in English and Ukrainian at: www.asser.nl/matra-ukraine/resources/.

Disclaimer

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Executive Summary

The inaction of the United Nations Security Council (UNSC) in relation to the contemporary conflicts in Syria and Iraq, among other things, has had an inevitable impact on the shift from international to domestic forms of accountability for core international crimes. The increasing number of investigations and prosecutions in the Member States of the European Union relating to the atrocities committed in Syria and Northern Iraq, often on the basis of universal jurisdiction, as well as the challenges faced by state authorities involved in these and other investigations into international crimes, can serve as lessons learned for the newly established specialised Department for Supervision of Crimes in the Situation of Armed Conflict within the Office of the Prosecutor General of Ukraine.

This report, as part of the T.M.C. Asser Instituut/Global Rights Compliance (GRC) MATRA Project, ‘Strengthening Ukraine’s Capacity to Investigate and Prosecute International Crimes’, identifies a number of difficulties faced by domestic war crimes units in Europe.¹ These include legislative, organisational and technical obstacles, which are addressed in various ways by the state authorities. Drawing on extensive desk research and the insights of practitioners, academics, and the civil society working on these issues, lessons learned from fully operational war crimes units in Europe that conduct international criminal investigations are identified. The present European domestic systems were selected as case studies for various reasons, including their unique legislative and organisational set-up, their proactive stance on prosecuting international crimes, the possibility to access information on these units as well as the types of evidence used in court proceedings, much of which is likely similar to the evidence available in Ukraine. For instance, many domestic prosecutions of international crimes in Europe proceed without direct access to the scene of the alleged crime, an issue that also faces Ukrainian authorities.

The first part of the report sets out the general context of the functioning of war crimes units. Part two discusses the structure of war crimes units, the division of departments, useful components and diversity of personnel. Part three focuses on investigations and the challenges

¹ It should be stressed that not every subsection addresses each domestic context in the same detail.



relating to accessing crime scenes and the witnesses of crimes and also assesses the practice of cumulative charging. Part four outlines a number of thematic issues of potential interest to the Ukrainian authorities pertaining to evidence collection, including witness testimony and digital evidence. Part five examines different forms of cooperation and coordination of core international crimes investigations and prosecutions between different domestic contexts.

This report argues that the creation of a specialised war crimes department within the Office of the Prosecutor General in Ukraine is already an important step towards domestic accountability. Nevertheless, certain legislative, organisational and technical reforms could further strengthen international criminal investigations and prosecutions in Ukraine. In light of this analysis, best practices of particular relevance for the Ukrainian authorities are set out in at the end of each section and compiled/summarised in Part six. In particular, the following best practices are identified:

In relation to the *legal basis for the investigation and prosecution of international crimes*:

- 1. Adoption of legislation allowing universal jurisdiction for core international crimes committed by foreign nationals outside of a state's territory is an important step to fighting impunity.**

In relation to the *structure of war crimes units*:

- 2. In many situations, the establishment of “mirror” war crimes units within different police, prosecutorial and government-level bodies – such as those responsible for registering internally displaced persons/forced migrants – helps to ensure the systematic referral of potential serious crimes cases to the relevant criminal justice authorities.**
- 3. Regardless of whether a decentralised or centralised approach is taken to adjudicating international crimes, dedicated personnel should be appointed, and roles should be clearly defined. Furthermore, it is important that all courts handling**



core international crimes cases have access to the necessary resources, training and expertise.

In relation to the *conduct of investigations*:

- 4. Governmental immigration bodies can prove very important in identifying potential perpetrators of international crimes – especially in countries with universal jurisdiction – and thus contribute to the opening of investigations.**
- 5. The prosecutorial strategy of structural investigation is a very efficient method of investigating international crimes in large-scale and/or lengthy conflicts, such as in Ukraine.**

In relation to the *formulation of charges*:

- 6. Adopting the practice of cumulative charging ensures that charges are representative of the crimes committed and adequately reflect the potential broad range of crimes committed by the defendant. In Ukraine, conduct might be criminalised under both the general provisions of the Criminal Code of Ukraine and Draft Law No. 2689.**

In relation to the *types of evidence*:

- 7. Pursuing the strategy of “seeking information elsewhere” helps to avoid the re-traumatisation of victims.**
- 8. Replicating the “pyramid approach” is a very efficient method of gathering evidence in situations such as Ukraine’s.**



- 9. Ensuring that domestic legislation is up-to-date with the latest technological developments and allows for wide use of digital open source evidence in domestic core international crimes prosecutions is fundamental. Furthermore, creating or strengthening working relationships with national forensic and research centres allows for the efficient verification and authentication of digital evidence.**

- 10. Domestic judges, investigators, and prosecutors should receive substantive training on using digital evidence in court. Digital evidence, or more specifically open source materials, can serve as (corroborating) evidence in domestic war crimes prosecutions.**

- 11. Obtaining the relevant software needed for the verification and authentication of digital evidence is important. Furthermore, establishing working relationships with social media companies to recover digital evidence that otherwise might be deleted under the grounds of removing content that promotes extremism is central to investigating and prosecuting international crimes.**

- 12. The adoption and implementation of legislation which enables the active participation of victims in international criminal proceedings, for example as accessory prosecutors or joint plaintiffs, is integral to successful prosecutions. Granting victims procedural rights will enable more to come forward with their testimonies, and thus facilitate investigations and prosecutions.**

- 13. The adoption of the new Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes, that is still in the drafting stage, would increase the protection of victims' rights. Increasing victim protections would hopefully encourage more to come forward and provide evidence.**



In relation to *cooperation and coordination*:

- 14. The ratification of the Rome Statute of the International Criminal Court and its implementation in national legislation is fundamental to ensuring accountability for international crimes. Joining the EU Genocide Network as an Observer State also aids accountability efforts for relevant states such as Ukraine.**

- 15. Participation in Eurojust projects as a Third State and formation of Joint Investigations Teams (JITs) with EU Member States and other third countries has proven to greatly facilitate investigations and prosecutions.**

- 16. Joining the Europol's Analysis Project on Core International Crimes (AP-CIC) allows states to benefit from forensic and technical support as well as information exchange while investigating international crimes.**

- 17. Information from NGOs can assist in providing the necessary context to conduct structural investigations. When safe extraction of documentary evidence becomes possible, cooperation with NGOs and local investigators to facilitate document extraction is key.**



1. Introduction

1.1. Background

The inaction of the United Nations Security Council (UNSC) in relation to the contemporary conflicts in Syria and Iraq, among other things, has had an inevitable impact on the shift from international to domestic forms of accountability for core international crimes. The increasing number of investigations and prosecutions in the Member States of the European Union relating to the atrocities committed in Syria and Northern Iraq, often based on universal jurisdiction, as well as the challenges faced by state authorities involved in these and other investigations into international crimes, can serve as lessons learned for the newly established specialised Department for Supervision of Crimes in the Situation of Armed Conflict within the Office of the Prosecutor General of Ukraine.

This report is a result of the study of domestic judgments and reports from Germany, Sweden, Finland and the Netherlands, as well as qualitative interviews with practitioners – prosecutors and investigators involved in international criminal investigations at the domestic level. These European systems were selected for various reasons, including their unique legislative and organisational set-up, their proactive stance on prosecuting international crimes, the possibility to access information on these units as well as the types of evidence used in court proceedings, much of which is likely similar to the evidence available in Ukraine. Indeed, in both “quasi-state” entities under scrutiny, namely the “republics” created in the Luhansk and Donetsk oblasts in Ukraine and the “Islamic State” (“IS”) that used to control territories in Iraq and Syria, there is a considerable number of user-generated evidence available, including online propaganda videos and photos. Particular attention will be paid to the evidence selection methods and prosecutorial strategies that might be worth replicating in the Ukrainian context.

This report’s objectives are to: identify best practices that can influence legislative, operational and technical reform in Ukraine to strengthen domestic war crimes prosecutions and investigations; highlight which structural elements proved vital in domestic war crimes investigations and prosecutions conducted in relation to the atrocities committed in other regions



that could be replicated in the Ukrainian context; identify successful investigative methods and prosecutorial strategies used by other fully operational war crimes units; suggest types of evidence that are prioritised in the context of war crimes investigations and prosecutions in relation to other contemporary armed conflicts, for instance in Syria and Iraq; and, illustrate the advantages of joining the necessary cooperation frameworks and institutions that could facilitate core international crimes investigations and prosecutions.

1.2. Increasing Use of Universal Jurisdiction

The use of universal jurisdiction (UJ) – when a state exercises jurisdiction over atrocities committed outside its territory without any link to the perpetrator or the victim – has been on the rise in recent years.² France, Germany, Sweden and the Netherlands can exercise UJ pursuant to legislation implementing the Rome Statute into domestic law. The widest definition of UJ (“pure UJ”) can be found in German, Swedish and Norwegian legislation. Germany and Sweden are also among the states with the highest number of ongoing (and past) international criminal investigations in recent years.³ The legislation in Belgium, the Netherlands and France provides for a limited use of UJ,⁴ when the perpetrator is present or has his habitual residence in the relevant state.

An annual review of ongoing UJ litigation cases illustrates significant use of UJ worldwide.⁵ Whilst in Europe the majority of UJ cases initially related to the conflicts in the former

² Máximo Langer and Mackenzie Eason, ‘The Quiet Expansion of Universal Jurisdiction’ (2019) 30(3) *European Journal of International Law* 779.

³ With over 111 and 50 investigations opened respectively in Germany and Sweden. See, Lena Bjurström, ‘Sweden on the Frontline with Syria Cases’, *Justice Info* (11 February 2021), available at: www.justiceinfo.net/en/73587-sweden-frontline-syria-cases.html. Note, unless otherwise stated, all online resources were last accessed 15 June 2021.

⁴ Law No. 2010-930 implementing the Rome Statute (Loi no. 2010-930 du 9 août 2010 portant adaptation du droit pénal à l’institution de la Cour pénale internationale); Code of Criminal Procedure (Code de procédure pénale) (CPP), Arts. 689-1, 689-11; Criminal Code (Code pénal) (CP), Arts. 211-1, 211-2, 212-1, 461-1 to 461-31.

⁵ TRIAL International, ‘Universal Jurisdiction Annual Review 2020’ (2020), available at: trialinternational.org/latest-post/universal-jurisdiction-annual-review-2020-atrocities-must-be-prosecuted-soundly-and-rigorously/; TRIAL International, ‘Universal Jurisdiction Annual Review 2021: A Year Like No Other? The Impact of Coronavirus on Universal Jurisdiction’ (2021), available at: [reliefweb.int/sites/reliefweb.int/files/resources/Trial International UJAR DIGITAL.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Trial%20International%20UJAR%20DIGITAL.pdf); International Center for Transitional Justice, ‘Advancing Global Accountability The Role of Universal Jurisdiction in Prosecuting International Crimes’ (December 2020), available at:



Yugoslavia and Rwanda, other countries and situations are now also targeted by prosecutors. For example, there is a growing interest in using the UJ principle to prosecute members of the Belarusian special police forces who are allegedly responsible for torture and inhuman treatment in Belarusian detention centres.⁶ Another example concerns the situation in Syria and Iraq. The ongoing trials of members of the Assad regime from Syria in Koblenz, Germany,⁷ as well as the Yazidi genocide trials in Munich and Frankfurt,⁸ have paved the way for fighting impunity in situations where the International Criminal Court (ICC) cannot act.

Adoption of legislation allowing universal jurisdiction for core international crimes committed by foreign nationals outside of a state's territory is an important step to fighting impunity.

1.3. The Purpose of War Crimes Units (WCUs)

The term 'War Crimes Unit' refers to and encompasses specialised domestic units of prosecution, police and immigration services dedicated to international crimes cases. In addition to these units, countries may have specialised (investigating) judges to try international crimes cases, as in the case of the Netherlands.

In 2003, the EU Council emphasised the importance of ensuring that law enforcement and immigration authorities have appropriate resources and structures to enable their effective

www.ictj.org/sites/default/files/ICTJ_Report_Universal_Jurisdiction.pdf; Wolfgang Kaleck and Patrick Kroker, 'Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?' (2018) 16(1) *Journal of International Criminal Justice* 165.

⁶ «Польская прокуратура расследует дело против белорусских силовиков» *Charter97* (13 January 2021), available at: charter97.org/ru/news/2021/1/13/407431/ (in Russian); 'Polish Prosecutor's Office Investigates Case Against Belarusian Security Forces', *Charter97* (13 January 2021), available at: charter97.org/en/news/2021/1/13/407431/ (in English); Каролина Аксамитовска, «Как сбежавших лукашистов будут преследовать в Европе», *Charter97* (31 December 2020), available at: charter97.org/ru/news/2020/12/31/405892/ (in Russian); Karolina Aksamitowska, 'How Escaped Lukashists are Going to be Prosecuted in Europe', *Charter97* (31 December 2020), available at: charter97.org/en/news/2020/12/31/405892/ (in English).

⁷ Syria Justice and Accountability Centre, Al-Khatib Trial Updates, available at: syriaaccountability.org/topic/trial-monitoring/updates/; European Center for Constitutional and Human Rights (ECCHR), Al-Khatib Trial Updates, available at: www.ecchr.eu/en/case/trial-updates-first-trial-worldwide-on-torture-in-syria/.

⁸ Hannah El-Hitami, 'The Yazidi Trial in Germany: How to Prove Genocide in a Single Case?', *Justice Info* (29 October 2020), available at: www.justiceinfo.net/en/tribunals/national-tribunals/45808-yazidi-trial-germany-prove-genocide-single-case.html.



cooperation in investigating genocide, crimes against humanity and war crimes.⁹ The Council recommended the Member States to consider the need to set up or designate specialist units within the competent law enforcement authorities responsible for investigating core international crimes.¹⁰

Furthermore, the Preamble to the Rome Statute of the International Criminal Court states that “effective prosecution [of the most serious crimes of concern to the international community] must be ensured by taking measures at the national level”, recalling that “it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes”.¹¹ Art. 1 of the Rome Statute affirms that the ICC should be complementary to national criminal jurisdictions.

In light of the principle of complementarity enshrined in the Rome Statute and highlighted in the EU Council Decision on investigation and prosecution of core international crimes, the proliferation of domestic prosecutions and the professionalisation of international criminal investigations, a closer look at domestic war crimes investigations and prosecutions is warranted.

2. Structure of WCUs

2.1. Useful Components of WCUs and the Division of Departments

This section will first examine the Netherlands, which has been hailed as a useful model for other countries in setting up war crimes units, being one of the countries that pioneered in this context.

When the International Criminal Tribunal for the former Yugoslavia (ICTY) was established in The Hague in 1994, a special police and prosecution team was formed to investigate

⁹ EU Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes.

¹⁰ Ibid.

¹¹ Rome Statute of the International Criminal Court, adopted 17 July 1998, entered into force 1 July 2002, UN Doc. A/CONF 183/9.



potential perpetrators of war crimes and crimes against humanity from the former Yugoslavia.¹² In 1998, this team became the broader National Investigation Team for War Crimes (NOVO), which focused on other countries as well. Both teams were led by the Arnhem Public Prosecution Service's team for Wartime Offenses. On 1 September 2002, the Cluster International Crimes of the National Public Prosecutors' Office (*Landelijk Parket*) in Rotterdam (LP-CIM) took over leadership of NOVO.¹³ In 2003, the NOVO team became the National Crime Squad's International Crimes Team (or Team International Crimes) (TIM-DLR).¹⁴

In order to more fully implement its obligations under the Rome Statute, the Dutch legislature adopted the *Wet Internationale Misdrijven* or International Crimes Act (ICA).¹⁵ The ICA entered into force on 1 October 2003. Currently, the Netherlands has specialised units within its immigration (the Unit 1F), police (TIM-DLR), and prosecution (LP-CIM) services to handle cases of grave international crimes. The Netherlands has also established a special department within the Ministry of Justice which provides mutual legal assistance requests and evaluates broader legal and policy issues raised by international crimes cases.

According to the head of the secretariat of the EU Genocide Network, the Dutch model, with four specialised segments (immigration, police, public prosecution service and judiciary), is a good example for other countries.¹⁶ Coordination amongst these actors is overseen by a Steering Committee on International Crimes (*Stuurgroep Internationale Misdrijven*).

The staff in the specialised police and prosecution units is drawn from a wide range of backgrounds, including historians, anthropologists, weapons and military experts, financial analysts, lawyers, and police officers with experience in various parts of the world.¹⁷

¹² Stephanie Van den Berg, 'The Dutch War Crimes Unit Hits Harder On Syrian Suspects', *Justice Info* (23 May 2019), available at: www.justiceinfo.net/en/tribunals/national-tribunals/41499-the-dutch-war-crimes-unit-hits-harder-on-syrian-suspects.html.

¹³ Thijs Bouwknecht, 'Opsporing, vervolging en berechting van internationale misdrijven in Nederland', *NIOD* (26 August 2019), p. 32, available at: www.rijksoverheid.nl/documenten/rapporten/2019/10/16/tk-bijlage-niod-onderzoeksrapport-gespecialiseerde-officier-van-justitie-voor-de-vervolging-van-is-strijders-voor-genocide.

¹⁴ *Ibid.*

¹⁵ 'Universal Jurisdiction Law and Practice in the Netherlands', *Trial International* (April 2019), available at: trialinternational.org/wp-content/uploads/2019/05/Universal-Jurisdiction-Law-and-Practice-in-The-Netherlands.pdf.

¹⁶ Tjitske Lingsma, 'Oorlogsmisdadigers onder vuur', *De Groene Amsterdammer* (22 January 2020), available at: www.groene.nl/artikel/oorlogsmisdadigers-onder-vuur.

¹⁷ Human Rights Watch, 'The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands' (2014), p. 7, available at: www.hrw.org/report/2014/09/16/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and.



Other countries have also adopted a multi-agency model of specialised departments fighting impunity for core international crimes. In Sweden, the Swedish Migration Agency (*Migrationsverket*), police, prosecutors, courts, and the Division for Criminal Cases and International Judicial Co-operation at the Ministry of Justice (JU-BIRS) are responsible for international criminal investigations.¹⁸

On 1 July 2014, the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes entered into force in Sweden. It adopts the Rome Statute crimes definitions and allows Swedish courts to exercise UJ over core international crimes. In principle, where there is a sufficient evidentiary basis, the Public Prosecution Authority has the obligation to prosecute.

The Swedish police have a specialised war crimes unit (*Gruppen för utredning av krigsbrott*) which is tasked with investigating core international crimes. The unit was established in 2008 and employs 15 investigators and two analysts. The war crimes prosecution team employs 15 prosecutors. The Swedish Migration Agency, which processes asylum applications in Sweden, reports about potential suspects present on the territory of Sweden to the war crimes unit.¹⁹

In contrast to the multi-agency model adopted in Sweden and the Netherlands, Finland concentrated their efforts to investigate and prosecute international crimes in one department. The Finnish police is the general investigating authority.²⁰ Once the Prosecutor-General has given an order for investigation, the national unit of the Finnish police of the National Bureau of Investigation (NBI) will lead the investigation. Prosecutors can request the police to undertake certain investigation measures, however the responsibility for conducting the investigations lies with the police.²¹

According to the Finnish Criminal Investigation Act, investigations shall commence when, on the basis of a report of an offence or otherwise, the investigation authority has “reasons to

¹⁸ Mark Klamberg, ‘Trials in Sweden: Participants in the Proceedings and other Actors’ in *Investigation and Prosecution in Scandinavia of International Crimes* 66 *Scandinavian Studies in Law* 32.

¹⁹ FIDH, ‘Breaking Down Barriers: Access to Justice in Europe For Victims of International Crimes’ (October 2020), p. 92, available at: reliefweb.int/report/world/breaking-down-barriers-access-justice-europe-victims-international-crimes.

²⁰ Chapter 2, Section 1(1) of the Criminal Investigation Act, 805/2011, amendments to 736/2015 included.

²¹ *Ibid.*, Chapter 5, Section 2(1).



suspect that an offence has been committed”.²² Victims can report a crime to the police.²³ The Homicide/Serious Crimes Unit of the NBI is in charge of investigations of international crimes, including war crimes, and crimes against humanity, as well as murder and other serious crimes, including terrorist offences. The unit is composed of seven senior police officers and 25 investigators.²⁴ Considering quite a low number of refugees from Syria have arrived in Finland, it was not necessary for the Finnish authorities to expand the existing unit or create a separate unit responsible solely for core international crimes committed during the conflicts in Syria and Iraq. Conversely, Germany hosted significant numbers of refugees from Syria and Iraq,²⁵ many of which were identified as victims, witnesses or even perpetrators of core international crimes, and therefore a separate specialised war crimes unit is a more viable option to ensure effective investigation and prosecution.

Germany was one of the first countries to incorporate the Rome Statute domestically through its Code of Crimes against International Law (*Völkerstrafgesetzbuch* or *VStGB*). The *VStGB* provides for “pure” UJ (*Weltrechtsprinzip*) over Rome Statute crimes. This means that investigations and prosecutions can be initiated into war crimes, crimes against humanity and genocide committed outside of Germany, regardless of the nationality of the victim or perpetrator even if the suspect is not on German territory.

Germany has specialised war crimes units within its police and prosecution services. Since 2003, the Federal Criminal Police (*Bundeskriminalamt* or *BKA*) has included a war crimes unit. The unit was restructured and renamed the Central Unit for the Fight against War Crimes and Further Offenses pursuant to the Code of Crimes against International Law (*Zentralstelle für die Bekämpfung von Kriegsverbrechen* or *ZBKV*) in 2009. Since August 2018, the *ZBKV* has the status of an independent unit within the *BKA*. The *ZBKV* investigates international crimes under the supervision of the Federal Prosecutor General (*Generalbundesanwalt*).²⁶

²² *Ibid.*, Chapter 3, Section 3.

²³ Ministry of Justice, ‘Stages of the Criminal Procedure, Reporting an Offence’, available at: oikeus.fi/en/index/mattersand/foravictimofacrime/ifyoubecomeavictimofacrime/stagesofthecriminalprocedure.html.

²⁴ Open Society Justice Initiative, ‘Universal Jurisdiction Law and Practice in Finland’ (February 2020), pp. 15-16, available at: www.justiceinitiative.org/publications/universal-jurisdiction-law-and-practice-in-finland.

²⁵ ‘Syrian Refugees Find a Safe Haven in Germany’, *Deutsche Welle* (15 March 2021), available at: www.dw.com/en/syrian-refugees-find-a-safe-haven-in-germany/a-56872099.

²⁶ FIDH, ‘Breaking Down Barriers: Access to Justice in Europe For Victims of International Crimes’ (October 2020), p. 62, available at: reliefweb.int/report/world/breaking-down-barriers-access-justice-europe-victims-international-crimes.



In many situations, the establishment of “mirror” war crimes units within different police, prosecutorial, and governmental-level bodies – such as those responsible for registering internally displaced persons/forced migrants – helps to ensure the systematic referral of potential serious crimes cases to the relevant criminal justice authorities.²⁷

2.2. Courts Involved in Core International Crimes Prosecutions

The Netherlands is a civil law country with an inquisitorial system, which means that an investigating judge plays an important role. Under the Dutch ICA, the District Court in The Hague (*Rechtbank 's-Gravenhage*) is the only court competent to hear first-instance trials concerning core international crimes. The Court has one full-time specialised investigating judge who is responsible for pre-trial investigations and is supported by a legal officer and an administrative assistant. Regarding trial proceedings, “[t]rials are held before a panel of three trial judges supported by two legal officers specialised in international law. The case is re-tried on appeal before the Court of Appeals in The Hague (*Gerechtshof 's-Gravenhage*) which is supported by court clerks, with further investigations by the examining judge if necessary. Appeals to the Supreme Court (*Hoge Raad*) are limited to questions of law”.²⁸

Investigating judges in Germany play a less important role than in other civil law systems, although the criminal justice system in Germany is also inquisitorial in nature. Cases concerning international crimes are governed by Germany’s Criminal Procedure Code (*Strafprozessordnung* or *StPO*). Most coercive powers are exercised by the Federal Prosecutor General during the investigation. Crimes under the Code of Crimes Against International Law are tried before the Higher Regional Courts all around the country.²⁹

The Swedish criminal justice system combines adversarial and inquisitorial elements and the Public Prosecution Authority leads the preliminary investigations of the war crimes unit. With no investigating judge, the prosecutor is obliged to consider both incriminating and exculpatory

²⁷ See, Ukrainian Legal Advisory Group (ULAG), ‘Principle of Complementarity: International Justice in Ukraine’ (9 December 2019), p. 10, available at: justiceforthefuture.org.ua/en/materials/documents/.

²⁸ FIDH, ‘Breaking Down Barriers: Access to Justice in Europe For Victims of International Crimes’ (October 2020), p. 79, available at: reliefweb.int/report/world/breaking-down-barriers-access-justice-europe-victims-international-crimes.

²⁹ *Ibid.*, 63.



evidence. Sweden has a decentralised judicial system and, unlike in the Netherlands, but similarly to Germany and Ukraine,³⁰ serious international crimes cases can potentially be prosecuted in courts anywhere in the country.³¹ The District Court (*tingsrätt*) acts as a court of first instance, and the Courts of Appeal (*hovrätter*) have an appellate function.

Regardless of whether a decentralised or centralised approach is taken to adjudicating international crimes, dedicated personnel should be appointed, and roles should be clearly defined. Furthermore, it is important that all courts handling core international crimes cases have access to the necessary resources, training and expertise.

3. Investigations and Charging

3.1. Opening an Investigation

The Dutch Police (*Landelijke Eenheid*) together with the International Crimes Unit at the National Office (*Landelijk Parket*) of the Public Prosecution Service (*Openbaar Ministerie*) are responsible for investigating and prosecuting core international crimes. Investigations are usually opened on the initiative of the Public Prosecution Service, once it receives information from a special department of the Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst* or IND), the “1F Unit”, which informs the Public Prosecution Service if it has serious reasons to believe that an individual seeking asylum in the Netherlands committed an international crime and is present on Dutch territory.³² The 1F Unit currently comprises 20 individuals. They conduct approximately 150 investigations each year and apply Art. 1F of the 1951 Refugee Convention in approximately 20-30 of those cases.³³

³⁰ ULAG, ‘Principle of Complementarity: International Justice in Ukraine’ (9 December 2019), p. 14, available at: justiceforthefuture.org.ua/uploads/MaterialDocument/ULAG_complementarity_web_en_002_1594211912.pdf.

³¹ FIDH, ‘Breaking Down Barriers: Access to Justice in Europe For Victims of International Crimes’, pp. 92-93.

³² FIDH, ‘Breaking Down Barriers: Access to Justice in Europe For Victims of International Crimes’ (October 2020), p. 78, available at: reliefweb.int/report/world/breaking-down-barriers-access-justice-europe-victims-international-crimes.

³³ Art. 1F reads: “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”.



The identification process for asylum seekers is carried out by the Police and the Royal Netherlands Marechaussee (KMar). Retrieving information from mobile phones is part of the asylum procedure's identification process.³⁴ The research conducted on mobile devices helps to find indications of the asylum seeker's identity and, if applicable, evidence of international crimes. The data carriers (for example mobile phones) are manually viewed to inspect photos, emails, contact lists, messenger apps and applications in relation to origin, itinerary, travel and identity documents and national security concerns. If needed, more information can be retrieved from the data carrier.³⁵

In Germany, investigations can be opened on the initiative of the Federal Prosecutor General or following a criminal complaint made by a victim or third party. For instance, the European Center for Constitutional and Human Rights (ECCHR) represents victims, based on the principle of universal jurisdiction in Germany and Sweden, filing complaints against senior officials within the Syrian intelligence services.³⁶ Most investigations are, however, opened on the basis of information provided by the German immigration authorities (*Bundesamt für Migration und Flüchtlinge* or *BAMF*). A specialised section of the immigration authorities shares information with the police concerning potential perpetrators or even witnesses and victims of core international crimes.³⁷

Governmental immigration bodies can prove very important in identifying potential perpetrators of international crimes – especially in countries with universal jurisdiction – and thus contribute to the opening of investigations.

³⁴ European Commission, 'EMN Ad-Hoc Query on Mobile device information Requested by AT EMN NCP on 9 May 2017', available at: ec.europa.eu/home-affairs/sites/homeaffairs/files/2017.1180_at_mobile_device_information.pdf.

³⁵ European Commission, 'EMN Ad-Hoc Query on Mobile device information Requested by AT EMN NCP on 9 May 2017', available at: ec.europa.eu/home-affairs/sites/homeaffairs/files/2017.1180_at_mobile_device_information.pdf.

³⁶ See, ECCHR, available at: www.ecchr.eu/en/topic/torture/.

³⁷ FIDH, 'Breaking Down Barriers: Access to Justice in Europe For Victims of International Crimes' (October 2020), p. 62, available at: reliefweb.int/report/world/breaking-down-barriers-access-justice-europe-victims-international-crimes.



3.2. The Prosecutorial Strategy of Structural Investigation

Germany – and other European states such as Sweden – employ the prosecutorial strategy of structural investigations. Structural investigations allow for a broad and flexible approach to investigations. This means that investigations are not directed against specific individuals, but are employed for the purpose of “investigating specific structures, within which international crimes have been allegedly committed”.³⁸

Structural investigators are meant to collect all relevant information that can be obtained in the country using, for example, open source evidence and witness testimony, before the suspects are even identified.³⁹ This facilitates the ability of prosecutors to identify suspects and to swiftly seek extradition when suspects’ locations are known, or to quickly act when suspects enter German territory. This strategy enabled the swift extradition of Taha Al-J from Greece in 2019, in order for him to face a UJ genocide trial in Frankfurt.⁴⁰

In 2011, German prosecutors launched a structural investigation into state sponsored war crimes in Syria; and in 2014, a similar investigation was initiated into crimes committed against the Yazidi minority in Syria and Iraq. This prosecutorial strategy has also resulted in over 111 ongoing German investigations into core international crimes.

The paths towards the trials of Anwar Raslan and Eyad A. (the first in the world involving Syrian intelligence officers) and Taha Al-J (the first in the world invoking pure UJ dealing with an alleged perpetrator of genocide against the Yazidis) also commenced with these structural investigations. Germany is currently at the forefront of domestic accountability efforts for core international crimes. Despite multiple ongoing investigations, the “Office of the German Federal Public Prosecutor General (*Generalbundesanwalt*) highlighted that they never intended to act as the international Office of the Prosecutor, nor to replace the ICC. Rather, their aim was to complement them”.⁴¹

³⁸ Wolfgang Kaleck and Patrick Kroker, ‘Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?’ (2018) 16(1) *Journal of International Criminal Justice* 165, 179.

³⁹ Wolfgang Kaleck and Patrick Kroker, ‘Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?’ (2018) 16(1) *Journal of International Criminal Justice* 165, 179.

⁴⁰ Yazda, ‘Press Statement: ISIS Militant arrested on suspicion of Genocide against Yazidis’ (15 October 2019), available at: www.yazda.org/post/press-statement-isis-militant-arrested-on-suspicion-of-genocide-against-yazidis.

⁴¹ Melinda Rankin, ‘The ‘Responsibility to Prosecute’ Core International Crimes? The Case of German Universal Jurisdiction and the Syrian Government (2019) 11(4) *Global Responsibility to Protect* 394, 407; see also, Wolfgang



In contrast to Germany or Sweden, the Netherlands' authorities have adopted a (limited) prosecutorial strategy of “no-safe-haven”.⁴² The result is that only perpetrators accidentally in the Netherlands, or with a nexus to the Netherlands (for example, Dutch citizenship or habitual residence in the Netherlands), can face prosecution for core international crimes.⁴³ Structural investigations are not conducted in the Netherlands. Nevertheless, the Dutch authorities collect and share evidence with Europol's Analysis Project on Core International Crimes (AP-CIC) in order to facilitate prosecutions in other jurisdictions.⁴⁴ The advantages of joining the AP-CIC will be further discussed Part five of the report.

The prosecutorial strategy of structural investigation is a very efficient method of investigating international crimes in large-scale and/or lengthy conflicts, such as in Ukraine.

3.3. Cumulative Charging for Core International Crimes and Terrorism-related Offences

Cumulative charging is a process “by which an accused can be charged with a number of different crimes on the same underlying acts, with the charges being expressed cumulatively rather than alternatively”.⁴⁵ To ensure that cumulative charges do not potentially punish the accused more than once for the crime, it is generally accepted that each different charge must contain a ‘materially distinct legal element’ – for example the act of murder could potentially simultaneously constitute a war crime, genocide, and crime against humanity where all of the respective elements

Kaleck and Patrick Kroker, ‘Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?’ (2018) 16(1) *Journal of International Criminal Justice* 165, 178; Christian Rischer, ‘Do Criminal Complaints Make Sense in (German) International Criminal Law? A Prosecutor's Perspective’ (2015) 13 *Journal of International Criminal Justice* 229; Gerhard Werle and Moritz Vormbaum, ‘Völkerstrafverfahren in Deutschland’ (2017) 72(1) *Juristenzeitung* 12; Gerhard Werle, ‘Anmerkung’ (2018) 73(5) *Juristenzeitung* 261.

⁴² *Ibid.* 78.

⁴³ International Crimes Act (Wet Internationale Misdrijven), Art.2; Instructions Regarding the Handling of Reports under the International Crimes Act (Instructie afdoening aangiften wet internationale misdrijven), 1 August 2018, para. 2.2.

⁴⁴ FIDH, ‘Breaking Down Barriers: Access to Justice in Europe For Victims of International Crimes’, p. 78.

⁴⁵ Fiona O'Regan, ‘Prosecutor v. Jean-Pierre Bemba Gombo: The Cumulative Charging Principle, Gender-Based Violence, and Expressivism’ (2012) *Georgetown Journal of International Law* 1323; Bongani C. Majola, ‘Cumulative Charges under International Criminal Law: Issues and Perspectives’ in Charles Chernor Jalloh and Alhagi B.M. Marong (eds.), *Promoting Accountability under International Law for Gross Human Rights Violations in Africa* (Brill, 2015), 201.



are met.⁴⁶ According to a recent report by the EU Genocide Network Secretariat, domestic jurisprudence of EU Member States demonstrates that it is possible to *cumulatively* prosecute and hold foreign terrorist fighters accountable for war crimes, crimes against humanity and the crime of genocide, in addition to terrorism-related offences. According to the EU Genocide Network, “prosecuting terrorism offences combined with acts of core international crimes ensures the full criminal responsibility of perpetrators, results in higher sentences and delivers more justice for victims”.⁴⁷

In some EU Member States, cumulative prosecution – on the basis on counterterrorism legislation, as well as legislation implementing international humanitarian law – can take place for the same facts.⁴⁸

For instance, in the trial before the Higher Regional Court in Munich, a German citizen, Jennifer W., is indicted for membership in a foreign terrorist organisation (the “Islamic State” or “IS”). Secondly, she is indicted for murder as a war crime, as well as murder by omission pertinent to general German Criminal Code. Jennifer W.’s husband, Taha A.J., is on trial in the Higher Regional Court in Frankfurt.⁴⁹ He was arrested in Greece in May 2019 and has been in detention in Germany since October 2019. A.J. has been charged with genocide, war crimes, crimes against humanity and human trafficking for labour exploitation. On 14 February 2020, the Federal Prosecutor sent an indictment against Mr. Taha A.J. to the state security senate of the Higher Regional Court in Frankfurt.

The indictment includes the following three acts of genocide: (1) killing, (2) serious bodily and mental harm, and (3) inflicting on the group conditions of life calculated to bring about their physical destruction in whole or in part. Five acts of crimes against humanity include: (1) killing, (2) inflicting with the intent of destroying a population in whole or in part, conditions of life on

⁴⁶ War Crimes Research Office, ‘The Practice of Cumulative Charging at the International Criminal Court’ (May 2010), 2-3, available at: www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-11-the-practice-of-cumulative-charging-at-the-icc/.

⁴⁷ EU Genocide Network Secretariat, ‘Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-related Offences’ (May 2020), available at: www.eurojust.europa.eu/increase-cumulative-charges-terrorism-and-war-crimes; www.eurojust.europa.eu/sites/default/files/2020-05/2020-05_Report-on-cumulative-prosecution-of-FTFs_EN.pdf.

⁴⁸ Including France, Germany, the Netherlands, and Hungary. See, EU Genocide Network Secretariat, *ibid*.

⁴⁹ Hannah El-Hitami, ‘The Yazidi Trial in Germany: How to Prove Genocide in a Single Case’, *Justice Info* (29 October 2020), available at: www.justiceinfo.net/en/tribunals/national-tribunals/45808-yazidi-trial-germany-prove-genocide-single-case.html.



that population or on parts thereof, being conditions calculated to bring about its physical destruction in whole or in part; (3) trafficking of persons, particularly in women or children, or whoever enslaves a person in another way and in doing so arrogates to themselves a right of ownership over that person, (4) torture, and (5) deprivation of liberty. Two acts of war crimes include: (1) killing, and (2) torture. These were all charged under the Code of Crimes Against International Law, the act which incorporates international crimes into the national legal framework. Under the German Criminal Code further charges refer to (1) membership of a foreign terrorist organisation, (2) murder, and (3) human trafficking for the purpose of labour exploitation.

Taha A. J. joined the terrorist organisation IS before March 2013. In the summer of 2015, he bought a woman and her five-year-old daughter from a group of Yazidis taken prisoner by IS. The press release of the Federal Prosecutor explicitly highlights that the suspect enslaved the mother and daughter with the intent to destroy the Yazidis in accordance with IS' aims.⁵⁰

Since the accused is an Iraqi citizen, this is the first ever trial of an alleged perpetrator of genocide against the Yazidis where the principle of universal jurisdiction is applied.

Adopting the practice of cumulative charging ensures that charges are representative of the crimes committed and adequately reflect the potential broad range of crimes committed by the defendant. In Ukraine, conduct might be criminalised under both the general provisions of the Criminal Code of Ukraine and under Draft Law No. 2689.⁵¹

⁵⁰ Der Generalbundesanwalt beim Bundesgerichtshof, 'Anklage gegen ein mutmaßliches Mitglied der ausländischen terroristischen Vereinigung "Islamischer Staat (IS)" wegen Mordes, Völkermordes u.a. erhoben', 21 February 2020, available at: <http://www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/DE/2020/Pressemitteilung-vom-21-02-2020.html>.

⁵¹ Draft Law No. 2689 "On Amending Some Legislative Acts of Ukraine Concerning Implementation of the Provisions of International Criminal and Humanitarian Law", dated 27 December 2019.



4. Evidence

4.1. Evidence Selection Strategies – Case Study of Sexual and Gender-Based Violence

Because of the prevalence of sexual and gender-based violence (SGBV) during the conflict in Eastern Ukraine, it is important to discuss the types of evidence of SGBV that may be available to the investigators from the specialised Department for Supervision of Crimes in the Situation of Armed Conflict within the Office of the Prosecutor General of Ukraine, as well as relevant evidence selection strategies employed in relation to similar types of crimes in other conflicts. The need to prioritise and prosecute SGBV has been addressed in the recent *Statement on the Legal Recognition of SGBV in Syria as a Crime Against Humanity* by the Prosecution in Germany.⁵² Moreover, the Koblenz Higher Regional Court recently ruled that SGBV will be included in the crimes against humanity charges against Anwar Raslan in the Al-Khatib case.⁵³ These developments illustrate the significance of including SGBV in the indictments.

A 2020 investigation found that of 300 people interviewed that had at some point been held captive by separatists in the Donbas region, one in four reported incidents of sexual violence.⁵⁴ Rape and other instances of SGBV have been extensively documented by non-governmental organisations in Eastern Ukraine.⁵⁵ For example, a gender-sensitive conflict analysis has been

⁵² Syrian Road Justice, ‘Al-Khatib Trial: Statement on the Legal Recognition of SGBV in Syria as a Crime Against Humanity’ (23 December 2020), available at: syriaroad2justice.medium.com/al-khatib-trial-statement-on-the-legal-recognition-of-sgbv-in-syria-as-a-crime-against-humanity-118ec42198d8.

⁵³ ECCHR, ‘Al-Khatib Trial in Koblenz – Sexual Violence Now Indicted as Crimes Against Humanity’ (17 March 2021), available at: www.ecchr.eu/en/press-release/syrien-prozess-in-koblenz/.

⁵⁴ Tatiana Yarmoschuk, ‘Rape as a Method of Torture – Sexual Violence in the Donbas Conflict’ (24 November 2020), available at: www.currenttime.tv/a/donbass-sexual-violence/30965297.html (in Russian); Ukraine Crisis Media Center, ‘Activists Have Prepared a Database of Evidence of Crimes Against Humanity and War Crimes in Eastern Ukraine’ (6 June 2017), available at: uacrisis.org/ru/57083-zlochyni-proti-lyudyanoi (in Russian); Amnesty International, ‘Not a Private Matter: Domestic and Sexual Violence Against Women in Eastern Ukraine’ (11 December 2020), available at: www.amnesty.org/download/Documents/EUR5032552020ENGLISH.PDF.

⁵⁵ Українською Гельсінською спілкою з прав людини, ««ГОВОРЯТЬ ЗАСТІНКИ» Воєнні злочини проти полонених і факти присутності військовослужбовців РФ на Донбасі» (2019), 19 and 30; see also, HRW, ‘Ukraine: Justice Still Needed for Victims of Unlawful Detention in Eastern Ukraine’ (6 August 2020), available at: www.hrw.org/news/2020/08/06/ukraine-justice-still-needed-victims-unlawful-detention-eastern-ukraine; Amnesty International, ‘Ukraine: “You Don’t Exist”: Arbitrary Detentions, Enforced Disappearances, and Torture in Eastern Ukraine’ (21 July 2016), available at: www.amnesty.org/en/documents/eur50/4455/2016/en/; Eastern-Ukrainian Center for Civic Initiatives, ‘Crimes without Punishment: Human Rights Violations in the Context of the Armed



conducted by the Eastern-Ukrainian Center for Civic Initiatives (EUCCI) and its partners in the framework of the Coalition “Justice for Peace in Donbas”. During the monitoring of the situation of illegal detention facilities in Eastern Ukraine, the EUCCI observed that there were instances of different forms of SGBV in “every 3rd interview” with survivors of detention in Eastern Ukraine.⁵⁶ Prosecuting the widespread SGBV as a crime of rape under Ukrainian domestic criminal law, or in the future as a crime against humanity or war crime, will thus inevitably become an increasingly important element of accountability efforts in Ukraine. The experiences and lessons learned from investigations relating to SGBV in Syria and Iraq might inform future accountability efforts in Ukraine and other countries.

The following part will focus on evidence selection strategies, on the basis of the example of evidence collected in Syria by the Commission for International Justice and Accountability (CIJA).

CIJA has been involved in private criminal investigations on the territory of Syria since the beginning of the Syrian Uprising. The evidence collected by CIJA has already led to successful prosecutions and convictions in Germany,⁵⁷ the Netherlands,⁵⁸ and the United States.⁵⁹ CIJA’s model relies on training local Syrian and Iraqi human rights activists and investigators to gather evidence, often at significant personal risk, that complies with the highest international criminal investigation standards.⁶⁰ CIJA employs a ‘do no harm’ investigative approach. The first and most

Conflict in Eastern Ukraine’ (2018), available at:

jfp.org.ua/system/reports/files/123/en/CRIMES_WITHOUT_PUNISHMENT_engl_compressed.pdf.

⁵⁶ Eastern-Ukrainian Center for Civic Initiatives, ‘Unspoken Pain: Gender-based Violence in the Conflict Zone of Eastern Ukraine’ (2017), available at: jfp.org.ua/system/reports/files/92/en/Unspoken-Pain-web.pdf.

⁵⁷ For example, the conviction of Zoher J. – a former leader of an extremist armed group in Aleppo – and Eyad A. of aiding and abetting 30 counts of crimes against humanity at the Higher Regional Court in Koblenz on 24 February 2021: Commission for International Justice and Accountability (CIJA), ‘Koblenz court issues verdict in Eyad A. case’ (24 February 2021), available at: cijaonline.org/news/2021/2/24/koblenz-court-issues-verdict-in-eyad-a-case.

⁵⁸ The Hague District Court sentenced Oussama A. to 7.5 years in prison, 2.5 years of which was specifically for the war crime of humiliating and degrading treatment (by posing next to a crucified body and disseminating the photo): de Rechtspraak, ‘Gevangenisstraffen voor gepleegde misdrijven in Syrië’, 26 January 2021, available at: www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Den-Haag/Nieuws/Paginas/Gevangenisstraffen-voor-gepleegde-misdrijven-in-Syrie.aspx?fbclid=IwAR3bBda5Qan2OLldVZyU-fpGyFqxJhbcGIyoPJ7px3eJov-KX8scApHGvgo (in Dutch).

⁵⁹ *Colvin v Syrian Arab Republic* in the US District Court for the District of Columbia, constituting the first case against the State of Syria for targeted killing of American journalist Marie Colvin: CIJA, ‘Colvin v Syrian Arab Republic’ (22 February 2021), available at: cijaonline.org/news/2021/2/22/colvin-v-syrian-arab-republic-1.

⁶⁰ The Draft Global Code of Conduct for Investigating and Documenting Conflict-Related Sexual Violence (The Draft Murad Code) (June 2020), available at: www.muradcode.com/s/English-DraftMuradCodeBackgroundPaper-June2020-Website.pdf; UK Foreign and Commonwealth Office, ‘International Protocol on the Documentation and



important pillar of this strategy is “seeking information elsewhere”.⁶¹ CIJA builds strong cases through relying on multiple pillars of corroborating evidence rather than on over-relying on witness testimony. For example, in developing its investigative strategy in relation to the Islamic State (IS) slave trade, CIJA “sought to emulate a strategy seen in successful sexual slavery prosecutions in jurisdictions such as Guatemala”.⁶² It pursued a ‘pyramid approach’ which can be outlined as follows:

- “At the top of the pyramid are witness interviews from both survivors and other key witnesses. CIJA calculated that it interviewed ‘less than 5% of the available pool of survivor witnesses in its IS enslavement investigation because it carefully observed the principle of ‘seeking information elsewhere’.
- The middle part of the pyramid is built using documentary evidence, including IS publications that made policy statements on its right to enslave Yazidis and others as well as internal IS documents that demonstrated the slave trade in practice. This evidence forms the second layer because it underpins and supports the victim testimony. It also demonstrates the systematic nature shown in the illustrative accounts above it.
- The bottom layer of the evidence pyramid is constituted by pattern and prevalence evidence and expert witness testimony, which helps to corroborate other evidence and show the scale, context and impact of the criminality”.⁶³

Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law’ (2nd Edition, March 2017), available at: [assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/598335/International Protocol 2017 2nd Edition.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/598335/International_Protocol_2017_2nd_Edition.pdf); Institute for International Criminal Investigations, ‘Guidelines for Investigating Conflict-Related Sexual and Gender-Based Violence Against Men and Boys’ (February 2016), available at: [assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546569/PSVI training - violence against men and boys.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546569/PSVI_training_-_violence_against_men_and_boys.pdf); UC Berkeley Human Rights Center and United Nations Human Rights Office of the High Commissioner, ‘Berkeley Protocol on Digital Open Source Investigations: A Practical Guide on the Effective Use of Digital Open Source Information in Investigating Violations of International Criminal, Human Rights and Humanitarian Law’ (December 2020), available at: www.ohchr.org/Documents/Publications/OHCHR_BerkeleyProtocol.pdf.

⁶¹ Stephanie Barbour, ‘Supporting Accountability for Sexual Violence in the Syria and Iraq Conflicts Innovations, Good Practices, and Lessons Learned through Private Criminal Investigations’ (2019) 18 Journal of International Criminal Justice 397, 416-417.

⁶² Ibid.; Jo-Marie Burt, ‘From Heaven to Hell in Ten Days: The Genocide Trial in Guatemala’ (2016) 18 Journal of Genocide Research 143.

⁶³ Stephanie Barbour, ‘Supporting Accountability for Sexual Violence in the Syria and Iraq Conflicts Innovations, Good Practices, and Lessons Learned through Private Criminal Investigations’ (2019) 18 Journal of International Criminal Justice 397, 417.



In this context, it is important to recall William Wiley's (CIJA's founding director) statement on the value of documents in criminal investigations, "[t]he queen and king of evidence in any criminal investigation is a document. It isn't cross-examined because it is factual".⁶⁴ On the other hand, the strategy of 'seeking information elsewhere' also takes into account the need to avoid over-documentation of crime-base witnesses (who testify about the crimes and their immediate context and not about the acts and conduct of the accused). In their effort to avoid over-documentation and re-traumatisation of witnesses by multiple interviews, CIJA tries not to burden witnesses too much. In CIJA's view, "the ethical imperative for criminal investigations into SGBV is to look for other evidence first".⁶⁵

Moreover, CIJA has witness selection policies in place. Given CIJA's focus on linkage evidence (providing evidential link to the accused), witnesses are screened and selected with defined criteria in mind: "witnesses possessing potential linkage evidence, whether insider information or eye-witness descriptions of high-level perpetrators are prioritised over those who do not".⁶⁶

With regard to the types of documents obtained by CIJA in IS' territory, there exists a vast number of "propaganda documents" or "policy documents" that set out IS' justification for sexual crimes, including sexual slavery. Because of their work on the ground, CIJA had access to documents illustrating the implementation of slave trade in practice or other SGBV crimes carried out by IS, for example transfer of slave ownership certificates ratified by a *Shari'a* court in IS' territory,⁶⁷ or the proof of execution of someone accused of adultery or homosexuality. IS produced a significant document trail in an attempt to demonstrate that their actions were religiously justified. They were trying to legitimise their "state" through bureaucratisation.

As indicated above, this may be particularly interesting for the Ukrainian war crimes unit. Arguably, a similar level of bureaucratisation is taking place in the territories of the "republics" in the Donetsk and Luhansk oblasts. "Propaganda documents" issued (and posted online, for example

⁶⁴ Melinda Rankin, 'Investigating Crimes against Humanity in Syria and Iraq: The Commission for International Justice and Accountability' (2017) *Global Responsibility to Protect* 395, 409.

⁶⁵ Stephanie Barbour, 'Supporting Accountability for Sexual Violence in the Syria and Iraq Conflicts Innovations, Good Practices, and Lessons Learned through Private Criminal Investigations'.

⁶⁶ Stephanie Barbour, *ibid.*

⁶⁷ *Ibid.* 406-407.



on blogs, VK or Telegram) by the separatists from Donetsk or Luhansk oblasts, as well as documents from the illegal detention facilities, could form an integral part of case briefs relating to SGBV crimes prosecuted in Ukrainian courts.⁶⁸ For instance, the types of documents could include lists of numbers and names of detainees, orders or medical certificates potentially documenting injuries resulting from SGBV. These documents could be extracted in cooperation with non-governmental organisations and locally trained investigators once the situation becomes safe enough in the conflict-affected regions. It is important to ensure that the chain of custody is observed at all stages of the evidence collection and transfer process.

Pursuing the strategy of “seeking information elsewhere” helps to avoid the re-traumatisation of victims. Furthermore, replicating the “pyramid approach” is a very efficient method of gathering evidence in situations such as Ukraine’s.

4.2. Digital Open Source Evidence

The authorities in Germany, Sweden, the Netherlands and Finland widely use social media content to corroborate other types of evidence in core international crimes prosecutions. Facebook posts are used in Germany and the Netherlands to prove the participation in a foreign terrorist organisation as a member.⁶⁹ In Finland, where, similarly to other civil law countries, the principle of freedom of evidence applies,⁷⁰ the NBI widely uses YouTube videos and Facebook content.⁷¹

⁶⁸ In the case of Oussama A. in The Hague District Court, the evidence included a payroll from IS and the accused’s mother’s testimony revealing that he had received salary from IS. See, *The Prosecutor v. Oussama A.*, The Hague District Court, Judgment, 23 July 2019, available at: uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2019:10647.

⁶⁹ *The Prosecutor v. Oussama A.*, The Hague District Court, Judgment, 23 July 2019, available at: uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2019:10647; Federal Court of Justice, ECLI:DE:BGH:2019:150519BAK22.19.0, BGH, order of 15 May 2019 - AK 22/19.

⁷⁰ Code of Judicial Procedure, Chapter 17, Section 1(2); *Prosecutor v Hadi Habeeb Hilal*, Case No. R 16/214, Judgment, District Court of Kanta-Häme, 22 March 2016, available at: www.eurojust.europa.eu/doclibrary/genocide-network/Pages/national-jurisprudence.aspx.

⁷¹ Open Society Justice Initiative, ‘Universal Jurisdiction Law and Practice in Finland’ (February 2020), available at: www.justiceinitiative.org/publications/universal-jurisdiction-law-and-practice-in-finland; *Prosecutor v Hadi Habeeb Hilal*, Case No. R 16/214, Judgment, District Court of Kanta-Häme, 22 March 2016, pp. 6-9.



In Sweden, YouTube videos published by rebel groups often help corroborate other types of evidence,⁷² and in the Netherlands, Tweets, Facebook or Instagram posts serve the same purpose.⁷³

Digital open source evidence (from YouTube, Facebook and Twitter) is often used in prosecutions of members of IS and other terrorist groups operating in Syria and Iraq, but also of other parties to the conflict, for example groups that have fought IS.⁷⁴ Moreover, military researchers that act as expert witnesses help judges analyse the user-generated evidence.

Courts in Germany, the Netherlands, Finland, and Sweden extensively rely on digital evidence in their proceedings in connection with the atrocities committed in Syria. This is in contrast to the “old UJ cases” taking place for instance in Belgium and concerning atrocities committed in Rwanda, where the availability of user-generated evidence was limited (and which will therefore not be discussed here). For that reason, lessons learned from digital evidence collection, analysis and presentation in the Netherlands, Finland, Sweden and Germany might be of interest to Ukrainian investigators and prosecutors owing to comparatively higher rates of digital documentation in contemporary conflicts, such as in Ukraine.

In Sweden, the Netherlands and Germany, national forensic institutes are tasked with verifying the reliability of evidence (including open source evidence). In the event that investigators are not certain about the authenticity of evidence, they are able to request an expert analysis by the national forensic institutes. The German Forensic Science Institute,⁷⁵ Swedish

⁷² *Sakhanh*, Stockholm District Court, Judgment, 16 February 2017, pp. 6 and 20. Also, the recent case of *Ahmad al K* before the Hague District Court, see: Lena Bjurström, ‘Syria: Why Dutch Prosecutors Link Terrorism and War Crimes’, *Justice Info* (18 June 2020), available at: www.justiceinfo.net/en/44620-syria-why-dutch-prosecutors-link-terrorism-and-war-crimes.html; Remco Andringa, ‘Hoe een Syrische executievideo leidde naar het Zeeuwse Kapelle’, *NOS* (15 June 2021), available at: nos.nl/artikel/2385098-hoe-een-syrische-executievideo-leidde-naar-het-zeeuwse-kapelle (in Dutch).

⁷³ *The Prosecutor v. Oussama A.*, The Hague District Court, Judgment, 23 July 2019, available at: uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2019:10647. In the Ahmad al-Y case, the Hague District Court found the defendant guilty of outrages upon the dignity of human remains. Evidence relied upon during the trial included photographs from Instagram that were used to identify the suspect and footage uploaded to YouTube of the defendant insulting and kicking remains of the dead. See, Hague District Court, ECLI:NL:RBDHA:2021:2998, Judgement, 21 April 2021, available at: [https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:3998](http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:3998); see also, Netherlands Public Prosecution Service, ‘What cases have been prosecuted?: Syria’, available at: <https://www.prosecutionservice.nl/topics/international-crimes/what-cases-have-been-prosecuted/syria>.

⁷⁴ *Prosecutor v Hadi Habeeb Hilal*, Case No. R 16/214, Judgment, District Court of Kanta-Häme, 22 March 2016, pp. 6-9.

⁷⁵ See, Bundeskriminalamt, ‘Forensic Science Institute’, available at: www.bka.de/EN/TheBKA/OrganisationChart/OrganisationalUnits/ForensicScienceInstitute/forensicscienceinstitute_node.html.



National Forensic Centre,⁷⁶ and the Netherlands Forensic Institute employ hundreds of analysts that prepare reports at the request of the police and prosecution authorities.

Digital evidence, that is found for instance on mobile phones of the terrorist fighters, is often not introduced in court on its own, but is used to corroborate witness testimony.⁷⁷ Witnesses that have participated in the mobile phone conversations (e.g. on WhatsApp, VK, Telegram or Viber) can confirm the identity of the accused participating in those conversations. The Prosecutor's strategy of searching for data found on the accused's mobile phone to verify their origin online helps determine the source of the file.

The German Federal Prosecutor General may receive expert legal advice on Syrian criminal law or forensics, prepared by researchers from the Max Planck Institute in Freiburg,⁷⁸ or forensics professors, specialised in forensic morphology from the University of Cologne.⁷⁹

Ensuring that domestic legislation is up-to-date with the latest technological developments and allows for wide use of digital open source evidence in domestic core international crimes prosecutions is fundamental. Furthermore, creating or strengthening working relationships with national forensic and research centres allows for the efficient verification and authentication of digital evidence. In addition, domestic judges, investigators and prosecutors should receive substantive training on using digital evidence in court. Digital evidence, or more specifically open source materials, can serve as (corroborating) evidence in domestic war crimes prosecutions.⁸⁰

⁷⁶ Mark Klamberg, 'Evidentiary Matters in the Context of Investigating and Prosecuting International Crimes in Sweden' in *Investigation and Prosecution in Scandinavia of International Crimes*, 66 *Scandinavian Studies in Law* (2020) 376.

⁷⁷ Karolina Aksamitowska, 'Digital Evidence in Domestic Core International Crimes Prosecutions – Lessons Learned from Germany, Sweden, Finland and the Netherlands' (2021) *Journal of International Criminal Justice*, available at: academic.oup.com/jicj/advance-article-abstract/doi/10.1093/jicj/mqab035/6276513?redirectedFrom=fulltext.

⁷⁸ Federal Court of Justice, ECLI:DE:BGH:2019:050919BAK47. 19.0, AK 47/19 of 5 September 2019.

⁷⁹ Syria Justice and Accountability Centre, 'Trial Monitoring Report 17' (18 February 2021), available at: syriaaccountability.org/updates/2021/02/18/inside-the-raslan-trial-a-forensic-analysis-of-the-caesar-photos/.

⁸⁰ Karolina Aksamitowska, 'Digital Evidence in Domestic Core International Crimes Prosecutions – Lessons Learned from Germany, Sweden, Finland and the Netherlands'.



4.3. Verification of Evidence and the Private Sector

The fact that user-generated content might not always be straightforward in interpretation and analysis – and especially in linking the crime to the perpetrator – creates the need for the use of the latest software and tooling for face recognition, voice recognition, geolocation, and shadow analysis.

The availability of shadow analysis technology enables courts to calculate the time and duration of events.⁸¹ Voice analysis technology can help identify the perpetrator and/or his or her associates.⁸² This type of technology might be available to the war crimes units through cooperation agreements with private sector entities. For instance, Georgia obtained technical assistance from the private sector.⁸³ In the case of *Georgia v. Russia (II)* before the European Court of Human Rights, Georgia relied on evidence in the form of satellite imagery as well as demining reports provided by private companies from the United Kingdom,⁸⁴ United States,⁸⁵ and Norway.⁸⁶ Whilst technology provided by private companies can also prove useful in domestic criminal proceedings, judges or law enforcement officials might be interested in the exact method/technique employed by the software of a particular company to reach a given result. Not every company is willing to reveal the technicalities of the software used for security or legal (confidentiality) reasons. There are, however, other ways in which war crimes units might be able to acquire software for the analysis of digital evidence. For instance, they might be able to adapt the existing

⁸¹ *Sakhanh*, Stockholm District Court, Judgment, 16 February 2017, p. 9.

⁸² *Prosecutor v Al-Mandlawi and Sultan*, Goteborg District Court, Judgment, 14 December 2015, p. 8.

⁸³ For context, Georgia ratified the Rome Statute in September 2003. Following ratification, Georgia harmonised its existing domestic legislation with the Rome Statute. Section 14 of the 1999 Criminal Code of Georgia consists of provisions for prosecution of crimes enshrined in the Rome Statute and other violations of international humanitarian law. Under Art. 5 of the 2013 Law of Georgia, The Prosecutor General of Georgia is empowered to undertake activities to investigate international crimes according to the Georgian criminal law and other international treaties ratified by Georgia. To date, however, no such crimes have been prosecuted in Georgia. See also, Iryna Marchuk and Aloka Wanigasuriya, ‘Venturing East: The Involvement of the International Criminal Court in Post-Soviet Countries and its Impact on Domestic Processes’ (2021) 44(3) *Fordham International Law Journal* 735.

⁸⁴ European Court of Human Rights, *Georgia v. Russia (II)*, Application no. 38263/08, Judgment (Merits) 21 January 2021, p. 20, available at: hudoc.echr.coe.int/eng?i=001-207757.

⁸⁵ *Ibid.* p. 268.

⁸⁶ *Ibid.* p. 230.



software available to other law enforcement units, develop their own software or request specialised forensic and technical support from Europol.⁸⁷

Cooperation with the private sector might become even more important in light of challenges faced by investigators searching for corroborating user-generated evidence, created through the deletion by social media platforms such as Facebook of content that allegedly promotes extremism.⁸⁸ When the deletion is automated, and the data was not even fully uploaded, the investigators will not be able to trace the origins and use it in court.⁸⁹ In the Conclusions of the 24th meeting of the EU Genocide Network, the Network members “emphasised that this content can simultaneously constitute or could lead to evidence in core international crimes cases. The Network noted that inappropriate content was increasingly being removed at the initiative of the social media companies, without any referral from public authorities, and urged them to preserve the removed content for a long period of time with sufficient data enabling future searches (metadata of the removed content)”.⁹⁰

On the other hand, war crimes units might already have established working relationships with social media platforms that enable swift information sharing.⁹¹ With time, newly established war crimes units may also be able to request more information from Facebook or Twitter than is openly available. The EU Genocide Network is also in contact with Google, YouTube and Facebook and receives updates relating to tools available for effective cooperation between service

⁸⁷ Europol, ‘Europol Strategy 2016-2020’ (2016), available at: www.europol.europa.eu/sites/default/files/documents/europol_strategy_2016-2020_0.pdf; Europol, ‘Operational Coordination & Support’, available at: www.europol.europa.eu/activities-services/services-support/operational-coordination-support.

⁸⁸ See also, Human Rights Watch, “‘Video Unavailable’ Social Media Platforms Remove Evidence of War Crimes” (10 September 2020), available at: www.hrw.org/sites/default/files/media_2020/09/crisis_conflict0920_web_0.pdf.

⁸⁹ Syria Justice and Accountability Centre, ‘How Facebook Failed Syria’ (14 January 2021), available at: syriaaccountability.org/updates/2021/01/14/how-facebook-failed-in-syria/; Armin Rosen, ‘Erasing History: YouTube’s Deletion Of Syria War Videos Concerns Human Rights Groups’, *Fast Company* (7 March 2018), available at: www.fastcompany.com/40540411/erasing-history-youtubes-deletion-of-syria-war-videos-concerns-human-rights-groups.

⁹⁰ Conclusions of the 24th meeting of the EU Genocide Network, 24-25 May 2018, available at: www.eurojust.europa.eu/conclusions-24th-meeting-genocide-network-hague-24-25-may-2018.

⁹¹ See also, Priya Pillai, ‘The Republic of The Gambia v Facebook, Inc.: Domestic Proceedings, International Implications’, *Opinio Juris* (8 August 2020), available at: opiniojuris.org/2020/08/08/the-republic-of-the-gambia-v-facebook-inc-domestic-proceedings-international-implications/.



providers and judicial or law enforcement authorities, as well as procedures to preserve content removed from the Internet on request of a national authority.⁹²

Obtaining the relevant software needed for the verification and authentication of digital evidence is important. Furthermore, establishing working relationships with social media companies to recover digital evidence that otherwise might become deleted under the grounds of removing content that promotes extremism is central to investigating and prosecuting international crimes.

4.4. Victims' Testimony

It is often the victims' determination to pursue justice that leads to successful war crimes investigations and prosecutions. For this reason, it is important to invest in adequate assistance and victims' rights guarantees. In the words of several NGOs: "[w]ithout the courage and determination of those victims who act as complainants or witnesses, many such cases would never reach trial. As such, States at the forefront of investigating and prosecuting international crimes at the domestic level are increasingly recognising that supporting, protecting and empowering victims is crucial to building strong cases".⁹³

Important lessons can be learned from victims' rights guarantees available in the Netherlands, Germany, Sweden and Finland.

Victims in the Netherlands benefit from fewer procedural rights than those in the other countries examined in this report and rarely assume an active role in proceedings. Moreover, the rights guaranteed to victims under Dutch law are often poorly implemented in practice, with the victim's ability to exercise his or her rights largely dependent on the individual attitude of the

⁹² Conclusions of the 24th meeting of the EU Genocide Network, 24-25 May 2018, available at: www.eurojust.europa.eu/conclusions-24th-meeting-genocide-network-hague-24-25-may-2018.

⁹³ Joint NGO Letter to the Core Group and Co-Sponsoring States to the initiative for the creation of a new multilateral treaty for the domestic prosecution of the most serious international crimes, also known as the 'Mutual Legal Assistance (MLA) Initiative' in response to The Draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes ('Draft Convention') and in advance of the Second Preparatory Conference of the MLA initiative (11-14 March 2019), available at: www.fidh.org/en/issues/international-justice/ngos-call-for-the-inclusion-of-victims-rights-into-the-mutual-legal.



police, prosecutor or judge handling the case.⁹⁴ Unless the victim is heard as a witness, the victim cannot by him- or herself introduce evidence in the criminal proceedings.⁹⁵

Conversely, in Germany victims in core international crimes proceedings (as *Nebenklage* – joint plaintiff) enjoy a number of additional rights to regular victims, which entitle them to active participation during the trial, equal to the rights of defence. In particular, as a joint plaintiff, the victim has the right to: attend the trial; apply for the recusal of judges; apply for the rejection of expert witnesses; question the defendant and witnesses; challenge orders of the presiding judge; introduce evidence; make statements; receive the same information as the prosecution; and appeal decisions of the court.⁹⁶

Similarly, in Sweden victims can participate in criminal proceedings as an injured party (*Målsägare*) in order to claim compensation from the offender. A victim can also become an injured party by supporting the prosecution. Injured parties that support the prosecution are accorded several procedural rights and are considered formal parties to the criminal proceedings. This means they can appeal against the decision on compensation as well as the verdict and sentence. Injured parties who support the prosecution have the following procedural rights: right to obtain a copy of the “preliminary investigation protocol” (criminal file); right to question witnesses and the accused; right to make submissions on the guilt of the accused; and right to appeal the decision on compensation, as well as the verdict and sentence imposed on the offender.⁹⁷ These rights apply once the accused has been indicted.⁹⁸

In Finland, victims as injured parties enjoy the right to endorse charges; right to present new evidence in support of these charges;⁹⁹ right to legal representation;¹⁰⁰ right to a support

⁹⁴ VOIARE Netherlands Report, ‘Victims of Crime Implementation Analysis of Rights in Europe’ (2019) 6, 85.

⁹⁵ Open Society Justice Initiative, ‘Universal Jurisdiction Law and Practice in The Netherlands’ (May 2019), p. 23, available at: www.justiceinitiative.org/publications/universal-jurisdiction-law-and-practice-in-the-netherlands.

⁹⁶ Section 401 of the German Code of Criminal Procedure; Open Society Justice Initiative, ‘Universal Jurisdiction Law and Practice in Germany’ (April 2019), available at: www.justiceinitiative.org/publications/universal-jurisdiction-law-and-practice-germany; Natalie von Wistinghausen, ‘Victims as Witnesses: Views from the Defence’ in Thorsten Bonacker and Christoph Safferling (eds.), *Victims of International Crimes: An Interdisciplinary Discourse* (T.M.C. Asser Press, 2013).

⁹⁷ Ch.20, s.8, ch.36, s.17, ch.37, s.1, Rättegångsbalk.

⁹⁸ FIDH, ‘Breaking Down Barriers: Access to Justice in Europe For Victims of International Crimes’ (October 2020), p. 96, available at: reliefweb.int/report/world/breaking-down-barriers-access-justice-europe-victims-international-crimes.

⁹⁹ Criminal Procedure Act, Chapter 1, Section 14(3).

¹⁰⁰ *Ibid.*, Chapter 2, Section 2(2).



person;¹⁰¹ right (and most often even an obligation) to attend trial;¹⁰² right to pursue a civil claim;¹⁰³ right to make statements at trial;¹⁰⁴ right to cost-free interpretation and translation.¹⁰⁵ The judgment and court orders, which are necessary to ensure their rights, must be translated into a language they understand.¹⁰⁶

The adoption and implementation of legislation which enables the active participation of victims in international criminal proceedings, for example as accessory prosecutors or joint plaintiffs, is integral to successful prosecutions. Granting victims procedural rights will enable more to come forward with their testimonies, and thus facilitate investigations and prosecutions.

4.5. Draft Mutual Legal Assistance Convention and Victims' Rights

Civil society organisations have been advocating for the strengthening of victims' rights guarantees in domestic prosecutions. The relevance of victims' rights has been highlighted in the latest draft of the Mutual Legal Assistance (MLA) Convention, explicitly recognising the rights of victims and witnesses in core international crimes proceedings.

Several NGOs involved in providing assistance to victims of core international crimes have been advocating for the strengthening of victims' rights guarantees in the final draft of the MLA Convention.¹⁰⁷ The Diplomatic Conference was initially planned for June 2020 in Ljubljana, Slovenia, however it was postponed to 2022 due to COVID-19. The following section outlines the updated victims' rights guarantees in the Draft MLA Convention.

¹⁰¹ Ibid., Chapter 2, Section 3.

¹⁰² Ibid., Chapter 8, Section 8(1) and Section 1(2).

¹⁰³ Ibid., Chapter 3, Section 9(1) and Section 10(1).

¹⁰⁴ Ibid., Chapter 6, Section 7(1).

¹⁰⁵ Ibid., Chapter 6a, Section 2(3).

¹⁰⁶ Ibid., Chapter 6a, Section 3(1).

¹⁰⁷ FIDH, 'Enhancing Victims' Rights in Mutual Legal Assistance Frameworks: Recommendations for the Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes' (1 May 2020), available at: www.fidh.org/IMG/pdf/policysubmission750a.pdf.



As expressed in the Joint Letter of the NGOs to the drafters of the MLA Initiative dated 8 March 2019, “victims play an important role in investigations and prosecutions of international crimes before domestic courts and tribunals”.¹⁰⁸

Under Art. 59(1) of the Draft MLA Convention “each State Party shall take the necessary measures to ensure that victims, witnesses and their relatives and representatives, experts, as well as other persons participating in or cooperating with any investigation, prosecution, extradition or other proceeding within the scope of this Convention, shall be protected against ill-treatment, intimidation, secondary victimisation or reprisal as a consequence of such participation or cooperation”.¹⁰⁹ Under Art. 60(4) of the Draft MLA Convention “[e]ach State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defense”.

At the time of writing of this report the Draft MLA Convention has 76 Supporting States, including Ukraine which has deposited a permanent declaration of support.

The adoption of the new Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes, that is still in the drafting stage, would increase the protection of victims’ rights. Increasing victim protections would hopefully encourage more to come forward and provide evidence.

¹⁰⁸ ‘Joint NGO Letter to the Core Group and Co-Sponsoring States to the initiative for the creation of a new multilateral treaty for the domestic prosecution of the most serious international crimes, also known as the ‘Mutual Legal Assistance (MLA) Initiative’ in response to The Draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes (‘Draft Convention’) and in advance of the Second Preparatory Conference of the MLA initiative (11-14 March 2019)’, available at: www.fidh.org/en/issues/international-justice/ngos-call-for-the-inclusion-of-victims-rights-into-the-mutual-legal.

¹⁰⁹ Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes (version 20 March 2020), available at: www.centruminternationaalrecht.nl/mla-initiative.



5. Coordination and Cooperation

5.1. Practical Advantages of Ratifying the Rome Statute

Ukraine committed to secure the Rome Statute's ratification and implementation under Art. 8 of the European Union-Ukraine Association Agreement.¹¹⁰ Ratifying the Rome Statute would signal Ukraine's overall commitment to accountability for international crimes and allow it to vote in elections and decisions of the ICC Assembly of States Parties. One of the further practical advantages of ratifying the Rome Statute and implementing the core crimes definitions in the Ukrainian legislation would be the ability to join and actively participate in the activities of the EU Genocide Network.¹¹¹ The EU Genocide Network expressly stated in November 2019 that the pre-requisite to join its activities as an Observer State is Ukraine's ratification of the Rome Statute. The EU Genocide Network considered that any new Observer State to the Network should first be a party to the Rome Statute of the ICC and implement the relevant crimes in their domestic legislation.¹¹²

The EU Genocide Network "catalyses the creation of national units by providing resources, models, and examples of comparative state practice, but also improves the functioning and operations of national units, providing detailed guidance on confronting practical challenges".¹¹³

The EU Genocide Network meetings are divided into different types of sessions. Open sessions focus on exchange of best practices with human rights organisations that are later summarised in the form of "Conclusions from EU Genocide Network Meetings" and posted on the Eurojust website twice a year. Closed sessions allow prosecutors to share more sensitive content on specific cases and exchange views more freely. Meetings are open to Observer States

¹¹⁰ Art. 8 reads: "The Parties shall cooperate in promoting peace and international justice by ratifying and implementing the Rome Statute of the International Criminal Court (ICC) of 1998 and its related instruments". See here, eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0529%2801%29.

¹¹¹ See, ULAG, 'Principle of Complementarity: International Justice in Ukraine' (9 December 2019), available at: justiceforthefuture.org.ua/uploads/MaterialDocument/ULAG_complementarity_web_en_002_1594211912.pdf.

¹¹² Eurojust, 'Conclusions of the 27th meeting of the Network for investigation and prosecution of genocide, crimes against humanity and war crimes' (7 November 2019), available at: www.eurojust.europa.eu/conclusions-27th-meeting-genocide-network-6-7-november-2019.

¹¹³ David Mandel-Anthony, 'Hardwiring Accountability for Mass Atrocities' (2019) 11 *Drexel Law Review* 903, 948.



that are not EU Member States. The Network helps national prosecution units identify emerging challenges and trends and design effective solutions.¹¹⁴

Therefore, following the Verkhovna Rada's adoption of Draft Law 2689 "On Amending Some Legislative Acts of Ukraine Concerning Implementation of the Provisions of International Criminal and Humanitarian Law",¹¹⁵ once the President signs it and Ukraine ratifies the Rome Statute, the Ukrainian war crimes unit could fully benefit from the EU Genocide Network facilities, contacts, resources and trainings. In addition, as a result of ratifying the Rome Statute, the Ukrainian war crimes unit could participate in the biannual EU Genocide Network meetings during which the Network members exchange best practices and lessons learned from ongoing investigations. The opportunity to participate in trainings and meetings with other European war crimes units is an added value of ratifying the Rome Statute.

The ratification of the Rome Statute of the International Criminal Court and implementation in national legislation is fundamental to ensuring accountability for international crimes. Joining the EU Genocide Network as an Observer State also aids accountability efforts for relevant states such as Ukraine.

5.2. Advantages of Participating in Joint Investigation Teams

As specialised war crimes units continue to grow and new war crimes units are established in various countries they increasingly cooperate with each other. Such cooperation takes place through networks and exchange of best practices, but also more formally through mutual legal assistance agreements and joint investigation teams (JITs).¹¹⁶ A "JIT" is an "international cooperation tool based on an agreement between competent authorities ...of two or more States, established for a limited duration and for a specific purpose, to carry out criminal investigations in

¹¹⁴ Ibid., 949.

¹¹⁵ Civil Society Letter to the Ukrainian MPs (16 September 2020), available at: t.co/xJxGIAa6aR?amp=1; Draft Law No. 2689 "On Amending Some Legislative Acts of Ukraine Concerning Implementation of the Provisions of International Criminal and Humanitarian Law", dated 27 December 2019.

¹¹⁶ Human Rights Watch, 'The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands' (2014), p. 130, available at: www.hrw.org/report/2014/09/16/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and.



one or more of the involved States”.¹¹⁷ A JIT is one of the most advanced methods in international cooperation in criminal matters. In practice, it can consist of prosecutors, judges and law enforcement officers and is established for a fixed period of 12 to 24 months to investigate a particular case or network of major cross-border criminal activities.

When combined with the use of JITs, structural investigations improve the ability of national war crimes units to conduct high-profile international investigations.

The EU legal framework for setting up JITs between Member States can be found in Art. 13 of the 2000 EU Mutual Legal Assistance Convention and the 2002 Framework Decision on JITs. JITs can also be set up on the basis of other international instruments, particularly with and between competent authorities of states outside the European Union (Third States).¹¹⁸

Providing operational, legal and financial support to JITs is a key part of Eurojust’s mission.¹¹⁹ An EU Network of National Experts on Joint Investigations Teams (JITs Network)¹²⁰ was founded in 2005. The JIT Network develops guidelines and evaluates the use of JITs in the European context.

Ukraine has been a part of one JIT in 2014, two JITs in 2017, three JITs in 2018 and four JITs in 2019.¹²¹ Eurojust has concluded twelve cooperation agreements with Third States: Albania, Georgia, Iceland, Liechtenstein, Moldova, Montenegro, Norway, North Macedonia, Serbia, Switzerland, Ukraine and the United States. Countries that have concluded a cooperation agreement with Eurojust may post a Liaison Prosecutor to Eurojust. Currently, Eurojust hosts Liaison Prosecutors from Norway, Switzerland, Montenegro, the United States, North Macedonia, Ukraine and Serbia.¹²² By far most JITs with Third State involvement were set up with Norway and Switzerland, with the support of the respective Liaison Prosecutors posted at Eurojust. The

¹¹⁷ Europol, ‘Joint Investigation Teams – JITS’, available at: www.europol.europa.eu/activities-services/joint-investigation-teams.

¹¹⁸ Council of the European Union, ‘Joint Investigations Team Practical Guide 6182/1/17’ (2017), available at: www.eurojust.europa.eu/jits-practical-guide-0.

¹¹⁹ Eurojust, ‘Joint Investigation Teams’, available at: www.eurojust.europa.eu/judicial-cooperation/eurojust-role-facilitating-judicial-cooperation-instruments/joint-investigation-teams.

¹²⁰ Eurojust, ‘JITs Network’, available at: www.eurojust.europa.eu/judicial-cooperation/practitioner-networks/jits-network.

¹²¹ Eurojust, ‘Third JIT Evaluation Report Evaluations received between: November 2017 and November 2019’ (March 2020), p. 20, available at: op.europa.eu/en/publication-detail/-/publication/cb4bfd7a-9656-11ea-aac4-01aa75ed71a1/language-en.

¹²² Ibid., 21.



number of JITs with Ukraine has also increased significantly since 2018, when the Liaison Prosecutor for Ukraine joined Eurojust permanently.¹²³

Eurojust and the JITs Network Secretariat have drawn up Guidelines on JITs involving Third States, which were published in January 2019. These guidelines aim to provide more specific guidance to practitioners considering the establishment of a JIT with the involvement of a Third State. The guidelines also include in an annex particular details for setting up JITs with North Macedonia, Norway, Switzerland and Ukraine. The guidelines are available for practitioners at the JITs Restricted Area on the Eurojust website.¹²⁴

JITs play an increasing role in facilitating cooperation between EU institutions, Third States and other international and non-governmental organisations.¹²⁵ As indicated in the recent Eurojust Evaluation Report, practitioners from EU Member States increasingly see JITs as a valuable tool of judicial cooperation with Third States. In fact, as at the end of 2019, 20 EU Member States had already gathered experience in JITs with Third State involvement. To date, a total of 74 JITs have been set up with one or more Third States as members.¹²⁶ They are partially funded by Eurojust and thus arguably easily accessible for war crimes units with limited funding.¹²⁷

JITs have been particularly successful in core international crimes investigations. For instance, a JIT between Germany and France has resulted in a successful arrest by Parisian prosecutors of a Syrian national alleged to have worked for the secret services of the Syrian

¹²³ Ibid.

¹²⁴ A web platform managed by the JITs Network Secretariat to which EU judicial and law enforcement authorities can be granted access. Access can be requested at: jitsnetworksecretariat@eurojust.europa.eu.

¹²⁵ The possibility of setting up JITs between Member States is provided for in Art. 13 of the Council Act of 29 May 2000 establishing in accordance with Art. 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. See also, Council Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA).

¹²⁶ Eurojust, 'Third JIT Evaluation Report Evaluations received between: November 2017 and November 2019' (March 2020), p. 19, available at: op.europa.eu/en/publication-detail/-/publication/cb4bfd7a-9656-11ea-aac4-01aa75ed71a1/language-en.

¹²⁷ Eurojust, 'JITs funding', available at: www.eurojust.europa.eu/judicial-cooperation/eurojust-role-facilitating-judicial-cooperation-instruments/joint-investigation-teams/funding.



regime.¹²⁸ Moreover, arrests were carried out in the Netherlands on the basis of the information provided by the German police in relation to alleged crimes committed in Syria.¹²⁹

Participation in Eurojust projects as a Third State and formation of Joint Investigations Teams (JITs) with EU Member States and other third countries has proven to greatly facilitate domestic investigations and prosecutions.

5.3. Advantages of Joining the Europol Analysis Project on Core International Crimes

A valuable option for Ukraine is to join the Europol Analysis Project on Core International Crimes (AP-CIC). As a Third Operational partner to Europol, Ukraine is eligible for associated membership to AP-CIC. Joining the Europol Analysis Project is a way for newly formed war crimes units to receive forensic and technical support and facilitate their work through evidence sharing (including biodata, communications, locations etc.). Non-EU or third-party countries and international organisations that have concluded an operational agreement with Europol can also exchange personal data with the AP-CIC.

The benefits of joining the Europol Analysis Project include a stand-alone maximum security database connected to all other Europol databases (including counter-terrorism databases, serious organised crime database); core international crimes data collection from different sources (law enforcement, NGOs, international organisations, military); a Secure Information Exchange Network Application (SIENA) – high security communication tools; institutional/long-term storage; provider ownership; automatic crosschecking now and in future; tailored analysis and intel support (open source and social media/financial intel/face recognition/mass data/CTW/satellite imagery/PNR).

¹²⁸ Alexander Heinze, ‘Private Investigators Helped Germany Arrest Two Former Syrian Secret Service Officers’, *EJIL:Talk!* (26 February 2019), available at: www.ejiltalk.org/private-investigators-helped-germany-arrest-two-former-syrian-secret-service-officers/.

¹²⁹ Politie, ‘Suspected commander of Jabhat al-Nusra battalion arrested in the Netherlands’ (21 May 2019), available at: www.politie.nl/nieuws/2019/mei/20/suspected-commander-of-jabhat-al-nusra-battalion-arrested-in-the-netherlands.html.



Joining the Europol’s Analysis Project on Core International Crimes (AP-CIC) allows states to benefit from forensic and technical support as well as information exchange while investigating international crimes.

5.4. Advantages of Cooperation with Non-governmental Organisations

Close cooperation with private investigators and NGOs, for instance Yazda and CIJA, is among the strengths of the German prosecutorial strategy for investigating and prosecuting core international crimes cases.¹³⁰

Yazda is a global Yazidi NGO whose documentation work in Iraq since 2015 was instrumental to the prosecution of Jennifer W. in the Higher Regional Court of Munich and the identification of the victim’s mother who now acts as the accessory prosecutor (*Nebenklage*) in that case.¹³¹

CIJA’s model (discussed already in Part IV above) relies on training local Syrian and Iraqi human rights activists and investigators.¹³² CIJA investigates the alleged crimes committed by the Syrian regime and the IS with the aim of bringing high-ranking perpetrators to justice. Despite the difficult situation in Syria, CIJA was able to extract over a tonne of documents from the Syrian regime (1040 kg) and 112.5 kg of materials from IS.¹³³ The documents were extracted from Syria and are now being used in European courts to prosecute regime members and IS fighters.

¹³⁰ Alexander Heinze, ‘Private International Criminal Investigations’ (2019) 2 *Zeitschrift für Internationale Strafrechtsdogmatik* 169, 172; see also, Alexander Heinze, ‘Private Investigators Helped Germany Arrest Two Former Syrian Secret Service Officers’, *EJIL:Talk!* (26 February 2019), available at: www.ejiltalk.org/private-investigators-helped-germany-arrest-two-former-syrian-secret-service-officers/.

¹³¹ Yazda, ‘ISIS Militant on Trial in Munich for Membership of a Foreign Terrorist Organization’ (10 April 2019), available at: www.yazda.org/post/isis-militant-on-trial-in-munich-for-membership-of-a-foreign-terrorist-organization.

¹³² Melinda Rankin, ‘The Future of International Criminal Evidence in New Wars? The Evolution of the Commission for International Justice and Accountability (CIJA)’ (2018) 20(3) *Journal of Genocide Research* 392; Melinda Rankin, ‘The ‘Responsibility to Prosecute’ Core International Crimes? The Case of German Universal Jurisdiction and the Syrian Government’ (2019) 11(4) *Global Responsibility to Protect* 394, 407; Michelle Burgis-Kasthala, ‘Entrepreneurial Justice: Syria, the Commission for International Justice and Accountability and the Renewal of International Criminal Justice’ (2020) 30(4) *European Journal of International Law* 1165; CIJA, ‘Annual Report 2019-2020’ (2020), available at: cijaonline.org/s/CIJA-Annual-Report-2019-2020-8w3r.pdf.

¹³³ CIJA, *ibid*.



Information from NGOs can assist in providing the necessary context to conduct structural investigations. When safe extraction of documentary evidence becomes possible, cooperation with NGOs and local investigators to facilitate document extraction is key.

6. Conclusions and Best Practices

In this report, a number of lessons learned and best practices have been identified in relation to investigations and prosecutions of core international crimes of relevance to the situation in Ukraine. Drawing on extensive desk research and the insights of practitioners, academics, and the civil society working on these issues, lessons learned from other fully operational war crimes units in Europe that conduct international criminal investigations have been identified. Particular attention was paid to the evidence selection methods and prosecutorial strategies that might be worth replicating in the Ukrainian context.

This report's objectives were to: identify best practices that can influence legislative, operational and technical reform in Ukraine to strengthen domestic war crimes prosecutions and investigations; highlight which structural elements proved vital in domestic war crimes investigations and prosecutions conducted in relation to the atrocities committed in other regions that could be replicated in the Ukrainian context; identify successful investigative methods and prosecutorial strategies used by other fully operational war crimes units; suggest types of evidence that are prioritised in the context of war crimes investigations and prosecutions in relation to other contemporary armed conflicts, for instance in Syria and Iraq; and, illustrate the advantages of joining the necessary cooperation frameworks and institutions that could facilitate core international crimes investigations and prosecutions. To achieve these objectives, the following best practices have been highlighted.



In relation to the *legal basis for the investigation and prosecution of international crimes*:

- 1. Adoption of legislation allowing universal jurisdiction for core international crimes committed by foreign nationals outside of a state's territory is an important step to fighting impunity.**

In relation to the *structure of war crimes units*:

- 2. In many situations, the establishment of “mirror” war crimes units within different police, prosecutorial and government-level bodies – such as those responsible for registering internally displaced persons/forced migrants – helps to ensure the systematic referral of potential serious crimes cases to the relevant criminal justice authorities.**
- 3. Regardless of whether a decentralised or centralised approach is taken to adjudicating international crimes, dedicated personnel should be appointed, and roles should be clearly defined. Furthermore, it is important that all courts handling core international crimes cases have access to the necessary resources, training and expertise.**

In relation to the *conduct of investigations*:

- 4. Governmental immigration bodies can prove very important in identifying potential perpetrators of international crimes – especially in countries with universal jurisdiction – and thus contribute to the opening of investigations.**
- 5. The prosecutorial strategy of structural investigation is a very efficient method of investigating international crimes in large-scale and/or lengthy conflicts, such as in Ukraine.**



In relation to the *formulation of charges*:

- 6. Adopting the practice of cumulative charging ensures that charges are representative of the crimes committed and adequately reflect the potential broad range of crimes committed by the defendant. In Ukraine, conduct might be criminalised under both the general provisions of the Criminal Code of Ukraine and Draft Law No. 2689.**

In relation to the *types of evidence*:

- 7. Pursuing the strategy of “seeking information elsewhere” helps to avoid the re-traumatisation of victims.**
- 8. Replicating the “pyramid approach” is a very efficient method of gathering evidence in situations such as Ukraine’s.**
- 9. Ensuring that domestic legislation is up-to-date with the latest technological developments and allows for wide use of digital open source evidence in domestic core international crimes prosecutions is fundamental. Furthermore, creating or strengthening working relationships with national forensic and research centres allows for the efficient verification and authentication of digital evidence.**
- 10. Domestic judges, investigators, and prosecutors should receive substantive training on using digital evidence in court. Digital evidence, or more specifically open source materials, can serve as (corroborating) evidence in domestic war crimes prosecutions.**
- 11. Obtaining the relevant software needed for the verification and authentication of digital evidence is important. Furthermore, establishing working relationships with social media companies to recover digital evidence that otherwise might be deleted under the grounds of removing content that promotes extremism is central to investigating and prosecuting international crimes.**



12. The adoption and implementation of legislation which enables the active participation of victims in international criminal proceedings, for example as accessory prosecutors or joint plaintiffs, is integral to successful prosecutions. Granting victims procedural rights will enable more to come forward with their testimonies, and thus facilitate investigations and prosecutions.

13. The adoption of the new Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes, that is still in the drafting stage, would increase the protection of victims' rights. Increasing victim protections would hopefully encourage more to come forward and provide evidence.

In relation to *cooperation and coordination*:

14. The ratification of the Rome Statute of the International Criminal Court and its implementation in national legislation is fundamental to ensuring accountability for international crimes. Joining the EU Genocide Network as an Observer State also aids accountability efforts for relevant states such as Ukraine.

15. Participation in Eurojust projects as a Third State and formation of Joint Investigations Teams (JITs) with EU Member States and other third countries has proven to greatly facilitate investigations and prosecutions.

16. Joining the Europol's Analysis Project on Core International Crimes (AP-CIC) allows states to benefit from forensic and technical support as well as information exchange while investigating international crimes.



17. Information from NGOs can assist in providing the necessary context to conduct structural investigations. When safe extraction of documentary evidence becomes possible, cooperation with NGOs and local investigators to facilitate document extraction is key.