Transnational crime without transnational prosecution: how positive obligations to cooperate may inspire national judicial authorities

de Jonge, B.

TRANSNATIONAL CRIME WITHOUT TRANSNATIONAL PROSECUTION: FROM TREATY OBLIGATIONS TO COOPERATE TO NEW INSPIRATION FOR NATIONAL JUDICIAL AUTHORITIES TO WORK TOGETHER

Boudewijn de Jonge*

ABSTRACT: The enforcement of transnational criminal law is left almost exclusively to national authorities. Public prosecutors and investigating judges play a key role in this field. This generates a seemingly dichotomous situation in which national bodies are faced with crime that is inherently transnational in nature. Each judge and each public prosecutor is expected to serve, their own national legal order first, bound to respect the limits of its jurisdiction set by national law, ultimately serving adjudication before a national court. This article reflects on the role of judicial authorities in the fight against transnational crime. Various treaty obligations expect them to coordinate with each other, and to make reasonable use of cooperation and coordination mechanisms. Over the last decade, a small body of caselaw from the European Court of Human Rights has emerged, setting a standard on how judicial authorities should deal with certain types of cross-border crime. Notwithstanding those obligations, a handful of empirical studies indicate that it remains very difficult for an average investigating judge or public prosecutor to address the transnational dimension of crime with a limited national mandate and competences. The author argues that a principle of solidarity should guide the work of the judicial authorities when their own case appears relevant to a foreign jurisdiction. Examples from practice show how a more concerted approach to transnational crime can be realized if national judicial authorities actively reckon with the interests of foreign jurisdictions when exercising their national mandate.

Key words:
- Judicial authorities
- Treaty obligations
- Collective enforcement
- Principle of solidarity
- International cooperation

1. INTRODUCTION

The enforcement of transnational criminal law is left almost exclusively to national authorities. Often public prosecutors and investigating judges play a key role in this field. This generates a seemingly paradoxical situation, in which national bodies are faced with crime that is inherently transnational in nature. Each judge and public prosecutor is expected to serve in the first place its own national legal order, bound to respect the limits of its jurisdiction set by national law, ultimately serving adjudication before a national court.

In this article, I want to reflect on the role of judicial authorities in the fight against transnational crime.[1] Through various treaty obligations, they are expected to coordinate with each other, and are obliged to reasonably use the instruments of international cooperation at

* Boudewijn de Jonge is a Senior Public Prosecutor of the Public Prosecution Service of the Netherlands. As a PhD candidate at the University of Leiden, he researches the response of investigating judges and public prosecutors in various countries to transnational organized crime. The author is grateful to the anonymous reviewers for their valuable suggestions.

1 In this article, I include public prosecutors in the concept of judicial authorities, as it happens to be the situation in many countries with a civil law tradition. Nevertheless, the thoughts developed in this article equally apply to independent public prosecution bodies that are not considered part of the judiciary under national law. This article summarizes the conceptual framework for my research as a PhD candidate at the University of Leiden.

their disposal. Also, in this article we will see how, over the last decade, a small body of caselaw from the European Court of Human Rights has emerged, setting a standard on how judicial authorities should deal with certain types of cross-border crime. Notwithstanding those obligations, a handful of empirical studies indicate that there is a lot of room for improvement of the performance of our national judicial bodies in this field. Finally, I propose a renewed appreciation of solidarity as a principle to give new impetus to a quest for a more concerted response by judicial authorities to transnational crime.

2. JUDICIAL AUTHORITIES AND PUBLIC INTERNATIONAL LAW

For practitioners it may not always be easy to see the relevance of public international law to their day-to-day business.[2] To lawyers that make up the national legal process, judicial authorities, and advocates alike, national law is the primary source for debate in the national court room. Whereas international human rights obligations have made their way into the national legal order and often into discussions in court, this is much less the case for other parts of international law, such as seemingly vague treaty obligations of effort that seem to address the executive exclusively. Take, for instance, the obligation included in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (UN Drugs Convention) that relates to early release and parole decisions in cases of trafficking in illicit drugs. It requires states to ensure that courts and other competent bodies pay attention to an enumerated set of aggravating circumstances of drug trafficking, every time that a decision is to be taken on early release or parole in such cases.[3] The wording and objective of this provision seemingly make it fit to rely directly on it in pleas before a court of law on early release or parole proceedings. Yet, an extensive online search found that virtually no national court decisions mention it.[4]

Nations may choose different paths when integrating public international law into their national legal order. Traditionally, a distinction is made between countries that apply a monistic model, in which international law forms part of the body of law to be applied in court directly, versus a dualistic model, in which transposition into national law is required before it can be relied upon in court. From an international public law perspective, though, treaty obligations bind each state organ equally, including its judicial branch. Article 27 of the Vienna Convention on the Law of Treaties implies that all national state institutions are to obey the treaty obligations undertaken by their respective state. The internal distribution of powers within a state cannot excuse non-compliance with treaty obligations. In such terms, the International Court of Justice (ICJ) considered in the *LaGrand* case that all internal organs of the state were to respect its provisional ruling.[5] In the case of *Djibouti v France* before the ICJ,

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2 To some extent, national judicial authorities may even be considered actors under international law, when liaising directly with other authorities, such as participating in a joint investigation team. Various multilateral treaties provide for a basis for direct cooperation between judicial authorities. National judges in particular have been considered actors in international law, it being their jurisprudence that is a profound source for the interpretation of international law. See: Antonios Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 Loy LA Intl & Comp L Rev 133; Filiz Kahraman, Nikhil Kalyanpur, and Araham L Newman, 'Domestic courts, transnational law, and international order' (2020) 26(1) Eur J Int Rel 96.

3 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988) 1582 UNTS 95 art 3(7).

4 Search conducted on 24 August 2023 with various excerpts from the provision, using the search engines of WestLaw and the European Case Law Identifier (ECLI) search engine, as well as Google and Google Scholar. No cases from national courts could be identified, other than one judgement from India (*Dadu Tulsidas v the State of Maharashtra*, Supreme Court of India, 12 October 2000).

5 *LaGrand Case (Germany v United States of America)* (Provisional Measures) [1999] ICJ Rep 9 [28]; *LaGrand Case (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466 [111].

the Court had no problem in assessing the work of a single French investigating judge against the international commitments undertaken by the state of France as a party to a bilateral cooperation treaty.[6] Likewise, the ICJ assessed in another case the legality of a decision of a court of appeal in Florence, Italy, and instructed the Italian state that the wrongful judicial decision had to be remedied.[7]

When discussing the role of judicial authorities in fighting cross-border crime, it is thus important to understand what the legally binding commitments that states have signed up to are. Judicial authorities are as much bound by positive obligations to engage in cooperation as they are by human rights obligations that may sometimes prevent them from cooperating. In fulfilling their duties, they should be aware of obligations under international law that their state has signed up to. Which brings us to consider some of the treaty obligations relating to transnational crime that many states have committed themselves to.

3. POSITIVE OBLIGATIONS TO COOPERATE INTERNATIONALLY

3.1 Treaty Law

One of the ways to counter cross-border crime has been the creation of treaty regimes. These treaties commonly aim to harmonize parts of substantive criminal law, provide instruments for improved cooperation between police and judicial authorities, and include wide obligations of effort to counter cross-border crime.

One treaty of particular relevance is the United Nations Convention against Transnational Organized Crime (UNTOC).[8] The general objective of the convention according to its first article is to 'promote cooperation to prevent and combat transnational organized crime more effectively.' As to cooperation, at first view the treaty appears only to hold obligations to cooperation in specific modalities, including extradition, transfer of proceedings, and affording mutual legal assistance at the request of another state party.

A general obligation of effort that states should organize their investigations and prosecutions of transnational organized crime in a concerted way is not there. One might come to think that the provisions on cooperation merely serve the demand side, and the treaty does not strive for a coordinated response that goes beyond the interest of a single requesting state. Yet, the drafters of the convention clearly wanted to inspire states to actively seek cooperation. It is indeed the very first objective of the convention mentioned in its first article. Article 11(2) requires the States Parties to endeavor:

> … to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered by this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

The wording of this provision originates from the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. At the time this formula was drafted, it was primarily aimed at introducing some limitation to prosecutorial discretion in

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6 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177.

7 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) [2012] ICJ 99 [133], [137], [139]. On 29 April 2022, Germany filed a new case against Italy, contending the Italian courts had ignored the ICJ Judgement. This case is still pending before the ICJ.

8 United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 (UNTOC).

countries where such discretion exists.[9] With that history in mind, the provision may at a first reading seem of lesser relevance to states that adhere to a legality principle, where there is no or little discretion as to the prosecution of suspected offenders. Nevertheless, the reality is that authorities in both systems usually have quite a lot of leeway in deciding how to deal with the cross-border dimension of an investigation. This discretion commonly includes choices as to whether or not to seek evidence from another state; deciding the geographical scope of the charges; whether extradition of foreign-based offenders is sought; whether prosecution shall be transferred to another jurisdiction; and if potentially incriminating evidence should be laid before a foreign competent authority. These examples show that in both systems there is likely to be ample room for discretionary choices, in particular to the question of if and how international cooperation takes place. It is to that ample room for discretion where Article 11(2) of the convention is relevant.

When interpreting the obligation of Article 11(2) to use discretionary legal powers in an effective way, this should be done in keeping with the primary objectives of the Convention as laid down in Article 1. The objective of the convention to promote cooperation and more effective enforcement should guide the interpretation of Article 11(2).[10] In doing so, the use of discretionary legal powers should be interpretated as demanding an effective cross-border prosecutorial strategy toward transnational organized crime. The Legislative Guide to the convention also touches upon this point where it reads:

305. […] Therefore, in addition to harmonizing substantive provisions, States need to engage in a parallel effort with respect to the issues of prosecution, adjudication and punishment.

Whereas a direct obligation to cooperate in every single case cannot be read in the wording of Article 11(2) or another provision of the convention, it is clear that it holds an obligation to strive for cooperation in cases of transnational organized crime. Whereas this obligation of effort to 'maximize' the effectiveness of law enforcement leaves a great discretion to states and in no way dictates conduct in a particular case, it still is a binding legal obligation. The ICJ referred in an incidental decision to the UNTOC as an obligation to 'participate in the international co-operation mechanism referred to therein.'[11] Indeed, the convention does not just open venues for cooperation, it contains an obligation of effort to make use of the mechanism.

Such an obligation of effort is relevant to national judicial authorities, which can be illustrated by the *Djibouti v France* case of the ICJ. The Court was asked in that case to interpret an explicit obligation of effort to cooperate in criminal matters, included in a bilateral treaty between the two litigant states. Amongst others, Djibouti argued that France violated the obligation to cooperate, included in the bilateral mutual legal assistance treaty between the two states.[12] France argued that these 'fairly vague' provisions could not be regarded as legally binding obligations to cooperate. The ICJ rejected the reading by the French government on this point. It ruled that these provisions concerned obligations of law, 'not bereft of legal

[9] As pointed out by Cecily Rose, 'Enforcing the "Community Interest" in Combating Transnational Crimes: The Potential for Public Interest Litigation' (2022) 69 Netherlands International Law Review 57, fn 20.

[10] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31 prescribes that good faith treaty interpretation should take place in accordance with the ordinary meaning of the terms of the treaty, in the light of the its object and purpose. Great weight is attributed to the purpose that the contracting states intent to achieve, and enabling the provision to be 'useful and effective.'

[11] *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Provisional Measures) [2016] ICJ 1148 [48]. France had contended that art 11(2) was just a recommendation and implied in no way specific conduct in a particular criminal proceeding. The ICJ ultimately held that it had no jurisdiction to rule on that part of case.

[12] Convention Concerning Judicial Assistance in Criminal Matters between France and Djibouti (adopted 27 September 1986, entered into force 16 November 1992) 1695 UNTS 298.

content' and 'articulated as obligations of conduct or, in this case, of co-operation.'[13] The Court went on to assess if the French judiciary had adhered in good faith to this treaty provision in their refusal of assistance to Djibouti. The approach of the ICJ in this case reminds us that obligations of cooperation in this field are not just to be regarded as policy commitments, but they should guide judicial bodies in their day-to-day work.

Aside from the more broadly defined obligations to cooperate, various conventions lay down specific obligations to engage in coordination or consultation.[14] Whilst the 1988 Drugs Convention only instructs to seek consultation when conflicting investigatory needs arise, UNTOC takes a broader perspective on it and instructs to seek coordination whenever two procedures deal with 'the same conduct.'[15] In the context of the European Union (EU), the topic of coordination and consultation is addressed specifically in a 2009 Framework Decision, as well as in various provisions regulating the relationship of national authorities with Eurojust.[16] The EU Framework Decision instructs national judicial authorities to initiate consultations with their counterpart if they have 'reasonable grounds' to believe that parallel proceedings exist in another county. This law does not regulate the actual outcome of that consultation process, but clearly demands a proactive stance when overlapping procedures are anticipated, in the interest of an efficient and proper administration of justice. Specifically, to improve coordination in organized crime cases, in 2009 an EU-wide obligation was introduced to inform Eurojust of investigations that seek assistance from multiple jurisdictions.[17] This not only serves to prevent *ne bis in idem* situations, but also allows for a concerted response to transnational organized crime.

In cases of transnational crime, the situation of related procedures in multiple jurisdictions frequently occurs. The aforementioned legal obligations illustrate that, both on the international level, and within the EU, judicial authorities are expected to actively seek coordination in such a situation. Where illicit flows of goods or money cross international borders, so should the investigations that pursue them.

International cooperation and coordination are not merely instruments that may discretionarily be sought when it serves the interest of a national investigation. Reading the international obligations cited here, one may expect from national authorities an effective internationally-oriented strategy and a proactive stance as to coordination in cases of transnational crime. A similar line of expectations as to the conduct of judicial authorities is developing in the field of human rights law.

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13 *LaGrand Case* (n 6) [104].

14 Such as: Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 19 December 1988, entered into force 11 November 1990) 1582 UNTS 164 art 7(17); International Convection Against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205 art 6(2); UNTOC (n 8) art 15(5).

15 ibid. The Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41 art 42(5) contains a similar provision.

16 Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings [2009] OJ L328/42; Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA [2018] OJ L295/138, art 21 (Eurojust Regulation). Eurojust is the agency of the EU that facilitates and coordinates cooperation between judicial authorities in criminal matters.

17 Eurojust Regulation (n 16) art 21(5). This obligation was first introduced by Council Decision 009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2009] OJ L138/14.

3.2 Human Rights Law

Over the last decade, a small but consolidating body of jurisprudence of the European Court of Human Rights (ECtHR) saw the light in which another set of obligations to engage in cross-border collaboration can be found.[18] These obligations find their roots in what has been called 'the coercive side' of human rights law, by which is meant that states may be required to initiate criminal law proceedings to counter serious violations of human rights.[19]

In the *Rantsev v Cyprus and Russia* judgment from 2010, the ECtHR took a position for the first time on the cross-border dimension of positive obligations for investigating authorities.[20] The case concerned the cross-border human trafficking of a Russian national who was brought to Cyprus for sexual exploitation. Upon her death, her father instigated proceedings against both countries for the failure to properly investigate the circumstances surrounding her death. In its judgment, the Court reiterates, in relation to trafficking of human beings, the general obligation of states to effectively investigate such a serious violation of human rights. The Court then goes on to describe that the duty to ensure an effective investigation may also entail the obligation to seek mutual legal assistance. Further, the Court indicates that the effective execution of mutual legal assistance requests may be part of the obligation incumbent on the state where the alleged facts occurred:

In addition to the obligation to conduct a domestic investigation into events occurring on their own territories, member States are also subject to a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories.[21]

Amongst other findings, the Court concluded both countries failed to conduct an effective joint investigation.

In 2019, the Court continued that line of reasoning in the case of *Güzelyurtlu v Cyprus and Turkey* concerning the investigation of the murder of a family of three in 2005.[22] Whilst the family was murdered on the territory of Cyprus, the suspects came from the northern side of the island, which is under the effective control of the Turkish state. Due to the long-standing dispute between the two states over the control of the island, the authorities did not manage to bring the suspected murderers to justice. In its judgment, the Court indicates that both states were expected to exhaust in good faith all possibilities to investigate the murders, including the use of mutual legal assistance. The Court touches in this case upon the long delays that may come with cross-border cooperation, and indicates that requests should be sent and executed with due care. The Court ultimately held both states responsible for their failure to cooperate in the investigation.

In 2021, the ECtHR issued its judgment in the case of *Zoletic v Azerbaijan*, which concerned the alleged labour exploitation of 33 construction workers from Bosnia and Herzegovina. They complained of having been subjected to forced labor in Azerbaijan. Amongst other issues, the Court addresses the requirement to instigate effective criminal proceedings in such situations. Whilst the prosecutor's office in Bosnia and Herzegovina issued multiple letters of request to Azerbaijan and achieved two convictions, the Azerbaijani authorities had received reports on the allegations but did not open any criminal investigation. The Court considers that Azerbaijani authorities had received complaints, and were aware of

[18] In the case law of the Inter-American Court for Human Rights, similar obligations to cooperate in criminal investigations can be found, yet up to now limited to cases of forced disappearances. Vera O Parra, '*La jurisprudencia de la Corte Interamericana respecto a la lucha contra la impunidad: algunos avances y debates*' (2012) 13 Revista Jurídica de la Universidad de Palermo 5.

[19] L Lavrysen and N Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Bloomsbury, 2020).

[20] *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010).

[21] ibid, para 289.

[22] *Güzelyurtlu v Cyprus and Turkey* App no 36925/07 (ECtHR, 29 January 2019) .

the proceedings in Bosnia and Herzegovina. The Court stipulates that in that situation the authorities were expected to genuinely make use of instruments of mutual legal assistance to identify and interview the victims or suspects who left its territory.[23]

In another ruling issued in 2021, the Court demands a similar proactive attitude toward cross-border evidence gathering. The *X v Bulgaria* case concerns allegations of child abuse, which the Bulgarian victims laid before the judicial authorities in Bulgaria, as well as to those of their new country of residence, Italy. Whilst various investigations had been conducted in Bulgaria, on no occasion had the authorities requested assistance from Italy, for instance to obtain the original interview records, medical certificate, or interview other witnesses. The Court expresses in its judgment that it expects the investigating authorities to exploit all means of cross-border evidence gathering, and describes several forms of assistance that could have been asked for in what should have been a thorough criminal investigation.[24]

Similarly, a state is expected to act upon finding a murder suspect on its territory and evidence may be secured, even when the murder itself may have taken place outside of its jurisdiction. So, the Court ruled in the case of *O'Loughlin v UK*, dealing with an alleged deficient response to alleged terrorists being present on the territory of the UK.[25] In that decision, emphasis is put on the need for authorities to act out of their own motion, in order to prevent impunity in cross-border situations. In relation to that urge to prevent impunity in cross-border situations, reference has to be made as well to the *Öcalan v Turkey* judgment. In that case, the Court refers to the increasing international dimension of crime and that states should work together to suppress the rise of safe havens for criminals. Referring to the need to avoid impunity as much as possible, the Court admits in that case an atypical form of extradition without any formal basis in (treaty) law.[26] In doing so, the Court allows states to look for creative ways of cooperation in order to bring offenders to justice even in absence of formal arrangements.

When read in conjunction, these judgements implicate a remarkable responsibility to engage in international cooperation and even a proactive stance, at least in those cases when the alleged crime constitutes also a serious violation of human rights.[27] The approach of the ECtHR is best summarized in the *Güzelyurtlu v Turkey* judgment, where it is recalled that this convention has a 'special character as a collective enforcement treaty [that] entails in principle an obligation on the part of the States concerned to cooperate effectively with each other in order to elucidate the circumstances of the killing and to bring the perpetrators to justice.'[28]

Whilst the ECtHR only directly addresses States Parties in its ruling, bearing in mind the exclusive role of judicial authorities in criminal proceedings, it is obvious that judicial authorities are to play a crucial role in that collective enforcement.

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23 *Zoletic v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 191 onwards.

24 *X v Bulgaria* App no 22457/16 (ECtHR, 2 February 2021), in particular, paras 217–220.

25 *O'Loughlin v UK* App no 23274/04 (ECtHR, 25 August 2005).

26 *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 May 2005), paras 88–89. Equally, the European Court of Justice balance the interest of avoiding impunity against the need for adequate protection of human rights. See, for instance: joined cases C-354 and 412/20 ECLI:EU:C:2020:1033, Opinion of AG Sánchez-Bordona [64].

27 See for critical reflections: M Pinto, 'Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34(2) Utrecht Journal of International and European Law 161–184; Sibel Top and Paul De Hert, 'Castano avoids a clash between the ECtHR and CJEU, but erodes Soering: Thinking human rights transnationally' (2021) 12 NJECL 52. But, also applauding reflections in, for instance: Davis H. and Klinkner M. 'Investigating across borders: the right to the truth in an European context' (2021) 26(4) IJHR 683.

28 Eurojust Regulation (n 22), para 232.

4. EMPIRICAL STUDIES ON INTERNATIONAL COOPERATION

Both treaty law and human rights jurisprudence demand an active role of national judicial authorities in the fight against various forms of transnational crime. While that may be the case, the mandate of these authorities and oversight over their performance depend by and large on national law and national political process. This provokes the question of how well national judicial authorities can take up that active role that is expected from them by international law.

Unsurprisingly, little is known about the effectiveness of judicial interventions in the fight against transnational crime. Rose has described in detail the ever-fragmented monitoring of the implementation of the treaties on transnational crime.[29] Yet, there exist few empirical studies that have looked into the effectiveness of judicial cooperation. Whilst international cooperation is really only one of the instruments available to judicial institutions when dealing with transnational crime, and it is only one possible factor in measuring their effectiveness, its use or under-use may still be indicative of how well national judiciaries perform in this field.

If that is the case, the available studies do not give the most reassuring impression of how national institutions manage to cope with the challenge of transnational crime. A 2009 study found that judicial authorities mainly held a negative perception of international cooperation and found that many of them actively tried to avoid it.[30] In 2011, the results of 132 structured interviews with practitioners from 18 countries were published. The respondents reported that the cross-border dimension of cases commonly hampered their case work, and in various ways they felt discouraged from engaging in international cooperation.[31] Brown and Gillespie reviewed the overseas work in 60 financial investigations in the UK. Their 2015 article describes the generally felt frustration over the execution of letters of request, and how some feel it is 'a lottery' whether any answer will be returned.[32]

In 2013, a report on judicial cooperation between Latin America and Europe was published, which described a long list of legal and organizational obstacles.[33] The long delays, lack of efficient procedures, lack of clear communication channels, and poor knowledge of instruments were amongst the long list of complaints. The application of special investigation techniques in a cross-border setting was reported in 2015 to suffer severe hindrance from legal obstacles, as well as practical obstacles such as the costs, lack of trust, and lack of training.[34]

These studies all relate to cooperation with or within the area of the EU. It appears there is scarce empirical research on cooperation in criminal matters in other parts of the world. One exception is the study done by Boister of the extradition process, interviewing 22 experts from 3 different regions in the world.[35] Although significant differences between countries were

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29 Cecily Rose, 'Treaty Monitoring and Compliance in the Field of Transnational Criminal Law' (2017) Transnational Crime 1.2–3, 40; Cecily Rose 'The Creation of a Review Mechanism for the UN Convention Against Transnational Organized Crime and Its Protocols' (2020) 114 AJIL 51.

30 Amandine Scherrer, Antoine Mégie, and Valsamis Mitsilegas, *The EU Role in Fighting Transnational Organized Crime* (EU Parliament Study, 16 February 2009).

31 Marianne Wade, *EuroNEEDs – Evaluating the need for and the needs of a European Criminal Justice System. Preliminary report* (Max Planck Institute for Foreign and International Criminal Law, 2011).

32 Rick Brown and Samantha Gillespie, 'Overseas financial investigation of organised crime' (2015) 18(3) Journal of Money Laundering Control 371.

33 European Commission, Directorate-General for Justice, M Robinson, J Luis Parra, Á Bodoque et al, *Study on judicial cooperation, mutual legal assistance and extradition of drug traffickers and other drug-related crime offenders, between the EU and its Member States and Latin American and -Caribbean (LAC) countries* (Publications Office, 2013) <https://data.europa.eu/doi/10.2838/67914>.

34 European Commission, Directorate-General for Migration and Home Affairs, *Study on paving the way for future policy initiatives in the field of fight against organised crime: Effectiveness of specific criminal law measures targeting organised crime* (Publications Office, 2014) <https://data.europa.eu/doi/10.2837/61146>.

35 N Boister, 'Global Simplification of Extradition: Interviews with Selected Extradition Experts in New Zealand, Canada, the EU and EU' (2018) 29(3) Criminal Law Forum 327.

reported, generally the extradition process was considered extremely slow.[36] The flawed judicial cooperation seems to be a global concern. In a 2020 working paper prepared by the UN Secretariat for the 2020 UN Crime Congress, a long list of obstacles is detailed that inhibits closer cooperation, including differences in legislation, criminal justice officials lacking knowledge of law and procedures, a lack of communication and coordination among institutions, a lack of trust between agencies and States, difficulties with regard to gathering evidence from abroad, and absence of legislation for the protection of witnesses and victims.[37]

Whilst numerous obstacles may hinder the use of the instruments of cooperation, another important element may go easily unnoticed when focusing too much on the instruments themselves. This concerns the limitations to the mandate or mission that is guiding the actions of the domestic institutions involved. At best, the international work seems to be disregarded in national priorities or, at worst, practitioners refer to negative incentives that inhibit doing cross-border work.[38] Vervaele remarked that 'gathering evidence transnationally […] is still very much based on the activity of the national domestic systems, which mostly work for a national agenda.'[39] There are notable exceptions to this general impression, such as the prosecution of extraterritorial grand corruption by corporate entities in some countries. Various scholars have warned of the risks of excessive exercise of extraterritorial jurisdiction.[40] Nevertheless, the limited evidence available in relation to international cooperation indicates that such a proactive stance to cooperation and the exercise of extraterritorial jurisdiction is mostly the exception.[41]

5. A PRINCIPLE OF SOLIDARITY

The concerted response by judicial authorities that treaty law and human rights law demand seems to be at odds with the plentitude of obstacles experienced. There is a strong need to take away those (legal) barriers, but that is not enough. Cooperation *is* possible in most cases, but professionals are frequently not interested or motivated to engage in cooperation. In fact, the focus on the trial in the nearby courtroom in their own national legal system does not invite

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[36] Illustrative is that the United States Justice Manual, which holds the Principles of Federal Prosecution, warns of delays both in extradition procedures and transfer of proceedings (United States Department of Justice, *Justice Manual* JM 9-15.000).

[37] Secretariat to the Fourteenth United Nations Congress on Crime Prevention and Criminal Justice. *International cooperation and technical assistance to prevent and address all forms of crime: terrorism in all its forms and manifestations, and new and emerging forms of crime*. A/CONF.234/7 (2020).

[38] Boudewijn de Jonge, *Eurojust and Human Trafficking:The States of Affairs* (Eurojust, 2005) 54 <https://documentation.lastradainternational.org/lsidocs/62%20Eurojust%20and%20Human%20Trafficking.pdf> accessed 23 August 2023.

[39] John AE Vervaele, 'European criminal justice in the European and global context' (2019) 10 NJECL 15 <https://doi.org/10.1177/2032284419840708>.

[40] To mention a few recent ones: Danielle Ireland-Piper, 'Extraterritorial criminal jurisdiction: Does the long arm of the law undermine the rule of law?' (2012) 13 MJIL122; Frédéric Mégret, '"Do Not Do Abroad What You Would Not Do at Home?": An Exploration of the Rationales for Extraterritorial Criminal Jurisdiction over a State's Nationals' (2020) 57 The Canadian Yearbook of International Law| Annuaire canadien de droit international 1 <https://doi.org/10.1017/cyl.2020.1>; Martin Böse, 'EU Substantive Criminal Law and Jurisdiction Clauses: Claiming Jurisdiction to Fight Impunity?' in: Luisa Marin and Stefano Montaldo (eds), *The Fight Against Impunity in EU Law* (Hart, 2020); Fulvia Staiano, *Transnational Organized Crime*, (Edward Elgar, 2022) ch 2.

[41] In addition to the studies mentioned earlier, the study of Klip and Massa should be mentioned. They conducted in 2009 an in-depth comparative study of extraterritorial jurisdiction in the Netherlands, Germany, Belgium and England and Wales. The study comprised also of interviews with 24 practitioners. Klip and Massa concluded that 'there is no indication of a significant practice of investigations or prosecutions or common crimes with a *locus* outside the Netherlands' [translation by author]. AH Klip and A-S Massa, *Communicerende grondslagen van extraterritoriale rechtsmacht* (Universiteit Maastricht, WODC Rapport 1662, 2010).

care for what happens elsewhere. Collective enforcement against gross human rights violations across borders and collective action against cross-border crime does not necessarily match with the national mandate given to judicial authorities. For instance, if a victim of sexual exploitation gives testimony on the person who recruited her under false pretenses, the mere fact that that possibly crucial perpetrator resides in another remote jurisdiction will dampen interest in that part of the testimony. Similarly, interest in pursuing a possible scheme of money laundering often wanes when it appears that the predicated offences have occurred outside the jurisdiction of the investigating authority.[42]

One possible way to reconcile the manifest tension between the national mandate and transnational nature of much crime is to explore how the shared responsibility of the involved judicial bodies can be put more to the foreground in their work. Of course, practical obstacles to cooperation need to be addressed, but those practicalities have no bearing on the sensed urge – or lack thereof – of the judicial authorities involved to actually engage in cooperation.[43]

Decades ago, just after the end of the World War II, the annual meeting of Dutch jurists debated whether a principle of solidarity should be a new foundation for international cooperation.[44] It was a time in which the belief in Europe in international cooperation was high, whilst the instruments for cooperation were still based on '19th Century political mistrust.'[45] The participants wished to include the interests of foreign nations in national criminal law, for instance by introducing subsidiary jurisdiction over facts committed abroad.[46]

More than half a century later, that very same principle of solidarity may be regarded as the rationale behind many of the positive obligations to engage in cooperation. The mentioned obligations suggest that cooperation should not only be engaged in when a purely national interest dictates, but it should be pursued in the *shared* interest of the jurisdictions involved. Solidarity between judicial authorities requires them to actively take into account the interests of jurisdictions other than their own. A principle of solidarity may not have found its way into doctrine yet,[47] however, the numerous positive obligations to cooperate and coordinate, and the positive obligations under human rights law, all seem to have a similar

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42 The interest of public prosecutors and investigating judges in including the transnational dimension in their investigations in various countries has been subject of ongoing empirical research by myself. It is expected that the results of that research will be published at a later date.

43 To illustrate the relevance of principles, besides the undisputed need to improve the legal instruments, one may point at the field of victim rights. Traditionally criminal proceedings are centred around the suspect, and it has taken decades to provide rights for victims in this field, a development which is still ongoing around the world. Naturally, the strengthening of the position of victim rights in procedural law is an indispensable step to their inclusion in criminal proceedings. However, to change the professional mindset of judicial workers, required a change of attitude that was inspired by principles. For a summary of how victims gained their position in criminal justice systems, see R Holder, T Kirchengast, P and Cassell, 'Transforming crime victims' rights: from myth to reality' (2021) 45(1) Intl J Comp & Applied Crim Just 1.

44 AD Belinfante, 'Is het wenselijk, met het oog op de toenemende behartiging van belangen in internationaal verband, die belangen hier te lande strafrechtelijk te beschermen, en zo ja, in hoeverre en op welke wijze?' *Handelingen der Nederlandse Juristen-Vereniging* 1958-I, 161–229.

45 To paraphrase Boister, (n 35) 374.

46 Belinfante used this principle of solidarity also to promote transfer of proceedings of traffic offences at the 1961 Council of Ministers of Justice of the Council of Europe (Comité Européen pour les Problèmes Criminels (CEPC)) (61)10, 16. This idea led to art 3 of the European Convention on the Punishment of Road Traffic Offences ETS 052.

47 Interestingly, the obligation of interstate cooperation has been put in the spotlight in the context of the protection of the environment. Boisson de Chazournes and Rudall give a thorough account of the ICJ caselaw in that field. See Laurence Boisson de Chazournes and Jason Rudall, 'Cooperation in a Transboundary and Global Context' in Yann Aguila and Jorge E Viñuales (eds) *A Global Pact for the Environment – Legal Foundations* (Cambridge Centre for Environment, Energy and Natural Resource Governance, C-EENRG Report 2019-1, 2019).

foundation. These separate sets of norms viewed in coherence point to one principle of solidarity.

Boister considers that current transnational criminal law above all reflects the interests of sovereign signatory states.[48] The transnational character of these treaties is a form of legal pluralism, in which each state merely responds to that part of transnational crime that occurs in its own jurisdiction. From a political and historical perspective, that is very convincing. A government signing a treaty in the field of transnational crime is most likely first and foremost led by concerns for domestic crime control. Yet, ratification does entail a binding commitment to all objectives and provisions as written, even if that goes beyond its initial intention.[49] That realistic account of political will also does not inhibit reflection on what may be expected from judicial authorities in cases with a transnational dimension.

It is worthwhile to mark that, in soft law, solidarity has been preached for much longer, albeit in different words. The 1999 International Association of Prosecutors (IAP) Guidelines for Prosecutors promoted that, in the interest of fairness and effectiveness, prosecutors should render each other assistance in accordance with the law and 'in a spirit of mutual co-operation.'[50] Likewise, Recommendation (2000)19 of the Council of Europe dealing with the role of prosecutors calls for an active role by prosecutors, to 'improve rationalisation and achieve co-ordination.'[51] These words aspire to a shared responsibility, which should guide the day-to-day casework and policy.

As an example, we may look at the EU, which has set the construction of one common judicial area as a core objective. In that common – or, better perhaps: shared – judicial area,[52] every national judge is also acting as an EU judge. Judicial authorities in this common area are to trust each other, recognize the rulings of one another, and, through dialogue and joint training, work toward a shared European judicial culture. A principle of solidarity between the different national jurisdictions has an added value in that discourse. It expresses the shared values that lay beneath those positive obligations, and that even though the judicial powers are derived from national law, the legal interests that are served transcend the national interest.[53]

It has been described how trust is an essential prerequisite to judicial cooperation.[54] Trust however is connected with the *other* authority: it relates to what you know of the other

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48 Neil Boister, 'Further reflections on the concept of transnational criminal law' (2015) 6(1) Transnational Legal Theory, in particular 16, 26.

49 The ICJ judgement in the *Djibouti v France* case (n 6) exemplifies this. The French government was convinced that the treaty provision on cooperation was no more than a soft recommendation, but the ICJ firmly rejected that argument.

50 UN Commission on Crime Prevention and Criminal Justice (17th Session) 'Resolution 2008/5, Strengthening the rule of law through improved integrity and capacity of prosecution services' (17 April 2008) UN Doc E/CN.15/2008/L.10/rev.2.

51 Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System [2000] <https://rm.coe.int/09000016804be55a>; Recommendation Rec(2001)11 of the Committee of Ministers to member states concerning guiding principles on the fight against organised crime [2001] <https://rm.coe.int/0900001680092b86>.

52 W Geelhoed and JW Ouwerkerk, '*De betekenis van territorialiteit in Europese strafrechtelijke rechtshandhaving*' (2019) 4 Strafblad 13.

53 Rosaria Sicurella, 'Fostering a European criminal law culture: in trust we trust' (2018) 9(3) NJECL 308, Sincurella describes the need to search for a shared judicial culture, in which trust is realised by discovering shared values; Estella Baker, 'Great Expectations: Sharing Confidences in EU Criminal Justice' (2016) 24 European Journal of Crime, Criminal Law and Criminal Justice 291. Baker sets light on the human side of trust. Elsewhere, I have argued that transfer of proceedings will only take place if there is sufficient trust in other authority that the case will be dealt in a competent way. See also B De Jonge, 'Transfer of criminal proceedings: from stumbling block to cornerstone of cooperation in criminal matters in the EU' (2020) 21(3) ERA Forum 450.

54 For instance: Saskia Hufnagel and Carole McCartney (eds) *Trust in International Police and Justice Cooperation* (Hart, 2017).

authority and how reliably that other judicial body is operating.[55] Solidarity pertains to the mission and mandate of the judicial body itself, and how it will act when confronted with a cross-border case. The development of this principle may contribute to a more holistic response to transnational cases from the national level.

6. SOLIDARITY APPLIED IN PRACTICE

The nature of cross-border crime demands judicial authorities to work together, and public international law has long recognized that. When judicial authorities are confronted with cross-border crime, various obligations of effort in cooperation apply, as well as positive obligations under human rights law as to judicial cooperation. This means there is little room for parochial thinking.

A *bona fide* adherence to public international law should have a concrete meaning, both to individual judges and public prosecutors, as well as their respective administrative bodies. It signifies a wider responsibility than the geographical borders of their respective districts. On the operational level of judges and public prosecutors, a loyal application of the solidarity principle should inspire them to creativity. On one hand, the principles of sovereignty and territoriality are likely to restrict the scope of an investigation or prosecution; providing limitations as to international cooperation. The principle of solidarity, on the other hand, should be taken as an instruction to exercise discretionary powers also in the interest of foreign jurisdictions with a legitimate interest in the case. [56]

One practical example is the question of how to deal with information about crimes that have been committed outside a state's own jurisdiction. The initial response is likely to be that such a case shall be discontinued for the very reason that jurisdiction over the alleged crime is lacking. That being the case, there may still exist the possibility to spontaneously forward a report to the competent colleague in the foreign jurisdiction. This is likely a discretionary decision, but from a viewpoint of solidarity this should be the right outcome.

Similarly, a phone may be seized with relevant information on crimes committed in a foreign jurisdiction. That material can easily be ignored as not relevant to the national investigation that is being conducted. However, adhering to the principle of solidarity, one would expect the judicial authority to see that the information is actively forwarded to the foreign competent bodies. Amongst others, Article 18(4) of UNTOC provides a legal basis for a 'spontaneous exchange of evidence.'[57] That may sound entirely optional, but in the light of the attitude that may be expected from the judiciary, an active stance should be taken.

A final example relates to the billions of hacked messages exchanged by criminals through the Sky ECC communication network.[58] From the viewpoint of solidarity, the national judicial authorities that control the access to that data should facilitate as much as possible the dissemination of all evidence related to other countries, with as few restrictions as possible. The legitimate interests of those other jurisdictions should be borne in mind when designing the most optimal legal process for sharing this data.

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55 Sicurella (n 53); Baker (n 53).

56 MFH Hirsch Ballin, '*Informationele solidariteit bij terrorismebestrijding*' [2016] Nederlands Juristenblad 1342. Hirsch Ballin provides a different angle of how cross-border judicial solidarity may be understood. She describes how solidarity may imply that executing authorities are transparent on how evidence was collected, and do not hide behind the non-inquiry principle.

57 Similar provisions were included in: United Nations Convention Against Corruption (2003) 2349 UNTS 41 art 28; Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000) OJ C 197 art 7; Convention on Cybercrime (2001) ETS No. 185 art 26; Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (2001) ETS No. 182 art 11; International Convention for the Suppression of Acts of Nuclear Terrorism (2005) 2445 UNTS 89 art 7.

58 Europol, press release of 8 June 2021, *800 criminals arrested in biggest ever law enforcement operation against encrypted communication* <www.europol.europa.eu> accessed 25 August 2023.

The examples mentioned so far relate to the proactive sharing of evidence. Multiple treaties provide good legal basis for doing so. Yet, solidarity opens another form of cooperation which is not explicitly foreseen in any treaty. That is the start of parallel investigations.

Thus far, states have appeared unwilling to take up obligations to open proper national investigations in the framework of crimes committed outside their territory.[59] Yet, solidarity should be felt as an incentive to assist the other judicial authority in the best possible way to properly dispose of its duties. This can be illustrated by looking at how urgent requests are handled. If a judicial authority is confronted with an urgent case, for instance a kidnapping, and it needs urgent measures, such as interception, to be implemented in a foreign jurisdiction, it will frequently be required to first submit a properly translated letter of request. In fact, virtually all treaties on international cooperation take a written, translated request as the basis for cooperation. In urgent cases, this often poses a challenge. From the viewpoint of intra-judicial solidarity, one expects the requested authority to actively consider if opening a parallel case would be a possible way to more quickly obtain the necessary data. Opening a parallel case may certainly bring extra work, but usually allows for much quicker action than can be achieved through letters of request.

Over the last decades, states have agreed to assume extraterritorial jurisdiction over a large part of transnational crime. This allows in many cases the opening of parallel investigations, which may open a more expedient track for cooperation, in which both judicial authorities exercise their own powers, whilst making the results available to one another.

In a similar vein, there are countries in which the issuing of an arrest warrant is a lengthy procedure. In an urgent case, judicial authorities should consider if an arrest could first be made in a national case, awaiting the arrival of the extradition request through the appropriate channels. Whilst opening a national case and initiating pretrial procedures may be cumbersome, this is sometimes the only way to prevent crucial suspects from going into hiding.

Solidarity as a guiding principle should inspire national judges and public prosecutors whenever their work is relevant to another jurisdiction. Moreover, the governing bodies or managerial levels should see international work as an integrated part of the job that judges and prosecutors do. It is difficult to conceive as to how national judicial authorities can play a proactive role in the fight against transnational crime when these roles are not properly facilitated through training and internal support.

7. THE ALTERNATIVE: INTERNATIONALIZING ENFORCEMENT

The ever more international nature of crime provokes the question of whether the mandate of national judicial bodies will allow them to take up their role effectively. Considering the numerous obstacles to a concerted response to transnational crime and the usually limited mandate of national judicial authorities, it is unsurprising that there are calls to create new intergovernmental judicial bodies to deal with transnational crime.

[59] The exception is the *aut dedere aut iudicare* rule, which in most cases will require opening a regular investigation to weigh and sustain the suspicion. Traditionally, the *aut dedere aut iudicare* obligation gave extradition priority over the opening of a proper national prosecution. The formula used in treaty law changed over time though. A number of terrorism suppression conventions now instruct to bring to justice anyone who committed such acts of terrorism, when found on the territory of the signatory state. See for a full overview, Claire Mitchell, '*Aut Dedere, aut Judicare*: *The Extradite or Prosecute Clause in International Law*' (Graduate Institute Publications, 2011) <https://doi.org/10.4000/books.iheid.249>; Andrea Caligiuri, 'Governing International Cooperation in Criminal Matters: The Role of the *aut dedere aut judicare* Principle' (2018) 18 Int CLR 244.

In our current century, first there was the long-heard call for the extension of the powers of the ICC.[60] Whilst those voices may have faded out, there has been the initiative on the table since 2013 for the establishment of a court for Latin America and the Caribbean for transnational crime.[61] Since 2014, there has been a proposal to establish a criminal chamber at African Court of Justice and Human and Peoples' Rights, which would have competence over an enumerated list of transnational crimes.[62] More recently, an initiative was launched by Ecuador, Canada, and the Netherlands to establish an international anti-corruption court. In the regional context of Europe, there is now the first genuine international judicial body operating, the European Public Prosecutor's Office (EPPO),[63] competent for a defined set of cross-border crimes. There have been persistent calls to include terrorism in the mandate of the EPPO.[64] And, at this moment, the idea to extend its mandate to violations of sanction regimes and – possibly – environmental crime seems to be gaining momentum.[65]

Whilst these initiatives may be seen as evidence of a renewed hope vested in international cooperation, it may likewise be understood that national institutions by and large fail to combat transnational crime effectively. Over the last decades, an impressive highway for international judicial cooperation was constructed. The impression exists that not enough cars are taking that highway. Before constructing new highways, it is worthwhile investigating if the existing highways are well-connected to the local network of roads.

8. CONCLUSION

Even for highly skilled investigating judges and prosecutors, it can be a challenge to define the right approach toward cross-border crime. Different legal and cultural rules apply across the border, which make it unattractive to engage in cooperation. There is scant evidence that numerous practical obstacles prevent international cooperation from developing into the agile tool that is needed to address transnational crime. Limitations due to legitimate human rights concerns and the principle of sovereignty seem to be emblematic for cross-border cooperation. Yet, binding treaty obligations as well as human rights law demand an active internationalized approach by judicial bodies, at least in relation to transnational organized crime and serious human rights violations in a cross-border setting. The shared responsibility for these types of

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60 Neil Boister, 'International Tribunals for Transnational Crimes: towards a Transnational Criminal Court?' (2012) 23(4) Criminal Law Forum 296. See in particular fn 3, which provides an overview of the scholarly debate on the inclusion of transnational crime in the mandate of the ICC.

61 Robert J Currie and Jacob Leon, 'COLPA: a Transnational Criminal Court for Latin America and the Caribbean' (2019) 88 Nord J Intl L 587.

62 Neil Boister, 'Transnational Crimes Jurisdiction of the Criminal Chamber of the African Court of Justice and Human and Peoples' Rights' in Charles C Jalloh, Kamari M Clarke, and Vincent O Nmehielle (eds), *The African Court of Justice and Human and Peoples' Rights in Context* (2019) <http://dx.doi.org/10.1017/9781108525343.013>.

63 Established by Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L283/1.

64 Commission, 'A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes' COM/2018/641 final. On that proposal, Adam Juszczak and Elisa Sason, 'Fighting Terrorism through the European Public Prosecutor's Office (EPPO)?' (2019) 1 EUCrim 66.

65 European Parliament, 'Report on the proposal for a directive of the European Parliament and of the Council /on the protection of the environment through criminal law and replacing Directive 2008/99/ECA9-0087/2023' A9-0087/2023, calls for inclusion of environmental crimes in the mandate. And, as to the sanction regime, the French and German ministers of justice jointly called for inclusion in the EPPO mandate: Eric Dupond-Moretti and Marco Buschmann, '*Europäische Staatsanwaltschaft muss Strafverfolgung übernehmen*' (*LTO*, 28 November 2022). <https://www.lto.de/recht/hintergruende/h/justizminister-deutschland-frankreich-eu-staatsanwaltschaft-russland-ukraine-sanktionen/> (accessed 25 August 2023).

cross-border crime means that judicial authorities must seek a concerted response, in which adequate consideration is given to the interests of the foreign jurisdiction.

It is my belief that the principle of solidarity may inspire how practitioners work in this internationalized context and inspire policy makers on how to equip them for that job. Not only could it be a further incentive to seek coordination, make active use of the possibility to share evidence, and discuss how this evidence may be tested in the foreign trial, it may also spark parallel investigations, the keeping of a close eye on extraterritorial jurisdiction, and reflection on the interest of foreign jurisdictions in investigative and prosecutorial strategies. On an organizational level, the principle of solidarity puts emphasis on the need for adequate training and the internal organization of the judiciary in a way that allows for effective work on cross-border cases.

Though the establishment of new international judicial institutions may certainly strengthen the fight against certain particular forms of transnational crime, we need to first and foremost strive to understand and improve the position of national judicial institutions faced with transnational crime.