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Editorial

The Role of the EU in the Investigation of Serious International Crimes Committed in Ukraine. Towards a New Model of Cooperation?

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1 EU Efforts to Combat Core International Crimes and Recent Developments Related to the War in Ukraine*

We are all well aware that the European Union is a highly complex and articulated entity, with multifaced interests. Yet we tend to consider it mainly as a system focused on developing a better economy improving progressively a common market. This approach with the eyes of the past prevents in some cases to pay due attention to the EU's efforts and the related strategies to counter the commission of core international crimes (CIC), a definition enclosing genocide, crimes against humanity and war crimes.[1] This probably explains why, while studies on EU institutions dedicated to investigating and prosecuting crimes affecting the financial interests of the Union inevitably abound, less attention is given to what has been produced at EU level in the field of combating serious international crimes. Certainly, it is admitted on some occasions that this perspective is present, and, it is hoped, may one day be developed

* B. Rossi, 'The Relationship Between the International Organizations (ONU, Interpol, EU) and the ICC. The Nature of the Interactions', Bologna, 2022, pp. 1–9.

1 The acronym is taken from the Eurojust website dedicated to this subject. See website: https://www.eurojust.europa.eu/crime-types-and-cases/crime-types/core-international-crimes.

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more widely.[2] But, for now, concrete results seem to be few, and the normative provisions that deal with the matter of serious international crimes appear more like programmatic forecasts than real precepts, valid here and now.

This depiction of the criminal policy conducted by the EU is in many respects correct. Indeed, it cannot be disputed that the Union's primary effort has focused on combating economic and financial crimes, which are capable of undermining the eurozone's economic prosperity. Moreover, the attack on the internal market and its economic-financial foundations appears so serious, considering the way the EU has developed (and, before it, the European Community), as to be perceived potentially destructive of the entire supranational edifice, thus overwhelming peace, social security, and democracy, that is endangering, in one concept, the basic values of the Union.

It would be a mistake, however, to underestimate the commitment that the EU, over time, has shown in favour of an effective fight against grave crimes, especially, for what here matters, core international crimes as well as of the institutions deputed to bring the perpetrators of such offences to justice. In fact, for at least two decades, the EU has been showing clear signs in favour of effective counteraction, both by its Member States and by its own bodies, against serious forms of transnational crime, including CIC, which undoubtedly constitute the gravest manifestation of such kind of offences.

The recent developments, linked to the war waged by Russia against Ukraine, and the actions taken by the EU to support the investigation and prosecution of CIC perpetrators in the framework of that conflict, are therefore not surprising, but in a way, can be understood as a consequence of the foundations laid by the Union in previous years to thoroughly implement a fight against impunity in the field of CIC.

This contribution is developed in two parts. The first describes, although in short terms, the actions taken by the EU to fight CIC, in approximatively the last two decades. The second part deals with the steps taken by the EU in the aftermath of the outbreak of war between Russia and Ukraine. The focus is in particular on the decision to set up a joint investigation team between some EU Member States, a non-EU State (Ukraine) and an international institution

2 See O. Bekou – A. Antoniadis, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times', *International Criminal Law Review*, 2007, 621–655, at 624; M. L. P. Groenleer – L. G. Van Schaik, 'United We Stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol', *Journal of Common Market Studies*, 2007, 969–998, at 270. Indeed, several contributions highlight the potential of EU in criminal matters beyond financial crimes. However, the emphasis is predominantly on combating terrorism. See for example C. Kaunert, 'The External Dimension of EU Counter-Terrorism Relations: Competences', Interests, and Institutions, *Terrorism and Political Violence*, 2009, 41–61.

(the Office of the Prosecutor of the International Criminal Court – OTP ICC). Furthermore, some considerations are spent to the amendment of the Eurojust Regulation, adopted in May 2022, which gives this body a specific competence in the investigation, collection, and preservation of evidence in the field of international crimes. The underlying question is whether the latest steps constitute a unicum, which cannot be repeated, or open the path for a new chapter in a long-cultivated EU strategy in the field of international criminal justice. The hypothesis, if the latter approach prevails (which, at the moment, remains to be seen), is that we could be facing a turning point in the framework of the fight against impunity for serious international crimes, thanks to the role played by the EU. In particular, the extension of the mutual recognition principle to the judicial cooperation regarding CIC, due to the closer engagement of the EU institutions, may imply an increased efficiency in investigations and prosecution, of which the main beneficiary could be the International Criminal Court.

2 The Reasons for EU Engagement Against the Commission of Core International Crimes

The European Union's commitment to counter serious international crimes is not episodic, nor is it linked to recent news developments. Actually, it is along the lines of the protection and promotion of human dignity, and the safeguarding of fundamental rights, since the commission of CIC constitutes one of the most serious attacks on both these values.

The reasons for this firm stance against the perpetrators of serious international crimes are not only idealistic. Alongside, one can find others, of a more practical nature (but certainly, from a different perspective, no less important). CIC not infrequently occur in the context of the commission of other serious crimes, albeit of a transnational, rather than international, nature. Thus, for example, war crimes may be linked to arms trafficking, or to trafficking in human beings (or even human organs).[3] Again, it is possible that there is a strategic link – on a criminal level – between CIC and the illegal circulation of works of art or cultural goods (as, for example, occurred at the time of the war in Iraq, through the initiative of various criminal associations, or in Syria).[4]

3 As well known, one of the reasons at the basis of the Kosovo Specialist Chambers is precisely the Council of Europe Parliamentary Assembly Report, according to which at the war time in Kosovo took place serious crimes concerning trafficking of organs. See 'Inhuman treatment of people and illicit trafficking in human organs in Kosovo', Doc. 12462, 7 January 2011, at https://www.scp-ks.org/sites/default/files/public/coe.pdf.

4 See for example S. Hardy, 'Curbing the spoils of war', at https://en.unesco.org/courier/october-december-2017/curbing-spoils-war.

Similarly, links between international crimes and financial crimes, such as money laundering, are not uncommon.[5]

Combating CIC therefore becomes a strategic choice to ensure a more effective fight against other serious transnational crimes, which, as already recognised in the Treaties, are at the heart of the criminal policy developed by the EU.

It should be added that CIC often, as was the case in the recent war conflict in Syria, involve terrorist organisations, sometimes with bases within the territory of EU Member States. Finally, serious international crimes can have repercussions on the stability of parts of EU territory, as was the case with the repeated refugee crises, as a result of which hundreds of thousand, sometimes over a million people entered the EU borders to escape from a scenario of war and the large-scale commission of core international crimes.

3 The Actions Taken by the EU to Counter CIC Commission

Many actions have been taken by the EU to counter the commission of CIC, and to punish those responsible for such serious criminal offences. It is worth mentioning the most relevant ones although it is rather difficult not to omit any relevant data in this respect.

3.1 *Conditionality Principle and Western Balkans' States Access to the EU*

A first tangible action adopted by the EU to contrast CIC commission, on a normative level, was, in the late 1990s, the establishment of a conditionality principle for countries interested in joining the EU from the break-up of the former Yugoslavia, as part of a new Stabilisation and Association Process kept by the Union in the area of Western Balkans.[6] In very short terms, the condition posed by the EU to the States aiming to be part of it required the handing over of major war criminals and full cooperation with the ICTY. This strategy, from the EU perspective, was considered instrumental to a complete implementation of the rule of law, a precondition for achieving, as it was brilliantly

5 This is the reason why, for example, the scope of the Financial Action Task Force (FATF), an independent inter-governmental body representing the world major financial centers, after 9/11, was extended to terrorism and the proliferation of weapons of mass destruction. See G. Lasagni, *Banking Supervision and Criminal Investigation. Comparing the Eu and US Experience*, Springer – Giappichelli, 2019, at 89–90.

6 K. H. Brodersen, 'The ICTY's Conditionality Dilemma', *European Journal of Crime, Criminal Law and Criminal Justice*, 219–248.

observed, "a greater degree of convergence with the EU's socioeconomic and legal standards and political values brings a country closer to membership".[7] According to others' view, the requirement to full cooperate with ICTY constituted a "litmus test of a state's moral readiness to join Europe",[8] intending with these words an assessment of a State willingness to depart from illegal conduct committed by its representatives in the past and to build up an effective culture consistent with the principle of legality.

3.2 *The EU Support to the International Criminal Court*

The focus on combating CIC has not stopped since then. In this context, it is worth mentioning the EU's commitment to the establishment of the International Criminal Court, to the Statute of which all EU Member States are parties, and the financial support given to the ICC.[9] Political and economic sustain has also been accompanied by legal support. It is in this key, in fact, that one can read those normative provisions which, since the framework decision on the European Arrest Warrant, have included the crimes over which the ICC has jurisdiction among those exempted from double criminality control. Put another way, in fact, whenever a national judicial institution of an EU Member State is proceeding against perpetrators of crimes covered by the Rome Statute, the principle of mutual recognition operates to its fullest extent, a double criminality check never being required.

In addition, the EU engaged in different forms of cooperation and support for the ICC.[10] Even before the entry into force of the Rome Statute, in 2001 the European Union adopted a Common Position on the ICC (2001/443/CFSP) to guide the action of the EU and its Member States with regards to the Court. The main objectives were assisting and contributing at an early entry into

7 K. H. Brodersen, The ICTY's Conditionality Dilemma', at 223.

8 V. Peskin – M. P. Boduszyński, 'Balancing International Justice in the Balkans: Surrogate Enforcers, Uncertain Transitions and the Road to Europe', *The International Journal of Transitional Justice*, 2011, pp. 51–74, at 55. Similar argument by T. Freyburg – Tina; S. Richter, 'National Identity matters: the limited impact of EU political conditionality in the Western Balkans', *Journal of European Public Policy* 2010, pp. 263–281, at 271.

9 The European Union has been one of the biggest financiers of the International Criminal Court from the beginning. Even after Brexit, the EU Member States finance approximatively the 40% of the ICC budget. See Assembly of the State Parties, 'Financial statements of the International Criminal Court for the year ended 31 December 2020', ICC-ASP/20/12, 23 July 2021, at https://asp.icc-cpi.int/sites/default/files/iccdocs/asp_docs/ASP20/ICC-ASP-20-12-ENG.pdf.

10 See A. Klip, *European Criminal Law. An Integrative Approach*, Intersentia, 2021, 4th ed., at 463. See furthermore O. Bekou – A. Antoniadis, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times', at 623.

force of the Statute by encouraging the widest possible ratification, acceptance, approval, or accession to it and promoting its values and principles. Subsequently, the Common Position was reviewed after the coming into force of the Rome statute in 2002,[11] then repealed in 2003[12] and finally in 2011 with the Council Decision 2011/168/CFSP. Starting from the one of 2002, the Common Positions and the Decisions were followed up by an Action Plan, adapted when appropriate, which provides concrete measures for the achievement of their objectives: promoting the widest application of the Rome Statute, promoting the independency of the ICC and its effective and efficient functioning, and encouraging cooperation. In order to better specify the terms of its relationship with the ICC, the EU adopted the Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, entered into force on 1 May 2006 through the Decision 2006/313/CFSP.[13]

For the purposes of the Agreement, the two organizations are required, by article 4, to cooperate closely and consult each other on matters of mutual interest, establishing regular contacts. Information and documents should be exchanged to the fullest extent possible, and the EU, on the basis of article 87 paragraph 6, should provide those in its possession if requested by the Court, or that could be relevant for its work (article 7). If the cooperation, including the disclosure of information and documents, endangers the security of current or former EU's staff, or its operation or activity, the Court may order measures of protection (article 8). The European Union, in conformity with article 10 paragraphs 1 and 2, should cooperate also when the Court requests the testimony of one of its officials or other staff, identifying measures of protection if necessary.

Moreover, the Agreement focuses on the cooperation between the Union and the Prosecutor in providing additional information, and in accordance with the provision of article 54 paragraph 3 (c)(d)(f)(e) of the Rome Statute mentioned above.

Finally, pursuant to article 44 paragraph 4 of the Statute, in exceptional circumstances determined case-by-case, the Court may employ the expertise of gratis personnel offered by the EU.

11 Council Common Position 2002/474/CFSP.

12 Council Common Position 2003/444/CFSP.

13 Importantly, the Agreement is binding on the European Union and not on their Member States, and it recalls article 87(6) of the Rome Statute, according to which the Court may seek the cooperation and assistance of intergovernmental organizations.

3.3 *The Establishment of the Genocide Network*

Furthermore, by means of a Council Decision, the EU established, since 2002[14] (and reinforced one year later, in 2003[15]), the European Network for investigation and prosecution of genocide, crimes against humanity and war crimes ('Genocide Network'). The aim of the network is to enable close cooperation between the national authorities when investigating and prosecuting the crime of genocide, crimes against humanity and war crimes. The Network's mandate is to ensure that perpetrators do not attain impunity within the Member States.[16] In this sense, each Member State may designate a point of contact in the Network for the exchange of information relating to the investigation of genocide, crimes against humanity and war crimes as defined by the Statute of the International Criminal Court.[17] The task of the contact points is to provide, at the request of the authorities of other Member States, any available information that may be relevant in the context of CIC investigations, or to facilitate cooperation with the competent national authorities.[18] Since 2011, the Genocide Network Secretariat has been hosted by Eurojust, with which it cooperates.[19] The Network's successes are not insignificant, considering that in 2021 the Myanmar Mechanism created by the United Nations decided to join the Genocide Network as an Associate.[20] In addition, several trials

14 2002/494/JHA: Council Decision of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes.

15 2003/335/JHA: Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes.

16 This is how the network is presented on the official website: https://www.eurojust.europa.eu/judicial-cooperation/practitioner-networks/genocide-network.

17 For some background on the strategy followed by the Genocide Network, see the report published on the following website: https://www.eurojust.europa.eu/publication/key-factors-successful-investigations-and-prosecutions-core-international-crimes.

18 We need also to consider that the European Judicial Training Network (EJTN) also exists for this purpose (https://www.ejtn.eu/About-us/).

19 Eurojust's support was useful for the Network to develop parallel cooperation with Europol, specifically with the Europol Analysis Project (https://www.europol.europa.eu/operations-services-and-innovation/europol-analysis-projects). This is an information processing system that focuses on certain crime areas from commodity-based, thematic or regional angles, e.g., drugs trafficking, Islamist terrorism, Italian organised crime. Working with these Analysis Projects (previously called Focal Points) Europol specialists can prioritise resources, ensure purpose limitation, and support EU law enforcement authorities and other partner organisations to tackle grave crimes, such as organised crime and terrorism, and also core international crimes.

20 https://iimm.un.org/myanmar-mechanism-joins-the-european-genocide-network-as-an-associate/.

for international crimes were facilitated by the Network's joint action with national judicial institutions (or with Joint Investigation Teams established to conduct investigations related to the commission of CIC).[21]

3.4 *The Support Given to the Specialist Chambers and Specialists Prosecutor's Office in Kosovo*

The EU firm commitment against the perpetration of CIC was confirmed, once more, in the support given to the establishment of the Specialist Chambers and Specialists Prosecutor's Office in Kosovo. After the failure of other attempts to establish international judicial bodies to try the serious international crimes that occurred in the framework of the conflict between Serbia and Kosovo,[22] the European Union, taking up a proposal of the Council of Europe (and on behalf of the United Nations), favoured the creation of the Specialist Chambers and Specialists Prosecutor's Office in Kosovo. These are institutions of a hybrid nature, housed within the ordinary jurisdiction of Kosovo, composed of both personnel from that Country and from other States of the international community.[23] The role played by EULEX (the EU Rule of Law Mission in Kosovo) for the establishment of the Chambers and the Prosecutor, for the selection of both judges and registry staff, was decisive for the existence and work of this hybrid jurisdiction.[24] In deciding to take responsibility for the leadership of this institution, whose achievements, at the moment, it must not be denied,

21 See the following Report: https://www.eurojust.europa.eu/publication/supporting-judicial-authorities-fight-against-core-international-crimes-factsheet. It is worth to remember, under this regard, that in 2018, a joint investigation team was established involving French and German authorities with support from Eurojust to further advance the investigation and coordination of prosecutions with regard to the grave international crimes committed during the conflict occurred in Syria. Due to the French-German cooperation, three members of the Syrian intelligence service were arrested in Germany and France in 2019. In April 2020, the trial against two of them began at the Higher Regional Court in Koblenz, Germany (the case is mentioned at the Report at page 5). See the Eurojust press release 'Syrian official sentenced to life for crimes against humanity with support of joint investigation team assisted by Eurojust', 13 January 2022, at https://www.eurojust.europa.eu/news/syrian-official-convicted-crimes-against-humanity-with-support-joint-investigation-team.

22 See C. Gardner Bill, *No Entry Without Strategy: Building the Rule of Law Under UN Transitional Administration*, Un Un Press, 2008, pp. 120 and seqq.

23 See E. Cimiotta, 'The Specialist Chambers and the Specialist Prosecutor's Office in Kosovo The 'Regionalization'of International Criminal Justice in Context', *Journal of International Criminal Justice*, 2016, 53–72. See also C. Stahn, *A Critical Introduction to International Criminal Law*, Cambridge Un. Press, 2019, pp. 206–207.

24 E. Cimiotta, 'The Specialist Chambers and the Specialist Prosecutor's Office in Kosovo', at 55–57.

still appear controversial,[25] the European Union stated in 2015 that "The EU firmly believe in the principle that there cannot be lasting peace without justice". In this sense, transitional justice institutions, including criminal courts and tribunals, "significantly contribute to initiating post-conflict recovery and in preventing the emergence of new cycles of violence".[26]

3.5 *EU Treaties and their Potentialities*

The framework outlined shows a firm and long-standing intention, although not always successful or uncontroversial, on the part of the EU to promote the fight against CIC, both by its Member States and its own institutions, to the best extent possible. At the same time, there is an equally strong political (and legal) line to promote effective support for the ICC as the leading judicial institution for international crimes.

Moreover, it cannot be ignored that the EU institutions themselves might one day decide to extend their competence to serious international crimes. Two different provisions of the Treaty on the Functioning of the European Union, Article 83(1) and Article 86(4), seem allow such scenario. They, in fact, provide that the EU competence, considered, on the one hand, in the legislation adopted by the Council through directives and, on the other hand, in the action of the EPPO, may extend to particularly serious crimes of a transnational nature. This is indeed a very broad formula, in which CIC can certainly also be included.

4 The Additional Tasks Assigned to Eurojust and the Establishment of a Joint Investigation Team

The framework depicted provides a better appreciation of recent developments following the outbreak of war between Russia and Ukraine.[27] There

25 A. Hehir, 'Lessons Learned? The Kosovo Specialist Chambers' Lack of Local Legitimacy and Its Implications, in *Human Rights Review* (2019) 20:267–287; A. Smith, Outreach and the Kosovo Specialist Chambers: A Civil Society Practitioner's Perspective', *International Criminal Law Review*, 2020, pp. 125–153.

26 EU, 'The EU's Policy Framework on Support to Transitional Justice', 16 November, 2015, https://data.consilium.europa.eu/doc/document/ST-13576-2015-INIT/en/pdf, pp. 27 and 31. See, for further analysis, A. Hehir, 'Lessons Learned? The Kosovo Specialist Chambers', at 271.

27 See for a general analysis antecedent to the actual developments related to the war N. Bodnar, 'The EU-Ukraine Cooperation in Criminal Matters: "Justice" Dimension', *European Political and Law Discourse*, 2018, pp. 13–19. Updated to the current events see G. Lanza,

seem to be two elements worthy of mention. On the one hand, the creation of a joint investigation team (JIT) involving both EU and non-EU countries and an international institution. On the other, the attribution to Eurojust of a pivotal role in the collection and exchange of information, with reference to investigations concerning serious international crimes (primarily those occurring in the Russia-Ukraine conflict).

4.1 *The Establishment of a Joint Investigation Team*

On 25 March 2022 two EU Member States, Lithuania and Poland, set up a JIT, together with Ukraine, a non-EU country. The initial composition of the group was later enriched by the involvement of three more EU States, Estonia, Lithuania and Slovakia, and the participation of the Office of the Prosecutor of the International Criminal Court.[28]

This development should not appear surprising. First of all, the EU's willingness to actively cooperate with the ICC bodies is evident, as reflected in all the cooperation agreements mentioned above. Furthermore, with specific regard to Ukraine, it should be noted that it is one of the ten non-EU States that have a Liaison Prosecutor at Eurojust.[29]

The action taken establishing a JIT thus adapts a legal tool, the JIT FD, conceived in the framework of mutual legal assistance Convention and translated in the mutual recognition regime, to the current scenario and the specific context of the international crimes committed in the conflict between Russia and Ukraine.[30]

The benefit of this choice is, in a nutshell, the extension of the mutual recognition principle, as far as the collection of information and evidence

'The Fundamental Role of International (Criminal) Law in the War in Ukraine', *Foreign Policy Research Institute*, 2022, pp. 424–435.

28 See the Eurojust press release 'Estonia, Latvia and Slovakia become members of joint investigation team on alleged core international crimes in Ukraine (31 May 2022)', at https://www.eurojust.europa.eu/news/estonia-latvia-and-slovakia-become-members-joint-investigation-team-alleged-core-international. See the further press release 'ICC participates in joint investigation team supported by Eurojust on alleged core international crimes in Ukraine', at https://www.eurojust.europa.eu/news/icc-participates-joint-investigation-team-supported-eurojust-alleged-core-international-crimes.

29 See the recording Press conference held at the premises of Eurojust on May 31st, 2022, on the JIT on alleged core intl. crimes in Ukraine (https://www.youtube.com/watch?v=_HW9AcF-AxI).

30 It should be noted that the FD JIT allows the participation of non-EU entities in this body.

is concerned, to States and institutions outside the EU legal order, such as Ukraine and the OTP ICC.[31]

This outcome is made possible thanks to two factors. Firstly, by the application – as well note – of the principle at stake in the cooperation between MS in investigating on the commission of CIC.[32] Secondly, by the establishment of the JIT. This in fact permits to expand some relevant advantages of the mutual recognition method to non-EU entities (Ukraine and the OTP ICC), as it allows several police officers or judicial authorities from different countries to work together, in conducting investigations and gathering of evidence.[33] Such a hybrid JIT composition, with EU and non-EU states, allows the former to work through the mutual recognition principles, and then to share, in real time, the results achieved with the other partners in the team. A specific added value of the JIT is indeed fostering the spontaneous exchange of information,[34] thanks to the practice of parallel investigations into the same or related criminal facts. The JIT, in itself, can serve as a forum where, more easily, the results of investigations conducted in parallel can be made available and exchanged. This way, the action of the national law enforcement agencies should be more effective, as well as more comprehensive than if the efforts of the national states and the JIT remained separate and unconnected.

4.2 *The Amendment of the Eurojust Regulation and the New Task Assigned to It*

In the perspective under scrutiny, one must appreciate the new role attributed to Eurojust, which, through the normative changes introduced, seems to become a privileged interlocutor in the fight against CIC not only at EU level, but also on a wider geopolitical area (wherever directly or indirectly some legal interest of the Union is at stake).

31 See on this topic M. Caianiello, 'Models of Judicial Cooperation with *Ad Hoc* Tribunals and with the Permanent International Criminal Court in Europe', in G. Illuminati – S. Ruggeri (eds), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings. A Study in Memory of Vittorio Grevi and Giovanni Tranchina*, Springer, 2013, 111–123.

32 See *supra*, at para. 3.b.

33 This operational mode helps to speed up the collection of information, which takes place, in a contextual manner, for the benefit of several judicial and law enforcement agencies. Above all, it considerably reduces the risks linked to the inadmissibility of evidence, since joint participation permits to respect each of the legal system involved in the JIT.

34 See M. Simonato, 'The "Spontaneous Exchange of Information" between European Judicial Authorities from the Italian Perspective', *New Journal of European Criminal Law*, 2011, 220–229.

Before examining of the recent reform, however, one must remember that Eurojust has already competence to deal with investigations of serious international crimes. Indeed, this is provided for in Article 3 para. 1 of Regulation (EU) 2018/1727, which, in turn, refers to Annex 1. The Annex in fact includes war crimes, crimes against humanity and genocide among the crimes in respect of which Eurojust may take action. In addition, Article 3 para. 4 extends Eurojust's competence to instrumental crimes, that is those necessary to procure the means of committing the serious crimes enlisted in the Annex 1, those made in order to facilitate or commit the formers, and those accomplished to ensure their impunity.

It may be useful to note that, within the framework of CIC, Eurojust enjoys a competence without particular constraints, compared to the one attributed to it in the field of offences affecting the financial interests of the EU. In fact, with regard to the latter, Eurojust must refrain from acting if EPPO has decided to intervene by initiating an investigation or prosecution.[35] On the contrary, with regard to serious international crimes, Eurojust is the only major player at EU judicial level and, as such, should not be subject to limitations or obstacles.

The recent developments occurred in the last Spring give Eurojust an advanced role in the collection and exchange of information for countering the commission of CIC, this way improving the relevant role that this body already had, for the considerations just expressed. Indeed, in order to provide an adequate law enforcement response to the commission of international crimes in the conflict in Ukraine, on 30 May 2022 the European Parliament and the Council adopted a new Regulation (EU) 2022/838, amending Regulation (EU) 2018/1727 as regards the preservation, analysis and storage at Eurojust of evidence relating to genocide, crimes against humanity, war crimes and related criminal offences.[36] Thanks to this amendment, Article 4 para. 1 of Regulation (EU) 2018/1727 has been added a letter 'j', as a result of which Eurojust is entitled to

> support Member States' action in combating genocide, crimes against humanity, war crimes and related criminal offences, including by

35 This holds true except with regard to offences committed in countries that do not participate in enhanced cooperation for EPPO s, or unless EPPO or a state participating in EPPO has asked Eurojust to participate.

36 See the press release of the European Council 'Eurojust: Council adopts new rules allowing the agency to preserve evidence of war crimes' at https://www.consilium.europa.eu/en/press/press-releases/2022/05/25/eurojust-le-conseil-adopte-de-nouvelles-regles-permettant-a-l-agence-de-conserver-des-preuves-de-crimes-de-guerre/.

> preserving, analysing and storing evidence related to those crimes and related criminal offences and enabling the exchange of such evidence with, or otherwise making it directly available to, competent national authorities and international judicial authorities, in particular the International Criminal Court.

To this end, the new Regulation mandates Eurojust to establish a new automated data management and storage facility which must collect, store and order DNA profiles established from the non-coding part of DNA, photographs and fingerprints and, in relation to the CIC, videos and audio recordings. For each item of evidence, the facility shall indicate the description and nature of the offences involving the person concerned, the date on which and location at which the offences were committed, the criminal category of the offences, the progress of the investigations and, in relation to CIC, information relating to criminal conduct, including audio recordings, videos, satellite images and photographs.

The purpose of these amendments is to give Eurojust a key role in judicial cooperation in the field of CIC. Indeed, as stated in recital 11 at the new Regulation

> By preserving, analysing and storing evidence related to genocide, crimes against humanity, war crimes and related criminal offences and, when necessary and appropriate, by enabling its exchange in accordance with the applicable Union data protection rules, Eurojust can support case building in national and international investigations and provide additional support to the competent national authorities and international judicial authorities. Such analysis might be especially valuable for the purposes of ascertaining the reliability of witness testimonies or to establish any relevant links. However, this Regulation does not introduce any obligation on national authorities to share evidence with Eurojust.

Since April 2022, when the EU legislator took action to introduce these legal changes, Eurojust has started to set up the new facility and to preserve and catalogue evidence related to crimes committed during the war in Ukraine. Although the legal changes indicated are very recent, it is easy to foresee that their effects will soon be seen. On the one hand, this is be due to Eurojust's great experience as a privileged mediator of judicial cooperation. On the other, this seems to be caused by the large amount of evidence that seems to be collected on the ground. Indeed, as has been observed, the conflict between Russia and Ukraine could be one of the most documented through digital evidence as well

as one of the most "actively watched" by the community on social media.[37] In such a scenario, the enhanced capacity to collect, preserve, sort digital evidence and make it directly accessible to the authorities conducting investigations – this is the role entrusted to Eurojust – may prove to be a choice that can make the difference in effectively prosecuting the commission of serious international crimes and bringing those responsible for them to justice.

5 Critical Aspects

Of course, all that glitters is not gold. The choices adopted certainly have positive aspects, some of which have already been mentioned, but, at the same time, they can entail risks to which attention must be paid.

Among the positive aspects are, without a doubt, the enlargement of much of the system inspired by mutual recognition to judicial cooperation on serious international crimes with third parties. Foremost among them is the Office of the Prosecutor of the International Criminal Court. It has been repeatedly observed, in various studies, that cooperation between the States Parties to the Rome Statute and the International Criminal Court is plagued by certain limitations (which tend to be due to the problem of being structured along the lines of more traditional instruments, such as extradition and letters rogatory).[38] These limits inevitably affect the efficiency of the intervention of the Court's organs, both when investigations and trials are administered directly by its offices, and when the case is left to a national authority, in the name of the principle of complementarity. Put differently, slowness and inefficiency in finding and using information harms both the direct administration of criminal proceedings, managed by the ICC itself, and the indirect administration (where jurisdiction is exercised by a State party, according to the principle of complementarity). Even in the latter case, the fairness of the choice (in particular the control over the willingness and ability of the national judiciary to conduct the trial) can be compromised by inadequate cooperation.

37 See S. Aalto-Setälä – M. F. Jaramillo Gomez, 'ICC investigations in Ukraine: How Digitally Derived Evidence can make a difference', at https://www.leidenlawblog.nl/articles/icc-investigations-in-ukraine-how-digitally-derived-evidence-can-make-a-difference.

38 See J. Nyamuya Maogoto, 'A Giant without Limbs: The International Criminal Court State-Centric Cooperation Regime', *The University of Queensland Law Journal*, 2004, pp. 102–133. The metaphor of the title is inspired by a definition of Antonio Cassese, who in turn defined the ICTY a giant "without arms and legs" (A. Cassese, 'On Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', *European Journal of International Law*, 1998, pp. 2–17, at 13).

The adoption of a system close to the EU mutual recognition system, in which what counts, beyond the legal technicalities, is the free sharing of information and direct access to it, as well as constant contact between the various bodies involved, can greatly benefit the quality of the ICC's action, and, more generally, the strategy of law enforcement against persons responsible of the of the commission of grave international crimes. The area of impunity, thanks to the extension of the EU cooperation method, can potentially be reduced.

In addition, Eurojust can help not only to make faster the exchange of information between the different bodies involved, but also to prepare stronger court cases, thanks to the system of collecting, storing and ordering evidence that is being set up (an area in which the experience gained over many years of work can produce positive results).

However, there are some critical aspects too. They are related to the actual impartiality of the initiatives undertaken. In fact, the JIT that has been set up involves Ukraine, whose system of administration of justice does not leave one entirely satisfied with the level of impartiality of the investigations conducted and judgments rendered.[39] As it has been observed "classic deficits in the rule of law have persisted since his election in 2019, not least concerning the independence of the judiciary. It is plainly unreasonable to expect that these problems would disappear – virtually overnight – with the Russian invasion of 24 February".[40]

Doubts concerning the actual independence and impartiality of the Ukrainian judiciary may have consequences for the effectiveness of the actions taken. For example, it is possible that the JIT that has been reported on may also appear in the eyes of the international community to be inadequately free from bias in the conduct of its work, given the key role that one of the countries involved in the war may play there. In this sense, the very action of the ICC OTP risks being – at least in the external perception – partly compromised. It

39 See K. Ambos, 'Ukrainian Prosecution of ICC Statute Crimes: Fair, Independent and Impartial?', at https://www.ejiltalk.org/ukrainian-prosecution-of-icc-statute-crimes-fair-independent-and-impartial/.

40 See under this regard the opinion expressed (no. 1029 / 2021) by the European Commission for Democracy through Law (Venice Commission). In that opinion the Venice Commission observed that a draft law under examination before the Ukrainian Parliament (draft law no. 5068) "is a partial measure and does not provide for a holistic reform of the judiciary", making various recommendation to improve the issue of independence and impartiality of the judiciary in Ukraine. The paper is available at the website: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2021)004-e.

is perhaps not by chance that the OTP opted not to plainly be a member of the JIT, but rather to be a mere "participant".[41]

Although the critical aspects outlined are certainly worthy of attention, and should not be underestimated, they should not be overestimated either. While it is quite realistic that the inquiry of the JIT may not be entirely complete, because it could be oriented to highlight mostly the crimes committed by one of the armies involved in the conflict, there is currently sufficient evidence to compensate for any gaps or limitations that may plague that investigative work.

First of all, the JIT is not the only body to investigate crimes committed in the framework of the armed conflict between Russia and Ukraine. To remain within the EU context alone, other countries have undertaken similar initiatives, including France, Germany and the Netherlands. The extraneousness of these states to the JIT can be seen as a factor potentially offsetting any limitations and tunnel vision that might affect the overall work of the JIT. Moreover, all EU countries, including those that are not part of the JIT, are required to cooperate with Eurojust, which in turn will support the work of the ICC OTP.

In this complex interweaving, there is hope that the information and results achieved may form a more articulated and ultimately more complete mosaic than can emerge from the inquiry conducted within the JIT alone. Moreover, it cannot be forgotten that, on an autonomous basis, the ICC OTP has, as of March 2022, decided to open an investigation into the situation in Ukraine.[42] It is therefore presumable that, on the one hand, this explains its mere participation in the JIT (instead of its full membership). This way, in fact, the OTP may benefit of the outcome produced by the JIT efforts, while at the same time follow its own strategy, that might integrate the results reached by the JIT.[43]

It must be considered that bias factors due to the way in which State parties cooperate do not at all constitute a novum, in the overall experience of the

41 K. Ambos, 'Ukrainian Prosecution of ICC Statute Crimes'.

42 See ICC, PTCh II, *Situation in Ukraine. Notification on receipt of referrals and on initiation of investigation*, ICC-01/22, 7 March 2022, available at https://www.icc-cpi.int/court-record/icc-01/22-2. See also the ICC, Presidency, Decision assigning the situation in Ukraine to Pre-Trial Chamber II, ICC-01/22, 2 March 2022, at https://www.icc-cpi.int/court-record/icc-01/22-1.

43 In the press conference at which the states, Eurojust and the OTP ICC presented the establishment of the ICC, Mr. Karim Khan QC, the current head of the office, was very careful to emphasise his aim to operate in a completely independent and impartial manner ("without fear and favour and with independence"), investigating crimes that may be committed by either of the armies involved in the conflict. See recording press conference of May 31st, 2022, at minute 15.05 of the conference (https://www.youtube.com/watch?v=_HW9AcF-AxI).

ICC. It is in fact well-known that the work of the ICC, and, of course, of the OTP, can be conditioned by the way in which States Parties to the Statute cooperate with them since from the first cases initiated on the basis of the self-referral practice.[44] This kind of problem cannot be eliminated, as it constitutes a structural critical element of the Court's action. However, it can be limited with rigorous scrutiny, through which testing that constraints and biases due to the cooperation with States do not compromise the Court's work as a whole. In the current case involving the conflict between Russia and Ukraine, the picture does not appear to be too different from others that have already occurred. On the contrary, the very plurality of different actors (EU states that are not members of the JIT, States that have instead become members of the JIT, the ICC OTP acting both independently but also as a JIT participant), all having an authoritative and experienced institution such as Eurojust as a point of connection, give hope that the overall result may be comprehensive enough in the long run to actually allow justice to be done.

6 The Role of the EU to Contrast the Commission of CIC

In this scenario, it becomes clear how the EU can play a leading role, in different forms. Firstly, by putting its legal instruments, *in primis* those inspired by mutual recognition (on arrest and surrender, collection and exchange of evidence and freezing and confiscation of assets) at the service of a more effective fight against the commission of serious international crimes. Secondly, by lending its organs, first and foremost Eurojust,[45] to act as a coordinating

44 See on this well note issue C. Safferling, International Criminal Procedure, Oxford University Press, 2012, at 87. See also P. Gaeta, 'Is the Practice of "Self-Referrals" a Sound Start for the ICC?', Journal of International Criminal Justice, 2004, pp. 949–952.

45 However, it should not be overlooked that Eurojust's entry into play will also favour the involvement of Europol. In this sense, Regulation (EU) 2022/838 states in recital 15 that "Eurojust and Europol should closely cooperate in the context of their respective mandates, taking into account the need to avoid duplication of effort and their respective operational capacity, in particular as regards the processing and analysis of information in the context of Europol's existing dedicated system on international crimes, referred to as 'Analysis Project Core International Crimes', to support competent authorities in investigating and prosecuting genocide, crimes against humanity, war crimes and related criminal offences. Therefore, Eurojust should be able to transmit to Europol information that it receives in the performance of its operational function, under Regulation (EU) 2018/1727, of supporting Member States' action in combating genocide, crimes against humanity, war crimes and related criminal offences. Such cooperation should include a regular joint evaluation of operational and technical issues".

and bridging institution between the EU level of investigation and the international level, carried out by the ICC. In this context, the action of Eurojust would also have the task of acting as a new highly developed facility for the collection, storing and ordering of evidence, that could be easily accessible by all the players in the field, first of all the OTP of the ICC. Thirdly, thanks to the investigations conducted by the judiciaries of EU Member States autonomously, integrating the cases presented before the ICC by the OTP, in a context of productive complementarity,[46] which has rarely been witnessed in other scenarios the ICC has dealt with since its inception. Trying to look at things from an optimistic perspective, integrated action between the EU and the ICC could make the latter a giant with, not without, arms.

The final question that can be asked is whether this course of action following the outbreak of war in Ukraine constitutes an isolated episode or whether it instead represents a new chapter, in which the EU chooses to play a more active role in combating serious international crimes and bringing the alleged perpetrators to justice. It is too early to give an answer to this question. On the one hand, the war in Ukraine appears very specific, due to the proximity of the theatre of war to the EU, the repercussions it may produce and the close geopolitical and economic ties between the EU area and the States involved in the conflict. It is therefore understandable why the EU has decided this time to adopt a noticeably productive attitude, with a multilevel and integrated involvement of its organs (accompanied by a clearly engaged attitude of many of its Member States). However, this does not imply that the Union is willing to act in the same way in different contexts, which are not as close to its interests as in the case concerning the Ukraine.

On the other hand, one cannot exclude that the EU may become more aware of its capacity to play a leading role and, if it wants, to make a difference, contributing to make more effective the action of the ICC, an institution to which the EU has appeared closely related since its establishment. It cannot therefore be ruled out that, should it prove strategically necessary, the EU will continue along the path it has taken, seeking to make international criminal justice a tool to promote its core values, which is ultimately nothing more than

46 A similar term, "proactive complementarity", was used some years ago by W. W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice', *Harvard International Law Journal*, 2008, pp. 53–108. Actually, the author intended to define the ICC ability to encourage and assist national governments to prosecute international crimes. The concept used in this contribution, productive complementarity, is referred instead to a different perspective, in which EU, as cooperator of the ICC, may help it to implement in a better, more aware way (a sort of augmented capacity) the principle of complementarity provided in the Rome Statute.

defending its essential interests more effectively. Such a development, which is currently not on the geopolitical agenda of the European Union, could one day find a way to develop. It is true, however, that the realisation of such a plan requires awareness of the time required for its practical implementation and the risks involved: after all, the Roman Empire strategy consisting in what the poet Virgil described as *pacisque imponere morem* (enforcing values through peace),[47] wasn't built in a day.

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47 Virgil, Aeneid, 6, 851–853.