CHAPTER 2

International Judicial Cooperation and the EU Principle of Mutual Recognition – towards a Convergence of Systems?

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1 Introduction

This chapter focuses on the investigations carried out by the ICC in cooperation with several EU institutions (as well as several EU Member States) in connection with international crimes committed during the war between Russia and Ukraine.

The idea is proposed that, on the one hand, EU cooperation instruments can serve as an inspiring model for cooperation between ICC States Parties and the ICC itself. On the other, that, in this investigation, what several scholars proposed in the first years after the Court's entry into force comes true: the ICC should play a predominantly 'Circuit Rider' role by facilitating State-level investigations and prosecutions of international crimes,[1] and by exploiting transnational networks.[2] These networks, thanks to their soft power, may be able, in comparison to top-down enforcement, to achieve effective results in the implementation of international criminal justice, which is still so strongly linked to the national interests of each State.[3]

The topic examined appears interesting because the actions taken by the EU, through its competent institutions and its Member States, to combat, investigate and help prosecute the commission of international crimes in the war conflict between Russia and Ukraine, cover, albeit with different modalities and measures, all the areas to which this research has been extended (arrest and surrender, collection and exchange of evidence, asset freezing and confiscation).

1 For an extensive and articulate reconstruction, see Jenia Iontcheva Turner, 'Nationalizing International Criminal Law' (2004) 41 Stanford Journal of International Law 1.

2 See Jenia Iontcheva Turner, 'Transnational Networks and International Criminal Justice' (2007) 105 Michigan Law Review 985.

3 See Turner (n 1) 994.

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A few considerations suffice to justify what has just been said. On the one side, the EU has consistently adopted economic sanctions, including asset freezing and confiscation measures, since 2014[4] and increasingly since Russia invaded Ukrainian territory in 2022, against individuals, organizations, and the Russian government.[5]

Furthermore, as of 2022, the EU is contributing significantly to the collection of evidence to help its Member States and the Office of the Prosecutor of the International Criminal Court (ICC's OTP) bring to justice persons responsible for international crimes. Finally, in a statement by the High Representative for External Action, the EU supported the decision of the Pre-Trial Chamber II of the International Criminal Court to issue an international arrest warrant against the President of the Russian Federation Vladimir Putin, and the Commissioner for Children's Rights in the Office of the President Maria Lvova-Belova, concerning the alleged crimes of illegal deportation and illegal transfer of children in the context of the situation in Ukraine.[6]

The analysis conducted in this chapter focuses mainly on the collection of evidence, a topic on which the doctrine is more abundant and allows for more in-depth considerations. However, from a methodological standpoint, the idea is that the principle of mutual recognition, through which the EU cooperates in criminal judicial matters with the ICC's OTP, can be an effective solution to improve the ICC's overall action and to realise in a more integrated way the principle of complementarity to which the ICC must be guided.

The chapter is divided into four parts. The first part (*infra,* §2 and 3) examines the operations the EU has put in place to cooperate with the ICC, mainly in evidence collection and exchange.[7] The second part (*infra,* §4) examines

4 See Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine; and the Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

5 See the complete framework at European Commission, 'Sanctions adopted following Russia's military aggression against Ukraine' (finance.ec.europa.eu) <https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine_en?prefLang=it> accessed 24 July 2024.

6 See The Diplomatic Service of the European Union, 'Russia/Ukraine: Statement by the High Representative following the ICC decision concerning the arrest warrant against President Putin' (eeas.europa.eu, 19 March 2023) <https://www.eeas.europa.eu/eeas/russia ukraine-statement-high-representative-following-icc-decision-concerning-arrest-warrant-against_en> accessed 30 July 2024.

7 In this part, I take up several considerations developed in my editorial published in 2022: Michele Caianiello, 'The Role of the EU in the Investigation of Serious International Crimes

the important legal implications for the EU of this cooperation and the role it can play in countering the commission of serious international crimes. The third part (*infra,* §5) reflects on the prospects for the ICC considering its experience in countering international crimes by cooperating with the EU and using its legal system of judicial cooperation. Finally, the fourth part (*infra,* §6) addresses the topic from the perspective of the rule of law and due process, seeking to draw some general considerations on the three legal levels of judicial cooperation: international, transnational, and national. A specific reflection is devoted, in the fourth part, to the topic of digital evidence and AI. Digital evidence constitutes, in numerical terms, the main type of evidence collected in the context of the war between Russia and Ukraine (but a similar figure had already emerged during previous investigations of situations other than the one examined here). The use of AI, given the large amount of digital evidence, seems crucial to order to such a large amount of information and to move across it. The final idea is that, in this specific field, which constitutes one of the effects of the digital transition in the judiciary, there is room to develop, at the supranational level, a more uniform set of principles and rules than has been possible for more traditional form of evidence (such as testimony, or searches and seizures). This is because, in the field of digital evidence and AI, different national legal traditions have less influence.

2 EU Actions to Fight against the Commission of Core International Crimes (CIC)

It is well known that 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 bodies, against serious forms of transnational crime, including Core International Crimes (CIC). Among these, it is worth mentioning the action adopted on a normative level by the EU in the late 1990s to contrast CIC commission: 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 Western Balkans.[8] Furthermore, the EU has fully committed to the establishment of the International Criminal Court, to the Rome Statute, to which all EU Member

Committed in Ukraine. Towards a New Model of Cooperation?' (2022) 30 European Journal of Crime, Criminal Law and Criminal Justice 219.

8 Kei Hannah Brodersen, 'The ICTY's Conditionality Dilemma' (2014) 22 European Journal of Crime, Criminal Law and Criminal Justice 219.

States are parties, and to the financial support given to the ICC.[9] Political and economic sustain has also been accompanied by legal support. It is in this key that one can read those normative provisions which, since the EAW FD, have included the crimes over which the ICC has jurisdiction among those exempted from double criminality control. In this regard, it is useful to recall that the three legal sources examined in this research, the just mentioned EAW FD, the 2014 EIO D and the Regulation 1805/2018, all confirm that for offences falling within the jurisdiction of the ICC, a double criminality check is not required.

This means, as is well known, that when a national judicial institution of any EU Member State is proceeding against perpetrators of crimes covered by the Rome Statute, the principle of mutual recognition operates to its fullest extent, and a double criminality check is never required. In addition, using a Council Decision, the EU established, in 2002[10] (and reinforced one year later, in 2003),[11] the European Network for investigation and prosecution of genocide, crimes against humanity and war crimes ('Genocide Network').[12]

The framework depicted provides a better appreciation of recent developments following the outbreak of war between Russia and Ukraine.[13] There seem to be two specific 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 (and, to a lesser degree, to Europol) of a pivotal role in the collection and exchange of information, regarding investigations concerning serious international crimes (primarily those occurring in the Russia-Ukraine conflict).

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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' (July 2021) <https://asp.icc-cpi.int/sites/default/files/iccdocs/asp_docs/ASP20/ICC-ASP-20-12-ENG.pdf> accessed 30 July 2024.

10 Council Decision 2002/494/JHA of 13 June 2002 on setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes [2002] OJ L 167/1.

11 Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes [2003] OJ L 167/12.

12 The EU's firm commitment against the perpetration of CIC was confirmed, once more, in the support given to establishing the Specialist Chambers and Specialists Prosecutor's Office in Kosovo. In this regard Caianiello (n 7) 226.

13 See for a general analysis antecedent to the actual developments related to the war Natalia Bodnar, 'The EU-Ukraine Cooperation in Criminal Matters: "Justice" Dimension' (2018) 5 *European Political and Law Discourse* 13; Giulia Lanza, 'The Fundamental Role of International (Criminal) Law in the War in Ukraine' (2022) 66 *Foreign Policy Research Institute* 424.

3 The Establishment of a Joint Investigation Team. The Role Played by Eurojust (and Europol)

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.[14]

This development should not appear surprising. First, 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.[15]

The action taken establishing a JIT thus adapts a legal tool, the JIT FD, conceived in the framework of the 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.[16]

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 is concerned, to States and institutions outside the EU legal order, such as Ukraine and the OTP ICC.[17]

This outcome is made possible thanks to two factors. Firstly, by the application – as well as note – of the principle of mutual recognition, that rules

14 See the Eurojust, 'Estonia, Latvia and Slovakia become members of joint investigation team on alleged core international crimes in Ukraine' (31 May 2022) <https://www.eurojust.europa.eu/news/estonia-latvia-and-slovakia-become-members-joint-investigation-team-alleged-core-international> accessed 30 July 2024. See the further press release Eurojust, 'ICC participates in joint investigation team supported by Eurojust on alleged core international crimes in Ukraine' (25 April 2022) <https://www.eurojust.europa.eu/news/icc-participates-joint-investigation-team-supported-eurojust-alleged-core-international-crimes> accessed 30 July 2024.

15 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. Eurojust, 'Press conference – Joint investigation team on alleged core intl. crimes in Ukraine | Eurojust' (31 May 2022) <https://www.youtube.com/watch?v=_HW9AcF-AxI> accessed 30 July 2024.

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

17 See on this topic Michele Caianiello, 'Models of Judicial Cooperation with *Ad Hoc* Tribunals and with the Permanent International Criminal Court in Europe' in Giulio Illuminati and Stefano 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.

in the cooperation between Member States in investigating the commission of CIC. Secondly, by the establishment of the JIT. This permits to expansion of 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 evidence.[18] Such a hybrid JIT composition, with both 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,[19] thanks to the practice of parallel investigations into the same or related criminal facts. The JIT 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 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.

In the perspective under scrutiny, one must also 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 the EU level, but also on a wider geopolitical area (wherever directly or indirectly some legal interest of the Union is at stake).

Before examining 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 Art 3(1) of Regulation (EU) No 1727/2018, which, in turn, refers to Annex 1. The Annex includes war crimes, crimes against humanity, and genocide among the crimes in respect of which Eurojust may act. In addition, Art 3(4) extends Eurojust's competence to instrumental crimes, that is those necessary to procure the means of committing the serious crimes enlisted in Annex 1, those made 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 constraints, compared to the one attributed to it in the field of offences affecting the financial interests of the EU. In fact, regarding

18 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.

19 See Michele Simonato, 'The "Spontaneous Exchange of Information" between European Judicial Authorities from the Italian Perspective' (2011) 2 New Journal of European Criminal Law 220.

the latter, Eurojust must refrain from acting if EPPO has decided to intervene by initiating an investigation or prosecution.[20] On the contrary, about serious international crimes, Eurojust is the only major player at the EU judicial level and, as such, should not be subject to limitations or obstacles.

The recent developments that occurred 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, 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) No 838/2022, amending Regulation (EU) No 1727/2018 as regards the preservation, analysis, and storage at Eurojust of evidence relating to genocide, crimes against humanity, war crimes, and related criminal offences.[21] Thanks to this amendment, Article 4(1) of Regulation (EU) No 1727/2018 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 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 that must collect, store, and order DNA profiles established from the non-coding part of DNA, photographs, and fingerprints and, about 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 the location at which the offences were committed, the criminal category of the offences, the

20 This holds except regarding offences committed in countries that do not participate in enhanced cooperation for EPPOs, or unless EPPO or a State participating in EPPO has asked Eurojust to participate.

21 See the press release of the European Council, 'Eurojust: Council adopts new rules allowing the agency to preserve evidence of war crimes' (25 May 2022) <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/> accessed 30 July 2024.

progress of the investigations, and, about 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 following 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 ascertaining the reliability of witness testimonies or establishing 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 a new facility and 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 due to Eurojust's great experience as a privileged mediator of judicial cooperation. On the other, this appears 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.[22] In such a scenario, the enhanced capacity to collect, preserve, and 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 a difference in effectively prosecuting the commission of serious international crimes and bringing those responsible for them to justice.

Finally, European Commission President Ursula von der Leyen announced the creation of the International Centre for the Prosecution of the Crime of Aggression against Ukraine at the 24th EU-Ukraine Summit on 2 February 2023

22 See Sofia Aalto-Setälä and Maria F. Jaramillo Gomez, 'ICC investigations in Ukraine: How Digitally Derived Evidence can make a difference' (Leidenlawblog, 18 May 2022) <https://www.leidenlawblog.nl/articles/icc-investigations-in-ukraine-how-digitally-derived-evidence-can-make-a-difference> accessed 30 July 2024.

(ICPA).[23] According to the description on the Centre's website, the ICPA is a unique judicial pole, incorporated into Eurojust to support national investigations into the crime of aggression related to the war in Ukraine. At the ICPA, independent prosecutors from various countries can work together on a daily basis in the same location, exchanging evidence and agreeing on an integrated investigation and prosecution strategy. ICPA efforts should prepare and support any future prosecution of the crime of aggression, regardless of the jurisdiction in which these cases will be tried. ICPA participants benefit from Eurojust's specialised operational, technical, logistical and financial support. The Core International Crimes Evidence Database (CICED), managed by Eurojust, is central to the operations of the ICPA. Evidence already submitted to CICED for other international crimes, such as genocide, crimes against humanity and war crimes, may also be relevant to the investigation of the crime of aggression. In addition, ICPA participants can submit national evidence to CICED for analysis.

Eurojust is not the only EU network involved at the forefront of the investigation of crimes committed during the war in Ukraine. A significant role is also played by Europol. As of 2022, Europol has been involved in several support activities, including communication and intelligence gathering, support for war crimes investigations, and support for the EU Commission's initiatives to seize and confiscate assets, knowledge sharing and liaison investigation officers.[24]

4 The Prospects for the European Union

The picture outlined so far can be interpreted in several ways, all of which can be useful in trying to work out different perspectives for the future. Although the initiatives adopted in the past two years, taking advantage of the opportunity offered by the war between Russia and Ukraine, are undoubtedly significant, the two main players involved, the EU and the ICC, still have significant

23 See the website Eurojust, 'International Centre for the Prosecution of the Crime of Aggression against Ukraine' (eurojust.europa.eu) <https://www.eurojust.europa.eu/international-centre-for-the-prosecution-of-the-crime-of-aggression-against-ukraine> accessed 30 July 2024. See also Julia Geneuss and Florian Jeßberger, 'Russian Aggression and the War in Ukraine. An Introduction' (2022) 20 Journal of International Criminal Justice 783.

24 See the information shared at the Europol website: Europol, 'Europol's solidarity with Ukraine' (europol.europa.eu) <https://www.europol.europa.eu/europol's-solidarity-ukraine> accessed 30 July 2024.

weaknesses. Both institutions, albeit in different ways and different contexts, are working to find a more stable balance than the one achieved so far and to acquire fuller legitimacy in the international scenario.

They have metaphorically travelled a road that has led them to a crossroads through what they have achieved by cooperating up to now: faced with this, they can choose whether to put what they have managed to achieve so far to more stable use or rather to be satisfied with the experience they have had, without expecting to turn it into a new chapter in their history.

If we look at the overall picture from the EU perspective, it is evident the significant role that its police and judicial institutions are potentially able to play in the fight against the commission of CIC. Paradoxically, it is precisely the fact that they can mainly rely on soft power rather than vertical power in the strict sense, that seems to make these transnational bodies more efficient in the international arena.[25] Moreover, this should come as no surprise, given that in the supranational context, in which respect for the sovereignty of States is still so important, soft power, due to its elasticity and flexibility, can be more effective than vertical hierarchical power, which is often perceived as an undue intrusion into what are traditionally considered to be matters that are strictly or predominantly the responsibility of national governments.

As is well known, both Europol and Eurojust are, in essence, facilitators of the work carried out by their national police and judicial counterparts.[26] Both European bodies have no direct capacity to carry out investigations or prosecutions. Their added value, however, lies in their ability to process a wide range of data, obtained through their position as privileged mediators, and their power to conclude agreements and work with institutions outside the EU Member States. This puts both agencies in a position to receive information, reports, and evidence on a wider scale and of higher quality than individual States could if they acted in isolation.

On the other hand, both Eurojust and Europol are endowed with the power to direct the work of the respective investigation and prosecution agencies of the EU Member States. This is particularly evident in Eurojust, which can give written directions to national judicial authorities, requesting them to prosecute, set up joint investigation teams, or order special investigative measures (such as controlled deliveries). Even Europol, in recent times, thanks to the

25 Jenia Iontcheva Turner, 'Transnational Networks and International Criminal Justice?' (2007) 105 Mich. L. Rev. 994, 999.

26 Gaetano de Amicis, 'Centralised Bodies of Administrative and Police Cooperation' in Roberto E. Kostoris (ed), *Handbook of European Criminal Procedure* (Springer 2018) 202, 223.

amendment to the Regulation governing its work adopted in 2022 (Art 6(1)(a)), can require the authorities of a Member State to initiate investigations, communicating this request immediately to Eurojust and EPPO.

These possibilities of making formal requests to national authorities – which are made known among all EU institutions with competence in criminal matters – have an effect not too far from that of an order in the proper sense. The authority of the Member State that neglects the invitation to act would be subjected to unpleasant scrutiny, while the government of the Member State in which the authority operates would face delicate diplomatic issues. Moreover, the closely intertwined interests, economic and otherwise, of the various EU countries produce a not inconsiderable indirect push, capable, especially if the stakes are high, of considerably reducing the margin of choice for the individual national authority. For instance, a financial aid package can also be linked to the compliance a State can show in the field of law enforcement. From this specific point of view, compliance with international criminal law, one must consider that the fight against CIC, and the activation to bring the persons responsible for crimes to justice is conceived by the EU as strategic for strengthening the rule of law, which, in turn, constitutes one of the common foundations of the entire Union and its Member States.[27]

At the same time, the soft nature of the power exercised by these supranational bodies is such that it leaves in the hands of the national authorities a margin of appreciation, regarding, if nothing else, how to act and how to achieve the objectives set by Europol and Eurojust.

The experience during the Russia-Ukraine conflict makes it clear that the EU's transnational bodies are also able to develop their potential in the field of international criminal justice. Eurojust has been able, by exploiting the legal framework that was already in place (and by benefiting from the amendment to the Regulation made in 2022 precisely to address the emergency of the war in Ukraine) to play a pivotal role, at the crossroads of investigations conducted by several EU countries, by third countries, and by the ICC OTP. The ability to collect information, to store it, and to allow access to all 'members of the club', meaning by this definition both the judicial authorities of EU States and those outside the EU who are partners in the investigation of crimes committed in Ukraine, gives Eurojust the role of director of a broader strategy. A strategy in which, realistically, the most numerous prosecutions will take place before national jurisdictions,[28] both within and outside the EU countries; at the same

27 See Caianiello (n 7) 221–223.

28 To a certain extent, this strongly pro-national jurisdiction's approach is inspired by what is observed in Turner (n 1) 31. But while Turner maintains a radical approach to his theory

time, a symbolically pivotal role, for the most sensitive cases involving Heads of State or members of Government, will be played by the ICC OTP (and ultimately by the ICC itself).[29]

Moreover, it should not be overlooked that the EU's potential to promote countering the commission of CIC seems broader than hitherto. If, exploiting the potential of the Treaty, the EU legislator was to choose to extend the competence of EPPO to the CIC commission, the EU could play a more direct and active role in the actual prosecution of crimes, conducting investigations, and directly prosecuting through its own body.[30]

Another very important aspect, from a European perspective, is the application of the principle of mutual recognition (and the Framework decision on Joint Investigation Teams) to cooperation with the ICC. This choice, on a technical level, seems to fit well with the needs of the ICC. The principle in question, which operates – as far as it is relevant in the context of this research – in matters of arrest and surrender, collection and exchange of evidence, and confiscation, ensures swift action by the jurisdictions involved. It also allows for respect, at least in essential aspects, for national legal traditions, while taking care not to depart from the tracks set by the EU Charter of Fundamental Rights and ECtHR human rights jurisprudence. The model, although certainly not free of flaws, seems easily compatible with the requirements, from the outset marked by a certain flexibility, applied by the ICC, which refers in the Statute to a set of principles very similar to the European one.[31] Similarly, the reluctance to provide for overly specific and strict exclusion rules, particularly in

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(whereby the ICC in practice should never hold trials), I believe that, as the reality of recent years has shown, a conception of the ICC as a mere 'circuit rider' is not optimal. Indeed, the ICC may have the capacity to go beyond the limits of national jurisdictions. One case, for example, concerns trials against Heads of State or members of government, who before national jurisdictions would always enjoy immunity. See Christoph Safferling, *International Criminal Procedure* (Oxford Un. Press 2012) 105. Of course, the issue of Heads of State and Head of governments is quite controversial. See Leila Nadya Sadat, 'Heads of State and other government officials before the International Criminal Court: the Uneasy revolution continues' in Margaret M. de Guzman, James E. Beasley and Valerie Oosterveld (eds), *The Elgar Companion to the International Criminal Court* (Edward Elgar 2020) 96–127; Gerhard Kemp, 'Immunity of High-Ranking Officials Before the International Criminal Court – Between International Law and Political reality' in Gerhard Werle and Andreas Zimmermann (eds), *The International Criminal Court in Turbulent Times* (Springer 2019) 61–82.

29 This should be the ideal set-up for the ICC, based on the principle of complementarity. See Safferling (n 28) 94.

30 See Caianiello (n 7) 227.

31 See Safferling (n 28) 378.

the field of evidence, which is typical of the ICC system,[32] bears a resemblance to the *modus operandi* of the EU directives on the admissibility of evidence: EU legislation, in fact, except in sporadic cases, tends to leave this aspect to national jurisdictions, tending not to impose standards or exclusion rules at the supranational level.

On reflection, the European model of exchange of information and evidence should apply not only in one direction (from the EU or its Member States to the ICC) but also in the opposite direction (from the ICC to the EU and its Member States). On the one hand, the operability of the JIT allows information, also collected by authorities operating within the EU, to be easily circulated through legal sources based on mutual recognition, within the Member States jurisdictions. On the other hand, a possible handing over by the ICC OTP to let us suppose Eurojust of evidentiary relevant information could then benefit from direct access for national authorities investigating a case (and wishing to make use of that information). Finally, the surrender by the ICC OTP to a national judicial authority within the EU, if considered admissible by the latter, could then be transmitted to other judicial authorities within the Union, under the aegis of the principle of mutual recognition, as also in the recent *Encrochat* case the Court of Justice established.[33]

Ultimately, the model at work seems to favour, if nothing else, celerity in cooperation, ensuring, on paper, respect for a set of common values, between the ICC and the EU.

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32 See in this regard Michele Caianiello, 'First Decisions on the Admission of Evidence at ICC Trials – A Blending of Accusatorial and Inquisitorial Models?' (2011) 9 Journal of International Criminal Justice 385; John D. Jackson and Sarah J. Summers, 'Evidence in the international criminal tribunals' in *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge University Press 2012) 108–148.

33 See Case C-670/22 *M.N.* (*EncroChat*) EU:C:2024:372. See Thomas Whal, 'AG: EncroChat Data Can, in Principle, Be Used in Criminal Proceedings' (Eucrim, 8 February 2024) <https://eucrim.eu/news/ag-encrochat-data-can-in-principle-be-used-in-criminal-proceedings/> accessed 30 July 2024; Bill Goodwin, 'Germany: European Court of Justice ruling on EncroChat could lead to new legal challenges. A ruling by the European Court of Justice could prompt legal challenges in EncroChat prosecutions in Germany and other EU States' (Computerweekly.com, 08 May 2024) <https://www.computerweekly.com/news/366583692/Germany-European-Court-of-Justice-ruling-on-EncroChat-could-lead-to-new-legal-challenges> accessed 30 July 2024; Lorenzo Bernardini, 'On Encrypted Messages and Clear Verdicts – the EncroChat Case before the Court of Justice (Case C-670/22, MN)' (EuLawLive, 21 May 2024) <https://eulawlive.com/op-ed-on-encrypted-messages-and-clear-verdicts-the-encrochat-case-before-the-court-of-justice-case-c-670-22-mn-by-lorenzo-bernardini/> accessed 30 July 2024.

5 The Prospects for the ICC

The collaboration between the International Criminal Court (ICC) and the European Union (EU) in the investigation and prosecution of war crimes in Ukraine is a significant example of how international and national institutions can work together to ensure justice.

The complementarity between the ICC and domestic prosecutions is a key element in enhancing the effectiveness of the ICC. The ICC can act as a catalyst for investigations by States, intervening only when national authorities are unable or unwilling to prosecute certain crimes. This provides an incentive for countries, such as EU Member States, to strengthen their investigative and judicial capacities in international crimes. Furthermore, the collaboration between the ICC and the European institutions allows for the construction of a transnational network of judicial cooperation, strengthening the impetus to investigate and prosecute such crimes.

Complementarity between the ICC's jurisdiction and actions at the national level, strengthened by collaboration with the EU, is key to overcoming some of the challenges the Court has faced in the past. Complementarity, first, is a method of work-sharing between the ICC and its Member States. It presupposes, but in practice mandates, that the ICC does not conduct most trials on serious international crimes. This is for two reasons. The first is that, although heavily funded by States, the Court does not have the necessary resources to cope with all the demands for justice that may arise across the globe to cases over which it would have jurisdiction under the Statute. Secondly, it should be noted that even if these resources would allow the ICC to administer every case that deserves to be tried, this would not be an optimal solution.[34] The Court's function is to encourage more widespread protection of rights that are compromised by the commission of serious international crimes.[35] To this end, the hope is that States Parties will develop their domestic systems to be able to do justice when an international crime is committed over which they could claim jurisdiction. Put another way, the political idea behind complementarity is not, as is obvious from the term itself, that of an isolated international court in an indifferent or inactive international context in the face

34 See what had already caught 20 years ago Turner (n 1) 18.

35 Nevertheless, it is true that the ICC has been less effective than hoped in encouraging national prosecutions. See Paul Seils, 'Putting Complementarity in Its Place' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford Un. Press 2015) 305–327.

of the commission of international crimes.[36] On the contrary, the Court can fully unleash its potential if it is placed in a position to act as the engine of an integrated system. To use the definition of the first Roman emperor, Octavian Augustus, the idea is that of an ICC *'primum inter pares'*, not of a powerful but remote institution.

It is not only a question of resources or power, of course; it is first and foremost a question of culture, and of the dissemination of a set of shared principles in the international community. In this perspective, the active involvement of domestic judicial authorities, demanded by the principle of complementarity, allows for the best use of their contextual knowledge, investigative resources, and relations with local communities. This makes it possible to build stronger cases and ensure greater acceptance and legitimacy of proceedings at the national level.[37] Furthermore, the central role of States is crucial to overcome traditional cooperation and coordination challenges that have often limited the impact of international criminal justice.

In this way, the culture of international criminal justice should spread more pervasively among those countries that have ratified the Rome Statute of the ICC. When States actively prosecute the most serious crimes according to the standards of international justice, the legitimacy and acceptance of prosecutions at the local level are strengthened, the harmonisation of domestic criminal law with international law is promoted, specialised expertise is created at the national level, and cooperation between national authorities and the ICC is fostered.

Finally, trials held at the national level have a more direct and visible impact on communities and the population.[38] They become more proximate and tangible for the citizens concerned, fostering greater public discussion and awareness of international crimes, enhancing victims' and their families' sense of justice and reparation, fostering acceptance and legitimacy of verdicts, and stimulating the growth of a legal culture regarding international crimes.

In sum, promoting expertise at the national level, strengthening investigation and prosecution capacities on international crimes within Member States contributes to consolidating a substratum of shared knowledge and professionalism. It also enhances cooperation and dialogue between national authorities and the ICC, because the frequent exchange of information, best

36 Turner (n 1) 18.

37 Turner (n 1) 23. See also Irene Milazzo, 'Commentary' in Andre Klip and Stephen Freeland (eds), *Annotated Leading Cases of International Criminal Tribunals. The International Criminal Court: 2012–2014*, vol. 61 (Intesentia 2020) 296–306.

38 Milazzo (n 37) 296.

practices, and working methods creates a collaborative culture that transcends individual prosecutions.

In this way, the central role attributed to States in the administration of international criminal justice fosters the widespread dissemination of a common mentality and standards among the countries that are parties to the Rome Statute. This contributes to the consolidation of the ICC's legal and institutional framework over time, making it increasingly entrenched and accepted globally.

Transnational networks, such as Eurojust and Europol, or collaborative legal networks, such as the EU JITs, in this regard, are crucial in enhancing the effectiveness of cooperation between the ICC and EU institutions.[39] These networks make it possible to share information and evidence in a timely and effective manner, harmonise investigative and prosecutorial standards and best practices, enhance national investigative and judicial capacities, and promote political and diplomatic coordination. In the context of the conflict in Ukraine, these networks seem to play a high value role to overcome the traditional challenges of coordination and cooperation, ensuring that perpetrators of the most serious crimes do not go unpunished.

On the one hand, the ICC can act as a catalyst for State investigations, exploiting the principle of complementarity that allows it to intervene only when national authorities are unable or unwilling to prosecute certain crimes. This provides an incentive for countries, such as EU Member States, to strengthen their investigative and judicial capacities in international crimes. On the other hand, the collaboration between the ICC and the European institutions allows for the construction of a transnational network of judicial cooperation that strengthens the impetus to investigate and prosecute such crimes.

6 Perspectives on the Rule of Law. The Potential of EU and ICC Collaboration in the Field of Digital Evidence and AI in Criminal Justice

Many considerations in terms of the rule of law have already been expressed in the previous paragraphs and can therefore be summarised here.

39 A more skeptical approach worth to be read is taken by Sergey Vasiliev, 'Watershed Moment or Same Old? Ukraine and the Future of International Criminal Justice' (2022) 20 Journal of International Criminal Justice 893.

Effective cooperation between the different actors in the international criminal justice system is crucial to countering the commission of international crimes and bringing alleged perpetrators to justice. From this perspective, cooperation between the EU and the ICC seems to be facilitated by the fact that its supranational institutions are inspired by a fairly similar operational model: complementarity for the ICC and subsidiarity, as per Art 4 TEU, for the EU. Trying to simplify the two concepts, which in detail are not as close as the words used might suggest, it can be said that both pursue the goal of giving precedence to State sovereignty. This requires, of course, that States equip themselves to cope with the responsibilities that rest on their shoulders, also considering their membership in these supranational institutions. In the background, of course, remains the role played by these latter institutions, which can intervene when a State is unable to act.[40]

The ultimate goal is the harmonisation of national systems, whose traditions we try as much as possible to respect, supplemented by joining supranational institutions that softly bind them together, the International Criminal Court in one case and, much more strongly, the EU in the other.

In this general framework, a few more words should be said about the type of evidence that, in the Russia-Ukraine conflict, but also previous cases, is becoming predominant. This is digital evidence.

As well known, the term 'digital evidence' refers to any information or data stored, transmitted, or processed in digital form that can be used in a court of law to prove or disprove a fact in question. This evidence is crucial in modern investigations and trials due to the pervasive use of digital devices and the Internet. Digital evidence includes a wide range of data types and sources,

40 Of course, the two guiding principles, complementarity and subsidiarity, are very different, on closer inspection. Complementarity operates primarily as a criterion for dividing jurisdiction over criminal cases between the ICC and the States Parties. In contrast, subsidiarity is a guiding criterion for all EU action, which only sporadically deals with or intervenes in criminal cases (especially in criminal matters, an area that has developed in recent times compared to the more traditional areas of the common market and energy). Furthermore, complementarity allows the ICC to evoke the case when a national State that would have jurisdiction over it is unwilling or unable to act. These are two specific criteria, though also open to interpretation, denoting a situation of impossibility, whether objective or not. Conversely, subsidiarity allows the EU to prevail over the Member States even when the latter would be able and willing to act (or perhaps, with national solutions, have indeed already acted) and yet the EU is best placed to address the supranational nature of the problems involved in the case. A case that, it is worth repeating, may well be of a non-criminal nature (and, moreover, concern problems that are not of a judicial nature).

such as electronic documents,[41] multimedia files,[42] internet activity, computer logs, data from mobile devices, network traffic data, metadata and databases, and cloud storage.

6.1 *Use of Digital Evidence and AI in the ICC*

The ICC increasingly relies on freely available digital evidence from the web, often referred to as open-source evidence.[43] This trend has been driven by various technological advances and social changes. In the new millennium, there has been a significant increase in the volume of open-source evidence. This growth has been further amplified by the advent of Web 2.0, which facilitates interaction and user-generated content. The ability of individuals to upload and share information online has opened new avenues for collecting evidence of international crimes.

The market introduction and widespread use of smartphones and other digital devices have led to a substantial increase in available digital evidence. These devices have become ubiquitous, allowing people around the world to capture events as they happen. New applications have been developed specifically to document international crimes, allowing individuals to capture and share crucial evidence. Notable examples are EyeWitness[44] to Atrocities and CameraV.[45] These applications are designed to ensure that the evidence collected is secure, verifiable, and admissible in court. They provide tools to document atrocities in a way that preserves the integrity of the data, making it useful for future court proceedings.

Since around 2010, there has been a marked increase in open-source digital evidence, coinciding with the mass adoption of smartphones and related technologies. This trend reflects the growing recognition of the importance of

41 Electronic documents are a primary form of digital evidence. They include e-mails, text messages, word processing documents, spreadsheets, PDFs and other files created or stored on computers and digital devices. Such documents can provide a detailed record of communications and transactions relevant to a case.

42 Multimedia files also play an important role among digital evidence. Photos, videos and audio recordings captured with digital cameras, smartphones or other recording devices can document events, capture interactions and provide an often compelling visual and auditory context in court.

43 Alexa Koenig, 'From 'Capture to Courtroom': Collaboration and the Digital Documentation of International Crimes in Ukraine' (2022) 20 Journal of International Criminal Justice 829.

44 See <https://www.eyewitness.global/>. See ibid 833.

45 See <https://camerav.en.uptodown.com/android>. See Raquel Vazquez Llorente, 'Deepfakes in the Dock: Preparing International Criminal Justice for Deepfakes and Generative AI' (2024) 20 The SciTech Lawyer 29.

digital evidence in documenting and prosecuting international crimes.[46] The ability to capture high-quality video and photographic evidence has transformed the international criminal justice landscape, offering new opportunities for accountability.

The ICC OTP has adopted a new strategy to make effective use of digital evidence. This strategy is part of broader initiatives such as Project Harmony, which aims to harmonise the collection and use of digital evidence across jurisdictions.[47] The new ICC OTP strategy recognises the central role of open evidence in building cases against perpetrators of international crimes and seeks to integrate this type of evidence into the judicial process in a more systematic way.[48]

A recent collaboration between Eurojust and the ICC resulted in the publication of guidelines to assist civil society organisations in documenting international crimes. This joint effort is described in the document 'Documenting International Crimes and Human Rights Violations for Criminal Accountability Purposes'.[49] These guidelines provide a comprehensive framework for civil society organisations to collect and store information on international crimes and human rights violations. They include a set of 'do's and don'ts' to ensure that evidence collected is admissible in court and does not inadvertently damage criminal accountability efforts. The guidelines respond to the request of

46 A significant example of the impact of digital evidence is the Al-Mahdi case. In 2016, Ahmad Al-Faqi Al-Mahdi pleaded guilty at the International Criminal Court to the war crime of attacking historic and religious buildings in Timbuktu, Mali. Video evidence played a crucial role in illustrating the extent of the destruction and linking Al-Mahdi directly to the acts. Similarly, the arrest warrants issued for Mahmoud Mustafa Busayf Al-Werfalli in 2017 and 2018 relied heavily on video footage. Al-Werfalli, a commander in the Libyan National Army, has been involved in multiple extrajudicial killings. Videos circulated on social media showed him personally participating in or ordering executions, providing crucial evidence to support the charges against him. See Maria de Arcos Tejerizo, 'Digital evidence and fair trial rights at the International Criminal Court' (2023) 36 Leiden Journal of International Law 749.

47 See Hayley Evans and Mahir Hazim, 'Digital Evidence Collection at the Int'l Criminal Court: Promises and Pitfalls' (justsecrurity, 5 July 2023) <https://www.justsecurity.org/87149/digital-evidence-collection-at-the-intl-criminal-court-promises-and-pitfalls/> accessed 30 July 2024.

48 See also The OTP Strategic Plan 2023–2025, where the Prosecutor in Strategic Goal No. 3 aims to make of the OTP a "global technology leader". See the document at <https://www.icc-cpi.int/sites/default/files/2023-08/2023-strategic-plan-otp-v.3.pdf>.

49 Eurojust, 'Documenting International Crimes and Human Rights Violations for Criminal Accountability Purposes' (Eurojust.europa.eu, 21 September 2022) <https://www.eurojust.europa.eu/publication/documenting-international-crimes-and-human-rights-violations> accessed 30 July 2024.

several civil society organisations and stakeholders in the field of accountability, who have indicated the need for guidance to ensure that the information collected can be used as evidence in future national or international court proceedings. This publication was jointly developed by Eurojust, the EU Network for the Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes ('Genocide Network'), and the Office of the Prosecutor of the International Criminal Court.

These developments highlight the changing landscape of evidence collection and the critical role of digital technologies in promoting accountability for international crimes.[50] The ICC and its partners are harnessing the power of digital evidence to build stronger cases and ensure that perpetrators of international crimes are brought to justice. Through strategic initiatives and collaborations, they are improving the capacity of civil society organisations and individuals to effectively document atrocities, thereby contributing to the broader goals of international criminal justice.[51]

However, the use of digital evidence is not without its challenges. There are inherent risks of possible bias in the collection and presentation of this evidence. On the one side, in fact, it is good that people living in remote and conflict-ridden regions can use their phones to proactively submit evidence to the ICC, potentially creating a bottom-up narrative of international justice. This bottom-up approach allows ordinary people to directly contribute to the documentation of crimes, fostering a sense of participation and ownership in the justice process. However, on the other, those documenting events may

50 The use of footage and videos as evidence is not a new phenomenon. Films were also shown at the Nuremberg Trials to account for the atrocities encountered by the Allies upon their arrival in European territories after the defeat of the Axis regimes. These films provided stark and irrefutable images of the horrors of the Holocaust and other war crimes, helping to convey the extent and brutality of the crimes to the court and the world. The use of visual evidence at Nuremberg set a precedent for the inclusion of multimedia evidence in international criminal proceedings.

51 This is understandable and, in many respects, also useful. The possibility of filming events that ordinary people witness on the street is now unlimited. Thanks to the wide accessibility of smartphones and digital cameras, almost everyone can become a documentarist of events in real time. This democratisation of the media has profound implications for the documentation of international crimes and human rights violations. Audio and video footage is a highly evidentiary asset, very useful for providing an account of the context in which crimes were committed and sometimes to constitute evidence of the crimes themselves. The visual and auditory details captured in these recordings can provide a vivid and undeniable record that complements traditional forms of evidence such as witness testimony and forensic analysis.

have a personal interest in what they are recording, which may influence the perspective and content of the evidence collected. This selective nature means that user-generated evidence is more likely to be collected, at least in the international context, by users seeking to document incriminating evidence, rather than exculpatory evidence. This bias can affect the objectivity of the evidence, and the overall narrative derived from it.

Furthermore, a specific problem is the huge volume of digital evidence that is often collected. The quantity of digital information can be enormous, creating a substantial challenge in terms of data processing and analysis. Investigators and prosecutors must sift through huge amounts of footage, images, and audio recordings to separate what is relevant from what is useless. This task can be excessive and time-consuming, potentially delaying the judicial process. Another critical challenge is verifying the authenticity of digital information. Digital evidence can be manipulated and ensuring its integrity is crucial to maintaining the credibility of the judicial process.

To address these challenges, the ICC is leveraging artificial intelligence (AI) systems. Using AI, investigators can handle large volumes of data more effectively, quickly identifying the most relevant evidence. AI systems can be trained to recognise patterns, detect anomalies, and flag potentially significant information, thus streamlining the evidence-collection process.

There are two types of problems. The first is related to authenticity and the risk of credible fakes, constructed by exploiting the 'new' world of digital evidence. The second, on the other hand, is related to respect for the rights of the defence and more generally of due process.[52]

In relation to the first, essentially the risk is that spontaneous documentation of criminal actions or scenarios in a war context may result in misleading or incomplete evidence. Although images and videos easily arouse a feeling of trust in the viewer, due to the high demonstrative capacity we usually attribute to this kind of representative evidence, errors and limitations are always around the corner. Thus, for example, a partial shot, which does not allow one to see what has happened outside the range of the camera, can compromise the reliability of the evidence (but many and various examples could be given

52 See De Arcos Tejerizo (n 46) 750–751; Lindsay Freeman, 'Prosecuting Atrocity Crimes with Open Source Evidence' in Sam *Dubberley, Alexa Koenig and Daragh Murray* (*eds*), *Digital Witness: Using Open Source Information for Human Rights Investigation, Documentation, and Accountability* (*Oxford Un. Press 2019*) *48–67*; Evans and Hazim (n 47).

on this point).[53] Added to this is the problem of fakes,[54] which are increasingly easy to make thanks to the development of technology. When faced with deep fakes, how can they be detected? Can technology develop not only to allow those who want to create forgeries to do so, but also to allow those seeking credible evidence to isolate forged documents?

In relation to the second, the need to ensure a fair trial in this new digital scenario, inevitably, serious concerns arise from such massive use of digital evidence. It is in fact crucial to ensure effective disclosure to the parties, particularly the defence. This is progressively challenging in the case of large volumes of digital data, which can be cumbersome to manage and examine thoroughly.

Under this perspective, the fundamental right of due process to allow the defence full access to the data available to the prosecution runs the risk of finding a practical limit and some theoretical or principled limits. As to the first, the problem concerns, as already mentioned, the large amount of data. Sometimes there can be so much of it that it is difficult for the prosecutor to fully access it, which in turn makes it difficult to catalogue and store it in an orderly fashion.[55]

But the biggest problem, inevitably, is one of principle. The data available to the prosecution may concern third persons: in these circumstances, the right to full access that the defence may claim, in the name of due process, risks being limited in the name of the right to privacy of third parties, whose data have been mistakenly or otherwise casually collected in the network of the data-driven investigation. Moreover, if by full access is meant, as it should be, the possibility for the defence to know also the artificial intelligence programmes used by the prosecutor to navigate through all the data, a further limitation could be intellectual property rights. This issue could be raised by

53 See Gabrielle McIntyre and Nicholas Vialle, *The Use of AI at the ICC: Should we Have Concerns? Part I* (OpinioJuris, 11 October 2023) <http://opiniojuris.org/2023/10/11/the-use-of-ai-at-the-icc-should-we-have-concerns-part-i/> accessed 30 July 2024. See also De Arcos Tejerizo (n 45) 753–754.

54 McIntyre and Vialle (n 53). See Vazquez Llorente (n 45) 30–31.

55 This, too, is not a new problem. The difficulty for the defence in navigating the information held by the prosecutor in a digital archive had already arisen with respect to the ICTY. In fact, to meet the defence's need to navigate the *mare magnum* of evidence collected by the Prosecutor, Rule 68(B) was amended, requiring the Prosecutor to "make available to the defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically". See Salvatore Zappalà, 'The Prosecutor's Duty to Disclose Exculpatory Materials and the Recent Amendment to Rule 68 ICTY RPE' (2004) 2 *Journal of International Criminal Justice* 620–630.

the company that supplied or created the AI system used by the prosecutor.[56] The latter, in turn, would be faced with an unsolvable dilemma: Either allow access to the data to the defence, thus violating intellectual property rights (and risking future problems with the companies designing the AI for justice, which might decide to stop cooperating with the ICC OTP); or do not allow access to the defence, thus violating due process (with risks for the fairness of the trial, as the issue would seem to have some similarities with the Lubanga case and the non-disclosure agreement signed at the time by the prosecutor on the basis of Art 54 St.).[57]

The provisions of the Rome Statute and the ICC Rules of Procedure and Evidence are designed to ensure fair and transparent proceedings. However, the question remains whether they are adequate to tackle the specific challenges posed by digital evidence. To address these problems, the ICC may need to develop more detailed guidelines for the disclosure and verification of digital evidence. Such guidelines should include specified procedures for handling large datasets, deadlines for disclosure, and standards for independent verification. In addition, the court could consider implementing training programmes for defence lawyers on digital evidence management and access to digital forensics experts.

In conclusion, while the current provisions of the Rome Statute and the ICC Rules of Procedure and Evidence provide a flexible framework for the

56 See Lorena Bachmaier Winter, 'The Quest for Evidentiary Rules in EU in Cross-Border Criminal Proceedings: Electronic Evidence, Efficiency and Fair Trial Rights', in Lorena Bachmaier Winter and Farsam Salimi (eds), *Admissibility of Evidence in EU in Cross-Border Criminal Proceedings: Electronic Evidence, Efficiency and Fair Trial Rights* (Hart 2024) 1–27; Giulia Lasagni, 'Admissibility of Evidence in Criminal Proceedings: Lessons (and Problems) from the 'Data Retention Saga'' in Lorena Bachmaier Winter and Farsam Salimi (eds), *Admissibility of Evidence in EU in Cross-Border Criminal Proceedings: Electronic Evidence, Efficiency and Fair Trial Rights*, 29–48. Although not related to the experience of international criminal justice, the problems examined in this volume on cross-border judicial cooperation in the EU formally recall those outlined in this chapter with reference to the ICC.

57 As is known, in the above-mentioned case the need for complete access to exculpatory materials was revealed to be fundamental for the accused to prepare his trial (and pre-trial) strategy. That is why the judges ordered the stay of the proceeding and the interim release of the accused: ICC Trial Chamber I, *Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008*, ICC-01/04-01/06-1401-13-06-2008; ICC Trial Chamber I, *Decision on the Release of Mr. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1418-02-07-2008. See Michele Caianiello, 'Disclosure Before the ICC. The Emergence of a New Form of Policies Implementation System in International Criminal Justice?' (2010) 10 International Criminal Law Review 23.

admissibility of evidence, more specific guidelines and procedures seem to be needed to address the challenges of digital evidence. Ensuring effective disclosure to all parties, in particular the defence, and safeguarding the right to verify the authenticity and reliability of evidence are key to maintaining the fairness and integrity of the judicial process in the new digitalised environment.

6.2 *Interaction with the EU in the Development of Shared Principles and Rules in the Field of Digital Evidence and AI*

In the field we have briefly described the interaction between the ICC and the EU institutions can be particularly fruitful. The EU has long had a set of rules to progressively address the issue of digital evidence and the use of AI in justice, including criminal justice. For instance, both Directive No 680/2016 and Regulation (EU) No 679/2016 (the General Data Protection Regulation), provide that a decision based solely on automated processing shall be prohibited.[58]

The jurisprudence of the Court of Justice, developed in numerous decisions on digital data and metadata, has also introduced significant safeguards on how data are collected, processed, and stored. Thus, starting with the pivotal judgment in *Digital Rights and Ireland*, the Court has prescribed that intrusion into an individual's virtual privacy may only take place in the presence of serious criminal offences, predetermined by law, and only following an authorisation order by a judicial (or other independent) authority. After that, it was clarified that this concept must be understood as meaning a body guaranteeing the levels of independence of a judge in the strict sense of the term, the order of a public prosecutor not being sufficient for this purpose.

Finally, in recent years the EU has adopted several regulatory measures, for instance on the acquisition of data directly from service providers, with the European Regulation on production orders,[59] and on artificial intelligence (the recent AI Act), which innovatively regulate areas that were hitherto not regulated by law.

For instance, the use of AI for facial recognition is defined as high-risk and the system implementing it must meet certain safety and quality standards,

58 See Giuseppe Contissa and Giulia Lasagni, 'When it is (also) Algorithms and AI that decide on Criminal Matters: In Search of an Effective Remedy' (2020) 28 European Journal of Crime, Criminal Law and Criminal Justice 280.

59 Stanislaw Tosza, 'All evidence is equal, but electronic evidence is more equal than any other: The relationship between the European Investigation Order and the European Production Order' (2020) 11 New Journal of European Criminal Law 161. Stanislaw Tosza, 'The E-Evidence Package is Adopted: End of a Saga or Beginning of a New One?' (2023) 9 European Data Protection Law Review 163.

without which the admission of this type of algorithmic testing should not be permitted.

The interaction between EU legal norms and the ICC can be fruitful, as it helps the Court to give substance to the criteria of fairness and reliability that characterise the law of evidence and are enshrined in Art 69 St. But there is perhaps a further point worth making. The terrains of digital and AI evidence are much less subject to the influence of national traditions, of which each State is usually very jealous than those of more traditional evidence, such as the testimony or interrogation of the accused. This interaction between two supranational institutions such as the International Criminal Court and the European Union can help to develop common standards that, gradually, lend themselves to serve as a point of reference for States, which are also grappling with the problems related to digitisation of evidence, without having, almost always, mature experience in the field.

7 Concluding Remarks

The cooperation between the International Criminal Court (ICC) and the European Union (EU) during the war between Russia and Ukraine has led to several important outcomes. This collaboration has allowed the ICC to enhance its operational capabilities and investigative reach by leveraging EU networks in criminal justice. As a result, the ICC has been able to gather and process digital evidence more comprehensively and effectively, which is crucial in investigating the crimes committed in the current conflict. Furthermore, working closely with the EU may ensure, and probably is allowing, a more faithful implementation of the principle of complementarity, which means that national jurisdictions are supported and strengthened to prosecute international crimes more effectively and adhere to international standards. Additionally, the collaboration has extended the principle of mutual recognition of judicial decisions to the relationship with the ICC, streamlining the process of international cooperation in criminal justice, particularly regarding digital evidence.

However, there are common problems that need to be addressed for the continued success of this cooperation. One of the primary issues is the need for adequate standards of fairness for digital evidence, as well as to defect flaws that may affect such kind of evidence (and discover fakes, of course). Establishing rigorous standards is crucial to ensuring the reliability and admissibility of digital evidence in court and upholding the rights of the accused.

The EU can help address these challenges by sharing its experience and legal precedent, as well as making its own set of legal forecasts available, in handling digital evidence over the past decade. By providing guidance and support, the EU can assist the ICC and national jurisdictions enhance their capabilities in handling digital evidence, thereby promoting justice and accountability.

In conclusion, the cooperation between the ICC and the EU, originated in the context of the war between Russia and Ukraine, shows interesting potentialities. This, however, does not obviate the need to address common challenges, such as ensuring the fairness and reliability of digital evidence, to fully realize the potential of this cooperation. It is to be hoped that these two supranational institutions, which came into play with reference to a specific and unforeseen event such as the war in Ukraine, will maintain their willingness to cooperate on the issues touched upon in this chapter in a more stable manner. With reference to the field of digital evidence, new to the entire international community as well as to national jurisdictions, a fruitful collaboration can help to formulate effective standards, with the ability to influence the development of this new area of law in a global manner.