

Comment

Romancing International Criminal Justice: The European Union and Criminal Accountability in Ukraine*

I. Falling for International Criminal Justice: The EU and the International Criminal Court	207
II. An Open Relationship: The Joint Investigative Team	210
III. Taking Some Distance: Eurojust's Evidence	214
IV. Growing Apart: The Case of Aggression	215
V. For Better or For Worse? The EU's Politics of International Criminal Justice	216

The European Union (EU) has responded to the Russian invasion of Ukraine with a strong commitment to international criminal justice. Russian leadership and troops have, according to United Nations' reports, likely committed the crime of aggression, war crimes, and crimes against humanity, among other crimes.¹ These violations of international law have caused concern in Europe not only as proof of Russian disregard towards the norms of international (criminal) law, but because they have called attention to the weaknesses of the complex system created to adjudicate and enforce those norms; the International Criminal Court (ICC), in which the EU and many of its Member States have placed their trust and a great deal of money for the international prosecution of core crimes, stands unable to hold to account all those persons responsible for the crimes that the EU most cares about.²

The permanent institutionalisation of international criminal justice embodies a paradoxical ambition of global criminal justice without sovereign force. To many audiences, the ICC's limitations thus come as no surprise. As Frédéric Mégret has argued, 'international criminal justice projects an aura of certitude [...] by emphasizing the non-contentiousness of the *jus cogens* norms it defends at the expense of highlighting the many complex, politically

* I am grateful to Carolyn Moser, Anne Peters, and Freek van der Vet for their insightful feedback on earlier drafts of this comment. I also thank Finn Preiß for helping with copyediting.

¹ Most recently, Report of the Independent International Commission of Inquiry on Ukraine, A/HRC/55/66, 18 March 2024, para. 10; see also Report of the Independent International Commission of Inquiry on Ukraine, A/77/533, 18 October 2022.

² For a concise description, see Isabelle Hassfurther, 'Accountability for the Crime of Aggression against Ukraine', *Verfassungsblog*, 24 February 2024.

sensitive and distributive choices that give it its unique physiognomy'.³ The same, I will argue, is true of the EU's mobilisation for international criminal justice. In its pursuit of Putin's and his allies' accountability in a politically volatile setting, the non-contentiousness of the norms prohibiting core international crimes allows the EU some cover as it promotes idiosyncratic mechanisms for its vision of the 'good functioning of the international criminal justice system'.⁴

The EU's projection of a romanticised picture of international criminal justice as a universally shared and unitary discourse may help obscure the politics of its actions. However, judicial systems become implicated in political fights because international criminal justice is a language with which to condemn perpetrators of core international crimes as enemies of humanity.⁵ In its efforts to attribute such enmity, the EU, like the ICC, purports to represent the international community, whilst remaining dependent on sympathetic states, warring parties, international organisations, and civil society. This arrangement has required the ICC to be implicated in politics even as it aspires to rise above them.⁶ The EU now acts in a similarly sensitive setting. States continue to debate the merits, politics, and legality of principles of jurisdiction and cooperation that might compensate for the ICC's limitations.⁷ Notably, the scope and conditions for universal criminal jurisdiction and more demanding cooperation obligations to prosecute core international

³ Frédéric Mégret, 'The Anxieties of International Criminal Justice', *LJIL* 29 (2016), 197-221 (218).

⁴ European Parliament Resolution of 4 July 2017 on Addressing Human Rights Violations in the Context of War Crimes, and Crimes against Humanity, Including Genocide (2016/2239 (INI)), para. 52.

⁵ This position is inspired by the framework offered by Sarah M. H. Nouwen and Wouter G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', *EJIL* 21 (2010), 941-965. On the association between international crimes and enemies of humanity, see David Luban, *The Enemy of All Humanity*, *Netherlands Journal of Legal Philosophy* 2 (2018), 112-137.

⁶ The politics of the Court's decision-making within this context have been criticised for elitism, colonialism, racism, and Eurocentrism. See, among others, Rachel López, 'Black Guilt, White Guilt at the International Criminal Court' in: Matiangai V. S. Sirleaf (ed.), *Race and National Security* (Oxford University Press 2023), 211-228; Oumar Ba, 'International Justice and the Postcolonial Condition', 63 *Africa Today* 4 (2017); Makau wa Mutua, 'Africans and the ICC: Hypocrisy, Impunity, and Perversion', in: Kamari M. Clarke, Abel S. Kottnerus and Eefje de Volder (eds), *Africans and the ICC: Perceptions of Justice* (Cambridge University Press 2016), 47-60; Patryk I. Labuda, 'The International Criminal Court and Perceptions of Sovereignty, Colonialism and Pan-Africanism', *AYIL* 20 (2016), 289-320; Robert Cryer, 'Sudan, Resolution 1593 and International Criminal Justice', *LJIL* 19 (2006), 195-222.

⁷ See, for example, on universal jurisdiction, Sixth Committee, Summary Record of the 12th Meeting, A/C.6/77/SR.12, 5 April 2023; on cooperation and conflicts of jurisdiction in the draft articles on the prevention and punishment of crimes against humanity, Sixth Committee, Summary Record of the 10th Meeting, A/C.6/77/SR.10, 15 February 2023.

crimes⁸ have remained controversial especially because of the risk of other states' use of such provisions for selective, political ends.⁹ This comment demonstrates the Union's growing power to amplify and multiply the legal forms available to hold accountable persons who commit core international crimes, those thereby constituted as enemies of all humanity. As caution toward the future of international criminal justice proposed by the EU persists, there is reason for the Union to be reflexive about the politics it will, or will not, pursue.

The EU's newfound agency in international criminal law builds on two decades of growing competence within its internal Area of Freedom, Security, and Justice, which it increasingly projects outward for external security and justice (section 1). To realise its recent ambitions, the EU has put its faith in the power of two of its criminal justice agencies, Eurojust and Europol, to fill what it considers as gaps in the existing international criminal law architecture. Eurojust, following the war in Ukraine, hosts a team of domestic prosecutors working together with Europol and the International Criminal Court in a joint investigation team (section 2); a new database wherein evidence on core international crimes can be stored (section 3); and a strategic centre preparing aggression cases for an envisaged aggression tribunal (section 4). Each of these arrangements contributes to shifting the enforcement and adjudication of international criminal law towards Europe, allowing the EU to wield the language of international criminal justice to diverse political ends.

I. Falling for International Criminal Justice: The EU and the International Criminal Court

The EU's contribution to the International Criminal Court is so substantial that some commentators have wondered whether the Court would ever

⁸ While recognising that there is much debate around the notion of core international crimes, this comment uses the term to refer to the four international crimes in the ICC's jurisdiction, namely genocide, crimes against humanity, war crimes, and aggression.

⁹ For example, African Union, Observations of the African Union on the Scope and Application of the Principle of Universal Jurisdiction to the Sixth Committee for its 75th Session, 2020, para. 4; Slovenia, Slovenia's View on the Scope and Application of the Principle of Universal Jurisdiction, Submission to the Sixth Committee for its 75th Session, 2020; Brazil, Submission to the Sixth Committee for its 76th session, 2021; Morocco, Submission to the Sixth Committee for its 77th session, 2022. On the contentiousness of extensive cooperation obligations, see Alison Bisset, 'The Mutual Legal Assistance Treaty for Core Crimes: Filling the Gap?', EJIL: Talk!, 13 June 2022.

have come to be without the EU.¹⁰ Not only was the EU beneficial to the ICC, however. The adoption of the ICC Statute and its promotion beyond the Union's boundaries, causes pursued first by Member States' foreign policies, also turned into an early example of an EU level commitment to implementing the Union's values and interests abroad.¹¹

For the EU, promotion of the ICC and its norms has a longstanding pedigree as a means to advance peace, human rights, and international security in 'its action on the international scene'.¹² Common Positions and a Plan of Action on the ICC articulated a basis for this policy in the early 2000 s.¹³ The Union has reiterated these commitments in the Council's 2013 'Complementarity Toolkit' providing European officials, delegations, and Member States with guidance on 'bridging the gap between international justice and national justice systems' through EU aid to third countries.¹⁴ In 2017, the European Parliament called upon 'the EEAS [European External Action Service] to ensure that accountability for atrocity crimes and support for the ICC is mainstreamed across the EU's foreign policy priorities'.¹⁵ Through these actions, the EU has aligned its politics with those of the ICC.

The EU's relationship to international criminal justice as embodied and enacted by the ICC has, hence, influenced its normative self-perception and external self-projection. In Ukraine, this disposition is enacted through the Ukrainian accession agreement. To accede to the Union, Ukraine must ratify the ICC's Statute and align its internal criminal code with the Statute's provisions.¹⁶ This requirement, albeit in line with Union policies and accession conditions previously concluded with other candidate states,¹⁷ does not

¹⁰ For an account, see Alexandra Kemmerer, 'Like Ancient Beacons: The European Union and the International Criminal Court – Reflections from afar on a Chapter of European Foreign Policy', GLJ 5 (2004), 1499-1467 (1458).

¹¹ Antonis Antoniadis and Olympia Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times', *IntCrimLRev* 7 (2007), 627-630 (646-649).

¹² Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and Repealing Common Position 2003/444/CFSP, Preamble, para. 1.

¹³ Council Common Position 2001/443/CFSP of 11 June 2001 on the International Criminal Court, OJ L 155/19, 12 June 2001; and Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court, OJ L 150, 18 June 2003.

¹⁴ Council of the EU, Joint Staff Working Document on Advancing the Principle of Complementarity – Toolkit for Bridging the Gap between International and National Justice, Brussels, 22 February 2013.

¹⁵ European Parliament Resolution of 4 July 2017 (n. 4), para. 27.

¹⁶ European Commission, Ukraine 2023 Report, SWD(2023) 699 final, Brussels, 8 November 2023, 30, 139.

¹⁷ See, for example, similar (if less demanding) requirements in Stabilisation and Association Agreement between the European Communities and Their Member States of the One Part, and the Republic of Serbia, of the Other Part, Art. 2.

extend to current Union Member States¹⁸ and does not derive from the Rome Statute.¹⁹ Through this use of its normative power, the Union strengthens the ICC's ability to enact its politics in Ukraine.

The Union's commitment to changing other states' systems has, in recent years, been paired with an expansion of its internal system, which extends its competences to step in where it perceives non-EU states' systems and the ICC to have failed at ensuring international criminal justice. The Union has, under its treaty law, an objective to offer EU citizens an area of freedom, security, and justice (AFSJ) within the Union's external borders.²⁰ Over the past two decades, the Union has taken an active role in developing means for police and judicial cooperation within the AFSJ based on the notion of mutual trust. Among the most notable advances is the adoption of the European Arrest Warrant, which Member States have since been able to rely on for the surrender, amongst themselves, of persons suspected of crimes within the ICC's jurisdiction who are apprehended within the EU.²¹ The latest change to EU treaty law – the Lisbon treaty, which entered into force in 2009 – conferred a mandate for the Union to engage in countering transnational crime and provided a basis for stronger roles for two of the Union's criminal justice agencies, Eurojust and Europol.²² Following this mandate, the EU legislator recently adopted new Regulations for both agencies, adding genocide, war crimes, crimes against humanity, and 'related crimes' to their mandates,²³ and has interpreted the mandate to counter 'transnational crime' in increasingly broad terms, expanding Eurojust's competence to crimes that 'have repercussions at Union level'.²⁴

¹⁸ Note that the European Parliament has called upon Member States to add atrocity crimes to the Union's competences, which would allow the EU to harmonise Member States' criminal laws, in: European Parliament Resolution of 4 July 2017 (n. 4), para. 31.

¹⁹ The Rome Statute provides only that States Parties 'shall ensure that there are procedures available under their national law for all of the forms of cooperation' specified in the Statute. See Rome Statute of the International Criminal Court, UNTS Vol. 2187, 3, Art. 88.

²⁰ Treaty on the Functioning of the European Union, OJ C 326, 26 October 2012, Part III, Title V.

²¹ Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA), OJ L 190, 18 July 2002, Article 2(2); see further Luisa Vierucci, 'The European Arrest Warrant – An Additional Tool for Prosecuting ICC Crimes', JICJ 2 (2004), 275-285.

²² Treaty on the Functioning of the European Union, Arts 85 and 88.

²³ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol), OJ L 135, 24 May 2016, Annex I; Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), OJ L 295, 21/11/2018, Annex I.

²⁴ Regulation (EU) 2018/1727 of the European Parliament and the Council (n. 23), and replacing and repealing Council Decision 2002/187/JHA, Art. 3(6).

Through a growing emphasis on the external dimension of the AFSJ, the Union conveys an aspiration to deliver international criminal justice from within its borders, where Member State authorities ‘are being confronted on a regular basis with persons who were involved in such [core international] crimes and who are trying to enter and reside in the European Union’,²⁵ for crimes committed beyond them. The Genocide Network, a forum for national prosecutors to cooperate and share their experiences, was established in 2002 and reinforced in 2003 and is an early embodiment of this disposition.²⁶ The recent increase in domestic adoption of universal jurisdiction in Europe, as promoted by the EU, and the EU criminal justice agencies’ continued and expanding cooperation with non-EU states has allowed EU to scale up its efforts to exert normative power beyond its borders.²⁷ Within this context, the war in Ukraine has become, for the EU, the latest in a series of crises serving an impetus for strengthening the mechanisms of European accountability for core international crimes.²⁸ EU policy, practice, and law following Russia’s invasion of Ukraine allows us to observe its normative and penal powers in action, and to glimpse a vision of a future centring international criminal accountability in Europe. In this future, the Union is further empowered to partake in defining enemies of humanity.

II. An Open Relationship: The Joint Investigative Team

Although the ICC remains, for the EU, an important international justice actor – as evidenced by the Union’s generous financial contribution toward the ICC’s investigations in Ukraine²⁹ – it has itself stepped up as a partner

²⁵ Council Decision 2003/335/JHA of 8 May 2003 on the Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes, para. 6.

²⁶ Council Decision 2002/494/JHA 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; Council Decision 2003/335/JHA of 8 May 2003 (n. 25).

²⁷ A total of 13 cooperation agreements are in force, between Eurojust and the following third countries: Albania, Georgia, Iceland, Liechtenstein, Moldova, Montenegro, North Macedonia, Norway, Serbia, Switzerland, Ukraine, the United Kingdom, and the United States. In 2021, the Council approved the Commission’s proposal to strengthen Eurojust’s cooperation with non-EU states, extending a mandate for the agency to begin negotiating agreements on the exchange of information with Algeria, Argentina, Armenia, Bosnia and Herzegovina, Brazil, Colombia, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia, and Turkey. See European Commission, Press Corner: Daily News 02 / 03 / 2021, <https://ec.europa.eu/commission/press-corner/detail/en/MEX_21_982>, last access 28 May 2024; see also Eurojust Strategy on Cooperation with International Partners 2024-2027, 27 March 2024.

²⁸ Eurojust, Fourth JIJs Evaluation Report, February 2023, 43.

²⁹ European Commission, Speech: Opening Remarks by Commissioner Reynders at the Justice Ministers Conference on Support to the International Criminal Court and its Investigations into the Situation in Ukraine, 20 March 2023.

and friend to the ICC in identifying Putin, his regime, and his allies as enemies of mankind. The EU's power to designate Russian forces as enemies builds on its construction of 'a shift from international to domestic forms of accountability for core international crimes'.³⁰ After decades of EU advocacy, following the Russian invasion of Ukraine, European states have accelerated what had, for the past two decades, been a 'quiet expansion'³¹ of universal criminal jurisdiction.³² Across the many domestic jurisdictions now available for the prosecution of core crimes, intergovernmental Eurojust has become 'key' to accountability for the crimes. From the declared safety and centrality of Europe, the EU asserts its power to coordinate parallel investigations to ensure cohesion across Member State, third-state, and international criminal jurisdictions.³³

No longer simply facilitating meetings among Member States' law enforcement authorities to combat intra-EU crime, the EU now signals a will and an ability to channel its connections and resources towards the prosecution of core international crimes committed outside EU borders. Days into the Russian aggression against Ukraine, Eurojust assumed a leading role in the coordination of investigations. At the heart of its involvement has been a Joint Investigation Team (JIT). Based on an agreement between participants, in this case an agreement drafted by Eurojust's JITs Network Secretariat,³⁴ parties collaborate closely, transcending state borders, to achieve a shared prosecutorial aim with Eurojust's logistical, financial, operational, and analytical support. The JIT for Russian crimes committed in Ukraine, which was created in early 2022 by Ukraine, Lithuania, and Poland, has an original composition. Four EU Member States, Estonia, Latvia, Slovakia, and Romania, have joined the original parties. Beyond their involvement, Eurojust has facilitated the JIT's growth by inviting and negotiating the terms for the

³⁰ European Commission, Speech: Opening Remarks by Commissioner Reynders (n. 29).

³¹ Maximo Langer and Mackenzie Eason, 'The Quiet Expansion of Universal Jurisdiction', *EJIL* 30 (2019), 779-817.

³² Julia Crawford and Thierry Cruvellier, 'Philip Grant: "Ukraine Is Accelerating a Revival of Universal Jurisdiction"', *JusticeInfo.net*, 29 November 2022.

³³ See, for instance, Regulation 2022/838 of the European Parliament and of the Council of 30 May 2022 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, Preamble; and the prior European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/1727 of the European Parliament and the Council, as Regards the Collection, Preservation and Analysis of Evidence Relating to Genocide, Crimes against Humanity and War Crimes at Eurojust, COM(2022) 187 final, Brussels, 25 April 2022.

³⁴ See Eurojust, 'Joint Investigation team into alleged crimes committed in Ukraine', <<https://www.eurojust.europa.eu/joint-investigation-team-alleged-crimes-committed-ukraine>>, last access 28 May 2024.

ICC's Office of the Prosecutor to join a JIT for the first time; the inclusion was desired as a means to create connections and pursue 'common investigative efforts' among the ICC, the national authorities of states party to the Rome Statute and the EU's JITs Network.³⁵ Europol, the Ukrainian JIT's most recent participant, provides forensic and analytic support to the team, including through collection and analysis of open-source intelligence.³⁶ The shared and coordinated response to core international crimes allows for participants' invocation of their common legal and judicial 'front'³⁷ built on friendship and solidarity through the shared language of international criminal justice.

The EU has drawn on international criminal justice to strengthen its alliance with Ukraine and with the ICC also outside of the context of the JIT. After Russia's invasion of Ukraine, the Council amended the mandate of the EU Advisory Mission for Civilian Security Sector Reform (EUAM) in Ukraine for purposes of providing support to Ukrainian authorities in the investigation and prosecution of international crimes through strategic advice, funds, and equipment.³⁸ The Mission is also to ensure close cooperation between Ukraine, the ICC, Eurojust, and Union Member States that are investigating and prosecuting core international crimes, as well as 'other relevant actors as appropriate'.³⁹ The presence the EU has built in Ukraine through EUAM and the EU Project Pravo-Justice II, through which the EU is involved in Ukraine's justice sector reforms, enable the EU to mobilise expertise, funds, vehicles, and people for purposes of gathering evidence and aligning Ukrainian efforts with EU and ICC standards. They all rely on evidence gathered by others, and to ensure the uniformity of that evidence with their standards, the EU and ICC have jointly issued guidelines for civil society on documenting and preserving information on international crimes.⁴⁰ In addition to contributing to the admissibility of evidence at the ICC and in Union Member States' courts, the guidelines reinforce the notion

³⁵ Eurojust, Fourth JITs Evaluation Report, February 2023, 42-43.

³⁶ Eurojust, Press Release: 'Europol Participates in Joint Investigation Team into Alleged Core International Crimes in Ukraine', 5 October 2023.

³⁷ See statements by Ukrainian Prosecutor General Iryna Venediktova, the ICC's Prosecutor Karim Khan and Eurojust President Ladislav Hamran in Stephanie Maupas, 'War in Ukraine: Some European Prosecutors Want to Unite in the Face of War Crimes', *Le Monde*, 3 June 2022.

³⁸ Council Decision (CFSP) 2022/638 of 13 April 2022 amending Decision 2014/486/CFSP on the European Union Advisory Mission for Civilian Security Sector Reform Ukraine (EUAM Ukraine), Art. 2 a(2)(a).

³⁹ Council Decision (CFSP) 2022/638 (n. 38), Art. 2 a(2)(b).

⁴⁰ Eurojust and the ICC, Documenting International Crimes and Human Rights Violations for Accountability Purposes: Guidelines for Civil Society Organisations, 21 September 2022.

that the EU, the ICC, and Ukraine are engaged in a common project based on shared standards and goals. The guidelines are, as Eurojust President Ladislav Hamran and Prosecutor of the International Criminal Court Karim Khan put it, proof of their ‘personal commitment to work together in this common effort’.⁴¹

This alliance between the EU, ICC, and Ukraine has been opened up to others, where shared notions of international criminal justice have been found. A Memorandum of Understanding between the JIT and the United States establishes contact between their prosecutors, ‘united in [their] ambitions’.⁴² The Ukraine Accountability Dialogue Group, including representatives from 45 states, the European Union, the ICC, and civil society, aims to promote coherence across national and international accountability mechanisms.⁴³ Through the Atrocity Crimes Advisory Board the EU alliances with the United States and United Kingdom in a show of their ‘international support and solidarity at this crucial historical moment for Ukraine’.⁴⁴

From these responses, a new picture of the EU’s role in international criminal justice begins to emerge. The twenty-or-so domestic investigations in EU Member States of crimes committed in Ukraine by Russians, Belarussians, and (perhaps) other non-nationals on the basis of extraterritorial jurisdiction are a testament to the EU’s perseverance in pushing for states to prescribe international crimes extraterritorially, and provide evidence of state practice for the EU to continue promoting the principle in ongoing debates.⁴⁵ Eurojust provides the contact point between these efforts, attempting to ensure alignment across ongoing investigations.⁴⁶ Through these actions, the EU generates a vision of itself and its Member States as enforcers and adjudicators of core crimes, acting to complement or to be complemented by the ICC, depending on strategies designed by Eurojust and its partners.

⁴¹ Eurojust and the ICC (n. 40), 2.

⁴² Eurojust, Press Release: ‘National Authorities of the Ukraine Joint Investigation Team Sign Memorandum of Understanding with the United States Department of Justice’, 4 March 2023.

⁴³ Eurojust Annual Report 2022, Catalog number QP-AA-23-001-EN-N, 24.

⁴⁴ EEAS, Press Release: ‘EU, US and UK, Atrocity Crimes Advisory Board’, 25 May 2022.

⁴⁵ Statement on Behalf of the European Union and Its Member States Ms. Simona Popan, Counsellor, Delegation of the European Union to the United Nations at the Sixth Committee on the Agenda Item 86: The Scope and Application of the Principle of Universal Jurisdiction, United Nations, New York, 2022.

⁴⁶ Eurojust Annual Report 2022 (n. 43), 20.

III. Taking Some Distance: Eurojust's Evidence

Two amendments to Eurojust's legal framework, justified, in part, by reference to the war in Ukraine, foreground an enhanced role for the EU in the coordination of investigations and prosecutions of core crimes. One amendment broadens Eurojust's competency from cases involving two or more Member States to cases involving a Member State and a third state, and a Member State and an international organisation.⁴⁷ The second amendment, motivated by the war in Ukraine, sets the legal basis for a new database allowing Eurojust to store, analyse, and transmit data on core international crimes and related crimes.⁴⁸ If embraced by states who have evidence on international crimes, the Core International Crimes Evidence Database (CICED) could grant the EU leverage to redefine its relationship with the ICC and other partners.

The EU has been committed to maximising evidence collection within the EU, encouraging states to continue adding what they collect to the database. Across the domestic investigations it coordinates, Eurojust has advocated for the use of the structural investigation: a strategy for collecting evidence of potential crimes before any suspects have been identified. Following this approach in investigations concerning crimes committed in Ukraine, some Member States have adopted measures, for instance, to gather witness testimonies Ukrainian refugees entering or residing in their territories.⁴⁹ Evidence is also being collected through open-source investigations, following EU-funded training of and collaboration with its partners.⁵⁰ The Eurojust amendment envisages these developments, broadening Eurojust's competence to store and transmit videos, audio recordings, satellite images, and photographs in addition to victim testimonies and witness statements.⁵¹

⁴⁷ Regulation (EU) 2023/2131 of the European Parliament and of the Council of 4 October 2023 amending Regulation (EU) 2018/1727 of the European Parliament and of the Council and Council Decision 2005/671/JHA, as Regards Digital Information Exchange in Terrorism Cases, OJ L 2023/2131, 11 October 2023, Art. 1(1).

⁴⁸ Regulation 2022/838 of the European Parliament and of the Council of 30 May 2022 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, PE/18/2022/REV/1, OJ L 148, 31 May 2022.

⁴⁹ Council of the European Union, Justice and Home Affairs Council, Meeting Results, 3-4 March 2022.

⁵⁰ Europol, News: Europol sets up OSINT Taskforce to Support Investigations into War Crimes Committed in Ukraine, <<https://www.europol.europa.eu/media-press/newsroom/news/europol-sets-osint-taskforce-to-support-investigations-war-crimes-committed-in-ukraine>>, last access 28 May 2024; EUAM Ukraine, Press Release: 'Sharing EU Best Practices on Open Source Intelligence and Criminal Analysis to Investigate International Crimes', 4 April 2023.

⁵¹ Regulation 2022/838, Art. 1(3).

Through CISED, the EU gives expression to its will to centre itself in international criminal justice. Control over evidence and over decisions about when and to whom it is shared generate for Eurojust further power in the coordination of cases pursued and forms and content of justice achieved. In investigations of crimes committed in Ukraine, Eurojust posits that with CISED it will ‘unveil’ the ‘full picture’, not only of individual cases but of the ‘systemic actions behind them’.⁵² Thus, through CISED, the EU constitutes Eurojust’s role as not only a helper or a partner to Member States and international institutions, but as the source and author of the greater narrative about the threats to and enemies of mankind. Through friendships with states and international organisations conducting such core crimes investigations that align with its priorities, the EU aspires to bring the politics of international criminal justice under Eurojust’s direction.

IV. Growing Apart: The Case of Aggression

In its boldest departure from the ICC, the EU has advanced the creation of another international criminal tribunal. Out of a frustration at the ICC’s inability to hold those responsible for aggression to account, the EU has made it known that it is willing to create a special tribunal for the prosecution of Putin’s aggression,⁵³ even when the ICC Prosecutor has suggested his disagreement.⁵⁴ Although discussions about the legal basis and parties of this potential tribunal are still ongoing (with the Council of Europe having recently taken a leading role⁵⁵), in the EU measures are being taken as if its future was already secure. At Eurojust, a precedent is being set for investigating aggression during war: an International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA) has begun operations. The

⁵² Eurojust Annual Report 2022 (n. 43), 22.

⁵³ European Commission Press Release: ‘Ukraine: Commission Presents Options to Make Sure that Russia Pays for Its Crimes’, Brussels, 30 November 2022; The establishment of a tribunal on the crime of aggression against Ukraine, European Parliament Resolution of 19 January 2023 on the Establishment of a Tribunal on the Crime of Aggression against Ukraine (2022/3017(RSP)) (2023/C 214/10), 19 January 2023.

⁵⁴ Nick Schiffrin, Schiffrin, ‘International Criminal Court Prosecutor on the Pursuit of Justice for Russian War Crimes’, PBS, 22 June 2022.

⁵⁵ The Committee of Ministers ‘authorised the Secretary General to prepare any necessary documents to contribute to consultations within the Core Group on a possible draft Agreement between the Council of Europe and the Government of Ukraine on the Establishment of a Special Tribunal for the Crime of Aggression of the Russian Federation against Ukraine, including its Statute’ in: Council of Europe Ministers’ Deputies Decision, 1497th Meeting, 30 April 2024, CM/Del/Dec(2024)1497/10.2, para. 1.

ICPA brings together the Joint Investigation Team's domestic prosecutors with a prosecutor from the United States and legal and analytical experts from Eurojust to work together daily to prepare aggression cases for a future tribunal.⁵⁶

Acting in a contested area of international law, the EU intervenes to redefine the mechanisms for prosecuting aggression, strengthening the narrative that it can provide international criminal justice when existing international institutions and legal forms fall short. In doing so, it seeks to build a place for itself among international justice actors, filling a 'gaping hole in accountability for the crime of aggression in the international criminal justice architecture'.⁵⁷ Unable to rely on friendship with the ICC because of its jurisdictional limitations, the EU invokes, in an effort to constitute, the concerns of 'the international community as a whole'.⁵⁸ When speaking of the ICPA, EU officials speak of 'bridging the gap between ambitions and reality'.⁵⁹ It is unclear whether they see ICPA, or the EU, as that bridge. Regardless, the EU presents itself as mobile and mobilised, in stark contrast with its dismay at the paralysis of the Security Council and the ICC.⁶⁰ With its response, the EU, thus, calls itself into being as a friend and defender of 'Ukrainian people' and 'the international community as a whole', whose international criminal justice ambitions supersede those of other international organisations', as it enables a contentious incursion into sovereignty.

V. For Better or For Worse? The EU's Politics of International Criminal Justice

Since the Russian invasion of Ukraine, the European Union has shown itself able to meaningfully contribute to the pursuit of justice for core international crimes. The expansions detailed above show an EU willing shape the complex trans- and supranational system of international criminal accountability. Within the future it foregrounds, the EU has stepped up as a global

⁵⁶ European Commission, News Article, 'Ukraine: International Centre for the Prosecution of Russia's Crime of Aggression against Ukraine Starts Operations Today', 3 July 2023.

⁵⁷ Eurojust, Press Release: 'History in the Making – the International Centre for the Prosecution of the Crime of Aggression Against Ukraine Starts Operations at Eurojust', 3 July 2023.

⁵⁸ European Council Conclusions, EUCO 1/23 EN, 9 February 2023, para. 4.

⁵⁹ For example, Eurojust, 'International Centre for the Prosecution of the Crime of Aggression against Ukraine', <<https://www.eurojust.europa.eu/international-centre-for-the-prosecution-of-the-crime-of-aggression-against-ukraine>>, last access 28 May 2024.

⁶⁰ Eurojust, Press Release: 'EU Prosecutors General Discuss Judicial Response to War in Ukraine During 16th Meeting of Consultative Forum', 13 October 2022.

actor, mobilising old and new legal competences, partnerships and funds where other architectures of international criminal justice fall short of its normative aspirations.

With the increase in the Union's impact on international criminal justice, its potential to participate and be used in political struggles rises, raising questions as to its selection of cases, choice of allies and pursuit of enemies. For the ICC, the situation in Ukraine has highlighted the potential of the Court to stand for the self-determination of less powerful states,⁶¹ but that potential has risked being undermined by a loss of legitimacy due to the Court's quietude about other crimes.⁶² Such a risk may have been somewhat alleviated by the ICC Prosecutor's recent application for arrest warrants for Hamas and Israeli leaders,⁶³ but its silence elsewhere remains 'deafening and astounding'.⁶⁴ Similar concerns must also resonate in the EU, when it is no longer only implicated in the ICC's exercises of power. In its pursuit of international criminal justice in Ukraine, the Union has stood with and for the justice of 'game-changers'⁶⁵ willing to lay 'the foundation'⁶⁶ for improved international criminal accountability. Having so recently found its footing in international criminal justice, the Union now has a unique opportunity to reflect on how the politics it enacts will ensure that 'the wish to make justice prevail [...] transcends national, continental and organisational boundaries'.⁶⁷

The EU's ability to bolster states' assertions of sovereign rights beyond their borders, through supporting the use of universal jurisdiction, facilitating the pooling of jurisdiction in investigations, and pursuing the creation of an international institution able to override the immunities of heads of state,

⁶¹ Patryk Labuda, *Beyond Rhetoric: Interrogating the Eurocentric Critique of International Criminal Law's Selectivity in the Wake of the 2022 Ukraine Invasion*, LJIL 36 (2023), 1095-1116.

⁶² Sergey Vasiliev, 'Watershed Moment or Same Old? Ukraine and the Future of International Criminal Justice', JICJ 20 (2022), 893-909 (902).

⁶³ ICC, News: 'Statement of ICC Prosecutor Karim A. A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine', 20 May 2024.

⁶⁴ For example, Sarah Nouwen, 'Why is the International Criminal Court so Silent on Sudan?', Al Jazeera, 13 July 2023; Ioannis Kalpouzos, 'International Criminal Law and the Violence against Migrants', GLJ 21 (2020), 571-597.

⁶⁵ Among others, Liaison Prosecutor for Ukraine at Eurojust, Ms Myroslava Krasnoborova, in: Eurojust, News: 'Start of Operations of Core International Crimes Evidence Database and New International Centre for Prosecution of the Crime of Aggression to Be Based at Agency', 23 February 2023.

⁶⁶ Political Declaration of the Ministerial Ukraine Accountability Conference, 2022, para. 24.

⁶⁷ Eurojust Vice-President and National Member for Lithuania, Ms Margarita Šniutytė-Daugėlienė in Eurojust, 'Start of Operations of Core International Crimes Evidence Database and New International Centre for Prosecution of the Crime of Aggression to Be Based at Agency' (above n. 65).

implicates the Union in the kind of justice international criminal law can provide. These mechanisms, even if one considers them to be available to all states in international law (and this is not uniformly accepted), are often, in practice, tools of powerful states and organisations, used when politically opportune.⁶⁸ The EU's power to bolster claims to authority beyond its borders projects an ideal of international criminal justice, and an ideal of the EU, rather than an existing reality.⁶⁹ The Union's expanding normative reach – narrated as an extension of the Area of Freedom, Security, and Justice, in which the rule of law is secured – may, from another perspective, be contrasted with the lacking protection of the rights of individuals accused of crimes in cross-border proceedings within the AFSJ;⁷⁰ the Union's support to actors committing core international crimes outside its borders;⁷¹ and the political power it has used to trump domestic justice concerns in favour of its own criminal justice priorities.⁷²

Through its power in the field, the Union has an opportunity to respond to calls for a more horizontal and egalitarian, less imperialistic, international criminal justice. Building the trust and solidarity required by such a system demands of the Union increased reflexivity toward its own standing and politics in international criminal justice. In Ukraine, the Union has used international criminal justice to translate commitments to the protection of self-determination and resistance toward oppression into reality through a politics of solidarity. The true test of its credibility as a global criminal justice actor will be the consistency with which it continues to pursue mutuality, internally and externally, in building collective means to act against violence and repression.

Kerttuli Lingenfelter

⁶⁸ See, briefly, the reflection offered by Robert Cryer, 'International Criminal Law vs State Sovereignty: Another Round?', *EJIL* 16 (2005), 979-1000 (987).

⁶⁹ I draw here on 'narratives of projection', as set out by Kalypso Nicolaïdis and Robert Howse, "'This is my EUtopia ...': Narrative as Power', *JCMS* 40 (2002), 767-792.

⁷⁰ Michael O'Flaherty, 'The Protection of Fundamental Rights in Cross-Border Cooperation – Trends and Future Perspectives', in: Eurojust, 20 Years of Eurojust: EU Judicial Cooperation in the Making – A Collection of Anniversary Essays (2022).

⁷¹ Human Rights Council, Report of the Independent Fact-Finding Mission on Libya, A/HRC/52/83, 3 March 2023, para. 4.

⁷² Rok Zupančič and Nina Pejič, 'EULEX Kosovo: Projecting the EU's Normative Power via a Rule-of-Law Mission' in Rok Zupančič and Nina Pejič, *Limits to the European Union's Normative Power in a Post-Conflict Society* (Springer 2018).