



HIGHLIGHT

THE RUSSIAN WAR AGAINST UKRAINE AND THE LAW OF THE EUROPEAN UNION

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THE JOINT INVESTIGATION TEAM IN UKRAINE: CHALLENGES AND OPPORTUNITIES FOR THE INTERNATIONAL CRIMINAL COURT

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A Joint Investigation Team (JIT) can be set up on the basis of an agreement between two or more member States of the European Union (EU) and/or other parties, for a specific purpose and a limited period.¹ The JIT in Ukraine was set up with the support of the European Union Agency for Criminal Justice Cooperation (Eurojust), and its agreement was initially signed by Lithuania, Poland, and Ukraine on 25 March 2022 to enable the exchange of information and facilitate investigations into war crimes, crimes against humanity, and other core crimes in Ukraine. Eurojust provides legal, logistical, financial, and analytical support to the JIT. On 25 April 2022, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) confirmed to be a participant in the JIT on alleged core international crimes

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¹ Council Framework Decision of 13 June 2002 on joint investigation teams, amended by Directive (EU) 2022/211 of the European Parliament and of the Council of 16 February 2022 amending Council Framework Decision 2002/465/JHA, as regards its alignment with Union rules on the protection of personal data, art. 1(1); Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, art. 13.



committed in Ukraine. It is the first time that the OTP joins a JIT under the auspices of Eurojust, in accordance with art. 54(3)(d) of the Rome Statute and relevant JIT provisions.² Other States, including Russia, may request to join the JIT based on mutual consent of member States in that JIT. Estonia, Latvia, Slovakia, and Romania had become members of the JIT. On 3 March 2023, the seven JIT member States signed a Memorandum of Understanding with the United States (US) Department of Justice, which enabled practical arrangements for cooperation, information exchange, and the participation of the US authorities in coordination meetings organised with Eurojust's support. On 3 July 2023, the International Centre for the Prosecution of the Crime of Aggression Against Ukraine (ICPA) started operations at Eurojust. In addition to Ukraine and the ICC, five JIT members - Lithuania, Latvia, Estonia, Poland, and Romania - are participating in the ICPA's start-up phase. The United States has also appointed a Special Prosecutor for the Crime of Aggression to support the ICPA's activities. On 5 October 2023, the European Union Agency for Law Enforcement Cooperation (Europol) became a participant in the JIT in Ukraine.

The OTP, Europol, and the seven partner countries may benefit from the Eurojust coordinated JIT through direct communications, access to an admissible evidence database, and financial support. Since March 2022, Eurojust has organised at least 19 coordination meetings for the JIT in Ukraine, which brought the right persons together, face-to-face, with interpretation services, and generated direct communications among national authorities and the OTP. Through the coordination, Eurojust also assists States in preventing and resolving conflicts of jurisdiction over core international crimes.³ Moreover, a Eurojust-supported JIT provides a platform for and facilitates the preservation of evidence at the battlefield, the documentation of testimonies of persons fleeing the war, and the analysis, storage and sharing of information and evidence. In February 2023, Eurojust set up the Core International Crimes Evidence Database to preserve, store, and analyse evidence of core international crimes. Further, Eurojust offers funding and assists the JIT in obtaining EU funding to cover the costs of travel and accommodation, cross-border transfer of seized items and evidentiary material, specialists and experts, and interpretation and translation incurred for the JIT.⁴

The JIT in Ukraine provides an opportunity for the OTP to implement the policy of proactive complementarity, which means to encourage and support national prosecutions and provide cooperation and assistance when it is appropriate.⁵ The JIT in Ukraine has the

² Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, art. 4; Consolidated text of the model agreement on the establishment of a Joint Investigation Team, 2022/C 44/02, art. 7 and Appendix I.

³ Eurojust, *Guidelines for Deciding 'Which Jurisdiction Should Prosecute?'* eurojust.europa.eu.

⁴ Eurojust, *Joint Investigation Teams Practical Guide* eurojust.europa.eu 40, 73-74.

⁵ ICC-OTP, *Informal Expert Paper: The Principle of Complementarity in Practice* www.icc-cpi.int, 3-4; see also Rome Statute of the International Criminal Court [1998] arts 17, 54(3)(c), 54(3)(d) and 93(10); C Stahn, 'Complementarity: A Tale of Two Notions' (2008) *Criminal Law Forum* 91-93; W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International

potential to strengthen the capacities on the ground and seek justice with both national and international inputs. With the JIT, the ICC, Europol, and partner countries provide support to Ukraine and help its national authorities to build and maintain capacities and the rule of law from being severely destroyed by the war and to restore as much evidence as possible amidst the ongoing conflict. The support strengthens Ukraine's ability to prosecute in domestic courts and prevents Ukraine from being easily deemed "unable" to conduct proper proceedings as required under art. 17 of the Rome Statute.⁶

Furthermore, the JIT tool offers an opportunity as well as a challenge to explore and achieve efficient cooperation between the ICC-OTP and the JIT partners, particularly in the investigation phase. A coordinated JIT will avoid duplication and over-documentation, thus mitigating the risk of contradictions in different statements or re-traumatization for witnesses. During the operation of the JIT, the OTP has the opportunity to amplify its practices of cooperation with States according to art. 93 of the Rome Statute, from specific actions of seizures of items, preservation of evidence, and protection of witnesses, to the disclosure of information and so on. Nevertheless, the size of the current JIT in Ukraine with seven States and the OTP as well as the Europol as participants might be complicated for the Eurojust to manage and coordinate. Eurojust has most experiences coordinating JITs with two or three countries.⁷ In addition, the OTP may need to respond effectively and timely to an increasing number of requests for assistance from JIT partner countries to access information, which might be overwhelming considering the ICC's limited resources. In 2021, the OTP received 24 requests for assistance and provided substantive responses to all the requests with an average time of 34 days.⁸ The following year, in 2022, the OTP received 16 requests for assistance, with a slight increase in the average time to provide substantive responses at 37 days.⁹ It is questionable whether a JIT with several partners will actually bring more efficiency and effectiveness.

Last but not least, participating in a JIT without Russia, the OTP might confront challenges to its independence and impartiality, especially from the Russian side. It is probable that the JIT's activities only cover a part of the facts for no access to the Russian-controlled territory, political or community pressures, and witnesses' fear of potential reprisals or the need for personal security. Further, if the OTP utilises the EU funding targeted on the Situation in Ukraine through its participation in the JIT, the ICC could be criticized for a lack of independence and a tendency of selective justice. This scrutiny arises from the idea that the ICC should not receive any external funds specifically designated for a particular situation or case. Potential doubts on the OTP's independence, even if merely in appearance, could harm the perceptions of the ICC's legitimacy among various

Justice' (2008) HarvardILJ 53; M El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Brill 2008) 298-304.

⁶ ICC-OTP, *Informal Expert Paper: The Principle of Complementarity in Practice* cit. 15.

⁷ See Eurojust, *Annual Report 2021* eurojust.europa.eu, Data annex.

⁸ See ICC, *2021 Report of the Court on Key Performance Indicators* icc-cpi.int 50.

⁹ See ICC, *2022 Report of the Court on Key Performance Indicators* icc-cpi.int 43.

audiences worldwide, including those in the Global South and victims suffering from atrocity crimes in many other situations, consequently undermining this institution's authority and diminishing public trust in it.

Overall, this short piece highlights the challenges and opportunities presented by the Eurojust-supported JIT in Ukraine for the ICC-OTP concerning complementarity, efficiency, independence, and legitimacy. This is the first time that the OTP has participated in a JIT investigating alleged core international crimes. The OTP's involvement in the JIT in Ukraine offers a significant opportunity to advance the implementation of the ICC's proactive complementarity policy. Moreover, the JIT tool presents both challenges and opportunities for the OTP in gaining valuable insights for managing efficient cooperation and assistance with seven JIT partner States under the Rome Statute. Lastly, the OTP must be cautious to safeguard its independence and impartiality in all its activities as mandated by the Rome Statute, particularly within its participation in the JIT in Ukraine, which is essential to the normative and sociological legitimacy of the ICC.