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## THE POLISH INVESTIGATION INTO CORE CRIMES COMMITTED IN UKRAINE: PRACTICAL ASPECTS OF THE FUNCTIONING OF THE JIT

**Abstract:** *This article explains the legal basis and reasons for establishing a Joint Investigation Team by the Polish Prosecutor's Office, investigating crimes committed as a result of the Russian aggression against Ukraine. It analyses the reasons why this investigation is so highly demanding and describes how it requires an unconventional approach to work from investigators, as well as enormous coordination efforts and support from the EU organs. Other states are involved in the JIT on an unprecedented scale, as well as the OTP ICC, and unconventional support has been offered by the EU organs, especially in the area of digitalisation of the exchange of evidence. The article highlights the state and picture of investigations conducted into crimes committed in Ukraine, both in domestic jurisdictions and before the ICC, as well as possibly before an international or internationalised tribunal established to adjudicate the crime of aggression. It explains how the Polish investigation – conducted within the framework of a JIT – has become an important element of 'strategic litigation networks' for serious international crimes.*

**Keywords:** International Criminal Court; Joint Investigation Team; Polish investigation into core crimes committed in Ukraine; war in Ukraine

### 1. ESTABLISHMENT OF A JOINT INVESTIGATION TEAM INTO ALLEGED CRIMES COMMITTED IN UKRAINE

On 28 February 2022 the Department for Organized Crime and Corruption of the National Prosecutor's Office in Warsaw opened an investigation "on the crime of ag-

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gression perpetrated on 24 February 2022 by the authorities and functionaries of the Russian Federation, directed against the sovereignty, territorial integrity and political independence of Ukraine; perpetrated jointly and in agreement with the authorities and functionaries of the Republic of Belarus by making available the territory of this country for carrying out acts of armed aggression against Ukraine” – based on a type of criminal act defined as “aggressive war” in the context of Art. 117 § 1 of the Polish Criminal Code (PCC), meaning “initiating or conducting of an aggressive war”, whether against Poland or any other state. Due to a reasonable suspicion about Russian forces attacking civilian objects, hospitals, and schools, and killing civilians and causing the destruction of property and cultural assets, the scope of the ongoing investigation was expanded to include war crimes, penalized (among other war crimes defined in the PCC) under Art. 122 (using prohibited types of weapons); Art. 123 (killing of civilians and prisoners); and Art. 125 PCC (destroying or robbery of cultural or material goods).<sup>1</sup>

On 25 March 2022, national authorities of Lithuania, Poland and Ukraine set up a joint investigation team (JIT, the so called “Ukrainian JIT”) into alleged core international crimes committed in Ukraine. The JIT agreement was signed by the Prosecutors General of Poland, Ukraine, and Lithuania. The signing took place at the Polish – Ukrainian border crossing in Korczowa-Krakovets,<sup>2</sup> which in itself is unusual and symbolic. The authorities of Estonia, Latvia and Slovakia joined the JIT on 30 May 2022 and Romania became a member on 13 October 2022. On 3 March 2023, the seven national authorities participating in the JIT signed a Memorandum of Understanding (MoU) with the United States Department of Justice.

The present article deals with the legal basis and reasons for establishing a JIT by the Polish Prosecutor’s Office, investigating crimes committed as a result of the Russian aggression against Ukraine. The purpose of this text is to analyse the reasons why this investigation is so highly demanding – both legally and practically – and how it requires an unconventional approach to work from investigators, as well as enormous coordination efforts and support from the EU organs and the ICC. The EU Member States (MSs) are involved in the JIT, together with the OTP of the ICC, on a previously unencountered scale, and unconventional support has been offered by the EU organs as well, especially in the area of digitalisation and exchange of evidence. This article highlights the state of cooperation between various actors in the framework of investigations conducted into crimes committed

<sup>1</sup> Mazovian Branch of the Department for Organized Crime and Corruption of the National Prosecutor’s Office in Warsaw investigation of 28 February 2022, Case 1001-105.Ds.12.2022.

<sup>2</sup> *Kolejne kraje dołączyły do międzynarodowego zespołu śledczego badającego zbrodnie wojenne na Ukrainie* [Additional countries join the international investigative team investigating war crimes in Ukraine], Prokuratura Krajowa, 30 May 2022, available at: <https://tinyurl.com/4x9jxc7b> (accessed 30 August 2024).

in Ukraine, both in domestic jurisdictions and before the ICC, and explains how the Polish investigation – conducted within the framework of a JIT – has become an important element of a “strategic litigation network” for core crimes committed in Ukraine. It shows how the practical and legal circumstances of the present investigation are previously unknown and extraordinary and thus require a new approach and newly designed responses. This JIT investigation is highly demanding and requires an unconventional approach to work from investigators, enormous coordination efforts and support from the EU organs, as well as the involvement of the OTP of the ICC.<sup>3</sup>

The possibility to establish a JIT is provided in the Council Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA).<sup>4</sup> The goal of this form of cooperation between MSs is – contrary to the traditional mutual legal assistance as well as the European Investigation Order, which are limited to specific investigation measures – to cooperate during the entire conduct of the investigation taking place in several MSs, where granting representatives of other MSs an unlimited, real-time exchange of information is crucial. In this form of cooperation authorities investigating a specific situation or crimes of a transnational character can directly exchange information and evidence; cooperate in real time; and jointly carry out operations, as this form of cooperation allows for delegated members of a JIT from other MSs to be present during investigative measures on each other’s territories.<sup>5</sup> According to Art. 4, MSs were supposed to take the necessary measures to comply with the provisions of this Framework Decision (FD) by 1 January 2003 – meaning that they had an obligation to implement the provisions of the Framework Decision into their national legal orders. The Polish legislator fulfilled this duty by introducing new Arts. 589b to 589f CCP<sup>6</sup> into Chapter 62 (“Mutual legal assistance and delivery of documents in criminal cases”) of the Polish Code of Criminal Procedure (CCP). In accordance with the assumptions of this provision, a joint investigation team is one of the forms of mutual legal assistance. A joint investigation team may, in particular, be set up where a MS’s investigations into criminal offences require difficult and demanding investigations having links with other MSs, or a number of MSs are conducting investigations into criminal

<sup>3</sup> M. Caianiello, *The Role of the EU in the Investigation of Serious International Crimes Committed in Ukraine. Towards a New Model of Cooperation?*, 3–4(30) *European Journal of Crime, Criminal Law and Criminal Justice* 219 (2022), pp. 219–237

<sup>4</sup> Council Framework Decision of 13 June 2002 on joint investigation teams [2002] OJ L 162/1.

<sup>5</sup> See e.g. C. Riehle, “20 years of Joint Investigations Teams (JITs) in the EU”: *An overview of their development, actors and tools*, 24 *ERA Forum* 163 (2023), pp. 163–167; A. Balcaen, *Law enforcement information exchange in the operational phase of a JIT*, in: G. Vermeulen, C. Rijken (eds.), *Joint Investigation Teams in the European Union: From Theory to Practice*, T.M.C. Asser Press, Hague: 2006, p. 86.

<sup>6</sup> Articles added to the CCP by Art. 2 point 2 of the Act of 16 April 2004 amending the Criminal Code and certain other acts [2004] JoL 93, 889.

offences in which the circumstances of the case necessitate coordinated, concerted action in the MSs involved. A request for the setting up of a joint investigation team may be made by any of the MSs concerned. The team shall be set up in one of the MSs in which the investigations are expected to be carried out (see Art. 1(3) FD).<sup>7</sup>

Also, Art. 13 of the Convention – established by the Council in accordance with Art. 34 of the Treaty on European Union on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000 Convention)<sup>8</sup> – contains a provision on the establishment and activities of joint investigation teams. However, the Convention was not adopted by the MSs for a considerable period of time, so the EU authorities decided to regulate this matter using a more effective method, and thus regulated the same area of cooperation in the legal form of a framework decision, which the MSs are obliged to implement into their own legal orders within a certain period of time. Therefore, this form of legal assistance, i.e. of joint investigation teams – currently operates in the EU law on two legal bases – both the 2000 Convention (in relation to the states that have ratified it) and the provisions of the Framework Decision 2002/465/JHA implemented into the internal law of the MSs.<sup>9</sup> Although in Poland it is customary to apply the provisions of the CCP as a basis for establishing a JIT, the doctrine has repeatedly pointed out that strictly formal adherence to legal rules should lead to the application of the provisions of the EU convention in each case.<sup>10</sup> Art. 615 § 2 CCP leaves no doubt that if an international agreement to which the Republic of Poland is a party provides otherwise, the provisions of Part XIII (including Chapter 62 CCP) regulating international cooperation do not

<sup>7</sup> M. Wróblewski, *Wspólne zespoły dochodzeniowo-śledcze* [Joint Investigation Teams], 9 *Prokuratura i Prawo* 74 (2006), pp. 74–75; M. Klejnowska, *Praca wspólnego zespołu śledczego w świetle przepisów kodeksu postępowania karnego* [The work of a joint investigation team in the light of the provisions of the Code of Criminal Procedure], 3 *Przegląd Policyjny* 132 (2005), pp. 134–135; M. Płachta, *Joint Investigation Teams. A New Form of International Cooperation in Criminal Matters*, 13(2) *European Journal of Crime, Criminal Law and Criminal Justice* 284 (2005), p. 297; A. Lach, *Europejska pomoc prawna w sprawach karnych* [European Mutual Legal Assistance in Criminal Matters], *Towarzystwo Naukowe Organizacji i Kierownictwa*, Toruń: 2007, p. 281; B. Janusz, A. Żołyńska, *Zasada prawdy a czynności dowodowe polskich zespołów śledczych* [The principle of truth and the evidentiary actions of Polish investigative teams], in: Z. Sobolewski, G. Artymiak (eds.), *Zasada prawdy materialnej* [The principle of material truth], Zakamycze, Kraków: 2006, p. 375; C.P. Kłak, *Zespół śledczy w świetle prawa międzynarodowego* [Investigative team in the light of international law], 6 *Prokuratura i Prawo* 108 (2008), pp. 108–128.

<sup>8</sup> 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 [2000] OJ C 197, pp. 3–23.

<sup>9</sup> See T. Spapens, *Joint Investigation Teams in the European Union: Article 13 JITS and the Alternatives*, 19(3) *European Journal of Crime, Criminal Law and Criminal Justice* 239 (2011), pp. 239–240.

<sup>10</sup> See P. Hofmański, A. Sakowicz, *Reguły kolizyjne w obszarze międzynarodowej współpracy w sprawach karnych* [Conflict of laws rules in the area of international cooperation in criminal matters], 11 *Państwo i Prawo* 29 (2006), pp. 29–42; H. Kuczyńska, *Kolizje norm prawnych we współpracy w sprawach karnych w ramach Unii Europejskiej* [Conflicts of laws in criminal matters cooperation within the European Union], in: T. Grzegorzczak (ed.), *Funkcje procesu karnego. Księga jubileuszowa Profesora Janusza Tylmana* [Functions of the criminal process. Professor Janusz Tylman's jubilee book], Wolters Kluwer, Warszawa: 2011, p. 775.

apply. Framework Decision 2002/465/JHA itself offers the possibility to remove this conflict, providing in Art. 5 that it shall cease to have effect when the EU Convention on Mutual Assistance in Criminal Matters has entered into force in all MSs. So far, as of 28 February 2024 the Convention has not entered into force in all MSs – as it results from the resources of the European Judicial Network.<sup>11</sup>

On the basis of the national provisions implementing the Framework Decision into the Polish law, both a JIT operating in the territory of Poland may be established, which includes members delegated by the cooperating state(s) (the so-called “Polish JIT”); and a JIT may be established operating in the territory of the cooperating state, which will include Polish delegated (seconded) members (the so-called “foreign JIT”). The basis for establishing this type of JIT is a mutual agreement concluded between the Polish Prosecutor General and the competent authority of another EU MS. This agreement establishes both the specific purpose of the JIT and the specific period of its operation. The time period may be extended by mutual consent. In addition the agreement should also establish the composition of the team (see also Art. 1(1) FD). The team can be established in cooperation with one or more MSs. The number of States that cooperate in a JIT should depend on the circumstances and needs of the specific investigation. A model agreement establishing a joint investigation team was published by the Council of the EU, following the approval of Council resolution 22/12/2021<sup>12</sup>, where all the necessary elements of such an agreement were pointed out.

In the present case 1001-105.Ds.12.2022, “the Polish JIT” was established on the basis of Art. 589b CCP. The scope and character of participation of members, seconded by other Member States, is regulated in the agreement pursuant to Art. 589c CCP, which provides for two forms of powers of seconded members: participation in all procedural activities performed, as part of the Polish team (§ 5); or personal performance of a specific investigation activity, excluding the issuance of decisions (§ 6). The content of this JIT agreement is considered an element of the casefile of the preparatory proceedings and access to the content of the agreement is refused pursuant to Art. 156 § 5 *in fine* CCP (which states that “With the consent of the prosecutor, files during preparatory proceedings may, in exceptional cases, be made available to other persons” than the parties to the proceeding).

<sup>11</sup> European Judicial Network, available at: <https://www.ejn-crimjust.europa.eu/ejn2021/Home/EN> (accessed 30 August 2024).

<sup>12</sup> *Model Agreement for setting up a Joint Investigation Team*, EuroJust, 8 February 2017, available at: <https://tinyurl.com/2835z5j4> (accessed 30 August 2024).

## 2. THE NEW QUALITY OF THE JIT'S COOPERATION AND COORDINATION NETWORK

Up until now, joint investigation teams have usually been established when two or more EU MSs decide that the demanded investigations have links with other MSs and necessitate the coordinated actions of authorities of more MSs. Usually, JITs are created in cases like drug trafficking, money laundering, or the smuggling of migrants – in accordance with the goals for which the Framework Decision 2002/465/JHA was established: “The Council considers that for the purpose of combating international crime as effectively as possible, it is appropriate that at this stage a specific legally-binding instrument on joint investigation teams should be adopted at the level of the Union, which should apply to joint investigations into trafficking in drugs and human beings as well as terrorism” (preamble, recital 6). However, this JIT – established in order to investigate alleged crimes committed in Ukraine – represents a totally different case. In the first place, it was established just three weeks after the war began, when there was very little precise evidence relating to the alleged crimes. Secondly, the practical and legal circumstances of the present investigation were unknown before and extraordinary, and thus required a new attitude and newly designed responses.

The JIT conducting an investigation into core crimes committed in Ukraine thus introduces a new quality to the short history of JITs established in the EU. Firstly, it concerns and includes a non-EU Member State (Ukraine) and operates on the basis of a MoU with the United States. Secondly, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) joined the JIT as a participant on 25 April 2022,<sup>13</sup> after opening its own investigation on 2 March 2022. It is worth noting that it was the OTP that joined the JIT (not the ICC as such). The OTP is an independent organ of the Court and is responsible for examining situations under its jurisdiction; it represents the Court's involvement.<sup>14</sup> Formally, on 15 July 2023 the JITs Network agreed to grant the OTP of the ICC the status of associate partner. The OTP's joining the JIT was preceded by Prosecutor of the ICC Karim A.A. Khan's visit in Poland and Western Ukraine on 16 March 2022. As he stated

<sup>13</sup> *One year on. A timeline of Eurojust's response to the war in Ukraine*, EuroJust, 4 May 2023, available at: <https://tinyurl.com/yjv83par> (accessed 30 August 2024).

<sup>14</sup> *Office of the Prosecutor*, International Criminal Court, available at: <https://www.icc-cpi.int/about/otp> (accessed 30 August 2024). JITs are not mentioned in the Rome Statute; however Part IX provides the legal basis for cooperation between the ICC-OTP and national authorities, allowing it to request and receive relevant information, while also providing a legal basis to provide assistance and information/evidence to national authorities upon their request. This part also represents the legal basis for the participation of the ICC-OTP in a JIT – see *Involvement of the Office of the Prosecutor of the International Criminal Court in Joint Investigation Teams*, EuroJust, 13 February 2024, available at: <https://tinyurl.com/3zu2hdun> (accessed 30 August 2024).

during this visit: “This has allowed me to personally assess the situation on the ground, meet with affected communities and to further accelerate our work by engaging with national counterparts.”<sup>15</sup>

Thirdly, on 5 October 2023 Europol also joined the JIT, on the same conditions as the OTP of the ICC.<sup>16</sup> According to its mandate, Europol provides analytical and forensic support to the JIT Member States, in accordance with their Analytical Project on Core International Crimes (AP CIC). Europol also has a wide ability in analysis of data legally obtained from open sources such as social media, broadcast TV or radio – known as Open-Source Intelligence (OSINT).<sup>17</sup> Inasmuch as the setting up of the JIT was also supported by another EU organ – Eurojust – now both of them, during the operational phase of the JIT, provide valuable operational support to the JIT members by offering a wide range of supporting tools, including mobile offices, cross-match and analytical analyses, coordination and operational centres, the coordination of prosecution, and expertise and funding. This wide range of supporting tools could be extremely important in an investigation conducted in such special conditions, i.e. of an ongoing war. In accordance with the opinion expressed by Eurojust: “a joint investigation team (JIT) is one of the most advanced tools used in international cooperation in criminal matters, comprising a legal agreement between competent authorities of two or more States for the purpose of carrying out criminal investigations.”<sup>18</sup>

The possibility to include in the procedural activities of a JIT the powers of a representative of an international institution established to combat crime has been provided for in the FD – and subsequently in the domestic legal orders of the MSs. According to Art. 1(12) FD, a JIT agreement may allow for persons other than representatives of the competent authorities of the MSs setting up the JIT to take part in the activities of the team. Such persons may, for example, include officials of bodies set up pursuant to the Treaty – but this indication is not exhaustive and on the basis of this provision it was possible for the OTP of the ICC

<sup>15</sup> *Statement of ICC Prosecutor, Karim A.A. Khan QC, on his visits to Ukraine and Poland*, International Criminal Court, 16 March 2022, available at: <https://tinyurl.com/2vjza2z9> (accessed 30 August 2024).

<sup>16</sup> *Europol participates in joint investigation team into alleged core international crimes in Ukraine*, Europol, 5 October 2023, available at: <https://tinyurl.com/yjsc6e7x> (accessed 30 August 2024).

<sup>17</sup> *Ibidem*; C. Riehle, *Europol Joins JIT on International Crimes in Ukraine*, Eucriim, 27 November 2023, available at: <https://eucriim.eu/news/europol-joins-jit-on-international-crimes-in-ukraine/> (accessed 30 August 2024); J.L. Lopes da Mota, *Eurojust and its role in joint investigation teams*, 3 Eucriim 88 (2009), pp. 88–90.

<sup>18</sup> *Joint investigation teams*, EuroJust, available at: <https://www.eurojust.europa.eu/judicial-cooperation/instruments/joint-investigation-teams> (accessed 30 August 2024)). In 2022 there were 78 newly signed JITs and 187 JITs ongoing from previous years, see: *Eurojust services and judicial cooperation instruments*, EuroJust, available at: <https://www.eurojust.europa.eu/annual-report-2022/judicial-cooperation-instruments> (accessed 30 August 2024).

to join the JIT. While these entities do not have all the rights conferred upon the members or seconded members of the JIT, the agreement may however provide for such a possibility and then the representatives of such authorities enjoy the same rights – the agreement must make it clear whether, and on what conditions, the OTP is invited to engage in the work of the JIT. What is noteworthy in this regard is that this case is the first time in the history of JITs when the OTP of the ICC has joined an EU JIT. Although the OTP of the ICC joins the JIT on conditions other than EU Member States, this is nonetheless a significant step since it makes it possible to facilitate cooperation and the exchange of evidence, or even to take joint actions in a much-simplified way as provided in the FD.<sup>19</sup> For example, it allows for a simplified exchange of evidence between members of a JIT: Art. 1(7) FD provides that where the joint investigation team needs investigative measures to be taken in one of the MSs setting up the team, members seconded to the team by that MS may request their own competent authorities to take those measures.<sup>20</sup> Those measures shall be considered in that MS under the conditions which would apply if they were requested in a national investigation. The seven MSs being parties to the JIT, together with the OTP may – thanks to the involvement and coordinating efforts of Europol – also benefit from special tools of coordination, such as: direct communications; access to an admissible evidence database and financial support; coordination meetings which bring all the persons responsible for conducting investigations in all the JIT MSs together; and generate direct communications among national authorities and the OTP and, increase their field presence.<sup>21</sup> In addition, thanks to the harnessing of new technologies (i.e. artificial intelligence, machine learning systems, and advanced systems with facial and object detection), the OTP has recently significantly strengthened its capacity to share, exchange information and evidence, and respond to requests from the JIT members.<sup>22</sup>

Another new structural element of the JIT that has never been used before is the so-called Core International Crimes Evidence Database (CICED). It was established on 23 February 2023 and is a centralised digital evidence database that was set up by Eurojust. The CICED was designed in order to preserve, store, and analyse evidence of core international crimes in a secure mode. The CICED

<sup>19</sup> *Statement by ICC Prosecutor, Karim A.A. Khan QC: Office of the Prosecutor joins national authorities in Joint Investigation Team on international crimes committed in Ukraine*, International Criminal Court, 25 April 2022, available at: <https://tinyurl.com/m5hrsrtb> (accessed 30 August 2024).

<sup>20</sup> For practical and legal simplifications regarding the sharing of evidence between JIT Member States and other entities participating in the JIT see: Eurojust, *Joint Investigation Teams. Practical Guide*, Publications Office of the European Union, Luxembourg: 2021, available at: <https://tinyurl.com/mr48nzh5> (accessed 30 August 2024).

<sup>21</sup> *See Involvement of the Office of the Prosecutor...*, *supra* note 14.

<sup>22</sup> *Delivering Better Together. Office of the Prosecutor Annual Report 2023*, International Criminal Court, Den Haag: 2023, pp. 49–53, available at: <https://www.icc-cpi.int/sites/default/files/2023-12/2023-otp-annual-report.pdf> (accessed 30 August 2024).



consists of three components: a safe digital data transmission method; secure data storage; and advanced analysis tools. The database also contains a register of information on who submitted the evidence as well as the event and type of crime being referred to. Evidence can only be submitted by competent national authorities from EU MSs and states with Liaison Prosecutors at Eurojust.<sup>23</sup> The CISED became part of a legislative package addressing the digitalisation of justice systems in the EU, where the main legal act is presently Regulation (EU) 2023/969 establishing a collaboration platform to support the functioning of joint investigation teams and amending Regulation (EU) 2018/1726.<sup>24</sup> Practice had shown that JITs faced a number of technical difficulties, especially when it came to exchange of evidence and their admissibility before national courts, preventing them from being efficient in their daily work and from fostering their operations, and therefore a “JITs collaboration platform” was established. The two above mentioned instruments allow for the exchange of operational information and evidence, including large files, that should be ensured through an upload/download mechanism designed to store the data centrally only for the limited period of time necessary for the technical transfer of the data. Moreover, the JIT collaboration platform allows for the traceability of exchanges of evidence through an advanced logging and tracking mechanism which allows for keeping track of all evidence exchanged, including its access and processing.

In the framework of the “Ukrainian JIT” another coordinating mechanism was utilised, which although it is not strictly a part of the JIT is closely related to it. It is the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA).<sup>25</sup> Due to the lack of the ICC’s jurisdiction to prosecute perpetrators of the crime of aggression, the ICPA was established to help to fill the gap concerning the collection of evidence of this crime and coordinate initiatives aimed at preventing impunity for the perpetrators. It is assumed that the work of the ICPA will effectively prepare and contribute to any future prosecutions of the crime of aggression, irrespective of the jurisdiction before which these will be brought. This initiative of the EU European Commission is intended to provide support for a JIT to which the Centre is linked in its operations. The Centre

<sup>23</sup> C. Riehle, *Eurojust Launches Core International Crimes Evidence Database and Gives Overview of Judicial Support for Ukraine*, Euclid, 5 May 2023, available at: <https://euclid.eu/news/eurojust-one-year-of-judicial-support-for-ukraine/> (accessed 30 August 2024).

<sup>24</sup> Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) No. 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No 1077/2011 [2018] OJ L 132/1.

<sup>25</sup> *International Centre for the Prosecution of the Crime of Aggression against Ukraine*, EuroJust, available at: <https://tinyurl.com/4uzh8tm3> (accessed 30 August 2024).

is composed of prosecutors who are already working in the Joint Investigation Team. The ICPA's duty is to prepare materials for future trials before national, internationalized or international courts, including a possible future Tribunal for the Crime of aggression against Ukraine or the ICC.<sup>26</sup> Polish prosecutors are also involved in this project.<sup>27</sup>

### 3. THE POLISH CONTRIBUTION TO INVESTIGATIONS CONDUCTED IN OTHER STATES AND BY THE OTP ICC

Since the escalation of Russia's aggression against Ukraine on 24 February 2022<sup>28</sup> Poland has played a significant role: both as a safe harbour for refugees and as a natural forum where the potential witnesses' testimonies of core crimes could be secured.<sup>29</sup> In the investigation conducted in case 1001-105.Ds.12.2022, so far close to 2.000 witnesses have been interviewed. The Polish investigation conducted under this case number is so far a structural one, with almost 30 separate events within this framework.<sup>30</sup> A structural investigation is a wide-range investigation into a situation within which more crimes could have been committed, but it is not yet possible to designate the precise elements of the crimes and the potential perpetrators. Several hundreds of testimonies are extremely valuable in terms of evidentiary importance and credibility for proving the elements of core crimes. Procedural activities in this case are conducted by prosecutors as well as the Internal Security Agency and the Police (also in the area of the OSINT-based investigation).<sup>31</sup>

In the case of this investigation an extraordinary approach towards the methods of conducting procedural activities had to be adopted: among other things towards the treatment of witnesses as well as the technical measures employed. The greatest

<sup>26</sup> *Ukraine: International Centre for the prosecution of Russia's crime of aggression against Ukraine starts operations today*, European Commission, 3 July 2023, available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_3606](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3606) (accessed 30 August 2024).

<sup>27</sup> M. Mikowski, *Prokurator Krajowy dla PAP: powstała instytucja, która ma rozliczyć odpowiedzialnych za napaść na Ukrainę* [National Prosecutor for the PPA: an institution was established to prosecute persons responsible for committing crimes of aggression against Ukraine], Polska Agencja Prasowa, 3 July 2023, available at: <https://tinyurl.com/bdfptk3w> (accessed 30 August 2024).

<sup>28</sup> See P. Grzebyk, *Escalation of the Conflict between Russia and Ukraine in 2022 in Light of the Law on Use of Force and International Humanitarian Law*, 41 Polish Yearbook of International Law 145 (2021).

<sup>29</sup> M. Jabłoński, *Polska prokuratura deklaruje pomoc przy wyjaśnianiu zbrodni wojennych w Buczy* [Polish prosecutors office declares help in investigating war crimes in Bucha], Polska Agencja Prasowa, 4 April 2022, available at: <https://tinyurl.com/3y7ubw53> (accessed 30 August 2024).

<sup>30</sup> *Ibidem*.

<sup>31</sup> *Briefing w sprawie śledztwa dotyczącego napaści Rosji na Ukrainę* [Briefing on the investigation into Russia's attack on Ukraine], Prokuratura Krajowa, 24 February 2023, available at: <https://tinyurl.com/5dj3as5m> (accessed 30 August 2024). Due to the fact that the investigation is ongoing, most of the information cannot be publicly shared, but even from this small amount of publicly available information it can be concluded that Poland is actively engaged in activities aimed at bringing war criminals to justice.

difficulty was persuading war refugees to testify. An extensive information campaign was carried out, involving numerous services and offices. For example, Polish investigators carried out, together with the Government Centre for Security, an information campaign based on sending messages to users of Ukrainian SIM cards located in Poland, informing them about the possibility of testifying as witnesses before Polish investigative authorities.<sup>32</sup> Cooperation with non-governmental organizations has also been initiated in this regard. This investigation also had to adopt a specific approach, since witnesses were only interviewed if they consented to become witnesses; and in many cases potential witnesses refused to testify due to the trauma they had experienced.<sup>33</sup> In such cases, because of the need to treat special care for their mental health as a priority, and in order to not compromise the well-being of individuals and the quality of information, interrogations were waived (quite in negation of the norm of Art. 177(1) CCP which obliges every witness, including a victim-witness, to testify, even if the potential perpetrator is not yet known). It is claimed by the Prosecutor's Office that Polish investigators are highly flexible in this investigation, and it is noteworthy that they are conducting actions which are not usually conducted in a typical criminal proceeding, like for example waiving the interrogation of a witness who is unwilling to testify. Also, if a witness is unable to appear at the police or prosecutor's office, interviews may take place in a place and at a time convenient for him/her, including his/her place of residence.<sup>34</sup>

The testimonies obtained in this investigation have concerned many cases of alleged war crimes, which gives rise to the possibility of proving various concrete events: among other cases the shelling of civilian objects. Witnesses described extreme sanitary conditions in besieged cities, for example in Mariupol. They also testified about Russian soldiers committing common crimes such as theft. Among the witnesses are persons forcibly deported from the territory of Ukraine, defenders of the Azovstal Metallurgical Combine, and prisoners of the so-called "filtration camp" in Olenivka. Polish investigators were able to discover and find evidence of a mechanism of forced deportations committed by functionaries of the Russian Federation, including mechanism of granting, to deported people, one-off subsidies by Russian banks, which could prove the systematic operation of the entire Russian

<sup>32</sup> *Alert RCB do ukraińskich świadków zbrodni wojennych* [Information campaign of Government Centre for Security addressed to Ukrainian refugees], Rządowe Centrum Bezpieczeństwa, 6 May 2022, available at: <https://tinyurl.com/4t3shp9n> (accessed 30 August 2024).

<sup>33</sup> For more on the topic see e.g. L. Marschner, *Implications of Trauma on Testimonial Evidence in International Criminal Trials*, in: P. Alston, S. Knuckey (eds.), *The Transformation of Human Rights Fact-Finding*, Oxford University Press, Oxford: 2016, pp. 213–230.

<sup>34</sup> M. Mikowski, *Prokurator Krajowy: są dowody na zabójstwa cywili, kradzieże i tortury w Ukrainie* [National Prosecutor: there is some evidence on killing civilians, thefts, and tortures in Ukraine], Polska Agencja Prasowa, 23 February 2022, available at: <https://tinyurl.com/mr3tftzb> (accessed 30 August 2024).

state. In some cases it was possible to identify potential suspects, like for example the commander of the so-called filtration camp in Olenivka. Investigators also secured documents confirming the above-mentioned crimes. What is noteworthy, the Polish Prosecutor's Office established cooperation with civil society organisations documenting crimes committed in Ukraine, coordinating efforts in order to secure witness testimonies from the persons first contacted by these NGOs<sup>35</sup>.

Another important feature of the present investigation is that the cooperation between the JIT Member States takes many different forms. For example, representatives of the OTP of the ICC worked together with the Polish investigators during their weeklong visit in Warsaw. They had the opportunity to become familiar with the evidence acquired by the Polish investigators so far and to discuss further procedural steps. As a result of this visit, the Polish Prosecutor's Office transferred evidence to the OTP of the ICC. Their mutual assistance was not based on the provisions of the Rome Statute (Part 9 providing for "International cooperation and judicial assistance" and the – coordinated with the Rome Statute in Chapter 66e norms of the CCP), as the procedure for exchanging evidence is facilitated within the JIT.<sup>36</sup>

Cooperation between the JIT Member States also takes on a practical dimension. Polish police officers and prosecutors, together with Ukrainian investigators, inspected sites of war crimes during the ongoing war. The General Prosecutor's Office of Ukraine twice asked Poland for support in carrying out activities at the crime scene. Due to this, Polish specialists have travelled to Ukraine twice so far, in summer 2022 and 2023, to conduct such activities. Polish investigators inspected hospitals, schools, kindergartens, police stations and multi-family buildings which were destroyed as a result of bombings, artillery and rocket fire, and kamikaze drone attacks<sup>37</sup>. They carried out activities in the Kyiv, Mykolaiv, and Sumy regions, sometimes in close distance to the front line. The Polish team consisted not only of prosecutors from the JIT but also of forensic technicians – 3D scanner operators, pyrotechnicians, paramedics and counterterrorist specialists.<sup>38</sup> The evidence was secured using 3D laser scanners, which allow for scanning the object with precise

<sup>35</sup> *Prokuratorzy prowadzący śledztwo dotyczące rosyjskiej agresji na Ukrainę spotkali się z przedstawicielami organizacji społecznych* [Prosecutors investigating the Russian aggression against Ukraine met with representatives of non-governmental organizations], Prokuratura Krajowa, 18 June 2024, available at: <https://tinyurl.com/3hy24svs> (accessed 30 August 2024).

<sup>36</sup> *Ibidem*.

<sup>37</sup> *Prokuratorzy pionu PZ Prokuratury Krajowej dokumentowali dowody rosyjskich zbrodni na Ukrainie* [Prosecutors from the Organized Crime Department have collected evidence about Russia's war crimes in Ukraine], Prokuratura Krajowa, 23 August 2023, available at: <https://tinyurl.com/39us88fz> (accessed 30 August 2024).

<sup>38</sup> *Działania polskich policjantów w Ukrainie w ramach zespołu śledczego JIT* [Polish police officers' activities in Ukraine within the JIT], Policja.pl, 23 August 2024, available at: <https://tinyurl.com/mpy7yjka> (accessed 30 August 2024).

accuracy and then its visualization. The results of their work, from the point of view of potential criminal proceedings, are extremely important as 3D scanners guarantee measurements with an accuracy of up to 1 mm as standard, and in the case of detailed scanning even below 1 mm. Depending on the type of area being scanned, a three-dimensional image is obtained in just a few minutes, registering its actual scale and temperature. The results of the scanning can be later presented in a trial as forensic evidence provided by specialists (Art. 205 § 1 CCP), i.e. as documentation of the scope and character of destruction. The relatively short process of scanning was an obvious advantage to the efficient performance of activities in Ukraine, where combat operations were constantly being carried out.<sup>39</sup>

## CONCLUSIONS

The extraordinary character of the “Ukrainian JIT investigation” highlights several problems that appear in connection with the present form in which the Polish investigation operates. The problems result, firstly, from the fact that this is the first investigation into core crimes conducted in Poland – and already on such a scale (with the exception of the so called Nangar Khel case, no WA 16/15 and WA 39/11 decided by the Supreme Court). At the same time, there are appropriate structures and instruments in the Polish legal order for implementation of the obligation to prosecute and punish the perpetrators of core crimes, as well as no practical experience and expertise – beginning with the proper structure of norms of material law and procedural provisions relating to the possibility to adjudicate core crimes before Polish courts. In the case of proceedings conducted by Polish authorities, one has to take into consideration the problem of proceeding in accordance with the principle of *nullum crimen sine lege* and answering the question: whether the definitions of crimes used in the PCC are sufficiently drafted and reflect all the necessary elements of core international crimes.

Another problem that should be pointed out is that the Polish Prosecutor’s Office conducts the investigation, according to press releases, on a “subsidiary” basis. This formulation is not in compliance with the fact that the prosecution is based on the protective principle, meaning that the investigation was initiated due to the need to protect the significant interests of the Republic of Poland. Its purported aim is not just to “help” in proceedings pending in Ukraine (or before the ICC), but rather to protect Polish interests, which cannot be treated as a “subsidiary” task. The JIT is a Polish JIT (within the meaning of Art. 1(3) FD – which states that: “A joint investigation team shall operate in the territory of the Member States setting up the

<sup>39</sup> *Ibidem.*

team”); meaning that – as was explained earlier in this text – since it was established in the territory of Poland it is a Polish investigation which must be finished by either issuing an indictment or proclaiming its discontinuation. There is also a possibility to transfer the proceeding on the basis of an international agreement (in which case the Polish investigation is discontinued).<sup>40</sup> Another problem connected with the “subsidiary character” of the Polish investigation is that, as reported by the Ministry of Justice, the actions of the Polish OTP are ancillary (supplementary) to the main investigation initiated by the ICC.<sup>41</sup> This information is imprecise in that only an investigation into war crimes could be eventually complementary, since the ICC cannot in this case prosecute the crime of aggression, lacking jurisdiction under Arts. 15(*bis*) and 15(*ter*) of the Rome Statute of the ICC. Also, the ICC’s jurisdiction is always complementary to the actions of states and domestic jurisdiction (*see* Art. 17 of the Rome Statute).

In consequence, there is a clear need to define the crucial goals of the Polish investigation. Basically, when prosecuting international crimes it is possible to set two types of goals. Firstly, it is possible to conduct an investigation in a “subsidiary” manner. This means that the Prosecutor’s Office will not bring indictments before Polish courts, because all evidence collected during the proceedings will be transferred to the Ukrainian justice system. Such a procedure is enabled by international agreements providing for the transfer of proceedings (e.g. Art. 54 of the Agreement with Ukraine on legal assistance and legal relations in civil and criminal matters, drawn up in Kyiv on 24 May 1993<sup>42</sup>). It is also possible to conclude a separate agreement for the needs of a given case (as happened in the case of Ukraine handing over to the Dutch authorities the prosecution of the shooting down of a Malaysian Airlines plane over Donbas, i.e. the so-called “Flight MH17”<sup>43</sup>). Another option is to issue arrest warrants in Poland and initiate international searches for the suspects. However, it would then be necessary to solve the problem of the lack of a possibility to conduct trials *in absentia* in the Polish criminal proceedings. It

<sup>40</sup> It is worth mentioning that in addition a JIT may be used as a useful tool to prevent and resolve conflicts of jurisdiction as, in the framework of a JIT, the competent authorities may also agree on which jurisdiction should prosecute and for which offences. Also, the rules of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings may be used.

<sup>41</sup> *Prokurator MTK o wojnie w Ukrainie: Chcemy, żeby sprawiedliwości stało się zadość* [ICC prosecutor on the war in Ukraine: We want justice to be served], *Dziennik Gazeta Prawna*, 16 March 2022, available at: <https://tinyurl.com/56h3y769> (accessed 30 August 2024).

<sup>42</sup> Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal matters (adopted 24 May 1993, entered into force 14 August 1994), UNTS 57106.

<sup>43</sup> Agreement between the Kingdom of the Netherlands and Ukraine on international legal cooperation regarding crimes connected with the downing of Malaysia Airlines Flight MH17 on 17 July 2014 (adopted 7 July 2017, entered into force 31 October 2018), 3274 UNTS 1.

is also possible to assume that a mixed option could be adopted: e.g. that in cases concerning specific aspects of war crimes the materials obtained during the Polish investigation will be transferred to the Ukrainian authorities for indictments to be brought there arrest warrants in cases of.<sup>44</sup> There is also the possibility that in the future crimes against humanity will be issued in Poland. On the other hand, the practical abilities of the Ukrainian courts to adjudicate all the cases of alleged war crimes (over 130.000 cases have been initiated) must be taken into account.

The last problem (among many others that cannot be described in this text) is that the Polish investigation is not conducted in relation to crimes against humanity. Prosecuting crimes against humanity is of particular importance because the Ukrainian Criminal Code does not penalize this type of crime, so Ukrainian courts have no jurisdiction to adjudicate such a case. (This lacuna has been noted and in 2021 the Ukrainian parliament adopted Bill no. 2689 defining the categories of war crimes and crimes against humanity according to international humanitarian law and the Rome Statute, as well as providing for command responsibility,<sup>45</sup> and Art. 442-1 of the Bill penalizes crimes against humanity.<sup>46</sup> However the Bill is yet to be signed by the President and thus is not yet in force<sup>47</sup>). In this situation it would be advisable to prosecute crimes against humanity in Poland – based on the provisions of the Polish CC and the principle of universal jurisdiction. The investigation into this scope would also require taking into account the specific nature of this type of crime – the need to prove their extensive or systematic nature. The contextual element of crimes against humanity can be best demonstrated by the use of evidence from open sources (OSINT), which involves conducting an analysis of the information and data available on the Internet (e.g. on Facebook, Tik-Tok, YouTube). Such analyses are carried out in the context of the Polish investigation, but there is no practical

<sup>44</sup> See more P. Grzebyk, *Crime of Aggression against Ukraine: The Role of Regional Customary Law*, 21(3) Journal of International Criminal Justice 435 (2023).

<sup>45</sup> *Parliament of Ukraine Adopts Bill to Implement International Criminal and Humanitarian Law*, Parliamentarians for Global Action, 20 May 2021, available at: <https://www.pgaction.org/news/ukraine-bill-2689.html> (accessed 30 August 2024).

<sup>46</sup> See Comparative Table to the Draft Law of Ukraine “On Amendments to Certain Legislative Acts on the Enforcement of International Criminal and Humanitarian Law” (On Amendments to the Criminal and Criminal Procedure Codes of Ukraine concerning the implementation of the norms of International Criminal and Humanitarian Law), BILL No. 2689, available at: <https://www.pgaction.org/pdf/2021/en-bill-2689-10-03-2021.pdf> (accessed 30 August 2024).

<sup>47</sup> M. O’Brien, *Options for a Peace Settlement for Ukraine: Option Paper XVI – War Crimes, Crimes against Humanity and Genocide*, OpinioJuris, 30 October 2022, available at: <https://tinyurl.com/55vhmdcw> (accessed 30 August 2024); K. Ambos, *Ukrainian Prosecution of ICC Statute Crimes: Fair, Independent and Impartial?*, EJIL: Talk!, 10 June 2022, available at: <https://tinyurl.com/5n6zcpz3> (accessed 30 August 2024).

experience with the use and admissibility of such evidence in a criminal trial – which is another problem that needs to be resolved.

The investigation into crimes committed as a result of the Russian aggression against Ukraine – conducted in the form of the “Ukrainian JIT” – is the first such investigation in history. It is highly demanding and requires an unconventional approach to the task from investigators, as well as enormous coordination efforts and support from the EU organs. Other states are involved in the JIT on an unprecedented scale, together with the OTP ICC. Of course, owing to many legal and practical factors it will not be easy to bring the perpetrators responsible for war crimes or acts of aggression to accountability, the main factors being the unclear character of universal jurisdiction in Poland, the impossibility to successfully extradite suspects from Russia and immunities of highest state officials. In addition, the current state of investigations conducted into crimes committed in Ukraine – both in domestic jurisdictions and before the ICC, as well as possibly before an international or internationalised tribunal established to adjudicate the crime of aggression – is a very complex matter in which international law, domestic legal systems, and international relations are intertwined.<sup>48</sup> Thus the Polish investigation – conducted within the framework of a JIT – has become an important element of a “strategic litigation network” to deal with serious international crimes.<sup>49</sup>

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<sup>48</sup> See e.g. M. Jędrysiak, *Putting Russia on trial. Ukrainian efforts to establish a tribunal for crimes of aggression*, Center for Eastern Studies, 12 December 2023, available at: <https://tinyurl.com/4w9mb9jv> (accessed 30 August 2024).

<sup>49</sup> See very accurate observations by: B. McGonigle Ley, *Using Strategic Litigation and Universal Jurisdiction to Advance Accountability for Serious International Crimes*, 16 *The International Journal of Transitional Justice* 363 (2022), p. 365, who uses this term in order to describe “legal actions that pursue a number of important and varied objectives, from modifying or clarifying existing laws to raising awareness and debate around specific issues.” For more on this topic, see also W. Kaleck, P. Krock, *Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?*, 16 *Journal of International Criminal Justice* 165 (2018).