A New European Map of Core International Crimes Accountability Spaces

Kerttuli Lingenfelter

28.10.2024 doi: 10.59704/e88a582a0fcb6d9f

In their responses to Russia's invasion of Ukraine, states affirm, time and again, the foundational nature of internationally recognized borders for state sovereignty. Mapping onto the 'jigsaw puzzle' cartography of international law, these statements promote a longstanding visual imaginary of the Earth as a globe divided into spatially delimited political units, each imagined as impenetrable to another. Yet, the European Union's (EU's) measures coalescing around the criminal accountability of individuals responsible for core international crimes in Ukraine also illustrate the explanatory limits of the Westphalian cartography of international (criminal) law.

Rethinking space as constituted by social processes brings into view how state and non-state actors creatively overcome the boundaries of territoriality, exercising penal power outside the sovereignty-territory paradigm. Although often narrated as exceptions to a perceived norm of domestic territoriality, supranational and extraterritorial forms of criminal jurisdiction are widely available under international law—and, as I will show, are acted upon creatively in Europe in the adjudication and enforcement of core international crimes. For practical reasons, I use the phrase 'core international crimes' in this post to refer to war crimes, genocide, crimes against humanity, and aggression. According to the EU's criminal justice agency Eurojust, the prosecution of these crimes was long 'largely uncharted territory'. Now charting this territory, the EU—acting alongside other actors—shapes it anew.

Mapping accountability spaces

Starting from the EU's practices aimed at attributing criminal responsibility for core international crimes in Ukraine, this post works toward a new map of changing core international crimes accountability spaces. I use 'accountability space', here, to refer to the places wherein and processes whereby rules creating individual criminal responsibility are made applicable and actionable through law enforcement and courts. This post thus builds on the idea that space and place are not pregiven geographical truths, but constructed through social processes and exercises of power and control. I will show that accountability spaces for core international crimes expand, contract, and become rebordered through transnational processes that transverse the longstanding cartography of international criminal law. The transnational and cross-organizational social processes and exercises of power that underpin accountability space give meaning to security and threat by locating them in time and place.

For core crimes committed in Ukraine, many different constellations of domestic and international authorities distribute criminal accountability, as displayed through three vignettes. Each vignette presents a different accountability space: the EU's area of freedom, security and justice (1); the Joint Investigation Team (2); and the Core International Crimes Database (3). The three accountability spaces differ temporally and territorially; while all shaped by the EU and brought together in Ukraine, these spaces, like the state territories they sometimes cover, are ever changing and moving.

Space 1: Rebordering the EU's area of freedom, security and justice in Ukraine

Since the Russian invasion, the past and future President of the European Commission Ursula von der Leyen has proclaimed Ukraine to have become 'front line of the defence of everything we Europeans cherish'. This sentiment also animates the EU's projection

of its ideals of core international crimes accountability – a process pursued, in part, through the expansion of the EU's area of freedom, security and justice (AFSJ) into and through Ukraine. Two spatial logics underpin the EU's AFSJ mandate: first, a shared policy on the control of the EU external border, and, secondly, an internal unbordering, which requires – so the logic goes – a high level of coordination and cooperation between police and judicial authorities, mutual recognition of judgments in criminal matters and, sometimes, the approximation of member states' criminal laws. The EU has taken measures in Ukraine according to both of these logics, thus hinting at an extension of the AFSJ territorial zone that the Union seeks to protect.

When it comes to external rebordering, the EU's border guard agency Frontex has enhanced its presence in Ukraine; most recently, Frontex and the EU Advisory Mission for Civilian Security Sector Reform in Ukraine (EUAM) agreed to cooperate in their shared fight against crime and irregular migration, aligning Ukraine with the EU's framework for external borders (for a similar example, see Carolyn Moser, Rabia Ferahkaya and Lukas Märtin's prior post on this blog). But perhaps more importantly for a future expansion of the AFSJ, the Union has pursued an internal unbordering of accountability space through measures aimed at approximating Ukrainian law and practice on core crimes with the EU's normative ideals. So far, the EU has amended EUAM's mandate tasking it with further reform of Ukrainian criminal law enforcement units, procedures, evidentiary standards and cooperation with the International Criminal Court (ICC), Eurojust and Union member states according to the EU's core international crimes investigation and prosecution ideals. Through accession, the EU now oversees that Ukraine harmonizes its criminal code with the ICC Statute.

These reforms, because they are not obligatory upon current member states, form part of a narrative of projection. Yet the projection of EU space into Ukraine is aligned with developments having, in fact, taken place in many member states: according to Eurojust, all EU member states except Denmark and Italy have adopted domestic prescriptions of crimes aligned with the ICC Statute—a policy encouraged at the EU level. Similarly, the EU Network for investigation and prosecution of genocide, crimes against humanity and war crimes recommends the establishment of specialized units for investigating core international crimes. By turning political commitments into accession conditions in Ukraine, the EU promotes the unity and delimitation of an EU accountability space. The resulting approximation of provisions, in turn, facilitates the use of mechanisms for cross-border police and judicial cooperation in criminal proceedings underpinned by EU law. These mechanisms are what set apart the AFSJ accountability space: by entering the EU through its reinforced external border, one becomes subject to a regime of cooperation unmatched in its speed and intensity; in the space governed by this regime, the 'free movement of judicial decisions in criminal matters' prevails. Through its exercises of normative power in Ukraine, the Union thus moves to reborder the AFSJ accountability space, extending the geographical reach of its penal standards.

Space 2: Shapeshifting investigative jurisdictions

At the same time as the EU reinforces a unified accountability space for current and prospective member states, its criminal justice agencies actively promote ad hoc jurisdictional arrangements that extend the spaces of investigative and prosecutorial cooperation beyond the Union's external boundaries. These arrangements can include varying combinations of EU member states, non-EU states and international organizations, thus significantly blurring traditional territorial, and hence law enforcement and accountability boundaries within and outside the EU. The Union's criminal justice agency Eurojust's ability to promote the use of such mechanisms was strengthened by a recent amendment allowing it to support investigations wherein only one member state is involved with a non-EU state or international organization. By bringing together changing constellations of domestic and supranational authorities acting on diverse legal provisions, these spontaneous spaces of shared authority change the environment in which

suspects, witnesses, and authorities may find themselves.

Whereas measures taken within the AFSJ are based on the legal principle of mutual trust, which usually excludes non-EU (candidate) states, accountability space may cross over the EU's external border when a practical mutual trust exists. Central among the arrangements promoted by the EU is the Joint Investigation Team (JIT). JITs are pooled penal spaces wherein the authorities of each member may operate together, based on an agreement between the parties. The JIT investigating war crimes and genocide committed by Russians in Ukraine brings together the jurisdictions of diverse parties: Lithuania, Poland, Estonia, Latvia, Slovakia, and Romania, who rely on extraterritorial jurisdiction, alongside Ukraine. The EU's agency for police cooperation, Europol, and, for the first time, the ICC Office of the Prosecutor have joined the JIT as participants. Over the two years since it was established, the JIT's scope has increased in temporal, geographical, organizational, and substantive terms. The resulting accountability space is an evolving one, in which state and organizational boundaries blur for the investigation of core international crimes. In the space of the JIT, authorities, information, and evidence travel across domestic and international authorities based on strategies and agreements not fully available to those affected.

The JIT for core crimes committed in Ukraine thus realizes and models an aspiration EU member states and Eurojust have communicated over the last years: to explore and expand their use of JITs with non-EU states and international organisations, especially the ICC. Mechanisms through which Eurojust can ensure 'that national borders are no obstacle to prosecuting crime' are key to its Strategy on Cooperation with International Partners 2024–2027. The shift, from being tasked with supporting member states in their intra-EU criminal investigation cooperation, to an emphasis on external partnerships and partaking in one or more member states' investigations reaching outside the EU, paves the way for further outward extension of the EU's penal power. Through the resources dedicated to JITs, this power can be channelled into constructing prosecutions in investigative spaces unhindered by internal borders and otherwise applicable time- and resource-consuming procedures for cross-border police and judicial cooperation.

Space 3: The place of information and evidence

The war in Ukraine, the EU often restates, is 'the most documented armed conflict in the history of humankind'. To rise to this challenge, the EU amended the Eurojust Regulation, enhancing the agency's mandate by establishing the Core International Crimes Database (CICED) and adding videos, audio recordings, satellite images, and photographs to the categories of data that Eurojust may process. Eurojust justifies the need for the database as follows:

With such a vast, fragmented landscape and so many stakeholders involved in investigations into the war in Ukraine, the need for a central, secure repository of evidence became clear early on.

As this citation evinces, the database is considered an antidote to a spatial problem: the centralization of data from multiple sources (many stakeholders and investigators) can help overcome a 'vast, fragmented landscape'. That antidote centralizes and secures the EU's control over, and through, data.

Data, as Fleur Johns has argued, has the power to reconfigure territoriality in international law. According to Johns, when territory becomes 'datafied' through an intensification of its representation as and through data, 'territoriality becomes a matter of managing and maintaining a dynamic, vital, information-rich, would-be seamless "planetary skin" available for navigation by those with access to the real time data of which it is comprised'. It is such access the EU seeks through the database on core international crimes.

CICED, if states fill it with evidence, may grant the EU privileged power to manage and navigate the world of core international crime. Relying on CICED, Eurojust has already postured as the centre of investigations in Ukraine, or the 'bridge' between domestic and international investigators. These spatial metaphors of centre and bridge bolster an image of the EU with access to all parties and points of view, thus strength-

ening the promise of its ability to help prosecutors 'get the full picture and build a stronger case, … make crucial links between the evidence and [shed] light, not only on individual offences but also on the systemic actions behind them'. Here, the EU's data and data analysis stand for its power to curate information for accountability purposes. The emerging EU is one whose data might allow it to transcend and overcome the borders that have conventionally placed accountability efforts in a 'fragmented landscape' of territorially diverse laws and piecemeal information, already reaching beyond its member states.

Accountability spaces charted anew

The core crimes accountability landscape that emerges from the rebordering of the AFSJ, from diversifying JITs, and from the Core International Crimes Database unsettles the fiction that the power to punish remains tied to each state's bordered territory alone. As these examples demonstrate, no constant map of core crimes accountability space can be drawn. Instead, suspects, victims, witnesses, and authorities alike must traverse shifting spaces of compounding norms, subject to changing boundaries and overlapping authority.

For the core international crimes committed in Ukraine, criminal accountability remains a priority shared by, among others, Ukraine, the EU, EU member states, and the ICC. But as they rearrange accountability space around this aim, uncertainty remains: accountability, but where? By whom? For whom? And by which rules? Attempts to remove 'safe havens' for individuals responsible for core crimes from the map must pay attention to these questions. Recent experience shows how challenging it can be to ensure respect for defendants' rights in cross-border criminal proceedings, and when EU institutions are involved (see also, however, the EU Court of Justice's recent judgment on Europol's joint responsibility for violations of individual rights). Only by attending to these deficits can the EU chart a geography of criminal accountability grounded on clear normative foundations and on respect for the rights of defendants and victims under international and EU law.

ABOUT THE AUTHOR

Kerttuli Lingenfelter

Kerttuli Lingenfelter is a post-doctoral researcher in the ENSURE research group at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. She holds a PhD in Law from the European University Institute.Kerttuli Lingenfelter is a post-doctoral researcher in the ENSURE research group at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. She holds a PhD in Law from the European University Institute.

SUGGESTED CITATION

Lingenfelter, Kerttuli: A New European Map of Core International Crimes Accountability Spaces, Verfassungsblog, 28.10.2024, doi: 10.59704/e88a582a0fcb6d9f.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20241029-000157-0.