

# The European Union and the International Criminal Court: an awkward symbiosis in interesting times

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## **Abstract**

The aim of this article is to provide an overview and evaluation of the EU-ICC partnership. The analysis includes the measures the EU has taken to commit to the ICC cause and implement the Rome Statute and their impact on EU policy-making. These measures include the EU-ICC Cooperation Agreement as well as EU Third Pillar rules affecting Member States cooperation with the ICC and governing the investigation and prosecution of crimes within the jurisdiction of the ICC. The issue of judicial protection and respect of fundamental rights in the EU under the Third Pillar will also be addressed. Finally, the analysis of EU initiatives, primarily in its relations with third countries, to preserve the universality and integrity of the Rome Statute will follow.

## **Introduction**

The International Criminal Court (ICC) occupies a central position in the establishment of a system of international criminal justice on a global scale. Owing to its wide-ranging objectives and potentially universal reach, the ICC's creation is regarded as the greatest development in international law over the past decade.<sup>1</sup> The European Union (EU) has been at the forefront of the efforts for the Court's establishment, development and operation. Beyond the grand rhetoric surrounding the EU-ICC relations, the EU has undoubtedly committed substantial diplomatic capital and resources to the ICC cause. Parallel to the developments at the ICC, the Union finds itself at an important crossroad in its constitutional development.<sup>2</sup> Over the years, its constitutional transformation has, to a large degree, enabled it to assume its responsibility as an active player in a rapidly changing world and in the face of ever-greater challenges.<sup>3</sup>

With regard to the ICC, however, the EU's protagonistic role is inherently controversial because of its constitutional features. The political capital invested in the success of the ICC may run the risk of being wasted as a result of the inability of the Union to support the good intentions with tangible policies and measures. This is

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<sup>1</sup> For an overview of the International Criminal Court (ICC), see *William A Schabas*, *An Introduction to the International Criminal Court*, 2<sup>nd</sup> edition, (Cambridge University Press, Cambridge, 2004).

<sup>2</sup> See, Brussels European Council 21/22 June 2007, Presidency Conclusions, Doc. 11177/07 CONCL2, embarking on yet another Treaty reform.

<sup>3</sup> Presidency Conclusions at paragraph 2. For the development of the EU institutional framework in areas falling within the ambit of the ICC, see *Steve Peers*, *EU Justice and Home Affairs Law*, 2<sup>nd</sup> edition, (Oxford University Press, Oxford, 2006), Chapter 2.

because the EU operates alongside a growing number of Member States, and is totally dependent upon their criminal justice systems, as well as national police forces, prosecutors and courts that the EU does not itself possess. In recent years, common rules have been promulgated by the EU in the field of Police and Judicial Cooperation leading to the emergence of an EU criminal law body,<sup>4</sup> which is becoming increasingly significant in relation to ICC matters.

The aim of this article is to provide an overview of the EU-ICC partnership. To do so, this article aims to examine the EU initiatives in relation to the ICC and analyse them against the backdrop of the EU's constitutional peculiarities. The analysis includes the measures the EU has taken to commit to the ICC cause and implement the Rome Statute and their impact on EU policy-making. More specifically, this article will analyse the EU-ICC Cooperation Agreement and the EU Third Pillar measures affecting Member States cooperation with the ICC and governing the investigation and prosecution of crimes within the jurisdiction of the ICC. A brief comment on the judicial review of Third Pillar measures in the European Union will follow. Further, focus will shift to the examination of EU initiatives, primarily in its relations with third countries, to preserve the universality and integrity of the Rome Statute. Finally, this article will identify some challenges this awkward symbiosis between the Union and the ICC is likely to face.

## ***The European Union and the ICC***

The Statute for the ICC was adopted on 17 July 1998 at the end of The Rome Conference which was, in many respects unique.<sup>5</sup> Spread over six weeks, never before had so many States and NGOs taken part in a multilateral conference on international law.<sup>6</sup> Following the successful outcome of the negotiations,<sup>7</sup> the Court became operational on 1 July 2002 and, to date, numbers 105 State parties to it.<sup>8</sup> Earlier this year, the Court's first trial, that of Thomas Lubanga Dyilo, began in the Hague and the charges against him were confirmed on 29 January 2007.<sup>9</sup> As a global institution, which, however, operates outside the UN system, the ICC benefits from the support of States and other international institutions. In order to sustain its potentially universal ambit in the fight against impunity, the Court relies heavily on the above not only to promote its cause, but also to perform its daily functions.

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<sup>4</sup> Ibid. at Chapter 8.

<sup>5</sup> Rome Statute of the International Criminal Court (Rome Statute) (17 July 1998) 2187 *United Nations Treaty Series* 3; 37 *International Legal Materials* 999.

<sup>6</sup> Philippe Kirsch and John T. Holmes, "The Birth of the International Criminal Court: The 1998 Rome Conference" (1998) 36 *Canadian Yearbook of International Law* 3.

<sup>7</sup> Philippe Kirsch and John T. Holmes, "The Rome Conference on an International criminal Court: The Negotiating Process, (1999) 93 *American Journal of International Law* 2.

<sup>8</sup> The Rome Statute came into force on 1 July 2002, 60 days after the 60<sup>th</sup> ratification, which took place on 11 April 2002. See Article 126 Rome Statute. Japan is the latest to join the ICC regime on the 17 July 2007. Information about state ratifications to the Rome Statute is available at <<http://www.iccnw.org/documents/RATIFICATIONSbyRegion.pdf>>

<sup>9</sup> Situation in the Democratic Republic of Congo in the Case of the *Prosecutor v Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, Pre-Trial Chamber I (ICC-01/04-01/06). *Matthew Haggold*, "Prosecutor v Thomas Lubanga, Decision of Pre-Trial Chamber I of the International Criminal Court, 29 January 2007" (2007) 56 *International and Comparative Law Quarterly* 713; *Gauthier De Beco*, "The Confirmation of Charges before the International Criminal Court: Evaluation and First Application" (2007) 7 *International Criminal Law Review* 469.

Being an international organisation the ICC membership consists of states. However, some role is also envisaged for intergovernmental organisations, but this is limited to issues of cooperation.<sup>10</sup> The EU is not a State and as such not a party to the Rome Statute. However, the EU developed as one of the staunchest supporters of the ICC,<sup>11</sup> not only in terms of its overall policy, but also in terms of generous financial support provided to the Court.<sup>12</sup> The EU advocated the importance of putting an end to the impunity of perpetrators of the most heinous international crimes since the first steps towards the establishment of the Court.<sup>13</sup> Since the entry into force of the Rome Statute, the EU has taken a series of measures to continue its support and reinforce the ICC. The importance the EU has given to the Court can be explained both with reference to the EU's own values and objectives, but also its strategic priorities.

Anyone with a vague understanding of the European integration process will identify the reasons behind the EU's interest in the ICC which goes beyond the easily identifiable events that led to the establishment of the European Communities in the 1950s.<sup>14</sup> Yet, nowhere in the Treaty on European Union (TEU) is inscribed a value and objective broad enough to fully and explicitly encapsulate the objectives laid down in the Rome Statute. This has been usually accommodated in "the consolidation of the rule of law and respect for human rights" eulogies of the TEU.<sup>15</sup> It has been assumed all along that "the principles of the Rome Statute ... are fully in line with the principles and objectives of the Union".<sup>16</sup> Regarding the strategic priorities of the Union, apart from the general objective enshrined in the TEU that the Union asserts its identity on the international scene,<sup>17</sup> the promotion of the ICC is identified as a priority in the EU's commitment to the establishment of an international order based on effective multilateralism.<sup>18</sup>

## ***The European Union as the ICC's partner***

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<sup>10</sup> Article 87(6) Rome Statute.

<sup>11</sup> Cedric Ryngaert, "Universal Jurisdiction in an ICC Era: A Role to Play for EU Member States with the Support of the European Union" (2006) 14 *European Journal of Crime, Criminal Law and Criminal Justice* 46.

<sup>12</sup> The EU, through a dedicated budget line created by the European Parliament has provided over EUR 20 million under the European Initiative for Democracy and Human Rights (EIDHR) for projects supporting the ICC and international criminal justice. See [http://ec.europa.eu/external\\_relations/human\\_rights/icc/index.htm](http://ec.europa.eu/external_relations/human_rights/icc/index.htm).

<sup>13</sup> Statement by the Spanish Presidency in the Sixth Committee in the 50<sup>th</sup> UN General Assembly on the establishment of an International Criminal Court, 30 May 1995, New York available at <http://www.consilium.europa.eu/uedocs/cmsUpload/ICC2EN.pdf>. The substantive input of the EU in the drafting of the Rome Statute must be presumed. In fact, most of the issues raised by the Spanish Presidency in its Statement have been addressed in an EU-desirable manner in the final text.

<sup>14</sup> This is not limited to the coincidence that the foundational Treaties of both the European Economic Community and the ICC were signed in Rome.

<sup>15</sup> Article 11 TEU. See also, Recital 1 of the Common Position.

<sup>16</sup> Recital 3 of Council Common Position 2001/443/CFSP of 11 June 2001 on the International Criminal Court, O.J. L 155/19, 12.6.2001.

<sup>17</sup> Article 2, second indent TEU.

<sup>18</sup> European Security Strategy, Brussels, 12 December 2003, available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/2004/4/29/European%20Security%20Strategy.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/2004/4/29/European%20Security%20Strategy.pdf); See, Agreement between the International Criminal Court and the European Union on cooperation and assistance, O.J. L115/50, 28.4.2006, Recital 5.

In developing a partnership with the ICC, the EU has taken a number of initiatives which will be examined in detail below. To understand where these fit with the EU legal order, a succinct introduction to the EU edifice is needed. A lot of ink has been spilled in law and political science literature to analyse the EU constitutional idiosyncrasy.<sup>19</sup> For our purposes, it is important to highlight that the EU is not a unitary international actor but, by contrast, it consists of a complex mesh of Treaties which establish different methods and rules depending on whether the EU is acting in the field of agriculture, monitoring missions abroad or measures taken to combat organised crime.<sup>20</sup> This peculiar constitutional structure has been graphically represented in the form of three pillars of an ancient Greek temple, the First Pillar incorporating EU action in fields of European Community competence, the Second Pillar covering the Common Foreign and Security Policy (CFSP) and the Third Pillar the Police and Judicial Co-operation in Criminal matters.<sup>21</sup> The remainder of competences remain with the Member States.

How is the EU supposed to operate on the international plane when there are overlaps between Community (First Pillar), Union (Second and Third Pillars) and Member States' competences? Traditional EU external relations theory and practice has dealt with the problem by having recourse to the principle of mixity, a term invented to describe the European Community and Member State joint participation in the negotiation, conclusion and implementation of international agreements.<sup>22</sup> Since the entry into force of the TEU and the subsequent practice of concluding agreements under the Second and Third Pillars, the problem has been exacerbated. All hope has been trusted in constitutional reform which would abolish the Pillar structure and provide for a more workable pattern of international action.<sup>23</sup> At present however, the EU constitutional construction necessitates measures taken under different Treaty regimes as well as by the Member States for the fulfilment of the Rome Statute obligations.

Having already portended the multidimensional character of EU policy towards the ICC, it should be explained that the different Treaty objectives, instruments and methods applicable in the different Pillars raise both theoretical and practical considerations. Moving from the domain of theoretical abstraction to the real problems in policy-making and policy-implementing, the main foundation of the

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<sup>19</sup> Inter alia, *Joseph H.H. Weiler*, *The Constitution of Europe: "Do the New Clothes Have an Emperor?"*, (Cambridge University Press, Cambridge, 1999); *Deirdre Curtin*, "The Constitutional Structure of the Union: A Europe of Bits and Pieces" (1993) 30 *Common Market Law Review* 17; *Walter van Gerven*, *The European Union: A Polity of States and Peoples*, (Hart Publishing, Oxford and Portland, Oregon, 2005)

<sup>20</sup> A more pragmatic view would indicate that the Union is a unitary organisation. See, *Deirdre Curtin* and *Ige Dekker*, "The EU as a 'Layered' International Organization: Institutional Unity in Disguise" in *Paul Craig and Gráinne de Búrca*, *The Evolution of EU Law*, (OUP, 1999), pp. 83-132.

<sup>21</sup> *Anthony Arnall, Alan Dashwood, Michael Dougan, Malcolm Ross, Eleanor Spaventa and Derrick Wyatt*, *Wyatt & Dashwood's European Union Law*, (Sweet & Maxwell, London, 2006), at p. 18.

<sup>22</sup> See inter alia, *Joni Heliskoski*, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, (Kluwer Law International, The Hague, London, New York, 2001); *Joseph H.H. Weiler*, "The external legal relations of non-unitary actors: mixity and the federal principle" in *Joseph H.H. Weiler*, supra note 19 at pp. 130-187; *Panos Koutrakos*, *EU International Relations Law*, (Hart Publishing, Oxford and Portland, Oregon, 2006), Chapter 4.

<sup>23</sup> The Treaty establishing a Constitution for Europe provided a qualified solution to the problems by proposing the abolition of the Pillar structure. However, the Treaty failed ratification by all Member States and has been consequently abandoned. A Reform Treaty based on the failed Constitution's blueprint has been proposed and negotiations are ongoing. Supra note 2.

relationship between the EU and the ICC is the Common Position on the International Criminal Court.<sup>24</sup> At the same time, the main instrument implementing the cooperation obligation of the Rome Statute on behalf of the EU is the EU-ICC Agreement.<sup>25</sup> Both instruments have been adopted under the CFSP. However, measures relating to the implementation of most other Rome Statute obligations to which the Union has committed itself by virtue of the Common Position have been adopted under the Third Pillar.<sup>26</sup> Finally, as will be seen below, the promotion, of the principles of international criminal law in third countries has taken place pursuant to First Pillar instruments, through international agreements concluded by the Community.<sup>27</sup> Clearly, however, most ICC-related obligations will have to be carried out by the Member States acting in their own competences.

This short introduction already demonstrates the Pillar-straddling activities of the EU with regard to the ICC are destined to challenge the EU in particular regarding the effective implementation of the ICC-sponsored obligations.

## The EU's commitment vis-à-vis the ICC

In order to put its intentions into action, the EU needs and to take those measures necessary to implement the ICC obligations. At the outset, it should be recalled that the EU is not a party to the Rome Statute and, as such, it is not bound by it in international law. From an EU perspective, the European Court of Justice (ECJ) promulgated the doctrine of functional succession which can be summarised in the proposition that the EU is bound by an international treaty to which it is not a party when the EU has taken over the responsibility from the Member States, i.e. having acquired exclusive competence, with regard to the agreement's functions.<sup>28</sup> It goes without saying that for such functional succession to take place all Member States must be parties to a given international agreement.<sup>29</sup> This is not the case with the Rome Statute.<sup>30</sup>

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<sup>24</sup> Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court, O.J. L 150/67, 18.6.2003. Hereafter the 'Common Position'. For an analysis of its provisions see *infra*.

<sup>25</sup> Council Decision 2006/313/CFSP of 10 April 2006 concerning the conclusion of the Agreement between the International Criminal Court and the European Union on cooperation and assistance, O.J. L 115/49, 28.4.2006. Hereafter, 'EU-ICC Agreement'.

<sup>26</sup> 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, O.J. L 167/1, 26.6.2002; Decision 2003/335/JHA of 8 May 2003 concerning the investigation and prosecution of genocide, crimes against humanity and war crimes, O.J. L 118/12, 14.5.2003; Framework Decision 2002/584 of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States, O.J. L190/1, 18.7.2002.

<sup>27</sup> For instance, the Revised Cotonou Agreement.

<sup>28</sup> Cases 21-24/72 *International Fruit Company NV v. Produktschaap voor Groenten en Fruit* [1972] ECR 1219 at paragraphs 14-19 with regard to the GATT.

<sup>29</sup> Robert Schütze, "On 'Middle Ground': The European Community and Public International Law", EUI Working Papers, LAW 2007/13, at p. 12.

<sup>30</sup> It has been argued in theory that the doctrine of functional succession could be translated from the GATT to other international settings in particular the United Nations. See, Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations*, (Oxford University Press, 2004), at p. 439. This suggestion has been controversially followed in the recent judicial pronouncements by the European Court of First Instance in Cases T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533 and T-315/01 *Yassin Abdullah Kadi v. Council and Commission* [2005] ECR II-3649.

The EU committed itself to the fight against impunity by virtue of a Common Position<sup>31</sup> which establishes the basic framework governing the EU-ICC relations. The first Common Position on the International Criminal Court was adopted by the Council in 2001.<sup>32</sup> In accordance with the theory of EU external relations, Common Positions establish the Union's policy statement on a certain theme.<sup>33</sup> The timing of its adoption affected its focus which concentrated on the early entry into force of the Rome Statute and the establishment of the ICC.<sup>34</sup> To this end, the EU assumed the obligation to contribute by raising the issue in its relations with third parties and by assisting with implementation.<sup>35</sup> The Common Position was amended in 2002<sup>36</sup> and reached its current form in 2003.<sup>37</sup>

The 2003 Common Position, which is largely based on the 2001 blueprint, endorses the principles and rules of international criminal law of the Rome Statute and identifies the priorities and areas in which the European Union and the Member States must act. In this respect, priority is given to the universal accession to the Rome Statute,<sup>38</sup> the implementation of the Rome Statute by measures taken by the European Union and the Member States,<sup>39</sup> as well as the preservation of the integrity of the Rome Statute.<sup>40</sup>

Measures to achieve the target of universal accession are further elaborated. The European Union and the Member States undertake to raise the issue of ratification, acceptance, approval and accession in negotiations with third States, groups of States or relevant regional organisations.<sup>41</sup> They also undertake to provide technical and financial assistance.<sup>42</sup> The provision of political and technical support may be part of country or region-specific strategies.<sup>43</sup> In addition to the mention of the Action Plan in the preamble, little else is set out with regard to implementation. The Council of the European Union is simply given the task to coordinate the measures by the European Union and the Member States but only in so far as implementation of Articles 2 and 3 of the Common Position.<sup>44</sup> It should be pointed out that, in a way, implementation by the EU and the Member States is not highlighted in the Common Position; the emphasis is on providing assistance to third States. Regarding the integrity of the Rome Statute, the Common Position draws attention to the EU Guiding Principles enshrined in the Council Conclusions of 30 September 2002.<sup>45</sup> Finally, the Common Position establishes an obligation on the Member States to cooperate to ensure the smooth functioning of the Assembly of States Parties (ASP).<sup>46</sup>

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<sup>31</sup> Supra note 24

<sup>32</sup> Supra note 16.

<sup>33</sup> Article 15 TEU. *Eeckhout*, supra note 30, at p. 404.

<sup>34</sup> Article 1(2) of the 2001 Common Position.

<sup>35</sup> Article 2 of the 2001 Common Position.

<sup>36</sup> See 2002/474/CFSP O.J. L 164/1, 22.6.2002.

<sup>37</sup> Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court, O.J. L 150/67, 18.6.2003.

<sup>38</sup> *Ibid*, Recital 7.

<sup>39</sup> *Ibid*, Recital 8.

<sup>40</sup> *Ibid*, Recital 10.

<sup>41</sup> *Ibid*, Article 2(1).

<sup>42</sup> *Ibid*, Article 2(3).

<sup>43</sup> *Ibid*, Article 2(4).

<sup>44</sup> *Ibid*, Article 4.

<sup>45</sup> *Ibid*, Article 5.

<sup>46</sup> *Ibid*, Article 7.

A critical reading of the Common Position reveals that it is formulated in general terms, as Common Positions are supposed to be, and leaves many gaps to be covered by either atypical instruments (Action Plan, EU Guiding Principles) or by further initiatives in international fora, either in the form of unilateral technical assistance to third States to deal with implementation issues or by establishing the ICC as part of the common vocabulary in relations with third States and international organisations. However, the absence of any detail regarding measures to be taken at an EU level to implement the Rome Statute is striking. The extent to which the European Union has fulfilled the general mandate provided by the Common Position will be examined further below.

The Common Position provisions are supplemented and further elaborated upon in the Action Plan to follow-up on the Common Position on the International Criminal Court, adopted in 2002 and amended in 2004.<sup>47</sup> The Action Plan is divided into three sections: A. Coordination of EU activities, B. Universality and integrity of the Rome Statute and C. Independence and effective functioning of the ICC.<sup>48</sup> Section A maintains an institutional focus and establishes the steps which must be taken to bring the ICC squarely within the EU agenda and ensure better flow of information on ICC-related matters among the EU institutions. The most important element informing the effective co-ordination and consistency of information is the establishment of an EU Focal Point and corresponding national Focal Points.<sup>49</sup> Section B establishes the means to achieve the universality objective which include political dialogue, demarches or other bilateral means, statements in the UN and other multilateral bodies and support for the dissemination of the ICC principles and rules.<sup>50</sup> Country or region-specific strategies will be developed to coordinate political and technical support.<sup>51</sup> Concrete measures include, among others, the mainstreaming of the ICC in EU external relations<sup>52</sup> and the provision of financial and technical assistance to third countries<sup>53</sup> including the establishment of a list of experts maintained at the EU Focal Point.<sup>54</sup> A single paragraph is dedicated to the integrity of the Rome Statute and provides for the application *mutatis mutandis* of Sections A and B of the Action Plan.<sup>55</sup> The independence and effective functioning of the ICC will be achieved by measures such as the transparent selection, nomination, election and subsequent training of the ICC judges, prosecutors and staff<sup>56</sup> and the prompt transfer of contributions to the ICC.<sup>57</sup> In addition, Member States are encouraged to contribute to the Special Working Group on the crime of aggression,<sup>58</sup> to put in place legislation necessary to implement the Rome Statute<sup>59</sup> including the Agreement on Privileges and

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<sup>47</sup> Doc 5742/04 LIMITE, Action Plan to follow-up on the Common Position on the International Criminal Court, Brussels, 28 January 2004. Hereafter, 'Action Plan'.

<sup>48</sup> Preamble to the Action Plan.

<sup>49</sup> Section A.1.2-3 of the Action Plan. The detailed mandate of the EU Focal Point can be found in the Annex to the Action Plan.

<sup>50</sup> Ibid, Section B.1(ii).

<sup>51</sup> Ibid, Section B.2(i).

<sup>52</sup> Ibid, Sections B.3(iii)-(viii).

<sup>53</sup> Ibid, Sections B.3(ix)-(xi).

<sup>54</sup> Ibid, Section B.3(xii).

<sup>55</sup> Ibid, Section B.3(xiii).

<sup>56</sup> Ibid, Sections C.2(i), (iv).

<sup>57</sup> Ibid, Section C.2(iii).

<sup>58</sup> Ibid, Section C.2(vii).

<sup>59</sup> Ibid, Section C.2(viii).

Immunities of the ICC,<sup>60</sup> to cooperate with the ICC in the investigation and prosecution of crimes within its jurisdiction, in particular through the provision of judicial assistance, compliance with requests for arrest and surrender and the enforcement of sentences<sup>61</sup> and promote effective cooperation between national and European law enforcement and immigration authorities and the ICC.<sup>62</sup>

Overall, the Action Plan is an amalgam of aspirational rhetoric and down-to-earth practical measures. It has become highly influential in EU policy-making while the success of achieving the objectives set has been mixed. Together with the Common Position, the Action Plan provides the framework of all direct EU action on the ICC and lay the foundations of the relationship between the Union, the Court and individual Member States.

## Implementing the Rome Statute

The section that follows concerns the implementation of the ICC obligations by the EU. Following some introductory remarks, this part will examine the measures taken by the EU in order to implement the cooperation obligations stemming from the Rome Statute. In addition, legislation adopted in the field of Police and Judicial Cooperation in Criminal Matters on an EU level, which albeit not ICC-specific is of immediate relevance to the ICC, will be examined. Such legislation raises issues of judicial protection and respect for fundamental rights in the European Union which will be addressed, prior to analysing the measures taken in order to achieve the universality and integrity of the Rome Statute. The final issue to be examined is that of EU Member State coordination in the ASP.

The Rome Statute cannot operate independently of State action. The incorporation into domestic law of certain Statute provisions is necessary for its procedures to gain meaning and effectiveness nationally. Implementation falls within the competence of individual Member States. To assess the reaction of the EU on the issue, an overview of some fundamental questions as to why, when and how a State must engage in the process is necessary. Not all of the Rome Statute provisions need to be implemented. This obligation is limited to the cooperation part of the ICC Statute<sup>63</sup> and does not extend to the substantive criminal law provisions, whose implementation remains at the discretion of the State concerned.<sup>64</sup>

Despite the merits of enacting national legislation, States have generally not taken up the implementation challenge.<sup>65</sup> To do it properly, implementation requires expert knowledge and adequate resources. The Rome Statute is a highly complex

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<sup>60</sup> Ibid, Section C.2(x).

<sup>61</sup> Ibid, Section C.2(ix).

<sup>62</sup> Ibid, Section C.2(xi).

<sup>63</sup> Article 88 Rome Statute states: "States Parties ... shall ensure that there are procedures available under their national law for all of the forms of co-operation which are specified under this Part."

<sup>64</sup> Fourth and sixth preambular paragraphs of the Rome Statute. Neither the preamble nor the reference therein are binding. Furthermore, the argument that the relevant preambular paragraphs codify existing customary law which obliges implementation is no more convincing. For this argument, see *Jann K Kleffner*, "The Impact of Complementarity on National Implementation of Substantive International Criminal Law" (2003) 1 *Journal of International Criminal Justice* 86 at pp. 90-94.

<sup>65</sup> Of the 105 State parties to date, only approximately one third have enacted ICC implementing legislation. For a complete catalogue of all available implementing legislation see: <http://www.nottingham.ac.uk/law/hrlc/international-criminal-justice-unit/implementation-database.php>



legal instrument which requires good understanding of international criminal law of the national drafters. Undoubtedly, implementation takes time.<sup>66</sup> The Rome Statute does not specify when implementation ought to take place. States are at liberty to decide whether to implement before or after ratification. Since the ICC became operational in July 2002, however, State parties may be required to execute an ICC cooperation request which requires available procedures nationally. In practice, most States become parties to the Rome Statute first and implement its terms afterwards.<sup>67</sup>

A State's ability to implement may be affected by certain provisions found in its constitution as well as the legal system that the State in question follows. Provisions in the Rome Statute may conflict with various constitutional guarantees<sup>68</sup> the resolution of which may lead to delays in implementation and may prove problematic in practice, particularly regarding the execution of an ICC cooperation request. The European Commission for Democracy (Venice Commission) of the Council of Europe has identified the following areas as potentially conflicting with the ICC regime:<sup>69</sup>

“[The] immunity of persons having an official capacity; the obligation for states to surrender their own nationals to the court at its request; the possibility for the court to impose a term of life imprisonment; exercise of the prerogative of pardon; execution of requests made by the court's Prosecutor, amnesties decreed under national law or the existence of a national statute of limitation; and the fact that persons brought before the court will be tried by a panel of three judges rather than a jury.”

A State facing constitutional incompatibilities essentially has two options: It may either amend the conflicting constitutional provisions or interpret them in such a way so as to allow for the application of the ICC regime.<sup>70</sup> Other delays may ensue owing to the model a State follows regarding the incorporation of international law within its domestic legal system.<sup>71</sup> States that follow the dualist tradition require

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<sup>66</sup> Even when the political will is present, the drafting of legislation and its subsequent approval by the relevant body, usually the national Parliament, take a substantial amount of time.

<sup>67</sup> The United Kingdom is a good example of a state which implemented first and ratified later. The International Criminal Court Act 2001 (UK) was passed on 24 September 2001 and entered into force on 17 December 2001. The United Kingdom's instrument of ratification was deposited on 4 October 2001, once the Act had been passed.

<sup>68</sup> See, for example, *Helen Duffy*, “National Constitutional Compatibility and the International Criminal Court” (2001) 11 *Duke Journal of Comparative & International Law* 5; *Darryl Robinson*, “The Rome Statute and its Impact on National Law” in *Antonio Cassese, Paolo Gaeta and John RWD Jones* (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol II, (Oxford University Press, Oxford, 2002), p. 1849; Venice Commission of the Council of Europe (Venice Commission) “Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the International Criminal Court Adopted by the Commission at its 45<sup>th</sup> Plenary Meeting (Venice, 15-16 December 2000)” (15 January 2001) CCDL-INF (2001) 1.

<sup>69</sup> *Ibid.* [footnotes omitted].

<sup>70</sup> For example, in France, the Head of State cannot be prosecuted before the national courts. Therefore, an amendment was made to Article 53-2 of the French Constitution of 1958 to recognise the jurisdiction of the ICC so that any proceedings against the Head of State can take place before the ICC. See *Antoine Buchet*, “L'intégration en France de la Convention portant statut de la Cour pénale internationale: histoire brève et inachevée d'une mutation attendue” in *Claus Krefß and Flavia Lattanzi* (eds.), *The Rome Statute and Domestic Legal Orders; General Aspects and Constitutional Issues*, vol 1, (Nomos Verlagsgesellschaft, Baden-Baden, 2000), p. 65.

<sup>71</sup> For a more detailed and sophisticated analysis, see *Ian Brownlie*, *Principles of Public International Law*, 6th edition, (Oxford University Press, Oxford, 2003), at pp. 31-33; *L. Ferrari-Bravo*, “International and Municipal Law: The Complementarity of Legal Systems” in *R StJ MacDonald and D M Johnston* (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory*, (Martinus Nijhoff, Dordrecht, 1983), p. 715; *Joseph G Starke*, “Monism and

incorporating legislation to give effect to an international treaty at the domestic level. States following the monist legal tradition may – mistakenly perhaps – assume that there is no need to provide for implementing legislation.<sup>72</sup> Whichever the case,<sup>73</sup> it is in any case important to emphasise that even if the crimes provisions of the Rome Statute could be directly relied upon in the domestic legal order, the cooperation regime would need further implementation. A state needs to specify in its legislation which is the competent authority, among others, to receive the cooperation request or to arrest the suspect and transfer them to the ICC.<sup>74</sup> Hence, the existence of legislation in place is necessary; and this is independent of the legal system followed and common to both monist and dualist traditions.

Taking into account the above need for enactment of ICC implementing legislation, the EU Member States have been distinguished for the rate of implementation of the ICC obligations. In fact, the majority of the States which have passed legislation are EU Member States.<sup>75</sup> This reveals a possible connection between the higher implementation rate and membership of the EU. It may indirectly be attributed to the enhanced interest which the active involvement of many EU Member States in the drafting of the Rome Statute may have generated, peer pressure and the active promotion of the ICC by the EU.<sup>76</sup> Despite the success in general terms, EU Member State implementation cannot be perceived to match the rhetoric of the Union's Common Position. Plenty of European States, particularly from the so-called "New Europe", have not yet enacted legislation, following thus the global trend.<sup>77</sup>

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Dualism in the Theory of International Law" (1936) 17 *British Yearbook of International Law* 66; Felice Morgenstern, "Judicial Practice and the Supremacy of International Law" (1950) 27 *British Yearbook of International Law* 42.

<sup>72</sup> The monist tradition dictates that when a state ratifies an international agreement, the self-executing provisions of that treaty apply directly in domestic law and prevail over conflicting domestic provisions. See Eileen Denza, "The Relationship between International Law and National Law" in Malcolm D Evans, *International Law*, (Oxford University Press, Oxford, 2003), p. 415, at p. 421.

<sup>73</sup> See Denza, *ibid*, pp. 422-428, who examines the approach taken by six different countries and identifies the absence of "pure" monist or dualist States. See also Francis G Jacobs and Shelley Roberts (eds.), *The Effect of Treaties in Domestic Law*, (Sweet and Maxwell, London, 1987); Ignaz Seidl-Hohenveldern, "Transformation or Adoption of International Law into Municipal Law" (1963) 12 *International and Comparative Law Quarterly* 88.

<sup>74</sup> Articles 86, 87(1) and 89 Rome Statute.

<sup>75</sup> See generally Nicolaos Strapatsas, "The European Union and its Contribution to the Development of the International Criminal Court" (2003) 33 *Revue de Droit de l' Université de Sherbrooke* 399.

<sup>76</sup> See Article 9(2) Common Position. By virtue of this provision, the Common Position applies to Romania, Bulgaria and Turkey. See also the pressure put on Serbia with regard to its international criminal law obligations and the impact non-compliance with these might have on its future accession. See European Commission "EU-Serbia relations" (2006), available at [http://ec.europa.eu/enlargement/serbia/eu\\_serbia\\_and\\_montenegro\\_relations\\_en.htm](http://ec.europa.eu/enlargement/serbia/eu_serbia_and_montenegro_relations_en.htm) See also Nevena Simidjijaska, "From Milosevic's Reign to the European Union: Serbia and Montenegro's Stabilization and Association Agreement" (2007) 21 *Temple International and Comparative Law Journal* 147.

<sup>77</sup> Greece, Lithuania and Cyprus have been conspicuously absent from the implementation debate.

## EU Cooperation: The EU-ICC Cooperation Agreement

International criminal justice institutions with no suspects in custody and no evidence at their disposal could hardly claim to be effective. The Court does not possess an international police force of its own, and relies on States to perform all cooperation tasks.<sup>78</sup> Cooperation with the ICC is both a Member State and an EU matter. EU Member States that are Parties to the ICC Statute are under an obligation to execute a cooperation request made by the Court.<sup>79</sup> Moreover, cooperation of intergovernmental organisations, such as the EU, is important for the ICC to adequately perform its functions. Recognition of the significance of the role that international organisations may play in post-conflict situations or situations where serious disturbances have occurred, in which the ICC operates as well as the assistance such organisations may provide to the Court, led to the inclusion of Article 87(6) Rome Statute, which enables the ICC to request assistance from intergovernmental organisations.<sup>80</sup> The emphasis of this Article on the provision of information or documents may be explained in that this would be the most common form of assistance these organisations would be able to provide the Court with. Other forms of cooperation, including, arguably, requests for arrest and surrender, are not precluded in Article 87(6) but should be seen in light of the organisation's constituent instrument and certainly "in accordance with its competence or mandate".<sup>81</sup>

An international agreement which defines the terms of cooperation and assistance between the EU and the Court has been concluded.<sup>82</sup> The origin of the Agreement can be found in a request made by the Office of the Prosecutor (OTP) of the ICC to the EU regarding strategic information from the EU on issues of concern to the OTP's investigations.<sup>83</sup> The Agreement which was concluded by the EU, on the basis of Article 24 TEU,<sup>84</sup> has narrow scope and is limited to the hardcore elements of cooperation and assistance, focussing, as per Article 87(6) Rome Statute, on the provision of information or documents. The Agreement is not intended to supplant the relationship individual Member States have with the Court. In fact, it is made explicit that the Agreement does not cover cooperation with the Member States of the European Union.<sup>85</sup>

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<sup>78</sup> As *Antonio Cassese*, the first president of the International Criminal Tribunal for the Former Yugoslavia (ICTY), observed in his paper "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law" (1998) 9 *European Journal of International Law* 2 at p. 8, "[The] ICTY is very much like a giant without arms and legs – it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, they cannot fulfil their functions." This statement is even more relevant with regard to the ICC, which, except for referrals, cannot rely on the United Nations (UN) Security Council for the monitoring of cooperation.

<sup>79</sup> Art. 86 Rome Statute.

<sup>80</sup> The Prosecutor may also request assistance for the initiation of an investigation from such organisations in accordance with Article 15(2).

<sup>81</sup> This is also reiterated in Article 54(3)(c) Rome Statute.

<sup>82</sup> Agreement between the International Criminal Court and the European Union on cooperation and assistance, O.J. L 115/50, 28.4.2006. The Agreement entered into force on the 1<sup>st</sup> of May 2006.

<sup>83</sup> [http://ec.europa.eu/external\\_relations/human\\_rights/icc/index.htm](http://ec.europa.eu/external_relations/human_rights/icc/index.htm).

<sup>84</sup> Council Decision 2006/313/CFSP of 10 April 2006 concerning the conclusion of the Agreement between the International Criminal Court and the European Union on cooperation and assistance, O.J. L 115/49, 28.4.2006.

<sup>85</sup> See Recital 10 and also implicitly Articles 2(1) and 3(1) EU-ICC Agreement.

For the most part, the EU-ICC Agreement is very technical.<sup>86</sup> This is appropriately so to ensure efficient execution of an ICC request. The approach taken replicates the general practice in international criminal justice institutions and other intergovernmental organisations, where the former makes a request and the latter proceeds with its execution.<sup>87</sup> In addition, there is provision for regular exchange of information and documents.<sup>88</sup> Those are EU documents containing EU classified information and not documents of the Member States.<sup>89</sup> Moreover, in relation to classified information the Agreement provides a detailed account of the rules and procedures governing such surrender.<sup>90</sup> Similar arrangements apply to cooperation between the EU and the Prosecutor.<sup>91</sup> Information shall not take only documentary form but, in addition, testimony of staff of the European Union may be requested.<sup>92</sup> Other provisions of the Agreement include the obligation of the EU to waive the Privileges and Immunities of a person within the scope of the ICC, where appropriate, in order to allow the Court to exercise its jurisdiction,<sup>93</sup> the conditions under which the EU may offer gratis personnel,<sup>94</sup> services and facilities to the ICC,<sup>95</sup> and the EU's assistance in training of judges, prosecutors, officials and counsel.<sup>96</sup>

The provisions of the EU-ICC Agreement are by and large uncontroversial. It should be noted however that the tenor of the Agreement is particularly deferential towards the EU. In particular, the legal obligations enshrined in the EU-ICC Agreement are subject to respect and with due regard to the EU Treaty and the relevant rules thereunder.<sup>97</sup> Regarding privileges and immunities, despite the ICC Statute providing that the official capacity is irrelevant,<sup>98</sup> at the same time, the privileges and immunities of EU officials and third party representatives accredited to the EU form part of primary Union law.<sup>99</sup> This harbours potential for conflict. However, the issue should not be overestimated. In addition to the deferential framing of the EU's obligations, these provisions have been carefully drafted to avoid such a legal impasse. For instance, the obligation to furnish information or documents under Article 11 EU-ICC Agreement is balanced by guarantees of the confidentiality of the information provided. Likewise, the Protocol on the Privileges and Immunities of the European Communities permits the waiver of immunities when such waiver is not contrary to the interests of the Communities.<sup>100</sup>

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<sup>86</sup> It stipulates eg where correspondence will be addressed to. See Article 16 EU-ICC Agreement.

<sup>87</sup> Article 7(2) EU-ICC Agreement. But see for instance *Simić et al Decision denying request for assistance in securing documents and witnesses from the International Committee of the Red Cross*, Trial Chamber., 7 June 2000. See also *Decision on Prosecution Appeal against Decision on Oral Application for Witness TFI-150 to Testify without Being Compelled to Answer Questions on Grounds of Confidentiality*, SCSL-04-16-AR73, 27 May 2006.

<sup>88</sup> Article 7(1) EU-ICC Agreement.

<sup>89</sup> Article 3(1) EU-ICC Agreement.

<sup>90</sup> Article 9 of and Annex to the EU-ICC Agreement

<sup>91</sup> Article 11 EU-ICC Agreement.

<sup>92</sup> Article 10 EU-ICC Agreement.

<sup>93</sup> Article 12 EU-ICC Agreement.

<sup>94</sup> Article 13 EU-ICC Agreement.

<sup>95</sup> Article 14 EU-ICC Agreement.

<sup>96</sup> Article 15 EU-ICC Agreement.

<sup>97</sup> Article 10 Testimony of staff of the European Union, Article 11 Cooperation between the European Union and the Prosecutor and Article 12 Privileges and Immunities of the EU-ICC Agreement.

<sup>98</sup> Article 27 Rome Statute.

<sup>99</sup> Protocol on the Privileges and Immunities of the European Communities, O.J., No. 167, 13.7.1967.

<sup>100</sup> Article 18 of the Protocol on the Privileges and Immunities of the European Communities.

Generally speaking, the situation would have been very different had the EU and the ICC taken advantage of the possibilities offered by Article 87(6) and included other forms of cooperation and assistance in the Agreement. An interesting example of such cooperation would include an EU freezing of assets order to implement a cooperation request under Article 93(1)(k) of the Rome Statute. The legal basis for the adoption of such orders remains a matter of controversy in EU law. While in terrorist cases, freezing of assets orders against terrorist organisations and individuals have been based on an a Common Position (Second Pillar) followed by an EC Regulation based on Articles 60, 301 and 308 EC Treaty (First Pillar),<sup>101</sup> freezing of assets orders against *Karadžić*, *Mladić* and *Gotovina* in order to implement the mandate of the ICTY have been based on a Council Common Position without any subsequent First Pillar measure.<sup>102</sup> The choice of the method for adoption of an ICC-related EU freezing of assets order, albeit controversial in itself, will determine issues of judicial protection and respect for fundamental rights and will be analysed below.

The current content of the EU-ICC Cooperation Agreement is not expected to raise many problems in its application and guarantees a functional relationship between the EU and the ICC. Even in the areas in which there is scope for conflict, the existing good will, will hopefully lead to a practical coordination of activities, leaving no room for institutional antagonism.

## **Member State Cooperation: The influence of Third Pillar measures**

In recent years the EU has been particularly active in adopting measures in the field of Police and Judicial Cooperation in Criminal Matters (Third Pillar). Such measures may potentially influence Member State cooperation with the ICC. For the most part, these measures do not entail ICC-specific obligations. However, the establishment of the ICC as a horizontal consideration on the EU policy-making agenda reveals that, when opportune, the EU has included reference to instruments that would assist Member States carry out a cooperation request by the ICC.

More specifically, significant work has been done in the field of extradition which culminated in the adoption of the European Arrest Warrant (EAW).<sup>103</sup> The Framework Decision provides a long list of offences attracting the issue of a EAW and, for a first time in a Third Pillar instrument, this includes crimes within the jurisdiction of the ICC.<sup>104</sup> The Rome Statute distinguishes between surrender which covers the delivering of a person by a State to the Court and extradition which involves the delivering of a person by one State to another.<sup>105</sup> Consequently, the EAW does not directly facilitate the EU's cooperation with the Court. However, the application of the EAW to aid an ICC-related cooperation request cannot be

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<sup>101</sup> Cases T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533, at paragraph 170 and T-315/01 *Yassin Abdullah Kadi v. Council and Commission* [2005] ECR II-3649, at paragraph 135. Currently under appeal as Cases C-415/05P *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* and C-402/05 *Yassin Abdullah Kadi v. Council and Commission*.

<sup>102</sup> Council Common Position 2004/694/CFSP of 11 October 2004 on further measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), O.J. L 315/52, 14.10.2004.

<sup>103</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. L 190/1, 18.7.2002.

<sup>104</sup> Article 2(2), thirtieth indent EAW.

<sup>105</sup> Article 102 Rome Statute.

precluded. In fact, the EAW offers the tools to the EU Member States to fully cooperate with the ICC.<sup>106</sup> Along the same lines, a related legal instrument of potentially great significance is the proposed European Evidence Warrant.<sup>107</sup>

Another instrument which the EU adopted under the Third Pillar is a Framework Decision on the execution in the European Union of orders freezing property or evidence.<sup>108</sup> The purpose of this Framework Decision is to establish the rules under which a Member State will recognise and execute in its territory a freezing order issued by a judicial authority of another Member State.<sup>109</sup> The list of offences which is identical to the EAW also includes crimes within the jurisdiction of the ICC.<sup>110</sup> This would facilitate Member States in the execution of a request for the freezing of assets of a person indicted by the ICC under Article 93(1)(k) of the Rome Statute.

Having a look at the broader picture, Police and Judicial Cooperation in Criminal Matters in the European Union is implemented primarily through the European Police Office (Europol) and the European Judicial Cooperation Unit (Eurojust).<sup>111</sup> Despite the substantive focus of the Third Pillar on organised crime, legal instruments adopted thereunder have included the investigation and prosecution of crimes falling within the jurisdiction of the ICC. Does this entail a role for Europol and Eurojust at the implementation of the Rome Statute? At the outset, it must be pointed out that the ICC context is permissive of such eventuality. In particular, Article 87(1)(b) Rome Statute provides that requests for cooperation may be channelled either through the International Criminal Police Organization or any appropriate regional organization.

Reality however, is daunting. There is no specific role for Europol and it should be assumed that it is excluded from enforcing ICC obligations in the EU.<sup>112</sup> Although it may be argued in theory that the expansion of the list of offences which fall within the competence of Europol is possible,<sup>113</sup> no such initiative has been forthcoming. As is also apparent in the Council Decision on investigation and genocide, crimes against humanity and war crimes, such expansive interpretation should be excluded.<sup>114</sup> After all, the Council Decision clearly limits itself to acts by

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<sup>106</sup> Luisa Vierucci, "The European Arrest Warrant: An Additional Tool for Prosecuting ICC Crimes" (2004) 2 *Journal of International Criminal Justice* 275 at p. 277.

<sup>107</sup> COM(2003) 688 final, Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters, Brussels, 14.11.2003.

<sup>108</sup> Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, O.J. L 196/45, 2.8.2003.

<sup>109</sup> Article 1 of the Framework Decision.

<sup>110</sup> Article 3, thirtieth indent of the Framework Decision.

<sup>111</sup> Articles 29-32 TEU.

<sup>112</sup> Council Act of 27 November 2003 drawing up, on the basis of Article 43(1) of the Convention on the Establishment of a European Police Office (Europol Convention), a Protocol amending that Convention, O.J. C 2/1, 6.1.2004.

<sup>113</sup> Peers, supra note 3 at p. 537.

<sup>114</sup> Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, O.J. L 118/12, 14.5.2003. The narrow window allowed by Article 3 of the Council Decision which states that "Member States shall assist one another in investigating and prosecuting the crimes referred to in Article 1 in accordance with relevant international agreements and national law" should not be overestimated. It is assumed that "relevant international agreements" do not encompass the Europol Convention.

national enforcement authorities and that in the context of immigration applications.<sup>115</sup>

Similar considerations apply to Eurojust. However, the possibility of involving Eurojust in future cooperation requests should not be excluded and the signs are already there. For instance, on 10 April 2007 the OTP and Eurojust signed a Letter of Understanding.<sup>116</sup> The Letter promulgates their agreement to enhance contacts between them, to explore areas of co-operation and to exchange experiences of a non-operational nature. More specifically, the agreement aims to promote the sharing of general and specific information about serious and organised crime that may be of mutual interest and benefit. Finally, the Letter of Understanding also expresses the intent to explore forging a formal cooperation agreement in the future. Eurojust could prove to be crucial to the OTP's mandate. Eurojust's remit and experience in dealing with serious cross-border crime might prove to be key in the arrest and surrender of individuals sought by the Prosecutor for trial before the ICC. Yet, both Eurojust and Europol mandates should be stretched to enable them to prosecute and investigate crimes falling within the jurisdiction of the ICC.<sup>117</sup>

Given the breadth of the EU activities in the Justice and Home Affairs area of Union competence, a certain degree of effect on ICC matters is to be expected. Although such Third Pillar measures are not directly linked to the EU's direct ICC initiatives, they may assist in increasing the level of assistance provided to the Court. Perhaps greater coordination and closer monitoring of such Third Pillar developments is required so as to have a more complete picture of the Union's action on ICC-related matters. This in turn, would ensure the coherent and consistent furtherance of the activities of the Union in the above area with regard to the ICC.

## **Investigation and Prosecution: ICC-specific EU measures**

The ICC co-exists with national courts and is not intended to replace or displace them. Its complementary nature<sup>118</sup> means that States get the opportunity to investigate and prosecute first the crimes set out in Article 5 of the Rome Statute, namely, genocide, crimes against humanity and war crimes. It also ensures that the ICC will only intervene if a State is "unwilling or unable genuinely" to deal with a case.<sup>119</sup> In such an instance, the ICC will take over from national courts and the case will be tried in the Hague.

Although not an obligation under the ICC regime, it is advisable for a State to incorporate the ICC crimes into domestic law, as well as to review the defences and

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<sup>115</sup> Articles 2 & 3 of Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, O.J. L 118/12, 14.5.2003.

<sup>116</sup> [http://eurojust.europa.eu/press\\_releases/2007/10-04-2007.htm](http://eurojust.europa.eu/press_releases/2007/10-04-2007.htm)

<sup>117</sup> Cedric Ryngaert, "Universal Jurisdiction in an ICC Era: A Role to Play for EU Member States with the Support of the European Union" (2006) 14 *European Journal of Crime, Criminal Law and Criminal Justice* 46 at pp. 72-76.

<sup>118</sup> See, tenth preambular paragraph, Articles 1 and 17 Rome Statute. On complementarity, see generally John T Holmes, "Complementarity: National Courts versus the ICC" in Antonio Cassese, Paolo Gaeta and John RDW Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (vol I, Oxford University Press, Oxford, 2002), pp. 667-686; John T Holmes, "Jurisdiction and Admissibility" in Roy S Lee (ed), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers, Ardsley, New York, 2001), pp. 321-348; Mireille Delmas-Marty, "Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC" (2006) 4 *Journal of International Criminal Justice* 2.

<sup>119</sup> Article 17 Rome Statute.



other general principles of international criminal law to determine their compatibility with the ICC regime. Enabling national prosecution of the crimes contained in the Rome Statute constitutes the first step in evading the ICC's jurisdiction.<sup>120</sup> As mentioned above, several Member States have adopted legislation in this respect.

Whether the political will exists to adopt ICC implementing legislation on an EU level could be a matter of debate. The competence of the EU in relation to approximation of substantive criminal laws of the Member States is extremely limited, focusing mainly on organised crime, terrorism and illicit drug trafficking,<sup>121</sup> that is areas classed as transnational rather than international criminal law.<sup>122</sup>

When it comes to investigation and prosecution though, the EU has adopted measures under the Third Pillar with a specific focus on the ICC. First, a Decision setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes has been adopted.<sup>123</sup> This Decision should be perceived as a limited ex ante implementation of the national Focal Points promulgated in the Action Plan and its objective is to facilitate the collection and exchange of information between national contact points.<sup>124</sup> Second, a Decision on investigation and prosecution.<sup>125</sup> This is a very important Decision whose aim is to increase cooperation between national units and maximise the ability of law enforcement authorities to cooperate effectively in the field of investigation and prosecution of genocide, crimes against humanity and war crimes.<sup>126</sup> Law enforcement authorities must be given information over suspects of crimes within the jurisdiction of the ICC. Such information may be obtained from immigration authorities of another Member State.<sup>127</sup> This provision undoubtedly flags the issue of personal data protection.<sup>128</sup> To this end, the Decision provides that all such exchange of information

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<sup>120</sup> As the ICC's Prosecutor said, upon taking up his position in June 2003: "the absence of trials before ... [the ICC], as a consequence of the regular functioning of national institutions, would be a major success." *Luis Moreno-Ocampo*, Chief Prosecutor of the International Criminal Court "Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC" (Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, The Hague, 16 June 2003) available at [http://www.icc-cpi.int/library/organs/otp/030616\\_moreno\\_ocampo\\_english\\_final.pdf](http://www.icc-cpi.int/library/organs/otp/030616_moreno_ocampo_english_final.pdf).

<sup>121</sup> Articles 29 and 31(e) TEU. *Peers*, supra note 3, Chapter 8.

<sup>122</sup> According to *Mueller*, "transnational crime" has been invented "in order to identify certain criminal phenomena transcending international borders, transgressing the laws of several states or having an impact on another country". See *Gerhard O.W. Mueller*, "Transnational Crime: Definitions and Concepts" in *Phil Williams and Dimitri Vlassis* (eds), *Combating transnational crime: concepts, activities, and responses*, (London, Frank Cass, 2001). The distinction between transnational criminal law which covers norms established by the suppression conventions and international criminal law *stricto sensu* has been advocated by *Boister*. See *Neil Boister*, "Transnational Criminal Law?" (2003) 14 *European Journal of International Law* 953 at 974-975.

<sup>123</sup> 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, O.J. L 167/1, 26.6.2002.

<sup>124</sup> Article 2 of the European network of contact points decision. The national Focal Points' mandate is broader as it provides for exchange of information with the EU Focal Point and NGOs in addition to other national Focal Points. See Section A.3(ii) of the Action Plan.

<sup>125</sup> Council Decision 2003/355/JHA on the investigation and prosecution of genocide, crimes against humanity and war crimes, O.J. L 118/12, 14.5.2003. Hereafter, the 'Investigation and Prosecution Decision'.

<sup>126</sup> Article 1 Investigation and Prosecution Decision.

<sup>127</sup> Article 3(2) Investigation and Prosecution Decision.

<sup>128</sup> See, in relation to terrorism, Opinion of the European Data Protection Supervisor on the Proposal for a Council Decision concerning access for consultation of the Visa Information System (VIS) by the



shall take place in full compliance with applicable international and domestic data protection legislation.<sup>129</sup> However, it must be noted that this provision appears to hand national law enforcement authorities unlimited rights over personal data following a well-established trend in the EU.<sup>130</sup>

### ***Quis custodiet ipsos custodes? Judicial control and human rights protection in the European Union in the Third Pillar***

It has been illustrated that the EU has adopted a series of measures under the Third Pillar directly or indirectly related to the ICC which may adversely affect the fundamental rights of individuals in the EU's area of freedom, security and justice. The analysis of the issues forms part of the EU constitutional discourse over the nature and qualities of measures taken under the Third Pillar. Whether the well-established principles of Community law under the First Pillar can be extended to the Third has been partly addressed by the TEU<sup>131</sup> and partly left in obscurity.<sup>132</sup> Judicial constitution-making in the Third Pillar has been heralded by the Court's groundbreaking judgment in *Pupino* in which the Court emphasised the obligation of national courts "to interpret national law in conformity with the Framework Decision".<sup>133</sup> Indirect effect marked the beginning of a series of analogies from Community law in order to contribute effectively to the pursuit of the Union's objectives.<sup>134</sup> Recently, the Court has been given the opportunity to confirm that respect for fundamental rights as general principles of Community law applies also to the Third Pillar. In particular, the Court held that "the institutions are subject to

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authorities of Member States responsible for internal security and by Europol for the purposes of prevention, detection and investigation of terrorist offences and other serious criminal offences (COM(2005) 600 final), O.J. C 97/6, 25.4.2006. In Section 1.2.a) of the Opinion the European Data Protection Supervisor states: "One must bear in mind that the VIS is an information system developed in view of the application of the European visa policy and not as a law enforcement tool." (Underlining appears in the original).

<sup>129</sup> Article 6 Investigation and Prosecution Decision.

<sup>130</sup> See, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, O.J. C 53/1, 3.3.2005.

<sup>131</sup> For instance, Article 34(2)(b) establishes Framework Decisions as instruments of the Third Pillar. The function of Framework Decisions echoes the First Pillar Directives. In order to establish the distinction the Treaty itself provides that Framework Decisions "shall not entail direct effect". For more, see *Bartolomiej Kurcz* and *Adam Lazowski*, "Two Sides of the Same Coin? Framework Decisions and Directives Compared" (2006) 25 *Yearbook of European Law* 177.

<sup>132</sup> *Pieter Jan Kuijper*, "The Evolution of the Third Pillar from Maastricht to the European Constitution: Institutional Aspects" (2004) 41 *Common Market Law Review* 609.

<sup>133</sup> Case C-105/03 *Pupino* [2005] ECR I-5285 at paragraph 34.

<sup>134</sup> *Ibid*, at paragraph 36.

review of the conformity of their acts with the Treaties and the general principles of law, just like the Member States when they implement law of the Union.<sup>135</sup>

The review of Union acts is dependent on the Court of Justice's jurisdiction under the Third Pillar. To start with, the ECJ's jurisdiction is governed by Article 35 TEU and is divided into preliminary rulings from national courts and direct challenges in the ECJ brought by a Member State or the Commission. The heads of jurisdiction are exhaustively listed in this Article<sup>136</sup> and, accordingly, Third Pillar Common Positions are in principle excluded from the Court's jurisdiction.<sup>137</sup> Remarkably, by making a further analogy to well-established Community principles, the Court held that all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties, can be challenged.<sup>138</sup> Hence, if the Court is faced with a Third Pillar Common Position which generates legal effects for third parties, it will accord the act its true classification and give a preliminary ruling.<sup>139</sup> In relation to the freezing of assets discussed above, were the EU to expand its cooperation with the Court and adopt an EU freezing order on the basis of a Second Pillar Common Position, following the ICTY model, would such order, after *Segi*, be reviewed by the Court of Justice?<sup>140</sup> Although the Court's judgment is framed in general terms "all measures adopted by the Council",<sup>141</sup> its application should be limited to Third Pillar matters as the jurisdiction of the Court under the Second Pillar is altogether excluded.<sup>142</sup>

Going onto the preliminary rulings jurisdiction of the Court, this includes rulings on the validity and interpretation of framework decisions, interpretation of conventions and validity and interpretation of the measures implementing them.<sup>143</sup> However, such jurisdiction is not compulsory. A Member State must make a declaration accepting the Court's jurisdiction and specify which national courts (any court or tribunal or a court or tribunal of a Member State against whose decision there is no judicial remedy) shall have the right to make a reference.<sup>144</sup> The latest available data indicate that only 14 Member States have made such a declaration.<sup>145</sup> Out of

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<sup>135</sup> Case C-303/05 *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, judgment of 3 May 2007, not yet reported, at paragraph 45. See also Case C-354/05P *Gestoras Pro Amnistia et al. v. Council*, judgment of 27 February 2007, not yet reported at paragraph 51 and Case C-355/04P *Segi et. al v. Council*, judgment of 27 February 2007, not yet reported, at paragraph 51. On the application of human rights as general principles of Union law see, *Eleanor Spaventa*, "Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Judgment in *Pupino*" (2007) 1 *European Constitutional Law Review* 5 at p. 17.

<sup>136</sup> Article 35(1) and (6) TEU.

<sup>137</sup> Measures adopted under the Second Pillar are also immune from the jurisdiction of the Court pursuant to Article 46 TEU. For instance, the foundations of the EU relations with the ICC, namely the Common Position and the Council Decision concluding the EU-ICC Agreement cannot be challenged in the Court of Justice.

<sup>138</sup> *Segi* op. cit. supra, at paragraph 53; *Gestoras*, op. cit. supra, at paragraph 53. The wording replicates the well-established rule regarding acts susceptible to judicial review under the First Pillar, Case 22/70 *Commission v. Council (Re ERTA)* [1971] ECR 263, at paragraphs 38-42. See also *Peers*, supra note 145 at pp. 898-902.

<sup>139</sup> *Segi*, op. cit. supra, at paragraph 53.

<sup>140</sup> *Segi*, op. cit. supra, at paragraph 54.

<sup>141</sup> *Segi*, op. cit. supra, at paragraph 53.

<sup>142</sup> Article 46 TEU.

<sup>143</sup> *Segi*, op. cit. supra, at paragraphs 44-46.

<sup>144</sup> Article 35(2)-(3) TEU.

<sup>145</sup> *Eleanor Spaventa*, "Remembrance of Principles Lost: On Fundamental Rights, the Third Pillar and the Scope of Union Law" (2006) 25 *Yearbook of European Law* 153 at p. 156.

those, in Spain and Hungary, only final instance courts may refer the case to the Court of Justice.<sup>146</sup>

There are some interesting considerations which access to the Court's jurisdiction under the Third Pillar generates. It must be pointed out at the outset that all national courts have jurisdiction to review national measures implementing Union acts against their own constitutional rules even if they have not accepted the Court's jurisdiction.<sup>147</sup> In this respect, national courts have been recently faced with challenges against national legislation implementing the EAW.<sup>148</sup> Obviously, when the implementing national measures depart from the Union act they implement, national courts can always review the manner in which State discretion has been exercised under both national constitutional rules and fundamental rights as general principles of Community law. When however the Union act has been implemented verbatim such review indirectly entails the review of the Union act by the national court and there are many legitimate reasons in Union law why a national court would refrain from doing this.<sup>149</sup> This is a good example of a case in which the national court may want to make a reference for a preliminary ruling on validity from the Court.

What if there are no implementing national measures? The *Segi* judgment indirectly addresses the issue.<sup>150</sup> The applicants in this case were included in a list of terrorists annexed to a Common Position adopted under both the Second and Third Pillars.<sup>151</sup> Instead of requesting the review of the lawfulness of the Common Position, they applied for compensation for the harm suffered as a result of their inclusion to the list.<sup>152</sup> Having been asked the wrong question the Court appears, at a first glance, to give the wrong answer or, to be more precise, it answered the question which was not asked, namely whether the lawfulness of Common Positions can be reviewed by the Court. As explained above, it held that they can if they create legal effects for third parties.<sup>153</sup> However, such expansive interpretation of Article 35 did not extend its jurisdiction to entertain a claim in damages. The Court then, presumably in order to dismiss claims for lack of effective judicial protection,<sup>154</sup> pointed towards the availability of national remedies. It held:

"Finally, it is to be borne in mind that it is for the Member States and, in particular, their courts and tribunals, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the lawfulness of any decision or other national measure relating to the drawing up of an act

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<sup>146</sup> Steve Peers, "Salvation outside the Church: Judicial Protection in the third pillar after the *Pupino* and *Segi* Judgments" (2007) 44 *Common Market Law Review* 883 at p. 886.

<sup>147</sup> *Spaventa*, supra note 145 at pp. 170-171. However, if this national review results in the non-execution of the ICC cooperation request, it will be treated as a failure to cooperate on behalf of that State and the Article 87(5) and 112(f) Rome Statute procedure will come into place.

<sup>148</sup> *Spaventa*, ibid at pp. 158-159 comments on the repercussions of the German and Polish Constitutional Courts judgments on the unconstitutionality of national legislation implementing the European Arrest Warrant. Also, *Ilias Bantekas*, "The Principle of Mutual Recognition in EU Criminal Law" (2007) 32 *European Law Review* 365 at pp. 376-377 who makes reference to several jurisdictions.

<sup>149</sup> *Spaventa*, ibid at pp. 158-159 with reference to the German Constitutional Court case.

<sup>150</sup> *Segi*, op. cit. supra.

<sup>151</sup> Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, O.J. L 344/93, 28.12.2001 which is a mixed Second and Third Pillar Common Position.

<sup>152</sup> *Segi*, op. cit. supra, at paragraph 5.

<sup>153</sup> Ibid, at paragraph 54.

<sup>154</sup> Ibid, at paragraph 57.

of the European Union or its application to them and to seek the compensation for any loss suffered.”<sup>155</sup>

Thereby, the Court directed the applicants towards national courts and encouraged them to challenge “national measures relating to the drawing up of an act”, for instance, a request by Spain for the inclusion of the applicants’ name in the Annex to the Common Position, “or to its application”, for instance, interrogation and arrest, “and to seek compensation for any loss suffered”. These are separate causes of action however, and the harmful impact of the Common Position per se is still not addressed. This is of course unless the Court implies that the applicant may sue the President of the Council of the European Union – the person having signed the Union act – in a national court for defamation. In all cases, if the incidental review of the lawfulness of the Union act becomes necessary to enable the national court to give judgment the national court would want to make a reference to the Court of Justice for a preliminary ruling on validity.<sup>156</sup> If the national court is barred from doing so because the Member State at issue has not accepted the jurisdiction of the Court we are back to square one, and the question of availability of a remedy re-emerges.

From all examples mentioned above it appears that the question of effective judicial protection is inextricably linked to and dependent upon the national declaration accepting the Court’s jurisdiction under Article 35. Where such declaration is missing effective judicial protection is at stake<sup>157</sup> unless, of course, national courts are willing to step in. Following this realisation, the reasoning of the Court in *Segi* becomes translucent. By emphasising the limitations of access – “subject to the conditions fixed by Article 35” – and by subtly passing the torch of judicial review of Union acts to national courts, the Court is sending a resounding message to the Member States much more explicitly than before:<sup>158</sup> unless Member States want national courts interfering with decisions of high political importance, they must ensure that all Member States make the declaration accepting the Court’s jurisdiction or take the even bolder step of amending the conditions of jurisdiction enshrined in Article 35 TEU in the ongoing constitutional reform.

Whichever the way out of this deadlock, the Union’s position is, at present, paradoxical. On the one hand, it has integrated the fight against impunity in its human rights policy but, on the other, it has not been convincing over its own ability to protect fundamental rights in the Third Pillar.

## **The preservation of the universality and integrity of the Rome Statute**

### ***Universality of the Rome Statute: An introvert look***

Ratification of the Rome Statute and subsequent implementation are essentially a State matter. A look at the ratification charts, reveals that membership of the Court amongst EU Member States is almost universal.<sup>159</sup> The Common Position

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<sup>155</sup> Ibid, at paragraph 56.

<sup>156</sup> Case C-352/98P *Laboratoires Pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v. Commission* [2000] ECR I-5291 at paragraphs 41-44.

<sup>157</sup> *Spaventa*, supra note 145 at p. 155.

<sup>158</sup> Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677 at paragraph 41.

<sup>159</sup> See <http://www.iccnw.org/?mod=romesignatures>.

was adopted before the 2004 enlargement. It provided in Recital 3 that all Member States had ratified the Rome Statute. The acceding Member States expressed their intention to apply the Common Position from the date of its adoption, almost a year prior to their formal accession to the Union.<sup>160</sup> Nevertheless, not all acceding States ratified the Rome Statute in time for their accession and insofar as the Czech Republic is concerned, the Rome Statute has not been ratified to date.<sup>161</sup> The issue has been given no attention in the Commission's monitoring report.<sup>162</sup> In fact, in contrast to the emphatic statement in the Common Position that all Member States have ratified the Rome Statute, the Action Plan a year later provides that they, where appropriate, will endeavour to put in place as soon as possible legislation necessary to implement the Rome Statute.<sup>163</sup> Similarly, the Member States are encouraged to ratify the Agreement on Privileges and Immunities of the ICC.<sup>164</sup>

There are awkward repercussions from this which become immediately apparent. The EU Member State which has not ratified the Rome Statute and is not bound by it, finds itself bound by measures adopted to give effect to the Rome Statute and facilitate the achievement of its objectives.<sup>165</sup> Despite the stated intention to engage the Czech Republic with the ICC pursuant the universality objective, the means at the EU's disposal are limited. The Common Position constitutes a Second Pillar instrument and as such the jurisdiction of the Court of Justice is excluded.<sup>166</sup> In this respect, there is no enforcement procedure similar to the one followed under Article 226 of the EC Treaty under the Second Pillar in order to secure compliance of the Member States with the Common Position. The EU is then found in a position in which, as will be seen below, it exerts pressure on third countries in order to achieve the universal ratification of the Rome Statute, while at the same time it does not have the tools at its disposal to demand such conduct from a Member State. While this is not the first instance of double standards between EU internal and external demands,<sup>167</sup> there is a qualitative difference in that the EU does not force the Czech Republic to accede to the ICC Statute, not because it does not want to, but because it cannot.

### ***Universality of the Rome Statute: An ICC Clause in Agreements with third countries***

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<sup>160</sup> Article 9(1) of the Common Position. It should be recalled here that the Accession Treaty was signed on 16 April 2003 and came into force on 1 May 2004.

<sup>161</sup> An event to convince Czech parliamentarians is planned for the 4<sup>th</sup> of October 2007. Although not officially backed by the EU, this event has had wholesome EU support.

<sup>162</sup> COM(2003)675 final, Comprehensive Monitoring Report of the European Commission on the state of preparedness for EU Membership of Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, Brussels, 5.11.2003.

<sup>163</sup> Agreement on the Privileges and Immunities of the International Criminal Court (APIC), ICC-ASP/1/3. As of the 6<sup>th</sup> of July 2007, 50 States have ratified the APIC. See also Section C.2(viii) of the Action Plan.

<sup>164</sup> Section C.2(x) of the Action Plan.

<sup>165</sup> Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, O.J. L 118/12, 14.5.2003.

<sup>166</sup> Article 46 TEU.

<sup>167</sup> The EU has been criticised repeatedly on this, in particular, in the context of the eastwards enlargement. See *Marise Cremona*, "EU Enlargement: Solidarity and Conditionality" (2005) 30 *European Law Review* 3. See also, *Andrew Williams*, *EU Human Rights: A Study in Irony*, (Oxford University Press, Oxford, 2004).

The aim of preserving the universality of the Rome Statute has led the EU to mainstream the ICC in its external relations and to bring it up as a human rights issue in the negotiations of agreements with third countries.<sup>168</sup> Since the entry into force of the Rome Statute, the envisaged result of the negotiations will include an ICC Clause in the international agreement concluded.<sup>169</sup> Before embarking on the analysis of these ICC clauses, it should be recalled that the European Union, acting primarily under its First Pillar competences has concluded agreements with most countries in the world.<sup>170</sup> These agreements are negotiated by the European Commission on the basis of negotiating directives granted to it by the Council pursuant to Article 300 EC Treaty. All recent negotiating mandates included an ICC clause.<sup>171</sup>

Faithful to the commitments undertaken by the Common Position and elaborated in the Action Plan, the European Union has included an ICC clause in the multilateral agreement with the African Caribbean and Pacific (ACP) countries. The recently revised Development Cooperation Agreement with the ACP countries (Cotonou Agreement) constitutes an important in coverage and political impact agreement.<sup>172</sup> However, Article 11 which contains the ICC clause falls under the heading “element of the political environment” and not an “essential element” of the Agreement, which mitigates its efficacy as there is no possibility of suspending aid on the basis of lack of compliance with this clause. Article 11(6) of the revised Cotonou Agreement reads:

“In promoting the strengthening of peace and international justice, the Parties reaffirm their determination to:

- share experience in the adoption of legal adjustments required to allow for the ratification and implementation of the Rome Statute of the International Criminal Court; and
- fight against international crime in accordance with international law, giving due regard to the Rome Statute. The Parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instruments.”

In the chapeau of Article 11(6), emphasis is placed by the Parties to the Agreement on the strengthening of peace and justice. Ever since the creation of the ad hoc Tribunals the peace and justice debate has been central to international criminal law.<sup>173</sup> Given that the ICC operates in situations where peace is likely to have been disturbed, the relationship between peace and justice is going to be of importance to the ICC as well, which is why this is also reflected in the ICC Statute.<sup>174</sup> That the EU

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<sup>168</sup> Section B.3(iii) of the Action Plan.

<sup>169</sup> For an overview, see Doc. 04/07 Rev 1, 30 May 2007 issued by the General Secretariat of the Council of the European Union.

<sup>170</sup> For a taxonomy of these agreements see *Koutrakos*, supra note 22, Chapter 10.

<sup>171</sup> Including negotiations with China (Doc. 14892/06), Russia (Doc. 15053/06), Ukraine (5062/07), Iraq (Doc. 6511/06), Central America (Doc. 7932/1/07) and the Andean Community (Doc. 7913/1/07). Similar detailed clauses have been proposed in pending negotiations with Indonesia, Singapore, Malaysia, Thailand, the Philippines, Brunei Darussalam and South Africa.

<sup>172</sup> Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June, O.J. L 317/3, 15.12.2000. An information note on the revisions is available at [http://ec.europa.eu/development/ICenter/Pdf/negociation\\_20050407\\_en.pdf](http://ec.europa.eu/development/ICenter/Pdf/negociation_20050407_en.pdf).

<sup>173</sup> *Paul R. Williams and Michael P. Scharf*, *Peace with Justice? War Crimes and Accountability in the former Yugoslavia*, (Oxford, Rowman & Littlefield, 2002); *Payam Akhavan*, “Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal” (1998) 20 *Human Rights Quarterly* 737.

<sup>174</sup> See Articles 13(b) and 16 ICC Statute. See also how the peace process in Uganda currently coincides with the ICC investigations.

therefore mentions peace and justice in Article 11 is a suitable lead into the discussion of the two areas covered by this Article.

The first priority of Article 11(6) is ICC ratification and implementation of the Rome Statute. The two are accurately given equal importance. For, ratification and implementation are interconnected. This is recognised by the EU which for the first time positively encourages the sharing of States' experiences in adjusting their legal systems in order to allow for ratification and implementation.

Experience sharing will help alleviate some of the burden smaller or less developed countries face when making the changes necessary nationally to ratify or implement the Statute. Putting the procedures in place and enabling a State to cooperate fully with the Court and to prosecute domestically, is not an easy task. However, all 105 State parties to the ICC will eventually go through this process. Inevitably, some patterns ought to develop and similar approaches will be formulated, which will assist States in finding the right approach that best fits their individual system. Article 11(6) Cotonou Agreement does not outline the exact mechanism to achieve this exchange of experience. The Court's Legal Tools project, however, aspires to provide the answer to this question.<sup>175</sup> Undertaking this commitment under the Cotonou agreement, is an important step in acknowledging that some legal adjustments are necessary, whilst rejecting their use as an excuse so as not to join the ICC regime.

Article 11(6) of the Cotonou Agreement further obligates State parties to it to "fight against international crime in accordance with international law, giving due regard to the Rome Statute". This latter provision is wider than trials at the ICC. Neither how States can fight international crime, nor what is meant by international crime is specified in this instance. Reference to international crime here does not cover terrorism or weapons of mass destruction which are specifically covered for in the Articles following on from Article 11. The wording of the Article does not preclude other international crimes from being considered, such as those covered by transnational criminal law.<sup>176</sup>

This fight against international crime, may take place either on the international plane but also nationally. Reference to the Rome Statute is not exclusive. The provision also makes reference to international law, thus accepting all available fora for the prosecution of international crimes such as international or internationalised tribunals as well as national courts.<sup>177</sup> What is striking however, is that it makes fighting against international crime an obligation. Although the Rome Statute has as its aim the combat of impunity, States have discretion as to whether they join the ICC regime. Even when they do join, they are not obliged to initiate national investigations and prosecutions, but if they do not, they risk having cases taken over by the ICC. The only reference to an obligation to prosecute nationally to be found in the Rome Statute is in its fourth and sixth preambular paragraphs which are not binding. By making it an obligation to fight against impunity, the Cotonou Agreement goes a step further than the Statute.

Similarly to the Cotonou Agreement, ICC clauses have been inserted in relations with third countries on a case-by-case basis. In relation to the European Neighbourhood Policy (ENP), it should be noted that ICC clauses have not been

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<sup>175</sup> <http://www.icc-cpi.int/legaltools/>

<sup>176</sup> Article 29 TEU.

<sup>177</sup> These would include but will not be limited to the ICTY, the ICTR, the Sierra Leone Special Court, the Iraqi Special Tribunal, etc..



inserted to the existing agreements – either Partnership and Cooperation Agreements or Euro-Mediterranean Agreements – but are included in the ENP Action Plans as political documents. These clauses require the States covered by the ENP<sup>178</sup> to insert, with some slight differentiation,<sup>179</sup> a clause providing the following obligations:

- to accede to the Rome Statute,
- to make the necessary legislative and constitutional amendments for its implementation and
- to fight against international crime in accordance with international law, having due regard to preserving the integrity of the Rome Statute.<sup>180</sup>

At a first glance, this ICC clause appears to go further than the Cotonou one in that it requires the third States to proceed with the constitutional amendments necessary so as to enable implementation of the Rome Statute. This is a positive legal obligation aiming to eliminate obstacles likely to slow down implementation post accession to the ICC Statute and is therefore very welcome.

The EU's position regarding candidate States for membership has been even more demanding. The obligation of compliance with international criminal law and the cooperation with the ICTY seem to have paved the way for ICC ratification and implementation to be elevated to an accession condition.<sup>181</sup> The example of Croatia whose candidate status risked delay because of its perceived lack of cooperation with the ICTY is illustrative of this.<sup>182</sup>

In sum, exerting pressure by diplomatic means is an important means of rallying support for the ICC. Carrot and stick techniques have also been used in relation to the ICTY with varying degrees of success.<sup>183</sup> While the European Union may not offer the carrot of accession to most States, by integrating an ICC clause in

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<sup>178</sup> Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, the Palestinian Authority, Syria, Tunisia and Ukraine.

<sup>179</sup> For instance, the ENP Action Plan with Israel, a non-ICC party, which has also signed a bilateral agreement with the US, requires Israel to promote cooperation on issues such as fight against impunity of authors of genocide, war crimes and any other crime against humanity. The ENP Action Plan with Tunisia has only a general clause for the respect of fundamental rights, despite Tunisia not having signed the Rome Statute.

<sup>180</sup> Doc. 04/07 Rev 1, 30 May 2007 issued by the General Secretariat of the Council of the European Union.

<sup>181</sup> All countries wishing to join the EU must abide by the accession criteria or the Copenhagen criteria, on which the Commissions opinion on any application for accession is based. These criteria were laid down at the European Council meeting in Copenhagen in 1993 and added to at the European Council meeting in Madrid in 1995. They include political criteria (stability of the institutions safeguarding democracy, the rule of law, human rights and respect for and protection of minorities), economic criteria (existence of a viable market economy, the ability to respond to the pressure of competition and market forces within the EU) and the ability to assume the obligations of a Member State stemming from the law and policies of the EU. The firm establishment of the ICC in the human rights policy of the EU elevates compliance with the ICC to a political criterion for EU membership.

<sup>182</sup> The Council gave its agreement for accession negotiations with Croatia to begin on the basis of a positive assessment of Croatia's cooperation with the ICTY. See, <http://www.consilium.europa.eu/showPage.asp?id=872&lang=en&mode=g>. The full cooperation with the is posited as a short term priority in the Accession Partnership with Croatia. See Council Decision 2006/145/EC of 20 February 2006 on the principles, priorities and conditions contained in the Accession Partnership with Croatia and repealing Decision 2004/648/EC, O.J. L 55/30, 25.2.2006.

<sup>183</sup> However, finding the right balance will always be a problem. From the deplorable pledging of aid by the US for the surrender of *Slobodan Milošević* to the “innocent” call by *Cassese* to ban former Yugoslavia from the Atlanta Olympics in 1996 (See ICTY Press Release CC/PIO/088-E, 13 June 1996), there has to be a middle way.



its relations with third countries, it is poised to develop a novel human rights conditionality which may yield good results.

### ***Integrity of the Rome Statute: Meeting the United States' challenge***

Whilst the US is not the only State to oppose the ICC,<sup>184</sup> soon after the conclusion of the Rome Statute, the US administration began its campaign to undermine the Court. A lot of ink has been spilled in analysing the US actions, with the main emphasis being on the most potent of those, the Bilateral Immunity Agreements (BIAs).<sup>185</sup> The purpose of these agreements is to preclude States from surrendering any persons sought by the ICC. Although the legality of BIAs and their impact on the Court have been the subject of much academic discussion,<sup>186</sup> the EU's response remains largely unexplored. Clearly, such actions run counter to the stated policy of the EU in support of the integrity of the Rome Statute.

In September 2002, the General Affairs and External Relations Council adopted its conclusions on the International Criminal Court.<sup>187</sup> The conclusions serve multiple aims. First, they reaffirm the EU's commitment to and support of the ICC, by referring to and summarising the aims of the Common Position. Second, they provide a common European front on the US objections, which are succinctly mentioned and subtly disposed of in the second paragraph of the Conclusions. In the same paragraph, confidence in the apolitical nature of the Court and in its complementarity regime is expressed. Third, due emphasis is placed on the importance of re-engaging the US in the international criminal law debate. However, no concrete measures are suggested as to how to achieve this. In fact, despite the stated intention of the EU to engage the United States with the ICC,<sup>188</sup> the topic has been absent from the agenda of all EU-US Summits to date.<sup>189</sup> The above conclusions are politically important as they bring the discussion to the State level and enhance a uniform approach. They confirm the EU position and implicitly reject the US efforts to thwart the Court's ambit. In terms of legal effect, the conclusions do not contain any hard clauses for the Member States and are of a declaratory nature.

Annexed to the above conclusions are a set of Guiding Principles. These specifically target US non-surrender agreements and set out the EU response. Interestingly, the Guiding Principles do not distinguish between EU Member States and third countries. Obviously, having masterminded the wording of the Guiding Principles the Member States have expressed their intention to be bound by them. However, these also constitute a foreign policy statement addressed to all countries, in particular the acceding States, the candidate States and the associated States.<sup>190</sup> In

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<sup>184</sup> China and India have also not signed up to the Court and have maintained a somewhat negative position. See *Lu Jianping and Wang Zhixiang*, "China's Attitude towards the ICC" (2005) 3 *Journal of International Criminal Justice* 608; *Usha Ramanathan*, "India and the ICC" (2005) 3 *Journal of International Criminal Justice* 627.

<sup>185</sup> For a compilation of resources on the US BIAs see: <http://www.iccnw.org/?mod=usaicc>

<sup>186</sup> See Opinion by *James Crawford SC, Philippe Sands QC and Ralph Wilde* on <http://www.iccnw.org/documents/SandsCrawfordBIA14June03.pdf>

<sup>187</sup> See General Affairs and External Relations, 2450<sup>th</sup> Council session – External Relations – Brussels, 30 September 2002, 12134/02 (Presse 279).

<sup>188</sup> General Affairs Council Conclusions, 30 September 2002

<sup>189</sup> [http://ec.europa.eu/external\\_relations/us/intro/summit.htm](http://ec.europa.eu/external_relations/us/intro/summit.htm)

<sup>190</sup> The policy of associating the acceding and candidate states with the Presidency Declarations on the International Criminal Court has been uninterrupted. The list of documents on the EU-ICC relations is

relation to the candidate States it also amounts to an accession condition.<sup>191</sup> It becomes clear thereby that the respect of the integrity of the ICC constitutes a fundamental element of the Union's foreign policy. More importantly, they contain useful guidelines for States, which although non-binding, are capable of being influential on State policy.

The Guiding Principles recapitulate the cooperation obligations of a State when it signs up to the ICC regime. Due respect is therefore paid on existing Agreements concluded under Article 98 Rome Statute, such as existing Status of Forces Agreements.<sup>192</sup> The EU Guiding Principles do not advocate forgoing of such agreements. This position is in line with the spirit of the Rome Statute provision. The main focus of the Guiding Principles is on the US BIAs concluded specifically after the entry into force of the ICC Statute. Such agreements, when concluded with ICC members, would be inconsistent with their pre-existing obligations under the Statute. The Guiding Principles echo this approach. Moreover, they go a step further when they maintain that such agreements "may [also] be inconsistent with other international agreements to which ICC States Parties are Parties". The lack of explicit reference to other such international agreements allows potentially other types of international agreements to be considered. Although this is not further specified, other extradition agreements would conform to the typology of such international agreements.

The Guiding Principles acknowledge that despite the clear EU position, some States may still sign up to US BIAs. A number of safety clauses are contained in the Guiding Principles for this eventuality. States are encouraged to aim for a guarantee that ICC crimes will be investigated and, provided that evidence is available, they will be prosecuted. A second requirement is that such agreements should only cover nationals of non-ICC parties. This principle stems from the fact that the Rome Statute, being an international treaty, is only opposable to States that are parties to it, and not third States.<sup>193</sup> Although the ICC would most commonly deal with nationals of State parties, it is foreseeable that crimes may be committed by third country nationals present on the territory of a State party to the ICC. In such a case, the ICC potentially

available

at

[http://www.consilium.europa.eu/cms3\\_fo/showPage.asp?lang=en&id=628&mode=g&name=](http://www.consilium.europa.eu/cms3_fo/showPage.asp?lang=en&id=628&mode=g&name=)

<sup>191</sup> The European Partnership with the Former Yugoslav Republic of Macedonia (FYROM), the Council requested that FYROM took fully into account the EU Guiding Principles as a medium term priority. Council Decision 2006/57/EC of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with the former Yugoslav Republic of Macedonia and repealing Decision 2004/518/EC, O.J. L 35/57, 7.2.2006.

<sup>192</sup> On the law applicable to SOFAs see generally *Dieter Fleck* (ed.), *The Handbook of the Law of Visiting Forces*, (Oxford, Oxford University Press, 2001).

<sup>193</sup> Article 34 of the 1969 Vienna Convention on the Law of Treaties, 1155 *United Nations Treaty Series* 331. See also *Dapo Akande*, "The Basis of and Limits to the Jurisdiction of the International Criminal Court over Nationals of Non-Parties" (2003), 1 *Journal of International Criminal Justice*, 618; *Gennady M. Danilenko*, "The Statute of the International Criminal Court and Third States" (2000) 21 *Michigan Journal of International Law* 445.

has jurisdiction, based on the territoriality principle enshrined in Article 12 ICC Statute.<sup>194</sup> The EU Guiding Principles are prepared to tolerate extradition of such an individual to the US, rather than the Court. The ICC operates on the basis of the complementarity principle anyway, which gives an opportunity to any State willing and able to exercise jurisdiction to do so.<sup>195</sup> This would not necessarily frustrate Article 12 Rome Statute on the preconditions for the exercise of jurisdiction, provided that the US will exercise this right and investigate, with the view to prosecuting, if appropriate. However, if the US were unwilling or unable to investigate and prosecute, and extradition of the individual were to take place to that State, the EU Guiding Principles would essentially encourage turning a blind eye to some of the most serious of crimes committed, which would consequently go unpunished.

Of considerable importance is the requirement established in the Guiding Principles for a sunset clause. The EU's approach on the issue acknowledges that if, despite the strong encouragement not to, States enter into US agreements, they should do so temporarily. It is hoped that the adopted solution would not encourage the renewal of such agreements beyond the set date of their lapsing.

The Guiding Principles contain a number of fallback positions. From the absolute rejection of BIAs to their being tolerated subject to some strictly defined conditions, they provide a flexible approach. Whilst the EU clearly opposes such agreements, its position as reflected in the Guidelines provides a workable solution for States unable to resist US pressure. Working within this practical reality, and given that the guidelines do not have any great legal bearing, the approach chosen could not have been any different.

## **Member State coordination in the ASP**

The issue of Member State coordination in the Assembly of State Parties (ASP) is one which concerns both the effectiveness of the Union in the ICC and the EU esoteric constitutional questions. The EU has actively participated in the Court's creation and still represents its Member States in the ASP. From an ICC perspective, such participation is not uncommon. It is a well-known fact that a number of groups had been formed in the run-up to the Conference, which represented the interests of their members and depending on their agendas, pushed for the inclusion or exclusion of various Statute provisions.<sup>196</sup> From an ICC perspective, representation in the plenary sessions of the ASP is unique.

The question of coordination of the EU and its Member States in international fora has been central to the development of the Union as an international actor<sup>197</sup> and has attracted the attention of several commentators.<sup>198</sup> Member States must coordinate

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<sup>194</sup> *Sharon A. Williams*, "The Rome Statute on the International Criminal Court: From 1947-2000 and Beyond" (2000) 38 *Osgoode Hall Law Journal* 297.

<sup>195</sup> Since Article 18(1) Rome Statute, which deals with preliminary rulings, stipulates that all States, regardless of whether they are parties to the Statute or not, have to be notified of the beginning of an investigation, the same should be accepted for Article 17(1)(a) and (b) as well.

<sup>196</sup> For instance, the Non-Aligned Movement, the like-minded group of States, the Arab League etc.

<sup>197</sup> The question of single external representation of the Union dates back to Kissinger's well-known exclamation: "If I want to call Europe, whom do I call?"

<sup>198</sup> *Koutrakos*, supra note 22; *Eeckhout*, supra note 30; *Rachel Frid*, *The Relations between the EC and International Organizations, Legal Theory and Practice*, (Kluwer Law International, 1995); *Karen E. Smith*, *European Union Foreign Policy in a Changing World*, (Polity Press, Cambridge, 2003).

their position and uphold the common positions in international fora.<sup>199</sup> This general duty is exercised predominantly by the Presidency when matters fall within the CFSP.<sup>200</sup> The Presidency is assisted by the High-Representative for the CFSP and the incoming Presidency, while the Commission shall be fully associated in those tasks.<sup>201</sup>

In addition to the Treaty provisions, the Action Plan addresses the issue but only briefly.<sup>202</sup> It restates the general principle that Member States should coordinate in *all* relevant multilateral fora as appropriate, and in accordance with established procedures.<sup>203</sup> It is clear from the Action Plan that the scope of this obligation exceeds the ASP and covers fora which are dealing with ICC-related matters and in which the EU participates. Member States are not only required to coordinate but also to actively contribute to the negotiations taking place in the Special Working Group established by the ASP to deal with the crime of aggression.<sup>204</sup>

In practice, unlike other fora, for instance the United Nations,<sup>205</sup> the EU participation in the ICC has been a resounding success. During the Rome Conference, the State holding the EU Presidency took the floor on behalf of all the Member States on numerous occasions to address the Conference and express the Union's position. This common voice has continued in the ASP before which successive Presidencies and occasionally the High Representative for the CFSP have made statements representing the Union.<sup>206</sup>

This rosy picture of Member State unity is tainted by the fact that, as mentioned above, the Czech Republic is not a party to the ICC. Naturally, the question arises: What will happen when the turn of Czech Republic comes to hold the rotating EU Presidency? From an ICC perspective, this should not cause too much of a problem since the Czech Republic is a signatory of the Statute, it is entitled to observer status in the Assembly of States Parties and may be allowed to address the Assembly.<sup>207</sup> From an EU perspective, apart from the enormous embarrassment, there is no legal reason why the Czech Republic may not coordinate and represent the 27 Member States of the Union. It has been common in practice however, when the Member State holding the Presidency is not a Member of the international organisation at issue for the next Presidency to represent the Union instead. This is likely to be the case with the ASP as well.<sup>208</sup>

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<sup>199</sup> Article 19(1) TEU.

<sup>200</sup> Article 18(1)-(2) TEU.

<sup>201</sup> Article 18(3)-(4) TEU. Prior to the Treaty of Amsterdam the troika consisted of the current, previous and next Presidencies according to old Article J.5(3) TEU. *Eileen Denza*, *The Intergovernmental Pillars of the European Union*, (Oxford University Press, Oxford, 2002), at pp. 156-159.

<sup>202</sup> Doc. 5742/04 LIMITE Action Plan to follow-up on the Common Position on the International Criminal Court, Brussels, 28 January 2004. It should be mentioned that in several international fora the EU adopts a detailed procedure for participation. See, for instance, Declaration of the European Community in application of Article 27(3)(c) of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, O.J. L 201/28, 25.7.2006.

<sup>203</sup> Section 5(i) of the Action Plan.

<sup>204</sup> Article 7(2) of the Common Position and Section C.2 (vii) of the Action Plan.

<sup>205</sup> *Jan Wouters*, "The European Union as an Actor within the United Nations General Assembly" in *Vincent Kronenberger* (ed.), *The European Union and the International Legal Order: Discord or Harmony?*, (T.M.C. Asser Press, The Hague, 2001), pp. 375-404 at pp. 380-381.

<sup>206</sup> [http://www.consilium.europa.eu/cms3\\_fo/showPage.asp?lang=en&id=628&mode=g&name=](http://www.consilium.europa.eu/cms3_fo/showPage.asp?lang=en&id=628&mode=g&name=).

<sup>207</sup> Article 112 Rome Statute.

<sup>208</sup> *Denza*, supra note 201, at p. 163.

## Concluding Remarks

Whilst the jury is still out as to the actual impact the ICC as a mechanism of international criminal justice will have on ending impunity and restoring the rule of law, the Court's success as the main adjudicative body at the international level, lies not only on its efficient operation, but also on its successful interaction with national and supranational legal orders.<sup>209</sup> As the Court gains in experience through a fair and efficient handling of more cases, States and the EU will have to find their place in the emerging international criminal justice system. Whereas the burden is likely to be more on the individual Member States, which will be required to execute a wide range of cooperation requests and take upon themselves the task of conducting investigations and prosecutions at the national level, the Union as a whole, will continue to play an important role both in positively encouraging its constituting members to be "good international citizens", but also independently, and in its own name, in supporting the Court's development.<sup>210</sup> This two-pronged relationship with the Court best reflects the internal and external functions of the EU in ICC-related matters.

An active Union can be an asset to the Court, particularly when concerted EU activities assist in furthering the Court's mission to end impunity for the most heinous international crimes. Not only has the EU provided the ICC with a firm commitment on institutional cooperation and has heralded support through a number of initiatives internally, but, most importantly, has counterbalanced the US offensive on the ICC through the means of ICC clauses in international agreements, an akin but much milder version of anti-US BIAs.

The EU's approach towards the Court has, to date, been distinctly pro-ICC. This does not preclude EU action running counter to the ICC in the future, or simply not being fully compatible with the Court. In the current state of affairs in EU integration, however, the possibilities of such conflicts seem practically limited. The real challenge will be for the EU to develop its ICC-related approach without being hampered by its constitutional imperfections, and for the ICC to continue to rip the benefits of a pro-ICC European Union in the future.

The relationship between the ICC and the EU has so far been ad hoc. Besides the functional aspects of the EU-ICC Cooperation Agreement, the rest of the EU initiatives have been undertaken without any formal coordination between the EU and the Court. This atypical interaction which aims at the promotion of the ICC cause within the remit of the Union is loaded with a great political charge and is fully compatible with the EU's human rights and democratic governance agenda. Given that one fourth of the Court's membership is made up by EU Member States, the EU is the single largest block of States within the ICC constitution. This fact alone and the possibility of an expansion of the Union, renders the EU-ICC relationship unique.

In many ways, the EU seems to act beyond its remit from an EU constitutional perspective. However, this seems to be acceptable by the individual Member States which have, in most part, followed the approach taken by the Union. All EU initiatives have so far been one-sided on behalf of the Union. The ICC has not taken

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<sup>209</sup> See generally *Jane Stromseth*, "Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?" (2007) 38 *Georgetown Journal of International Law* 251.

<sup>210</sup> For an interesting view of the European influence on States see *Anne-Marie Slaughter* and *William Burke-White*, "The Future of International Law is Domestic (Or, the European Way of Law)" (2006) 47 *Harvard International Law Journal* 327.

any action to accommodate potential Union needs, nor should it have to. However, it has benefited from the hands-on support provided freely by the EU. Although most of the measures adopted so far contain at best the Union's aspirations towards the Court, rather than any concrete measures, they reveal a strong connection between the EU and the ICC. This connection has to be cherished as a success in effective multilateralism benefiting both the EU activities in areas of considerable importance for its moral and political standing, but also the ICC which finds in the EU an invaluable partner.