

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT



Mainstreaming Support for the ICC in the EU's Policies

DROI





**DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
OF THE UNION**

DIRECTORATE B

POLICY DEPARTMENT

STUDY

**MAINSTREAMING SUPPORT FOR THE ICC IN THE EU'S
POLICIES**

Abstract

The European Union and its Member States have been the staunchest supporters of the ICC system of international criminal justice in the last two decades. That system is now at a critical juncture. With a view to the future, it is necessary to examine how the ICC can overcome the current challenges and build upon its successes to date. And more specifically, how the EU and its Member States can, and should, help the ICC in this respect. By critically assessing the EU's performance to date in mainstreaming support for the ICC throughout its policies and activities, this study addresses these questions.

This study was requested by the European Parliament's Subcommittee on Human Rights.

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LIST OF ABBREVIATIONS

ACP	Africa, Caribbean and Pacific States
AfCHPR	African Court of Peoples' and Human Rights
AFET	Committee on Foreign Affairs
APIC	Agreement on Privileges and Immunities
ASEAN	Association of South East Nations
ASF	Avocats Sans Frontières
ASP	Assembly of States Parties
ASPA	American Servicemembers' Protection Act
AU	African Union
BIAs	Bilateral Immunity Agreements
CAR	Central African Republic
CFSP	Common Foreign and Security Policy
CILRAP-CMN	Centre for International Law and Policy - Case Matrix Network
CJEU	Court of Justice of the European Union
COJUR-ICC	Comité Juridique-International Criminal Court
CSO	Civil Society Organisation
DRC	Democratic Republic of Congo
DROI	Sub-Committee on Human Rights
EAW	European Arrest Warrant
ECCC	Extraordinary Chambers in the Courts of Cambodia
EDF	European Development Fund
EEAS	European External Action Service
EIDHR	European Instrument for Democracy and Human Rights
ENP	European Neighbourhood Policy
EP	European Parliament
EU	European Union
EUSRs	European Union Special Representatives
GENVAL	Working Party on General Matters Including Evaluation
GRULAC	Latin American and Caribbean Group
GSP(+)	Generalised Scheme of Preferences (+)
ICC	International Criminal Court
ICJ	International Commission of Jurists
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IfS	Instrument for Stability
JHA	Justice and Home Affairs
JURI	Legal Affairs Committee
LIBE	Civil Liberties, Justice and Home Affairs Committee
MEPs	Members of the European Parliament
NGO	Non-Governmental Organisation
NPWJ	No Peace Without Justice
OTP	Office of the Prosecutor
PGA	Parliamentarians for Global Action

RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNDP	United Nations Development Programme
VCLT	Vienna Convention on the Law of Treaties
WEOG	Western Europe and Other Group

EXECUTIVE SUMMARY

On 17 July 1998, negotiations were concluded on the Rome Statute of the International Criminal Court ('Rome Statute')⁽¹⁾, the instrument that established the first permanent International Criminal Court ('ICC', 'the Court') with jurisdiction over genocide, crimes against humanity and war crimes. With this, came the establishment of a system of international criminal accountability with the ICC standing firm at its centre. The Court became operational on the 1st of July 2002 and the Statute currently numbers 122 State Parties to it, with all European Union (EU) Member States having ratified it. Eight situations are currently under investigation by the Court, all of which hail from the African continent.

The European Union and its Member States have been the staunchest supporters of international criminal justice in the last two decades. The ICC system is now at a critical juncture; looking to the future, how can the ICC overcome the current challenges it faces and build upon its successes to date? And more specifically, how can, and should, the EU help the ICC in this respect? To answer these questions, this study critically assesses the EU's performance to date in mainstreaming support for the ICC throughout its policies and the measures taken to implement those policies. By assessing the EU's performance across the full spectrum of its policies, this study identifies gaps and overlaps in those policies that may reduce the capacity of the Union to attain the full potential of effectiveness when supporting the ICC. Based upon an assessment of where the EU has been successful, and where there is room to improve, this study provides recommendations as to concrete policies and measures that the EU can take in order to continue and enhance its support to the ICC in aid of the Court's needs and interests and the system that it represents.

In 2011, the Council adopted Decision 2011/168/CFSP ('the 2011 Decision') that establishes the current framework for EU support for the ICC. It identifies five objectives through the pursuit of which the EU and its Member States can promote universal support for the Statute. These are: to promote the widest possible participation in the Statute (universality); to preserve the integrity of the Statute; to support the independence of the ICC and its effective and efficient functioning; to support cooperation with the ICC; and to support the implementation of the principle of complementarity.

Further to this, the main substantive innovation of the 2011 Decision comes in the form of Article 8. This commits the EU to ensuring that there is consistency and coherence between all its instruments and policies in matters that concern the crimes within the ICC's jurisdiction. Crucially, when doing so, the Decision commits the EU to ensuring that such consistency and coherence exists not only in its external action, but also in respect to its internal activities. Each of the five objectives are of equal concern to all actors that support the ICC – whether they are states or international institutions. It is for this reason that the 2011 Decision is directed at both the EU and its Member States. Moreover, it is an acknowledgement that, because of its very nature, the EU in many respects has to act *through* its Member States – as State Parties to the Rome Statute, acting in their own competences.

However, this study demonstrates that in practice the implementation of the 2011 Decision does not equally engage both the internal and external dimensions at all times. Largely, this is down to the constitutional architecture of the Union. However, for effective mainstreaming, emphasis should be placed on those areas that have been under-utilised and areas of policy that have been under-developed. Although some of the most prominent areas of success in the EU's policies have been in the external dimension of the Union's action, attention should also be directed to identifying those internal areas that would be suitable for further development in order to enhance consistency and coherency in the implementation of the EU's policies.

The measures undertaken by the EU to promote the universality of the Rome Statute have been particularly successful. Measures to encourage Member States, candidate states for accession to the Union, and third states to ratify the Rome Statute, have been an effective and visible way in which the EU has demonstrated

¹ Rome Statute of the International Criminal Court (adopted 17.07.1998, entered into force 1 July 2000) 2187 UNTS 3 (hereafter 'Rome Statute').

its commitment to the Rome Statute system of international justice. This success can be built upon by first, further enhancing the consistency with which the ICC is placed on the agenda in the course of interactions with third states. Second, to further develop initiatives that encourage the full implementation of the Statute within national legal orders once the Statute has been ratified – both within Member States as well as third states. Third, by ensuring that EU initiatives are visible and prominent as well as widely disseminated, action by local, regional and international actors can be catalysed in order to entrench and enhance the goals pursued by the EU.

Whereas the promotion of the integrity, independence, effectiveness and efficiency lies primarily with the ICC, some of the EU's measures have been influential and engagement should continue.

The main finding of this study is that with the institution building process complete, and the ICC fully functional, it is time to consider whether a shift in the EU's attention is needed. The EU support of the ICC is now needed in order to ensure that the Court can work effectively and meaningfully or else it will become 'a very expensive experiment'. Whilst undeniably, the political support ought to remain strong, placing increased emphasis upon assisting the Court in the performance of its everyday operations as well as filling the gaps inherent in the Rome system of justice, would be where the EU can leave its greatest mark. Focusing therefore on technical and financial assistance is the way forward.

Looking to the future, the success with which the EU and its Member States pursue the two objectives of enhancing cooperation and implementing the principle of complementarity will determine their continuing role as the foremost supporter of the Court. While the provision of continued and consistent political support remains necessary, focus must turn to technical and financial forms of assistance.

The study has affirmed that both the EU and its Member States have a significant role to play in regards to enhancing cooperation with the ICC. Member States can continue to enhance cooperation with each other and with the Court in order to efficiently discharge their obligations as State Parties to the Statute. From the EU's perspective, using its political standing as a global actor, it can play an important role in responding to instances of non-cooperation with the Court by third states. Existing examples of effective EU responses to non-cooperation have been the consistent statements by the EU High Representative in response to failure by State Parties to the Statute to comply with their obligations under the Rome Statute to execute arrest warrants issued by the Court against individuals. In addition, the technical support that the EU can offer in order to enhance cooperation with the Court can provide tangible outcomes, for example in the context of witness protection and asset freezing. Similarly, without the EU's financial support of initiatives to promote cooperation, the ICC would have been in a much worse position.

Perhaps the area where the EU can make its greatest contribution yet is that of the implementation of the principle of complementarity, in particular, positive complementarity. The recent adoption of the Complementarity Toolkit is therefore of paramount importance. Besides demonstrating a strong political commitment, it is the funding that is made available to implement positive complementarity that has a transformative effect. However, the technical assistance that the Member States and the EU could provide in that respect remains insufficient at present.

Whilst acknowledging that the implementation of the 2011 Action Plan that operationalizes the 2011 Decision involves a step-by-step process, it would be important to identify and prioritise those aspects of the Action Plan that have not been implemented fully to date. In order to do this, each of the main players might consider the following suggestions:

Given that presidency of the **COJUR-ICC** rotates bi-annually with the Presidency of the Council, there is the potential that different priorities may be pursued, affecting continuity. Consideration should therefore be given to the possibility of making technical and bilateral assistance a standing item on the COJUR-ICC's agenda, in addition to the particular priorities of a given Presidency. Related to this, the **EU Focal Point** and the **EU Network of Focal Points** (envisaged by the 2011 Action Plan but not yet fully implemented) is likely to play an important role in the delivery of such technical and financial assistance. To this effect, consideration should be given to strengthening the **EU Focal Point** through the provision of extra support to enable it to fulfil its mandate effectively and efficiently. Furthermore, updating the list of experts

managed by the Focal Point would bring cross-cutting benefits to the implementation of the EU's policy objectives.

In order to enhance the ability of EU Member States to cooperate with the Court, strengthening of the **Genocide Network** should be considered. In particular, **GENVAL** and other competent institutions should further explore the possibility of widening the list of crimes falling within the competence of the EU under Article 83(1) (Treaty on the Functioning of the European Union (TFEU)) to include the core international crimes as defined in the Rome Statute. This would increase the effectiveness of the measures to ensure internal consistency in the full implementation of the Statute. Further, it would enable the EU to adopt additional measures to cooperate directly with the Court. GENVAL should consider the formulation of an Action Plan and Task Force to increase the efficiency in combating impunity within the EU.

In order to build upon the EU's success in the promotion of the universality of the Statute, the **EEAS and EU Delegations** should ensure that there is consistency in the way that the ICC is incorporated into the fight against impunity in all actions in relation to third states, including but not limited to, ICC clauses and demarches. Full use should also be made of the local knowledge and resources of EU delegations. Building upon this, the **Parliament** should continue to provide political support across all areas, and to make better use of the standing committee structure and individual MEPs who can take a leading role in adopting a more hands on promotion of universality.

Finally, the **Commission** should continue to keep under review the degree to which the ICC and international justice related issues are mainstreamed across the different instruments and to monitor the successful implementation of the 2011 Decision.

The final part of this study turned to consider contemporary challenges facing the ICC – in the form of the current tensions between certain African states and the ICC - and focused on what role there might be for the EU and its Member States in supporting the ICC to meet those challenges. It identified that although some work towards defusing the Africa-ICC tension has been undertaken, (e.g. amendment of the ICC's Rules of Procedure and Evidence) the issue giving rise to these tensions is the Court's proceedings against sitting heads of state. Observing that the primary European actors in this context should be **EU Member States** – as State Parties to the Rome Statute – this study concluded that the key priority should be to continue to pursue open and constructive dialogue with all partners in the African region, while in the course of doing so, ensuring that the integrity of the Statute is preserved.

PART ONE: THE EU AND THE ICC – FRAMING THE ISSUES

1. INTRODUCTION

On 17 July 1998, when delegates at the Rome Conference concluded the negotiations on the Rome Statute, the instrument that they adopted did not ‘merely’ establish the first permanent International Criminal Court with jurisdiction over genocide, crimes against humanity and war crimes (the ‘core international crimes’). Rather, what was agreed upon, whether fully appreciated at the time, was the establishment of a *system* of international criminal accountability, with the ICC standing firm at its centre.

In the intervening years since the Rome Statute’s entry into force in July 2002, the ICC has become a prominent institution on the international legal and political landscape – a focal point for the fight against impunity. By ratifying the Rome Statute, states express their shared commitment to the hopes, values and principles embodied in the Statute’s eleven preambular paragraphs – a shared commitment to international justice and accountability, the rule of law and respect for human rights.

Few at the Rome Conference could have envisaged the impact of the ICC on the international landscape in such a short period of time; proceedings are under way against a sitting head of state and his deputy. Another now has to rearrange his travel plans in order to avoid his arrest and surrender to the Hague-based Court, where a former head of state is currently held in custody. Calls by states and by non-state actors and organisations for referrals to be made by the UN Security Council of situations to the ICC are now a familiar tool in the diplomatic toolbox for responding to mass atrocities⁽²⁾. Discussion regarding international criminal justice, and the ICC, is no longer confined to the specialist journals and among a relatively small – but committed – group of international criminal justice experts.

All this is despite the fact that out of the eight situations currently under investigation by the Court, only three judgments have been delivered, with a third due to be made in early March 2014. All eight situations currently on the Court’s docket hail from the African continent, 12 arrest warrants are still outstanding⁽³⁾ and high-profile cases against heads of state are being suspended⁽⁴⁾. The ICC faces almost a daily barrage of attacks against its legitimacy – claims of bias and selectivity are accompanied by threats of non-cooperation and collective withdrawal from the Rome Statute system⁽⁵⁾.

The European Union and its Member States have been the staunchest supporters of international criminal justice in the last two decades. Their support for the two *ad hoc* Tribunals established in the 1990s by the UN Security Council in response to the atrocities committed in the course of the breakdown of the former Yugoslavia and the genocide in Rwanda has been instrumental to their success⁽⁶⁾. With regard to the support for the establishment of the ICC, the drafting and conclusion of its Statute, and its becoming operational, once more, the EU has stood at the forefront of those developments. The ICC system is now at a critical juncture; looking to the future, how can the ICC overcome the current challenges and build upon the successes to date? The ICC is established as the *permanent* international criminal court – that much is clear. The question is however, how to make that institution effective? And more specifically, how can, and should, the EU and its Member States – as historically one of international justice’s strongest and staunchest

² UNOHCHR, 13.02.2013; Deutsche Welle, 8.09.2013; Federal Authorities of the Swiss Federation, 14.01.2013.

³ Individuals at large are Sylvestre Mudacumura, Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, Ahmad Harun, Ali Muhammed Ali Abd-Al-Rahman, Omar Hassan Ahmad Al Bashir, Abdel Raheem Muhammed Hussein, Simone Gbagbo, Charles Blé Goude, Walter Osapiri Barasa.

⁴ *Prosecutor v Uhuru Muigai Kenyatta*, Notification of the removal of a witness from the Prosecution’s witness list and application for an adjournment of the provisional trial date, 19.12.2013 (ICC-01/09-02/11-875).

⁵ See Part Three, section 12.

⁶ UNSC Res. 827 (UN Doc S/RES/827 (1993)) adopted 25 May 1993; UNSC Res. 955 (UN Doc S/RES/955 (1994)) adopted 8.05.1994.

supporters - help the ICC in this respect? How can, and should, the EU continue its support to the ICC system in the most effective manner?

This study answers these questions. This is achieved through a critical assessment of the EU's performance to date in mainstreaming support for the ICC throughout its policies and activities. Mainstreaming requires that consideration of ICC and international criminal justice related matters is integrated into all areas of decision making and policy development within the EU. This is in order to ensure that the EU's approach towards the ICC system of international criminal justice is consistent, coherent and coordinated in order to maximise its effectiveness. By assessing the EU's performance when implementing its policies in support for the ICC across the full spectrum of its activities, this study identifies gaps and overlaps in the measures adopted that may reduce the capacity of the Union to attain the full potential of effectiveness. Based upon an assessment of where the EU has been successful, and where there is room to improve, this study provides recommendations as to concrete policies and measures that the EU can take according to the needs and interests of the ICC and the system that it represents.

2. METHODOLOGY

The main research method employed for the completion of this study has been desktop research. This involved sourcing all relevant primary and secondary documents emanating from the EU, the ICC and other international and regional organisations as well as reports by Non-Governmental Organisations (NGOs) and academic articles. Once sourced, documents were classified and analysed according to themes. The themes were chosen to reflect the main priority areas of the ICC in conjunction with areas where action has been undertaken by the EU. The emerging issues were assessed also in light of whether they relate to Member States or the EU as a global actor (see explanation of approach in section 5). Although every effort has been taken to be as comprehensive as possible, the study does not claim to have included every document pertaining to each aspect of EU policy. Rather, the approach chosen, guided by the key areas identified both at the ICC as well as at the EU level, has sought to analyse in depth the principal instruments and their application. Other primary and secondary sources were also utilised to provide the necessary background information in aid of in-depth analysis of certain key areas. Once analysed, appropriate recommendations have been produced which shall aid the EU in mainstreaming its support of the ICC.

The research for the study has been supplemented by 15 qualitative telephone interviews as well as over 20 informal face to face discussions with legal practitioners from the ICC, State Parties and Non-State Parties to the Rome Statute, the EU and global, regional and local NGOs. The purpose of conducting interviews was to gain a personal insight, or insider perspective, into the issues at hand. A key issue when conducting qualitative interviews is sampling. As the subject-matter for which opinions are sought is highly specialised, the method of 'elite interviewing' was chosen⁷. Participants were selected on an *ad hoc* basis and recruited through existing contacts within the wider international criminal justice community. The focus was to obtain a sample that would be representative of a number of different viewpoints. Semi-structured interviews were conducted. These were thought to be preferable to fully structured interviews for the purposes of elite interviewing, because they allowed the participants the flexibility to fully articulate their answers and draw attention to issues that they considered to be relevant to the discussion. All participants were sent a consent form to be filled and returned in advance of the interview and a brief FAQ document outlining the purpose of the study and what would be covered in the interview. In order to encourage the most honest responses possible, participants were told that information provided at the interview would remain strictly anonymous. Moreover, all participants were asked whether they would object to having the interview recorded. If they agreed, special software provided for by the University of Nottingham was used, which enabled the recording and facilitated the transcription. In terms of privacy and confidentiality, participants were informed that data, such as audio recordings (if applicable), consent forms, transcripts, and interview

⁷ Richards, 1996; Dexter, 1970; Ostrander, 1993. McDowell, 1998; for an overview see Berry, 2002.

notes will be kept for a maximum of 48 months from the date of the interview. The information will be kept in a secure environment according to data protection guidelines⁽⁸⁾. Compliance with the University of Nottingham's Code of Conduct on data storage as well as the School of Law's ethics checklist was guaranteed.

In order to guarantee the anonymity of all interview participants, some of who may be identifiable if an institutional affiliation is provided, only generic organisational affiliations have been disclosed in the study. However, details of all interviews (notes, and where appropriate, transcripts and audio files) have been appropriately coded and filed and can be verified by the author upon request, subject to the requirements of confidentiality. The study also benefitted from more informal interactions with ICC, State and NGO representatives present at the 12th Session of the Assembly of States Parties (ASP), which took place in the Hague, from the 20th-28th of November 2013. Numerous informal discussions and attendance of relevant side events sponsored by states and NGOs in the course of the ASP, contributed to refining the content of the study. Of particular value were interactions with regard to the ICC-Africa debate which dominated this year's ASP session.

The study was completed in the period between late-November 2013 – late-February 2014.

3. THE ROME STATUTE SYSTEM OF INTERNATIONAL CRIMINAL JUSTICE

3.1 The International Criminal Court

The ICC is a permanent treaty-based international institution established by the Rome Statute which was adopted on 17 July 1998. Sixty days after the 60th ratification of the Statute, on 1 July 2002, the Statute entered into force, establishing a permanent international criminal court with jurisdiction over genocide, crimes against humanity, war crimes (the 'core international crimes', 'core crimes'), and foreseeing the possibility of future jurisdiction over the crime of aggression. The Court's mandate is to investigate and prosecute 'the most serious crimes of international concern' and to hold to account those found to be individually criminally responsible.

To date, 122 states have ratified the Rome Statute, becoming State Parties to the Court. Of these:

- 34 are African;
- 18 are from the Asia-Pacific;
- 18 are Eastern European;
- 27 are from Latin America and the Caribbean;
- 25 are Western European and Other⁽⁹⁾.

While the Rome Statute only binds states that have accepted its jurisdiction through its ratification, the Court holds jurisdiction over both the territory and the nationals of state parties. In doing so, it opens up the possibility that it could investigate situations that involve the nationals of non-State Parties (where that impugned conduct occurred upon the territory of a State Party) or situations that occurred on the territory of non-State Parties (but which involved nationals of State Parties). While existing independently of the United Nations ('UN') Charter regime, under Article 13(b) of the Rome Statute, the Court is able to accept referrals of situations by the UN Security Council acting under its Chapter VII powers. In this scenario, the Security

⁸ Regulation (EC) No45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L8, 12.1.2001, at p.1.

⁹ For a list of ratifications, see UN Treaty Series (Rome Statute), see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en.

Council has the capacity to refer situations to the Court for investigation involving also states that are not party to the Statute.

In addition to opening investigations on the basis of referrals of situations made by the UN Security Council or by States Parties⁽¹⁰⁾, the most striking manifestation of the Prosecutor's independence, is the ability to open an investigation *proprio motu*, that is on her own initiative based upon information received suggesting that crimes within the Court's jurisdiction have occurred⁽¹¹⁾.

The ICC is currently conducting investigations into eight country situations. The investigations into situations in the Democratic Republic of Congo ('DRC'), Uganda, the Central African Republic ('CAR') and Mali are all situations referred to the Court by the situation state itself⁽¹²⁾. In contrast, two situations under investigation by the Court have been opened using the Prosecutor's *proprio motu* powers – those of Kenya and Côte d'Ivoire. The remaining situations, concerning Libya and Sudan, both states not being states party to the Rome Statute, are investigations pursuant to a referral to the Court by the UN Security Council under its Chapter VII power.

3.2 The Principle of Complementarity – The ICC System of International Criminal Justice

Central to the Rome Statute system of international criminal justice is the principle of complementarity. As Article 17 of the Rome Statute stipulates, situations and cases before the Court are only admissible when states with concurrent jurisdiction over the situation are unwilling or unable genuinely to conduct investigations into and prosecution of suspected international crimes within the Court's jurisdiction. Accordingly, the ICC is conceived as a 'court of last resort', activated only when national proceedings are not forthcoming. Thus, the competence of the ICC is not meant to displace national authorities. By only granting the ICC the ability to exercise its jurisdiction in the residuary of situations where states have failed, the primary responsibility to attain those objectives must lie with states. Therefore, on the face of it, the principle of complementarity might appear to be a simple acknowledgement of the primacy of the state and the respect for state sovereignty. Observing and applying the principle of complementarity ensures that the ICC does not overstep the boundaries of its competence negotiated by the drafters of the Rome Statute and consented to by ratification. However, the implications of the principle of complementarity are much more complex.

From a systemic perspective, by locating the primary responsibility for the investigation and prosecution of international crimes as existing in the hands of states, the principle of complementarity strengthens the norm of international criminal justice by developing a 'culture of accountability'⁽¹³⁾. It is commonplace to talk of the catalytic effect by which the principle of complementarity operates. Indeed, the first Prosecutor of the ICC stated in 2003 that a measure of the ICC's success would be the lack of proceedings before the Court. This is not because no international crimes are being committed, but rather because states are complying fully with their duties to conduct effective investigations and prosecutions⁽¹⁴⁾. States, in order to avoid being subject to investigation by the ICC, and suffering the political and diplomatic disrepute that might thereby arise, may initiate their own investigations and prosecutions into the impugned situations in order to bar the Court from exercising its jurisdiction over the case.

¹⁰ Article 13(b) and Article 14 Rome Statute.

¹¹ Article 15 Rome Statute.

¹² ICC-OTP, Press Release 19.04.2004; ICC-OTP, Press Release 29 January 2004; ICC-OTP, Press Release 7.01.2005; ICC-OTP, 13.07.2012. However, at the time of writing, the Office of the Prosecutor announced the intention to open a preliminary investigation into the ongoing conflict in the Central African Republic and in light of the reports of atrocities being committed in the course thereof. This preliminary investigation is unrelated to the existing situation referred by the CAR authorities in 2004 (ICC, Press Release 7.02.2014).

¹³ ICC-OTP, 'Report on Prosecutorial Strategy', 14.09.2006, at p.4.

¹⁴ Statement made by Luis Moreno-Ocampo, Chief Prosecutor, Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, 16.06.2004, The Hague.

From a domestic perspective, the internalisation of the responsibility to investigate and prosecute crimes under international law can contribute to the process of strengthening, if not building, a domestic culture of justice and the rule of law. It is a reality that international crimes are committed in the context of systematic and systemic violence where there has been a partial or complete breakdown of law and order. The process of ensuring criminal accountability for serious and mass violations of human rights can play an important role in the process of transitional justice. Ultimately concerned with the facilitation of the process of societal reconciliation, transitional justice denotes the various policies and strategies adopted by societies in transition to address gross human rights violations that occurred in the course of periods of conflict, authoritarianism or other forms of violence and social unrest.

In many cases, societies will lack the capacity – resources, infrastructure and manpower – to respond to situations of potential mass criminality. State law enforcement agencies and judicial authorities may not have the technical expertise necessary to conduct large scale complex criminal investigations, potentially also involving a high number of both victims and perpetrators. The size of the investigations and volume of evidence can be overwhelming for even the most well-resourced justice systems. But quite aside from the legal and factual complexity of international criminal investigations are the practical elements – war torn countries or regions may lack the basic physical infrastructure necessary for a functioning justice system – courtrooms, detention centres and prisons. Further, societies transitioning out of periods of authoritarianism and internecine violence may lack trust in the very justice and security institutions that would be responsible for delivering criminal accountability given the role that those institutions can often play in maintaining authoritarian regimes and in systematic violence.

However, where the situation is appropriate, it is important to encourage local ownership over criminal justice for atrocities in order to strengthen the contribution that international criminal justice can play to societal reconciliation. The proceedings of international judicial institutions of international criminal justice – the ICC, the two *ad hoc* tribunals for the former Yugoslavia and Rwanda, and even the proceedings of hybrid institutions such as the Special Court for Sierra Leone ('SCSL') and the Special Tribunal for Lebanon ('STL') are geographically and temporally remote from the societies that experienced and were victim to the impugned violence. By encouraging local justice rather than international justice – complementarity assists in making the process of justice visible, so that it is both done and seen to be done by those directly affected by the wrongdoing.

From a practical perspective, it is important to acknowledge the limitations to the ICC's capacity. Given the impossibility for the Court to shoulder responsibility for the investigation and prosecution of every act of core international criminality, by encouraging states to step up to their duty, the principle of complementarity alleviates the pressures upon the ICC as an institution of finite resources and capacity. Therefore, the principle of complementarity operates to reduce the 'impunity gap', both between the situations that are subject to investigation by the ICC and those that are not, and between those individuals who are prosecuted by the Court and those perpetrators who are not¹⁵.

The principle of complementarity, by engaging both national authorities and the Court in the pursuit of the objectives of universal accountability, helps to manage the workload of the Court. Further, where national judicial systems have the capacity to conduct effective investigations and prosecutions and there exists the political will to enable those proceedings to take place and to do so in accordance with the rule of law, national proceedings, particularly those undertaken by the situation-state, are likely to be more efficient with a greater chance of success. For example, national authorities have easier and more direct access to evidence and witnesses and do not face the logistical challenges faced by the ICC or by third states that are not only geographically more remote, but which rely on the full cooperation of the situation state to access

¹⁵ Report of the Bureau on Stocktaking: Complementarity' (ICC-ASP/8/51) 18.03.2010 at para.3 (hereafter 'Report of the Bureau on Stocktaking: Complementarity').

that evidence and those witnesses⁽¹⁶⁾. However, the importance of national proceedings is not just concerned with domestic proceedings by situation states. By incorporating the definitions of the core international crimes into domestic law in order to grant national courts jurisdiction over those crimes, the courts of all states can be engaged in the implementation of complementarity.

Accordingly, while it is understandable to focus upon the establishment and functioning ICC as institutional milestones in the pursuit of accountability for the core international crimes, wherever committed and perpetrated by whomever, the ICC is a symbol of a much wider system of accountability. Properly understood, the success of the ICC as but one tool in the fight against impunity is dependent on the strength and success of the wider system within which it operates. Therefore, to be an effective supporter of the ICC requires a full commitment to the entire system of justice that the Court envisages.

4. THE EUROPEAN UNION AND THE ICC SYSTEM OF INTERNATIONAL CRIMINAL JUSTICE

Since the reorientation of the global political landscape following the end of the Cold War, the EU has become an increasingly prominent actor in international affairs. One area in which it has dominated throughout this period has been the development of a nascent system of international criminal justice. Many of the values that underpin the institutions of international criminal justice - fighting impunity and the pursuit of justice, respect for human rights, consolidation of the rule of law, and preserving and strengthening international peace and security - are commitments that lie at the heart of the European Project and are shared by the Union's Member States⁽¹⁷⁾. As the EU sought to foster a stronger European identity, its support for the institutions of international criminal justice – first the *ad hoc* tribunals established by the UN Security Council in 1993⁽¹⁸⁾ and 1994⁽¹⁹⁾, and later the ICC – has played an important role in the recognition of the EU as a global actor, by third states, non-state actors, other international organisations and institutions, and even among the EU Member States themselves⁽²⁰⁾. In sum, as it has been eloquently observed, for the EU, 'itself a hybrid of an emerging polity and an international organization, the development of the ICC as an issue of foreign policy has enhanced its role as an international actor in its own right'⁽²¹⁾.

4.1 The Evolution of the EU's Framework to Support the ICC System

In anticipation of the Rome Statute's entry into force, in 2001 the EU declared its commitment to the fight against impunity by virtue of Common Position 2001/443/CFSP⁽²²⁾, which established the basic blueprint for the framework governing EU-ICC relations. Such Common Positions adopted by the Council declare the Union's policy on a particular theme. Focusing upon early entry into force of the Rome Statute, the first priority established by the 2001 Common Position was to promote the matter of ratification in its relations with third parties, and by assisting them in the implementation of the Statute in domestic law (for further elaboration, see Part Two, section 6).

¹⁶ See ICC-OTP, 'Paper on some policy issues before the Office of the Prosecutor', September 2003, at p.4. Other reasons that suggest that local proceedings are more favourable to the remoteness of international proceedings are discussed at Bergsmo M., Bekou O. and Jones A., 2011 at p.800.

¹⁷ From the perspective of the EU, see Articles 2 and 3, Consolidated Version of the Treaty on European Union [2010] OJ C 83/13 (hereafter, TEU).

¹⁸ UNSC Res 827 (25.05.1993) UN Doc S/RES/827.

¹⁹ UNSC Res 955 (8.05.1994) UN Doc S/RES/955.

²⁰ See Groenleer M. and Riiks D., 2009 at p.179.

²¹ Groenleer M. and Riiks D., 2009 at p.168.

²² Council Common Position 2001/443/CFSP of 11.06.2001 on the International Criminal Court, OJ L 155, 12.6.2001, at p.19 (hereafter 'Council Common Position 2001/443/CFSP').

By 2003, having been amended in 2002 (upon the Statute's entry into force)⁽²³⁾ and again in 2003⁽²⁴⁾, the EU Common Position on the ICC had developed into a more comprehensive policy framework for EU and Member State action. Continuing to focus upon universal ratification (primarily among third states) and the implementation of the Rome Statute by Member States as State Parties to the Statute, the Common Position included measures to promote the integrity of the Statute - to protect the fragile new system for international accountability from actions that could undermine its *raison d'être*.

Accompanying the Common Positions were Action Plans, the first adopted in 2002, pursuant to the call by the European Parliament for the adoption of a 'concrete plan of action' in order to 'promote the ratification of the Rome Statute legislation by the largest possible number of States'⁽²⁵⁾. In 2004, a revised Action Plan was adopted based upon the strengthened provisions of the 2003 Common Position⁽²⁶⁾. This Plan was 'focused on the initial period of the effective functioning of the ICC' and concentrated upon three issues: 1) coordination of EU activities, 2) universality and integrity of the Rome Statute and 3) independence and effective functioning of the ICC⁽²⁷⁾. This formed the principal basis for the EU's engagement with ICC related matters until 2011. The emphasis was squarely upon supporting the Court in establishing and securing its jurisdiction within the international order.

By 2010 the Court was established and operational, and attention – both at the ICC and in the EU - shifted to making the Court effective. At the first Review Conference of the Rome Statute of the International Criminal Court, held in Kampala, Uganda, ('Kampala Review Conference') in 2010, State Parties to the Rome Statute took the opportunity to engage in a stocktaking exercise, to reflect upon the successes of the Court and the challenges it faced following the first years of its operation⁽²⁸⁾. Reflection focused around four themes, each having a direct bearing on the Court's effective pursuit of its mandate. Those four priorities were complementarity, cooperation, victims and affected communities and peace and justice⁽²⁹⁾. As was observed by the representative of Spain, speaking on behalf of the European Union, these four priorities underlined the role of the ICC as part of a system of international criminal justice and the functions it serves therein⁽³⁰⁾. Those functions are to fight impunity, to serve as a catalyst of international criminal justice, and further, to prevent and deter the commission of international crimes⁽³¹⁾. The EU and its Member States, to highlight their continuing commitment to the ICC and its mission, issued a pledge to:

- Continue to promote the universality and preserve the integrity of the Rome Statute;
- Emphasise the fight against impunity as a core value in the course of entering into agreements with third states;
- Provide financial support to the ICC, civil society and third country partners;

²³ Council Common Position 2002/474/CFSP of 20.06.2002 amending Common Position 2001/443/CFSP, OJ L 164, 22.6.2002, at p.1 (hereafter 'Council Common Position 2002/474/CFSP').

²⁴ Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court OJ L 150, 18.6.2003, at p. 67 (hereafter 'Council Common Position 2003/444/CFSP').

²⁵ European Parliament resolution of 28.02.2002 on entry into force of the Statute of the International Criminal Court (P5_TA(2002)0082) OJ C 293, 28.11.2002, at p. E/88, at para.5.

²⁶ Council of the European Union, Action plan to follow up on the Common Position on the International Criminal Court, 2004 (hereafter 'Action Plan, 2004').

²⁷ Action Plan, 2004, at p.1.

²⁸ Opening remarks by the President of the Assembly, Ambassador Christian Wenaweser, 30.05.2010, Kampala (Uganda).

²⁹ Opening remarks by the President of the Assembly, Ambassador Christian Wenaweser, 30.05.2010, Kampala (Uganda).

³⁰ Declaración realizada en nombre de la Unión Europea por la Excm. Sra. Dña. María Jesús Figa López-Palop Subsecretaria de Asuntos Exteriores y de Cooperación del Reino de España en el debate general de la Conferencia de Revisión del Estatuto de Roma de la Corte Penal Internacional, 30.05.2010, Kampala (Uganda).

³¹ Declaración realizada en nombre de la Unión Europea por la Excm. Sra. Dña. María Jesús Figa López-Palop Subsecretaria de Asuntos Exteriores y de Cooperación del Reino de España en el debate general de la Conferencia de Revisión del Estatuto de Roma de la Corte Penal Internacional, 30.05.2010, Kampala (Uganda).

- And update and review the EU instruments in support of the outcomes of the Review Conference⁽³²⁾.

In 2011, the Council adopted Decision 2011/168/CFSP ('the 2011 Decision') implementing the commitments made in Kampala. Along with the Action Plan adopted in order to execute the Decision (the '2011 Action Plan')⁽³³⁾, these documents form the principal basis of the EU's current framework for engagement with the ICC system of international criminal justice.

4.2 Current Framework

While the 2011 Decision shares the same overall aim as the previous Common Positions adopted by the Council – to advance universal support for the Rome Statute⁽³⁴⁾ – the 2011 Decision identifies with greater precision how the EU should pursue that aim through its activities. The 2011 Decision identifies five objectives through the pursuit of which the EU and its Member States can promote universal support for the Statute⁽³⁵⁾. These are:

- To promote the widest possible participation in the statute (universality);
- To preserve the integrity of the statute;
- To support the independence of the ICC and its effective and efficient functioning;
- To support cooperation with the ICC;
- To support the implementation of the principle of complementarity.

Throughout the course of Part Two, it will become apparent that the EU has been undertaking activities with the aim, and intended effect, of pursuing each one of those five objectives since the outset of institutional support for the ICC system in 2001. The objectives of effectiveness, independence and cooperation all explicitly feature in the EU's previous strategies for its support for the ICC⁽³⁶⁾. Even the objectives of 'integrity', 'efficient functioning', and 'complementarity', which may be considered 'new' can be seen as having been pursued through policies adopted by the Council prior to the adoption of the 2011 Decision.

The main substantive innovation of the 2011 Decision comes in the form of Article 8. This commits the EU to ensuring that there is consistency and coherence between all its instruments and all its policies in matters that concern the international crimes with the ICC's jurisdiction⁽³⁷⁾. Crucially, when doing so, the Decision commits the EU to ensuring that such consistency and coherence exists not only in its external action, but also in respect to its internal measures⁽³⁸⁾.

Running alongside the evolution in the EU's approach to the ICC through its Common Positions and most recently, the 2011 Decision, the EU and its Member States have adopted a number of initiatives that are designed to, or can be used to, assist Member States discharge their responsibilities within the Rome Statute system for international criminal justice. Council Decision 2002/494/JHA provided for the establishment of a network of national contact points for the exchange of information concerning the investigation and prosecution of genocide, crimes against humanity and war crimes ('the Genocide Network') including, but

³² Declaración realizada en nombre de la Unión Europea por la Excm. Sra. Dña. María Jesús Figa López-Palop Subsecretaria de Asuntos Exteriores y de Cooperación del Reino de España en el debate general de la Conferencia de Revisión del Estatuto de Roma de la Corte Penal Internacional, 30.05.2010, Kampala (Uganda).

³³ Council of the European Union, Action Plan to follow-up on the Decision on the International Criminal Court, Brussels, 12.07.2011 (12080/11) (hereafter Action Plan, 2011').

³⁴ Article 1(2) Council Decision 2011/168/CFSP of 21.03.2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP, OJ L 76, 22.3.2011, at p.56 (hereafter 'Council Decision 2011/168/CFSP').

³⁵ Article 1(2) Council Decision 2011/168/CFSP.

³⁶ Articles 1-5 Council Common Position 2003/444/CFSP.

³⁷ Article 8 Council Decision 2011/168/CFSP.

³⁸ Article 8 Council Decision 2011/168/CFSP.

not limited to, those crimes within the jurisdiction of the ICC⁽³⁹⁾. The Genocide Network, can be seen as a key structure through which EU Member States can strengthen the system of international criminal justice and accountability embodied in the Rome Statute. If used to its potential, it can enhance the effectiveness and efficiency of action taken by EU Member States to ensure that the EU area is not a safe haven for those responsible for international crimes. Accordingly, by the Review Conference in 2010 and through the commitments to which the EU had pledged itself, the EU had already established mechanisms that address the new areas of priority identified in the course of the stocktaking exercise.

Having established the basic legislative framework through which the EU provides the ICC with support, the following sub-section will introduce the structures involved in its implementation and their interaction.

4.3 Institutional Mainstreaming – the Players and their Coordination

Acting upon the recommendation in the 2011 Decision⁽⁴⁰⁾, the Council amended its Plan of Action in order to reflect the newly defined objectives set forth in the 2011 Decision. It also provided an opportunity to update the Plan in light of the institutional reforms introduced by the Lisbon Treaty in 2010⁽⁴¹⁾. While mainstreaming requires that all actors within an institution share the responsibility to ensure that support for the ICC is implemented, the following section will identify the principal actors responsible for mainstreaming support for the ICC in all areas of Union decision making.

4.3.1 Council

Through its different configurations, the Council of the European Union plays an important role in establishing the EU's policy agenda in terms of its support for the ICC and the Rome system of justice. Sections 4.3.2. and 4.3.3. will discuss two of the main structures within the Council that are responsible for the development of EU policy on ICC-related matters. However, in addition to establishing policy, statements made by the Presidency of the Council in support of the ICC and international criminal justice are a powerful demonstration of the EU's commitment to the ICC system and the values it embodies. They constitute a principal tool through which the EU can encourage third states and organisations to share in that commitment to international criminal justice, and where appropriate, fulfil their obligations to cooperate with the ICC under the Rome Statute.

4.3.2 COJUR-ICC

COJUR-ICC, a sub-group within the COJUR working group of the Council is responsible for establishing the common EU approach to matters concerning international criminal law from the perspective of the Council in the context of the CFSP. Established in May 2002 in light of the increased workload in matters relating to the ICC and international criminal law, COJUR-ICC, and before it, COJUR, are responsible for formulating the Common Positions and their Action Plans, and most recently, the 2011 Decision. According to the most recent Action Plan in 2011, COJUR-ICC meets at least 4-5 times a year, in addition to once in preparation for the annual ICC ASP⁽⁴²⁾. The sub-group coordinates approaches towards the ICC and related matters between Member States, as well as coordinating initiatives with other Council Working Parties in order to mainstream support for the ICC across all relevant policy activity. Also meeting regularly with representatives of civil society, the establishment and operation of the COJUR-ICC, comprised of ICC and international criminal justice government-experts of EU Member States, was identified by one interviewee as an instance of EU best practice that other regions could look to for an example of an effective structure to promote regional

³⁹ Article 1 Council Decision 2002/494/JHA of 13.06.2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, OJ L 167, 26.6.2002, at p.1 (Hereafter, 'Council Decision 2002/494/JHA').

⁴⁰ Council Decision 2011/168/CFSP, preambular paragraph 16.

⁴¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community, signed as Lisbon, 13.12.2007, OJ C 306, 17.12.2007, at p.1 (hereafter 'Lisbon Treaty').

⁴² Action Plan, 2011, at p.3-4.

coordination and cooperation⁽⁴³⁾. Accordingly, the COJUR-ICC is a principal actor in the formulation of EU policy in regard to the ICC and ICC related matters.

4.3.3 GENVAL

The Working Party on General Matters Including Evaluation (GENVAL) is the Council Working Party addressing and evaluating EU activities within the area of police and judicial cooperation on criminal matters. Accordingly, the functioning of the genocide network, established by Council Decision 2002/494/JHA falls within the remit of this working party.

4.3.4 Parliament

Through its resolutions, the European Parliament has provided much of the political impetus behind the EU's support for the ICC and international criminal justice. More broadly, the Parliamentary Committees – in particular, the Committee on Foreign Affairs ('AFET') and the sub-Committee on Human Rights ('DROI') – consider and recommend legislative proposals concerning matters relating to international criminal justice and the EU's support for the ICC which are then put to the plenary for consideration. In addition, such Committees prepare specialised reports into specific areas of EU policy, which often accompany proposals for resolutions⁽⁴⁴⁾. In order to mainstream support for the ICC across the EU's policies, it is necessary to mainstream ICC and international criminal justice related issues across all appropriate Parliamentary Committees. While support for the ICC will primarily fall within the mandate of the AFET and DROI, where appropriate ICC and international criminal justice related issues may also fall within the competence of other Committees. For example, these might include Legal Affairs ('JURI') and Civil Liberties, Justice and Home Affairs ('LIBE'), in order to ensure the consistency of the mainstreaming of support for the ICC across both the internal and external dimensions⁽⁴⁵⁾.

Individual and groups of Members of the European Parliament ('MEPs') also play an important role in advancing and demonstrating the EU's commitment to international criminal justice and the ICC. The informal 'Friends of the ICC' group of MEPs adopts a particularly proactive role in advancing support for the ICC, while individual MEPs have worked to promote cooperation with the Court in their capacity as European Parliamentarians⁽⁴⁶⁾. These individual MEPs and groups of MEPs play an important role in building support within the Parliament for particular initiatives, for example by convening meetings between Parliamentarians and external experts in order to explore the options that particular ICC related issues raise⁽⁴⁷⁾.

As the only directly elected institution of the EU, the demonstrated commitment to international criminal justice and the values embodied in the Rome Statute by the European Parliament is a particularly powerful statement of European commitment to the ICC.

⁴³ Telephone interview #11 with former representative of global NGO with experience as a successful EIDHR applicant, 14.02.2014.

⁴⁴ e.g., see the European Parliament resolution of 17.11.2011 on EU support for the ICC: facing challenges and overcoming difficulties (P7_TA(2011)0507) OJ C 153, 31.5. 2012, at E/115 (hereafter, 'European Parliament resolution P7_TA(2011)0507') and European Parliament, Report of the Committee on Foreign Affairs, 'EU Support for the ICC: facing challenges and overcoming difficulties' (A7-0368/2011), 20.10.2011 (hereafter 'Report of the Committee on Foreign Affairs (A7-0368/2011)').

⁴⁵ For more discussion on the importance of this consistency, see section 5).

⁴⁶ e.g. Schaake, 2012.

⁴⁷ e.g. The meeting convened by Helmut Scholz MEP, member of the Parliamentarians for Global Action Group in the European Parliament and member of the informal 'Friends of the ICC' group' in November 2013, to discuss initiatives to promote wider ratification of the Kampala Amendments on the crime of aggression (for more details, see Part Two, section 6.3.1.) See PGA, 28.11.2013.

4.3.5 Commission

According to the 2011 Action Plan, the role of the Commission is the 'financing of relevant programmes under the EU budget along the lines of the Decision'⁽⁴⁸⁾. As will become clear throughout the following Part, the EU not only provides direct financial assistance to the Court, but also provides financial assistance to NGOs and civil society organisations (CSOs) working either to promote and support the ICC system directly, or that operate to build national capacity. Accordingly, the Commission plays an essential role in facilitating EU financial and technical support to the ICC and the ICC system of international criminal justice. While it is possible for the Commission to support the ICC through a number of different financial instruments, sections 4.3.10. and 4.3.11. will examine the two most prominent.

4.3.6 Genocide Network Secretariat

Whereas COJUR-ICC (along with the EU Focal Point, section 4.3.7.) is responsible for coordination between Member States on international criminal justice issues in the framework of foreign or external relations, the Genocide Network Secretariat hosted by Eurojust provides coordination and support between Member States with regard to the investigation and prosecution of international crimes by national authorities. The Secretariat provides support to the European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, established in Council Decision 2002/494/JHA (for further details, see Part Two, section 9.2.2.).

4.3.7 EU Focal Point

Established by the 2004 Plan of Action adopted pursuant to the 2003 Common Position, the EU Focal Point was mandated to ensure the efficient co-ordination and consistency of information and to prepare EU programmes for the implementation of the 2003 Decision⁽⁴⁹⁾. Created jointly by the General Secretariat of the Council and the Commission, the EU Focal Point is the point of reference within the EU for all matters relating to EU support for the ICC. Following the constitutional reforms introduced by the Lisbon Treaty, the EU Focal Point sits within the European External Action Service and is responsible for coordinating and mainstreaming international criminal justice across all the EU's external action policies and activities. Accordingly, the Focal Point plays a critical role in ensuring the effectiveness of EU support for international criminal justice, in practice. Working with COJUR-ICC, the EU Focal Point shares responsibility for coordinating between Member States on matters relating to international criminal justice in the context of foreign or external affairs.

4.3.8 EEAS and EU Delegations

One of the main objectives of the legal and institutional reforms introduced by the Lisbon Treaty, including the creation of the European External Action Service ('EEAS') was to 'bring increased consistency to our external action'⁽⁵⁰⁾. Accordingly, the success with which the EU mainstreams support for the ICC system in its activities is largely determined by the success with which the EEAS has implemented the EU's policies on international criminal justice and ICC related matters in the course of their activities in all areas of the common foreign and security policy ('CFSP').

The 2011 Action Plan provides some indication as to the responsibilities of the EEAS in the process of mainstreaming support for international criminal justice and the ICC in all areas of the EU's external action – not only in the context of thematic and regional directorates, but also crisis management structures and missions under the common security and defence policy⁽⁵¹⁾. Examples of actions to be undertaken by the EEAS include the inclusion of the theme of ICC and international criminal justice related issues in human rights strategies and country strategies, the provision of relevant training to EU staff and Member States

⁴⁸ Action Plan, 2011, at p.6.

⁴⁹ Action Plan, 2004, at p.2 and Annex.

⁵⁰ Council of the European Union, Presidency Conclusions', Brussels, 14.12.2007 (16616/07).

⁵¹ Action Plan, 2011, at p.6.

officials and to make experts on specific relevant international criminal justice issues available to EU delegations⁽⁵²⁾. On the ground, in third states, EU delegations are required to monitor the cooperation with the ICC by those states with obligations to do so under the Rome Statute – such as situation countries and States Parties⁽⁵³⁾ and to provide direct support to the Court on the ground⁽⁵⁴⁾.

4.3.9 EUSRs and the High Representative

The regional and thematic EU Special Representatives, along with the High Representative play an essential role in promoting and implementing the EU's commitment to international criminal justice at a high level. Their ability to raise justice matters in the course of high level dialogues with third states and organisations mean that they can play an important role in strengthening the impact of the EU's political initiatives. Every regional EUSR has an important role to play in promoting the universality of the Statute and the values that it embodies, however specific Representatives, such as the Special Representative for the African Union, can play a particularly important role in regions where the ICC is particularly active, with regard to assisting partners to cooperate with the Court and fulfil their responsibilities within the system of international criminal justice.

4.3.10 The European Instrument for Democracy and Human Rights ('EIDHR')

Replacing the European Initiative for Democracy and Human Rights in 2007⁽⁵⁵⁾, the EIDHR is the primary financial instrument through which the EU contributes to the strengthening of democracy, the rule of law and the respect for human rights and fundamental freedoms within the framework of the Union's external relations. In terms of its strategy for the period 2011-2013, support for the ICC and international criminal justice principally falls within the objective of 'supporting and strengthening international and regional frameworks for the protection and promotion of human rights, justice, the rule of law and the promotion of democracy'⁽⁵⁶⁾. The EIDHR enables the EU to provide financial support to CSOs engaged in activity that is designed to strengthen and support the Rome Statute system for international criminal justice at the grassroots level. The work that such organisations engage varies and include political initiatives to promote the values, principles and objectives of international criminal justice and shared by the ICC – both within civil society but also among political decision makers at the national or regional level. The other umbrella of activities is technical support and capacity building that enables states and civil society to participate in the system of international criminal justice – either by strengthening national capacity to investigate and prosecute international crimes, or to cooperate with the ICC.

4.3.11 Instrument for Stability

The objective of the EIDHR is to develop, deepen, and strengthen commitment to – and the realisation of – democracy and human rights, and as such takes a medium to long term view. In contrast, the Instrument for Stability is a more flexible instrument that includes a capacity to respond to rapidly evolving situations⁽⁵⁷⁾. Under Article 3(1) of the Instrument, the Union can provide technical and financial assistance 'in response to a situation of urgency, crisis, or emerging crisis, a situation posing a threat to democracy, law and order, the protection of human rights and fundamental freedoms, or the security and safety of individuals, or a situation threatening to escalate into armed conflict or to severely destabilise the third country or countries concerned'⁽⁵⁸⁾. Envisaged technical and financial assistance within the scope of this mandate includes support to the development of state institutions in accordance with international law, the rule of law and

⁵² Action Plan, 2011, at p.6.

⁵³ Action Plan, 2011, at p.6.

⁵⁴ Telephone interview #10 with ICC official, 13.02.2014.

⁵⁵ Regulation (EC) No 1998/2007 of the European Parliament and of the Council of 20.12.2006 on establishing a financial instrument for the promotion of democracy and human rights worldwide, OJ L 386, 29.12.2006, at p.1.

⁵⁶ European Instrument for Democracy and Human Rights (EIDHR) Strategy Paper 2011-2013, 21.04.2010 (C(2010)2432).

⁵⁷ Regulation (EC) No 1717/2006 of the European Parliament and of the Council of 15.11.2006 establishing an Instrument for Stability, OJ L 327, 24.11.2006 at p.1 (hereafter 'Regulation (EC) No 1717/2006').

⁵⁸ Article 3(1), Regulation (EC) No 1717/2006.

good governance (including capacity building for law enforcement and judicial authorities)⁽⁵⁹⁾, support for initiatives to promote conflict resolution, mediation and dialogue, and also 'support for international criminal tribunals and ad hoc national tribunals'⁽⁶⁰⁾.

Accordingly, the Instrument for Stability is an important and flexible tool through which the Union can provide concrete support and assistance to strengthen the immediate effectiveness of the ICC system of international criminal justice in the short and medium term.

To reiterate, while all EU institutions and actors have a role to play in ensuring that the EU's support for the ICC is mainstreamed across their policies and activities, the aforementioned players are those that directly or indirectly are envisaged to play an important role in facilitating that mainstreaming process.

5. EXPLANATION OF APPROACH

The following analysis is designed to assess the success with which the EU has effectively mainstreamed its support for the ICC system of international criminal justice across its policies and their implementation. The objective behind mainstreaming support for the ICC is to ensure that the overall approach taken by the EU is consistent and coherent. Article 13(1) of the Treaty on European Union (TEU) requires that the Union 'ensures the consistency, effectiveness and continuity of its policies and actions'⁽⁶¹⁾ and further Article 21(3) TEU specifically requires consistency and across all areas of EU external action and 'external aspects of its other policies'. Consistency (the absence of contradiction between policies and actions⁽⁶²⁾) and coherence ('to guarantee that policies arrive at synergetic effects'⁽⁶³⁾) is essential in order to obtain effectiveness of the policies and actions⁽⁶⁴⁾. This has been acknowledged by the EU in the Strategic Framework and Action Plan for Human Rights and Democracy in 2012⁽⁶⁵⁾.

The 2011 Decision correctly identified the five primary areas of concern to the ICC – universality, integrity, independence, effectiveness and efficiency, cooperation and complementarity. These are of equal concern irrespective of the international actors involved – whether they are states (both State Parties and non-State Parties, EU Member States or third states) or international institutions (such as the EU). It is for this reason that the 2011 Decision is directed at both the EU and its Member States. Moreover, it is an acknowledgement that because of its very nature, the EU in many respects has to act *through* its Member States – as State Parties to the Rome Statute, acting in their own competences.

The activities and measures that the EU undertakes pursuant to these five areas of concern are drawn from a variety of instruments, some adopted in the internal sphere, and some in the external. This fragmented approach is a consequence of the EU's constitutional structure. However, as the EU has pursued greater integration, the distinction between the internal and external aspects of its actions is diminishing. In practice, it is becoming increasingly untenable to think about the 'internal' or 'external' dimension in isolation – the activities that the EU undertakes in the context of one dimension are often inextricably linked to the other, particularly when Member State activity is informed not only by Union policies but by common obligations derived under the Rome Statute system.

Before the conclusion of the Lisbon Treaty and the implementation of its constitutional reforms, it was hoped that the abolition of the traditional pillar structure would enable a more coherent and workable

⁵⁹ Article 4(1)(a), Regulation (EC) No 1717/2006.

⁶⁰ Article 3(2), Regulation (EC) No 1717/2006.

⁶¹ Article 13(1) TEU.

⁶² Organisation and Functioning of the European External Action Service: Achievements, Challenges and Opportunities, February 2013, EXPO/B/AFET/2012/07 at p.16 (hereafter 'EXPO/B/AFET/2012/07').

⁶³ EXPO/B/AFET/2012/07 at p.16.

⁶⁴ EXPO/B/AFET/2012/07 at pp.16-17.

⁶⁵ Council of the European Union, EU Strategic Framework and Action Plan for Human Rights and Democracy, Luxembourg, 25.06.2012 (11855/12) (hereafter 'EU Strategic Framework').

pattern of EU action in the external sphere⁽⁶⁶⁾. While in principle, the consolidation of EU treaties has opened the door to the potential for a more integrated approach towards delivering EU support to the ICC, that potential is yet to be fully realised⁽⁶⁷⁾. Rather, the current framework for support - predicated upon a combination of the 2011 Decision (adopted under the CFSP) and Member State activity to in observation of their Rome Statute obligations, largely reflects a continuation of the pre-Lisbon approach.

The purpose of this study is to assess the extent to which this current framework for EU support for the ICC nevertheless facilitates consistency, coherence – and therefore its effectiveness. The following thematic framework borrows from the five aforementioned areas of concern to the ICC that were also identified as the objectives by the EU in its 2011 Decision. As the 2011 Decision itself stipulates:

The Union shall ensure consistency and coherence between its instruments and policies in all areas of its external and internal action in relation to the most serious international crimes as referred to in the Rome Statute⁽⁶⁸⁾.

In order to assess the consistency and coherence in the EU's approach to each theme, this study will assess the EU's activities both in the external and the internal sphere. Consistency has three dimensions, all of which are essential to the effectiveness of the EU approach as a whole:

- 'internal-internal': within the Union there must be consistency between EU Member States;
- 'internal-external': the EU must uphold the same values and principles that it promotes in its policies with regards to third states;
- 'external-external': the EU must treat all third states alike – in that hold them to the same expectations and values⁽⁶⁹⁾.

While the policies adopted might differ depending on what is appropriate for each context, it is only by adopting this approach that a true assessment can be made of the success with which the EU has mainstreamed its support for the ICC, to identify inconsistencies and how they may be remedied.

Accordingly, Part Two will assess the performance of the EU as a whole in supporting the ICC – or more accurately the ICC *system* - taking each of the five thematic areas in turn. Each section will first provide an explanation of what each area of concern entails from the perspective of the ICC system of international criminal justice. It will then assess the measures that the EU takes – first in the context of its Member States, and then in terms of its external action, in order to contribute support in those fields.

⁶⁶ Antoniadis A. and Bekou O., 2007, at p.626.

⁶⁷ Cameron, August 2013, at p.5.

⁶⁸ Article 8, Council Decision 2011/168/CFSP.

⁶⁹ This approach is inspired by the framework of analysis presented by EU Special Representative Stavros Lambrinidis during his lecture, S. Lambrinidis, 'The Rights of Others: Why Human Rights Diplomacy Matters', Human Rights Law Centre Annual Lecture, Human Rights Law Centre, University of Nottingham, 30.01.2014.

PART TWO: UNPACKING THE EU'S POLICIES ON THE ICC

6. UNIVERSALITY

6.1 General Discussion

6.1.1 Universality of the ICC System

As discussed in Part One, with the entry into force of the Rome Statute in July 2002 a new system of international criminal justice was established – a universal system designed to ensure accountability for crimes under international criminal law, wherein impunity is the exception, not the norm. While the objective of universality is not explicitly mentioned in the Rome Statute of the ICC, the universal sentiment is evident. The Statute's preamble opens with the acknowledgement of the universality of the human experience – in heritage, bonds and also of suffering⁽⁷⁰⁾. It continues to note that international crimes within the jurisdiction of the Court 'threaten the peace, security and well-being of the world' (emphasis added)⁽⁷¹⁾. The Rome Statute did not just establish an institution; it laid the foundations of a *system* of international criminal justice. The drafters of the Statute were certain; the Court is not, and cannot be the only actor. In this system of justice, the primary responsibility for accountability lies with states, as the principle of complementarity makes clear. In order for the Court to operate as an effective *safeguard* against impunity, it requires the widest possible acceptance of its jurisdiction. Thus, ensuring that the largest possible number of states agree to be bound by the ICC system, has been a key objective for the Court ever since its establishment⁽⁷²⁾.

As a treaty-based institution, the ICC only has jurisdiction over crimes committed on the territory, or by nationals, of states⁽⁷³⁾ that have accepted the Court's jurisdiction by ratifying the Rome Statute. To date, 122 of the 193 member states of the United Nations have ratified the Rome Statute⁽⁷⁴⁾. For the ICC to have attained this level of international commitment in the first decade of its operation is certainly a remarkable achievement⁽⁷⁵⁾. However, despite this, the reality is that many of the world's most populated and largest states are yet to ratify the Rome Statute. According to World Bank data on world population, six of the world's ten most populated countries (including the top four – China, India, the US and Indonesia) are not parties to the Rome Statute⁽⁷⁶⁾. With the populations of China, India, the US and Indonesia alone accounting for 44% of the world's population, roughly 65% of the world's population do not benefit from – or are subject to – the ICC⁽⁷⁷⁾. Therefore, in terms of universality of the Statute, work remains to be done. Significant gaps also exist in terms of membership from the Arab world⁽⁷⁸⁾ or the Asian continent⁽⁷⁹⁾; both are an ICC priority in terms of enhancing universality⁽⁸⁰⁾.

⁷⁰ 1st preambular paragraph, Rome Statute.

⁷¹ 3rd preambular paragraph, Rome Statute.

⁷² Telephone interview #10 with ICC official, 13.02.2014.

⁷³ Article 12(2), Rome Statute.

⁷⁴ While 122 states have signed and ratified the Statute, thereby becoming states parties, and additional 31 states have signed but not yet ratified. These non-state party signatories are Algeria, Angola, Armenia, Bahamas, Bahrain, Cameroon, Egypt, Eritrea, Guinea-Bissau, Haiti, Iran, Israel, Jamaica, Kuwait, Kyrgyzstan, Monaco, Morocco, Mozambique, Oman, Russia, Sao Tome and Principe, Solomon Islands, Sudan, Syria, Thailand, Ukraine, United Arab Emirates, USA, Uzbekistan, Yemen, and Zimbabwe. See UN Treaty Series (Rome Statute).

⁷⁵ The most recent ratification, by Cote d'Ivoire in February 2013, came six months after the Court celebrated its 10th anniversary of its becoming operation.

⁷⁶ World Bank, 2012.

⁷⁷ Based upon figures provided by the World Bank (World Bank, 2012).

⁷⁸ Of the 22 members of the League of Arab States, only Jordan, Djibouti, the Comoros Islands and Tunisia are State Parties to the Rome Statute. See UN Treaty Series (Rome Statute).

⁷⁹ Of the 24 countries in Asia, only Afghanistan, Bangladesh, Cambodia, Maldives, Mongolia, the Philippines, the Republic of Korea, Timor-Leste and Japan have ratified the Rome Statute. See UN Treaty Series (Rome Statute).

In 2006, the ICC ASP adopted a Plan of Action for achieving universality of the Statute⁽⁸¹⁾. In it, it acknowledged that

1. Universality of the Rome Statute of the International Criminal Court is imperative if we are to end impunity for the perpetrators of the most serious crimes of international concern, contribute to the prevention of such crimes, and guarantee lasting respect for and enforcement of international justice.
2. Full and effective implementation of the Rome Statute by all States Parties is equally vital to the achievement of these objectives⁽⁸²⁾.

Once more, this suggests that there is more to the objective of universality than to endow the ICC with jurisdiction over all territories and all individuals. This objective relates to the universality of the values and principles embodied by the Rome Statute and the ICC - international criminal justice, respect for the rule of law and ending impunity. As Part One, section 5 observed, these objectives are shared by the EU. Given that Article 21 TEU states that the EU's actions on the international scene are guided by democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law⁽⁸³⁾, the EU and the ICC are natural partners for the promotion of the Rome Statute's universality.

6.1.2 Universality of the Court

While signing and ratifying the Statute can itself constitute a powerful demonstration of political commitment to the values and objectives it embodies, in order to establish the envisaged system of international criminal justice, it is necessary for states to also implement the Statute provisions in their domestic legal orders. Implementation requires states to review their existing legislation, assess its compatibility with the Rome Statute and make appropriate amendments, or more likely, to adopt specific legislation. The implications of this are twofold.

First, such legislation should be designed to enable states to investigate and prosecute the core international crimes. Typically, this involves incorporating the core international crimes, namely, genocide, crimes against humanity and war crimes into domestic law. While there is no explicitly binding obligation under the Statute for states to investigate and prosecute crimes nationally, to do so allows them to maintain control over the case(s) while also precluding ICC action (for further on this, see Part Two, section 11). Second, from the perspective of the ICC, full implementation enables states to cooperate with the Court so as to enable it to discharge its functions. Given the absence of a dedicated enforcement agency, the ICC relies exclusively on state cooperation to conduct its activities. To borrow the words of the late Antonio Cassese, one of the main architects of the contemporary system of international criminal justice, the ICC - like the ICTY to which his metaphor originally referred - can be seen as a 'giant without arms and legs - it needs artificial limbs to walk and work'⁽⁸⁴⁾. The willingness and ability of states to cooperate with the ICC (i.e. arrest, surrender alleged perpetrators, serve documents, collect evidence, facilitate the appearance of witnesses etc.) is absolutely essential to the Court's ability to fulfil its mandate. It should be noted that there is a clear obligation under the Statute for states to make national procedures available for all forms of cooperation⁽⁸⁵⁾. Full implementation *enables* states to investigate and prosecute, to the exclusion of the ICC, as well as cooperate with requests made by the Court. This, in turn, ensures that the ICC system enjoys

⁸⁰ Telephone interview #05 with ICC Official, 04.02.2014.

⁸¹ Strengthening the International Criminal Court and the Assembly of States Parties, 1.12.2006 (ICC-ASP/5/Res.3) (hereafter 'ICC-ASP/5/Res.3'); Plan of Action of the Assembly of States Parties for Achieving Universality and Full Implementation of the Rome Statute of the International Criminal Court, Annex to ICC-ASP/5/Res.3 (hereafter 'ASP Universality Plan of Action').

⁸² ASP Universality Plan of Action, paras. 1 and 2.

⁸³ Article 21, TEU.

⁸⁴ Cassese, 1998, at p.13.

⁸⁵ Bekou, 2009.

universality in practice. For this reason, it is common to consider universality and implementation as two sides of the same coin.

Attaining the universality of the ICC in order to enable it to discharge its functions requires further measures beyond the adoption of implementing legislation. State Parties, in order to be able to fulfil their cooperation obligations with the ICC must also sign, ratify and implement the Agreement on Privileges and Immunities (APIC)⁽⁸⁶⁾. The APIC provides the Court, officials and staff of the ICC⁽⁸⁷⁾, as well as victims and witnesses⁽⁸⁸⁾, with the privileges and immunities necessary to perform their duties in an independent, unconditional, and efficient manner.

6.1.3 The Kampala Amendments: Expanding the Scope of War Crimes and the Crime of Aggression

Universality of the Court also requires ratification by State Parties of amendments to the Statute adopted at the 2010 Kampala Review Conference. Two amendments were adopted, one to Article 8, expanding the list of crimes that constitute war crimes within the Court's jurisdiction⁽⁸⁹⁾, and another, adopting a definition of the crime of aggression⁽⁹⁰⁾. The amendment to Article 8 of the Rome Statute, which incorporates the use of certain weapons in the context of non-international armed conflicts into the scope of war crimes within the ICC's jurisdiction, enters into force for each ratifying state in accordance with Article 121(5) of the Statute⁽⁹¹⁾. However, Article 8bis, which defines the crime of aggression, not only requires a minimum of 30 ratifications but also, in order to enter into force, requires the adoption of a decision to activate the Court's jurisdiction by a 2/3 majority after 1 January 2017⁽⁹²⁾.

For many, the promise of the Court's jurisdiction over the crime of aggression upon the agreement of a definition of the crime can be seen as one of the biggest draw to the Rome Statute system. Defined as the planning, preparation, initiation or execution by a person in a leadership position of an act of aggression⁽⁹³⁾, the amendment agreed upon at Kampala represents a compromise reflecting the high controversy and political sensitivity that this issue involves. Although all Member States of the UN are already bound by the UN Charter regime of international law, as well as customary international law, regarding the legality of the use of force – the ratification and implementation within domestic legal systems (and the accompanying institutional reforms of foreign and defence policy to make it compliant with that law) of the *crime of aggression* would incur a significant effort by State Parties to the Rome Statute.

In addition to the measures required of State Parties when implementing Article 8bis of the Rome Statute, the novelty of the crime of aggression *within the Rome Statute system* (for the crime of aggression can be traced back to the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East where crimes against peace were included in the list of charges, and on which convictions were made) warrants closer appreciation by all. This is not to discourage ratification of the amendment, but rather to raise awareness of the implications of ratification and implementation of the amendment upon the Rome Statute system of international justice.

Foremost, it is important to note the definition of aggression and who, under that definition, may be responsible for it. Article 8bis(1), defining the crime of aggression, declares it as only being able to be committed by 'a person in a position effectively to exercise control over or to direct the political or military

⁸⁶ Agreement on the Privileges and Immunities of the International Criminal Court (adopted 9.09.2002, entered into force 22 July 2004) 2271 UNTC 3 (hereafter 'APIC').

⁸⁷ Articles 13-18, APIC.

⁸⁸ Articles 19 and 20, APIC.

⁸⁹ Article 8, Rome Statute (amended by ICC-ASP resolution RC/Res.5 of 11.06.2010, adding paragraphs 2(e)(xiii) to 2(e)(xv)).

⁹⁰ Article 8bis Rome Statute, as amended by resolution RC/Res.6 of 11.06.2010.

⁹¹ Article 121(5), Rome Statute.

⁹² Article 15bis(3), Rome Statute, added by resolution RC/Res.6 of 11.06.2010.

⁹³ Article 8bis (1), Rome Statute.

action of a State'⁽⁹⁴⁾. Two observations are to be made here – first, is that it can only be committed by individuals acting on behalf of *the state* (as opposed to non-state actors or organisations). Second, and more significantly, both in principle and in practice, is the fact that the crime of aggression is also only a *leadership crime*. This is important because it ensures that only those most responsible for acts of aggression are held accountable, rather than for example individual soldiers following the orders of their commanders.

However, in order to be able to investigate and prosecute the crime of aggression it is necessary that the Court is able to successfully pursue those high level state officials such as heads of state and government, as well as commanders in chief with effective control over the military actions of the state. Current difficulties faced by the Court in the context of its proceedings against high level officials regarding crimes currently within the Court's jurisdiction – genocide, crimes against humanity and war crimes – provide some indication of the challenges that the Court might face should it attempt to conduct investigations into the even more politically sensitive matter of aggression. Political difficulties must not deter the pursuit of the values and principles embodied in the Rome Statute. However, in order for the Court to be able to independently, effectively and efficiently fulfil its *judicial* mandate when investigating and prosecuting the crime of aggression⁽⁹⁵⁾ State Parties must be prepared to provide the Court with all the robust political support and technical cooperation that it requires to do so.

Despite the practical challenges presented by the crime of aggression, ratification and full implementation of both of the Kampala amendments are necessary in order to ensure the full universality of the Statute and the ICC system of international criminal justice. To have amendments agreed upon and adopted by the ASP, the legislative branch of the Court, but for those amendments not to have comprehensive legal effect, can risk undermining not only the universality of the Statute (in particular the principle of its application to all without distinction) but also its integrity (see Part Two, section 7) and ultimately, the Court's effectiveness (see Part Two section 8). Knowledge that the Court is unable to exercise jurisdiction over those crimes unless states have ratified the amendment, and in the case of the crime of aggression – until a minimum number of states have ratified the amendment – risks diminishing the deterrent effect of the Court's jurisdiction.

Having set out in general terms what is implied by the objective of universality, the following sub-sections will unpack and assess the performance of both EU Member States and the Union in terms of the promotion of the universality of the Rome Statute.

6.2 Member States

All 28 Member States of the EU are State Parties to the Rome Statute, with all, except the Czech Republic and Lithuania, having ratified the Statute prior to its entry into force in July 2002⁽⁹⁶⁾. While Lithuania ratified the Statute in May 2003 and therefore prior to its accession to the Union in 2004, the Czech Republic ratified the Statute in 2009, some five years after its accession to the Union (for further discussion of the issues raised by the Czech accession, see section 6.3.1). Similarly, as of November 2011, all EU Member States have signed and ratified the APIC. This internal consistency not only is a powerful statement of European unity in their commitment to both international criminal justice generally, and the ICC specifically, but also significantly strengthens the EU's position as it seeks to promote universality of the Statute in its external relations.

⁹⁴ Article 8*bis*(1), Rome Statute.

⁹⁵ The potential challenges to the independence of the Court as a judicial institution were acknowledged by the European Parliament in its resolution in the lead up to the Kampala conference, where it called upon State Parties to adopt a definition of the crime of aggression that would respect the Court's independence by avoiding any 'jurisdictional filter' that might make the exercise of the Court's jurisdiction of the crime conditional upon the determination by a political actor (for example, the UN Security Council) that a crime of aggression has occurred. See 'European Parliament resolution of 19 May 2010 on the Review Conference on the Rome Statute of the International Criminal Court, in Kampala, Uganda (P7_TA(2010)0185), OJ C 161, 31.5.2011, at E/78 at para.8.

⁹⁶ UN Treaty Series (Rome Statute).

Although the vast majority of Member States have adopted some form of relevant national implementing legislation, four Member States – the Czech Republic, Lithuania, Romania and Slovakia – are yet to adopt any such domestic legislation. As was discussed in the previous section, the absence of national implementing legislation bears directly upon the universality of the Rome Statute system. Where such legislation would also incorporate the definitions of the crimes within the Court's jurisdiction into the domestic legal system so as to enable national courts to exercise jurisdiction over them, this lack of specific legislation may prevent such states from making use of the principle of complementarity (see section 10). But from the perspective of the Court, the failure to adopt implementing legislation undermines the ability of those states to cooperate with the Court, and thus assist the Court in pursuing its mandate.

The European Parliament has acknowledged this lack of internal consistency within the EU and has, as recently as in December 2013, called upon all EU Member States to fully implement the Rome Statute within their domestic legal orders⁽⁹⁷⁾. Whereas, as will be discussed in section 6.3.3, it is envisaged that the EU can provide technical assistance with regard to the implementation of the Rome Statute to third states, no equivalent provision is made for Member States. Currently, the core international crimes are not included in the list of crimes over which the EU has competence under Article 83(1) TFEU. This limits the competence of the EU to harmonise the domestic criminal laws within the Union with regard to these crimes. Given that all EU Member States share in the same commitment to combat impunity for the crimes as defined within the Rome Statute, to which they are all a party, to include at a minimum the crimes within the jurisdiction of the Court, as defined in the Rome Statute, would be a way through which the EU could then assist its Member States to ensure that they have fully implemented the Rome Statute.

Although EU Member States lead the way in ratifying both the Rome Statute and the APIC, they appear to have foregone the opportunity to do the same with regard to the amendments adopted at the Kampala Review Conference. While the matter of the crime of aggression warrants closer consideration by EU Member States (see above), the amendment to Article 8 stands as a distinct amendment. Therefore, any concerns that Member States may have with regard to the crime of aggression should not preclude their ability to ratify and implement the amendments to Article 8. To date, 16 State Parties to the Rome Statute have ratified the amendment to Article 8⁽⁹⁸⁾, and 13 have ratified the aggression amendment. Of these ratifications, only seven for each of the amendments are by EU Member States⁽⁹⁹⁾. Those Member States are Belgium, Croatia, Cyprus, Estonia, Germany, Luxembourg and Slovenia.

Members and groups within the European Parliament have taken the initiative to encourage wider ratification among EU Member States of the Kampala amendments, particularly Article 8*bis* on the crime of aggression. For example, in November 2013, MEPs participated in a meeting entitled 'The Kampala Amendments on the Crime of Aggression: a promise for the end of the illegal use of force in international relations' organised by supporters of the ICC within the Parliament⁽¹⁰⁰⁾. Here parliamentarians engaged with external advocates of promoting universality of the Statute and in particular the Kampala amendments, in order to discuss both the need to promote wider ratification among EU Member States of the amendment, but also to discuss how such encouragement could be advanced and what the European Parliament can do to this end. In this latter respect, options discussed included the adoption of a Plenary Recommendation supporting the ratification of the aggression amendment accompanied by a Parliamentary resolution including a call to ratify the amendments. Further, it was suggested that MEPs from Greece and Italy (who

⁹⁷ European Parliament resolution of 11.12.2013 on the Annual Report on Human Rights and Democracy in the World and the European Union's Policy on the Matter, Strasbourg 11.12.2013 (P7_TA(20130575), Strasbourg, 11.12.2013 (hereafter 'European Parliament resolution 'P7_TA(20130575)'), at para.101. See also European Parliament resolution P7_TA(2011)0507 at para.43.

⁹⁸ In addition to the seven EU states, the other states parties that have ratified the Article 8 amendment are Andorra, Botswana, Liechtenstein, Mauritius, Norway, Samoa, San Marino, Trinidad and Tobago, and Uruguay.

⁹⁹ In addition to the seven EU states, the other states parties that have ratified the aggression amendment are Andorra, Botswana, Liechtenstein, Samoa, Trinidad and Tobago and Uruguay.

¹⁰⁰ PGA, 28.11.2013.

hold the presidency of the Council in 2014) should be engaged in the effort to promote wider ratification of the amendment. Finally, amendments to the EU's Action Plan on Democracy and Human Rights were proposed in order to place greater emphasis upon the need for ratification of the Kampala amendments⁽¹⁰¹⁾. On 12 February 2014, this was followed up by the inclusion of a segment on the agenda of the Subcommittee on Human Rights on the Kampala amendment on the crime of aggression⁽¹⁰²⁾.

This focus on the crime of aggression is commendable, but the exclusive focus on Article 8*bis* has overshadowed the promotion of ratification and implementation of the amendments to Article 8, the discussion of which is notable only for its absence. This is despite the fact that the amendment to Article 8 does not incur the same political and practical challenges that the crime of aggression implicates. Accordingly the European Parliament may wish to consider undertaking efforts similar to those adopted to promote ratification of the aggression amendment in order to promote the ratification of the amendment to Article 8.

As both State Parties to the Rome Statute and as Member States of the EU, Member States are required to promote the universality and full implementation of the Statute in the course of their relations with third states. As members of the ICC ASP, Member States have an obligation to implement the 2006 ASP Resolution and Plan of Action for achieving universality and full implementation⁽¹⁰³⁾. As Member States of the EU, they are guided in their activities by the 2011 Decision. Article 2(1) and 2(2) of the 2011 Decision state that along with the EU, its Member States shall 'make every effort' to further the processes of universal ratification, full implementation and participation in the values embodied by the Statute. The 2011 Action Plan outlines some of the measures that Member States could take to work towards these objectives. These include, raising the ICC in bilateral contacts with third countries⁽¹⁰⁴⁾, or contributing, where requested, with appropriate financial and technical support to assist third states in the legislative work necessary to ratify and implement the Statute⁽¹⁰⁵⁾.

6.3 The EU as a Global Actor

In the previous section, it was noted that the consistency across EU Member States in their ratification of the Rome Statute and APIC places the EU as an international actor in a stronger position when promoting the universality of the Statute and its full implementation in its external affairs. It can be recalled that since the adoption of the first EU Common Position on the ICC in 2001, the promotion of the universality of the Statute has consistently been one of the EU's top priorities⁽¹⁰⁶⁾. The 2001 Common Position prioritised the EU's promotion of the widest possible ratification of the Statute in order to contribute to the early entry into force of the Statute⁽¹⁰⁷⁾. In 2002, when the Common Position was updated to account for the Statute's entry into force, although not explicitly using the language of 'universality', Article 2 of the 2002 Common Position stated that both the EU and its Member States would promote the widest possible participation in the Statute by promoting its ratification and acceptance, and also would promote the dissemination of the 'values, principles and provisions' contained in the Statute⁽¹⁰⁸⁾. In subsequent updates of EU policy regarding its support for the ICC by the Council, this provision was replicated, both in the 2003 Common Position⁽¹⁰⁹⁾,

¹⁰¹ PGA, 28.11.2013.

¹⁰² European Parliament Subcommittee on Human Rights, Committee Meeting 12.02.2014, Agenda Item 9: 'Exchange of views on the Kampala amendments to the Rome Statute on the crime of aggression'.

¹⁰³ ICC-ASP/5/Res.3 and ASP Universality Plan of Action.

¹⁰⁴ Action Plan, 2011, at p.9

¹⁰⁵ Action Plan, 2011, at p.10.

¹⁰⁶ See Part 1, section 4.1.

¹⁰⁷ Article 2, Council Common Position 2001/443/CFSP.

¹⁰⁸ Articles 2(1) and 2(2), Council Common Position 2002/474/CFSP.

¹⁰⁹ Articles 2(1) and 2(2), Council Common Position 2003/444/CFSP.

and the 2011 Decision⁽¹¹⁰⁾. The following three sections will assess the measures – political, financial, and technical, that the EU has adopted when giving effect to these commitments.

6.3.1 Political

The consistent commitment to promoting the universality of the Statute reflected in each of the Common Positions and the 2011 Decision itself constitutes a significant political statement in support of the universality of the Statute. By exercising its policy making and coordinating mandate in the form of the adoption of Common Positions and Decisions⁽¹¹¹⁾, the Council – representing the views of every Member State – has provided the political impetus and legal basis for all of the EU's concrete policy to support this objective.

This pledge has also been supported by the European Parliament through the adoption of resolutions that address the EU's commitment to, and support for, the ICC. In addition to ICC-specific resolutions that call for the promotion of the universality and full implementation of the Statute⁽¹¹²⁾, the resolution of December 2013 on the Annual Report on Human Rights and Democracy in the World 2012⁽¹¹³⁾:

- Called on all EU Member States to fully implement the Rome Statute, as well as calling upon EU Member States to ratify the Kampala Amendments and encourage ratification by third states;
- Called on the EU and its Member States to emphasise the need to ratify and implement the Statute and Agreement on Privileges and Immunities in negotiations and dialogues with third states.

This resolution demonstrates how the EU as an international actor is equally concerned with promoting universality and full implementation internally – amongst its own Member States – as it is in the context of its external affairs. While this section focuses upon the measures taken by the EU and its Member States to promote the universality of the Statute and the values it embodies in the framework of external relations with third States, it is important also to acknowledge the role that the Union and its Member States play in other international institutional fora – most notably, within the UN. Section 7 will present a mixed view on the success with which the EU and its Member States have achieved a unified and consistent approach when defending the integrity of the Statute within the UN Security Council. However, here it is important to note the successes and continuing improvements that EU Member States and the EU have achieved when promoting the mainstreaming of support for the ICC and the system it embodies within the UN. The EU is increasingly speaking with one voice in debates within UN fora, wherein it has taken the opportunity to raise support for international criminal justice and the ICC⁽¹¹⁴⁾. A recent example where both individual EU Member States and the EU demonstrated a strong commitment to international criminal justice and the ICC was in the open meeting of the UN Security Council on the promotion and strengthening of the rule of law in the context of international peace and security on 19 February 2014, organised on the initiative of Lithuania, that is currently holding the Presidency of the Security Council⁽¹¹⁵⁾. The ICC, international criminal justice and accountability featured heavily in the contributions of all EU Member States, reiterating their importance to the advancement of the rule of law, both at the national and international levels⁽¹¹⁶⁾. In addition to the individual speeches by EU Member States, a representative of the EU delegation to the UN

¹¹⁰ Article 2, Council Decision 2011/168/CFSP.

¹¹¹ Article 16 TEU.

¹¹² European Parliament resolution P7_TA(2011)0507, para.4.

¹¹³ European Parliament resolution 'P7_TA(2013)0575), at para.101.

¹¹⁴ Recent examples include: The Situation in the Middle East, including the Palestinian Question, 22.10.2013 (UN Doc S/PV.7046), statement by Mr Hallergard (EU observer) at p.40; Women and Peace and Security, 24.06.2013 (UN Doc S/PV.6984), statement of Mr Vrailas, speaking on behalf of the EU and its Member States, at p.57; Agenda Item 69: Promotion and Protection of Human Rights, 24.12.2012, (UN Doc A/C.3/67/SR.27) statement of Ms. Kaljulata (EU Observer), at p.10.

¹¹⁵ Letter dated 3.02.2014 from the Permanent Representative of Lithuania to the United Nations addressed to the Secretary-General, 3.02.2014 (S/2014/75).

¹¹⁶ See UN Security Council, Press Release 19.02.2014.

spoke on behalf of the EU, similarly stating the EU's strong commitment to the ICC and the ICC system of accountability⁽¹¹⁷⁾.

Accordingly, before considering how the EU has acted to promote universality among third states in the course of its political activities, this section will consider how the EU has used its political leverage to encourage candidate countries for EU membership to ratify the Statute.

The Policy of Conditionality

While all EU Member States are State Parties to the Rome Statute, in order to maintain this consistency across the Union, the EU has adopted a policy of conditionality, requiring candidate states to ratify and implement the Rome Statute as a condition for accession. Of the five current candidate countries – the former Yugoslav Republic of Macedonia, Iceland, Montenegro, Serbia, and Turkey, only one – namely Turkey – is not yet a party to the Rome Statute. This was highlighted in the 2013 Progress Report as having affected the rate of Turkey's alignment with the EU on the common foreign and security policy⁽¹¹⁸⁾.

When continuing negotiations with Turkey, and potential future candidates (of the three potential candidates acknowledged, one, Kosovo, is not yet a State, and therefore is unable to ratify the Rome Statute) the EU can benefit from the experience it has gained in the course of its previous negotiations. In the previous section, it was noted that the Czech Republic, despite having not ratified the Rome Statute, nevertheless joined the EU in 2004, making it the only non-State Party within the Union until its ratification of the Statute in 2009. This is despite the Council noting, in its 2003 Common Position, and thus prior to the Czech accession, that candidate countries including the Czech Republic had intended to apply the Common Position as from the date of its adoption⁽¹¹⁹⁾. Nevertheless, the failure of the Czech Republic to comply with this commitment was overlooked in the final monitoring report on the preparedness of candidate countries for accession⁽¹²⁰⁾. Once the Czech Republic became an EU Member State, the absence of any mechanism to enforce compliance placed the Union in a weaker position to require ratification of the Rome Statute.

In order to avoid the reoccurrence of this situation with regard to Turkey or future candidate countries and to preserve the internal consistency within the EU as regards to ratification and implementation, the Commission must ensure that mechanisms are in place to prevent accession of new Member States without having ratified the Statute.

The following section will assess the EU's promotion of universality and full implementation in the context of its relations with third states. In order to enhance the effectiveness of the policies undertaken by the EU to promote ratification in its external relations, repetition of the Czech situation should be avoided so as to maintain both EU-external consistency as well as internal consistency.

Promoting Universality Among Third States

The ASP Plan of Action suggests that State Parties to the Rome Statute could focus their efforts to promote universality of the Rome Statute based upon regional or geographical proximity⁽¹²¹⁾. On the basis of this suggested strategy, the EU might also look to other states within the two geopolitical groupings that the majority of EU Member States belong to – 'Western European and Others' ('WEOG') and 'Eastern Europe'⁽¹²²⁾. From the WEOG group, the main absentee from the roll-call of State Parties to the Rome Statute is the USA. Similarly, from the Eastern Europe grouping, non-State Parties include Russia, Armenia, Azerbaijan, and

¹¹⁷ See UN Security Council, Press Release 19.02.2014.

¹¹⁸ Commission Staff Working Document: Turkey 2013 Progress Report, Brussels 16.10.2013 (SWD(2013) 417 final) at p.75.

¹¹⁹ Article 9(1) Council Common Position 2003/444/CFSP.

¹²⁰ European Commission, Comprehensive Monitoring Report of the European Commission on the State of Preparedness for EU Membership of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, Brussels, 11.11.2003 (COM (2003)675 final).

¹²¹ ASP Universality Plan of Action, at para. 4.

¹²² The only Member State to fall outside one of these two groups is Cyprus, which sits in the Asia-Pacific grouping at the UN.

Belarus. In this regard, through the European Parliament, the EU has called upon the US and Russia as two of the three permanent members of the UN Security Council who are not parties to the Rome Statute, to ratify the Rome Statute⁽¹²³⁾.

Turkey, as was discussed in the previous section, is a candidate country for EU membership. Accordingly its membership of the EU is subject to the condition of its ratification of the Rome Statute. Beyond this approach, the EU could – and indeed, has – incorporated ratification and implementation into its policies and strategies with respect to other non-candidate neighbours, in the form of ICC clauses that are, however, non-essential. Ratification and implementation of the Rome Statute features as an element of the European Neighbourhood Policy (ENP). Applying to 16 countries in Europe's southern and Eastern neighbourhoods (including the aforementioned Armenia, Azerbaijan and Belarus)⁽¹²⁴⁾, clauses relating to the ratification and implementation of the Rome Statute are included in all agreements⁽¹²⁵⁾, except for those with Israel⁽¹²⁶⁾, Morocco⁽¹²⁷⁾ Palestine⁽¹²⁸⁾ and Tunisia⁽¹²⁹⁾. While the inclusion of an ICC clause in the agreement with the Palestinian authorities remains controversial pending confirmation of Palestine's statehood and thus its ability to ratify the Rome Statute⁽¹³⁰⁾, it is recommended that a consistent approach towards ICC clauses is taken across all states within the ENP. A failure to make any mention of the ICC in the agreements concluded with Israel and Morocco and an omission to include an implementation of the ICC clause in the agreement with Tunisia risks fostering the impression that the EU takes an inconsistent approach to the universality of the Rome Statute. Furthermore, the EU should continue to monitor developments in the ongoing situation in Ukraine.

It may be recalled that Ukraine is one of the states that has signed but not yet ratified the Rome Statute. At the time of writing, the temporary Ukrainian Parliament that emerged out of the recent upheaval has indicated support for the ICC system of international accountability through a 'referral' resolution to the ICC⁽¹³¹⁾. While the legal effect of its resolution remains unclear⁽¹³²⁾, it nevertheless may be taken to demonstrate in principle political support for the ICC from within some quarters. The Parliamentary resolution itself may be insufficient to accept the Court's jurisdiction under Article 12(3) of the ICC Statute, and further, the ICC Registrar has confirmed that no such declaration accepting the Court's jurisdiction has been formally made to the Court to date. Furthermore, the Ukrainian Constitutional Court has opined that a number of the provisions of the Rome Statute are incompatible with the Ukrainian Constitution, which

¹²³ European Parliament resolution P7_TA(2011)0507, at para.37.

¹²⁴ These countries are Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestine, Syria, Tunisia, and Ukraine.

¹²⁵ EU/Armenia Action Plan, at p.14; EU/Azerbaijan Action Plan; EU/Egypt Action Plan; EU/Georgia Action Plan; EU/Jordan Action Plan; EU/Lebanon Action Plan; EU/Moldova Action Plan; EU/Ukraine Action Plan.

¹²⁶ EU/Israel Action Plan.

¹²⁷ EU/Morocco Action Plan.

¹²⁸ EU/Palestine Action Plan.

¹²⁹ EU/Tunisia Action Plan.

¹³⁰ In January 2009, the Palestinian National Authority lodged a declaration with the Registrar of the ICC under Article 12(3) of the Statute which enables non-states parties to accept the jurisdiction of the Court on an *ad hoc* basis. When determining whether to open an investigation into the communications received by the OTP regarding alleged crimes to have been committed in Palestine, the OTP was required to consider whether Palestine qualifies as a 'state' for the purposes of Article 12(3). After three years of deliberation, the OTP issued a decision declined to make a decision on the issue, deferring the question as to the legal status of Palestine to competent bodies of the UN or the ASP. For further details, see 'Situation in Palestine' 3.04.2012.

¹³¹ See Draft Statement to the International Criminal Court for recognition of the International Criminal Court's jurisdiction over Ukraine concerning crimes against humanity by senior officials of state, which led to very serious consequences and mass murder of Ukrainian citizens during the peaceful protests in the period from 21.11.2013 to 22.02.2014, 4269 of 25.02.2014, translation available at http://translate.google.nl/translate?hl=en&sl=uk&tl=en&u=http%3A%2F%2Fw1.c1.rada.gov.ua%2Fpls%2Fzweb%2Fweb%2Fwebproc4_1%3Fpf3511%3D49944&sandbox=1.

¹³² For an analysis, see Heller K., 2014.

thereby precludes the acceptance of the Court's jurisdiction, either through ratification or through the *ad hoc* acceptance of jurisdiction provided for by Article 12(3) of the Statute⁽¹³³⁾. In light of the complexity of the emerging situation, the EU and its Member States could have a role here to provide assistance to the Ukrainian authorities in order to overcome these legal and technical challenges that are currently an obstacle to the acceptance of the ICC's jurisdiction either on an *ad hoc* basis, or to ratify the Statute and thus become a State Party⁽¹³⁴⁾.

Moving further afield, clauses promoting universality and full implementation of the Rome Statute have been included in the EU's Central Asia Strategy⁽¹³⁵⁾. One of the most successful measures undertaken by the EU in order to promote the ratification of the Rome Statute was the inclusion of an 'ICC clause' in the Cotonou Agreement which provides the framework for the EU's relations with 79 countries from Africa, the Caribbean and the Pacific (ACP)⁽¹³⁶⁾. Signed in 2000, and revised again in 2005⁽¹³⁷⁾, and 2010⁽¹³⁸⁾, the Cotonou Agreement establishes the basis for cooperation on matters relating to economic, social and culture development, aimed at reducing poverty and integrating ACP states into the global economy while at the same time adhering to the aims of sustainable development. The preamble to the Agreement acknowledges the commitment of all Parties to the Agreement to the fight against impunity and the role of national action and global action in order to effectively pursue accountability and international criminal justice⁽¹³⁹⁾. Further, Article 11(7) establishes a list of commitments undertaken by the Parties to the Agreement in respect of the promotion of international criminal justice. Parties are encouraged to share their experiences in making the necessary legislative changes to facilitate ratification of the Rome Statute and implementing the Statute upon ratification⁽¹⁴⁰⁾. While not obliging Parties to actually ratify and implement the Rome Statute, it does commit them to 'seek steps towards' doing so⁽¹⁴¹⁾.

Currently, of the 79 ACP countries, 11 states have signed but not ratified the Rome Statute⁽¹⁴²⁾, while a further 10 have yet to sign or ratify the Statute⁽¹⁴³⁾. Following the referral of the situation in Darfur to the ICC and the issue of the warrant for the arrest of President Al Bashir by the ICC, Sudan did not sign the revised Cotonou Agreement of 2005 due to the inclusion of the ICC clause (which had been a clause in the original agreement)⁽¹⁴⁴⁾. Although legally, Sudan's non-ratification of the revised Agreement prevents the Union

¹³³ ICRC, 'Issues raised with regard to the Rome Statute of the International Criminal Court by National Constitutional Courts, Supreme Courts and Councils of State' January 2003 Advisory Service on International Humanitarian Law, at p.11.

¹³⁴ It should be noted that even if an effective declaration to accept the Court's jurisdiction is made, it would still be necessary to consider whether the violence that has occurred in Ukraine falls within the Court's jurisdiction – namely that the alleged criminal acts meet the threshold to constitute crimes against humanity and thus fall within the Court's competence.

¹³⁵ Council of the European Union, 'The European Union and Central Asia: The New Partnership in Action', June 2009 at pp.16-17.

¹³⁶ 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 23.06.2000, OJ L 317, 15.12.2000, at p.3.

¹³⁷ Agreement amending the 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 23.06.2000, OJ L 209, 11.8.2005, at p.27.

¹³⁸ Agreement amending for the second time the 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 23.06.2000, as first amended in Luxembourg on 25.06.2005, OJ L 287, 4.11.2010, at p.3.

¹³⁹ Preamble para. 10 and 11.

¹⁴⁰ Article 11(7) Consolidated version of the ACP-EC Partnership Agreement, 2012.

¹⁴¹ Article 11(7) Consolidated version of the ACP-EC Partnership Agreement, 2012.

¹⁴² Being Angola, the Bahamas, Cameroon, Eritrea, Guinea Bissau, Haiti, Jamaica, Mozambique, Sao Tome and Principe, Solomon Islands, and Zimbabwe (see UN Treaty Series (Rome Statute)).

¹⁴³ Being Ethiopia, Kiribati, Micronesia, Niue, Palau, Papua New Guinea, Rwanda, Swaziland, Togo and Tonga.

¹⁴⁴ European Commission, Non-ratification of the revised Cotonou Agreement by Sudan FAQ (August 2009).

from implementing bilateral development cooperation through the European Development Fund (EDF), this hasn't resulted in the EU ceasing all assistance to Sudan, either through the EDF or other instruments⁽¹⁴⁵⁾.

Similarly, at least one of the reasons for South Sudan's failure to join the Cotonou Agreement is the ICC clause⁽¹⁴⁶⁾.

At the same time, political support for the promotion of the universality of the Statute is not limited to regional strategies. The EU has placed support for the ICC – whether it be ratification and implementation or whether it be cooperation, on the agenda of issues it raises with third states in the course of its bilateral relations. In the 2012 Annual Report on Human Rights and Democracy, the Thematic Report documents the measures taken by the EU in the promotion of universality and full implementation. In the Report on Thematic Issues, the EU notes that:

[t]he European Union and its Member States continued encouraging the widest possible participation in the Rome Statute. Ratification of and accession to the Rome Statute respectively as well as – where relevant – implementation of the Rome Statute continued to be a standing item on the agendas for most human rights dialogues, including the human rights dialogue with the African Union. In addition, the EU maintained its systematic demarche campaigns worldwide, its policy of including ICC clauses in agreements with third countries (such as the EU-Ukraine Association Agreement initialled on 30 March 2012) and financial aid to civil society organisations⁽¹⁴⁷⁾.

This is elaborated upon by the EU Annual Report on Human Rights and Democracy in the World in 2012 (Country Reports), which indicates that the ICC was raised in the course of diplomatic engagements, dialogues and negotiations with Syria, Libya, Chad, Côte d'Ivoire, Equatorial Guinea, Brunei, Indonesia, Laos, Malaysia, Solomon Islands, and Vanuatu⁽¹⁴⁸⁾.

A similar picture is painted by the 2012 Report, which observes that in 2011, the EU carried out actions in support of the universality and implementation of the Rome Statute in the following countries and regional organisations: ASEAN, Armenia, Bahamas, Cambodia, Cameroon, China, Republic of Congo (Brazzaville), Egypt, El Salvador, Guatemala, Jamaica, Kazakhstan, Kuwait, Kyrgyzstan, Mongolia, Morocco, Nepal, Qatar, Thailand, Togo, Turkey, Ukraine, and Vietnam⁽¹⁴⁹⁾.

While commendable, the absence of key partners including the USA and Russia – both permanent members of the UN Security Council – from the lists of states with whom the issue of ICC ratification has been recently raised, is an inconsistency that needs to be addressed. Another key absentee from the list of states with whom the ICC has been recently raised is India⁽¹⁵⁰⁾. As the 2013 Thematic Report states, it is a standing item on *most* dialogues. While diplomatic sensitivities are acknowledged – as are the benefits of so-called 'quiet diplomacy' – taking a differential approach in the public sphere risks creating a public perception of selectivity or inconsistency in the eyes of those who are faced with public calls for ratification, implementation or cooperation. The risk of creating a perception of 'double standards' is particularly concerning in the context of the objective of promoting universality, which by its very nature rejects any sense of differential treatment.

¹⁴⁵ European Commission, Non-ratification of the revised Cotonou Agreement by Sudan FAQ (August 2009).

¹⁴⁶ Telephone interview #09 with EU official, 07.02.2014.

¹⁴⁷ EU Annual Report on Human Rights and Democracy in the World in 2012 (Thematic Reports), Brussels, 13.05.2013 (9431/13) at p.110.

¹⁴⁸ EU Annual Report on Human Rights and Democracy in the World in 2012 (Country Reports), Brussels, 21.10.2013 (15144/13).

¹⁴⁹ EEAS, Human Rights and Democracy in the World: Report on EU Action in 2011, Brussels, June 2012 at p.61.

¹⁵⁰ However, the full list of demarches conducted by the EU on matters relating to the ICC *since 2002*, indicate that demarches have been conducted in respect of these states. For a full list, up until 1.09.2013, see The European Union's reply to the information request in paragraph 6, sub-paragraph h) of the Plan of Action for achieving universality and full implementation of the Rome Statute', at Annex 1 ('EU reply to Plan of Action request').

With regard to the effectiveness of these diplomatic actions, in particular demarches, a number of interviewees observed a need to assess their impact and effectiveness⁽¹⁵¹⁾. In particular, informal feedback following some demarches has given rise to the suggestion of a need for greater training within the EU for those responsible for conducting demarches on its behalf on ICC and international criminal justice related matters in order to improve their effectiveness⁽¹⁵²⁾.

Complementing the political initiatives to promote the ratification of the Rome Statute, the High Representative has issued statements welcoming ratification of the Statute by states⁽¹⁵³⁾.

While the *promotion* of universality is included in policies and dialogues adopted with respect to regions or states, participation in those strategies and initiatives is not conditional upon ratification of the Rome Statute. One opportunity missed by the EU was the inclusion of the Rome Statute in the list of Treaties the ratification of which is a condition for qualification for GSP+ status. The 'Generalised Scheme of Preferences' (GSP) allows developing country exporters to pay lower duties on their exports to the EU and GSP+ enhanced preferences means full removal of tariffs on essentially the same product categories as those covered by the general arrangement. In order to qualify for GSP+ status, states must ratify and implement a number of international conventions relating to labour rights, the environment and good governance, including human rights treaties, but not including the Rome Statute⁽¹⁵⁴⁾. Two of the first 10 countries to receive GSP+ status, Armenia and Pakistan are both non-State parties to the Rome Statute. Had the Rome Statute been included in the list of treaties, the EU could have used the economic incentive of GSP+ status as a 'carrot' with which to encourage third states to ratify the Rome Statute. This is a significant missed opportunity, as recognised by the European Parliament⁽¹⁵⁵⁾. One of the EU's strongest assets in terms of its external relations is the economic benefits that its partnership brings to third states. For example, according to the European Commission, the EU is Pakistan's most significant trading partner, accounting for over 21% of its exports⁽¹⁵⁶⁾. By including the Rome Statute in the list of treaties and by making GSP+ status conditional upon ratification, this would have provided a considerable incentive for ratification and thus the expansion of the Rome Statute system of international criminal justice.

¹⁵¹ Telephone interview #07 with representative of a non-EU Member State, ICC State Party (GRULAC Group), 06.02.2014; Telephone interview #11 with former representative of global NGO with experience as a successful EIDHR applicant, 14.02.2014.

¹⁵² Telephone interview #11 with former representative of global NGO with experience as a successful EIDHR applicant, 14.02.2014.

¹⁵³ Recent statements include, Statement by EU High Representative Catherine Ashton on the ratification of the Rome Statute of the International Criminal Court by Côte d'Ivoire, Brussels, 19.02.2013 (A 91/13); Statement by High Representative Catherine Ashton on the ratification of the Rome Statute of the International Criminal Court by Guatemala, Brussels, 3.04.2012 (A 157/12); Statement by the High Representative Catherine Ashton on the ratification of the Rome Statute of the International Criminal Court by Vanuatu, Brussels, 7.12.2011 (A 498/11).

¹⁵⁴ For a list of the Conventions, see Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25.10.2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, OJ L 303, 31.10.2012, at p.1, at Annex VIII.

¹⁵⁵ European Parliament resolution P7_TA(2011)0507 at para.96.

¹⁵⁶ See <http://ec.europa.eu/trade/policy/countries-and-regions/countries/pakistan/>.

6.3.2 Financial

The EU, together with assistance from individual Member States, has been a key financial supporter of many of the ICC's activities. In terms of universality, a number of seminars were organised with the support of the EU to raise awareness of the ICC, particularly in the early days of the Court's operation⁽¹⁵⁷⁾, but also, more recently, an 'NGO Forum' was organised to engage civil society from around the world⁽¹⁵⁸⁾.

Whereas ICC awareness is high amongst a number of states, some of the EU funding for ICC-related matters could be directed at reaching out to regions where ICC membership is low⁽¹⁵⁹⁾. In addition, funding could also be channelled to ICC initiatives aimed at enhancing implementation⁽¹⁶⁰⁾. It should not be forgotten, that 64% of Asian States have not ratified the ICC, while 89% do not have an adequate legal framework. Similarly while 62% of African States have joined the ICC, 18% have experienced conflict or patterns of abuse that may amount to ICC crimes and do not have adequate legal frameworks or work processes in place⁽¹⁶¹⁾.

The EU is the principal funder for a number of prominent NGOs and CSOs that work to promote universality and full implementation of the Rome Statute. The European Commission, through the EIDHR, has funded a number of organisations who have important universality components. Amongst others, Parliamentarians for Global Action ('PGA'), the Coalition for the International Criminal Court ('CICC'), No Peace Without Justice ('NPWJ'), and The Centre for International Law and Policy - Case Matrix Network ('CILRAP-CMN') have all received funding in order to promote ratification of the Rome Statute⁽¹⁶²⁾. The EIDHR has also been a critical supporter of smaller regional, or national NGOs and CSOs working within states and regions to promote the ICC and its values⁽¹⁶³⁾.

The work of NGOs and CSOs to promote support for the ICC on the ground can be an important reinforcement to bilateral political efforts between the EU and third states. For example, PGA focuses upon mobilising the 'political and legal prerogatives of its members' to 'promote peace, democracy, the rule of law, human rights, gender equality and population issues by informing, convening, and mobilizing parliamentarians to realize these goals'⁽¹⁶⁴⁾. One prominent campaign led by its International Law and Human Rights Programme is to promote universal ratification and implementation of the Statute and the Kampala Amendments. Given that its membership comprises legislators from democratically elected parliaments from around the globe, it can therefore play a particularly influential role in fostering the necessary political will for ratification among those responsible for making policy and legislative decisions on behalf of a country.

While PGA promotes and mobilises support within governments, the CICC focuses upon mobilising support for the Rome Statute system of international criminal justice within civil society. The Coalition represents 2500 civil society organisations around the globe sharing the same concern and commitment to the strengthening of a universal, fair, independent and effective ICC⁽¹⁶⁵⁾. Coordinating the efforts of its member organisations on the basis of geographic networks and thematic caucuses, one of the Coalition's most

¹⁵⁷ Telephone interview #01 with ICC Official, 03.02.2014.

¹⁵⁸ The NGO Forum took place between 5-6.12.2013 and within the wider accountability theme, the ICC was included in the Fight against Immunity pillar. Telephone interview #09 with EU official, 07.02.2014.

¹⁵⁹ Telephone interview #05 with ICC Official, 04.02.2014.

¹⁶⁰ Telephone interview #01 with ICC Official, 03.02.2014; Telephone interview #10 with ICC official, 13.02.2014.

¹⁶¹ See information obtained through the National Implementing Legislation Database which forms part of the ICC Legal Tools Project, available at www.legal-tools.org/en/go-to-database/national-implementing-legislation-database/.

¹⁶² Informal interviews with representatives of each organisation.

¹⁶³ EIDHR, EIHDR evaluation of its support to the International Criminal Court (ICC) and to NGOs for the Establishment and Functioning of the ICC, 2000-2008, Final Report, 16.12.2008 (hereafter 'EIDHR Evaluation, 2008'); EIDHR, The European Initiative for Democracy and Human Rights Compendium 2000-2006, at pp.295-310; The European Instrument for Democracy and Human Rights (EIDHR) Compendium January 2007-April 2009, at pp.37-39.

¹⁶⁴ See <http://www.pgaction.org/about/pga/overview.html>.

¹⁶⁵ See <http://www.iccnw.org/?mod=coalition>.

prominent campaigns centres upon the objective of promoting a ‘universal court with global support’⁽¹⁶⁶⁾. As the Coalition describes, this policy includes the ‘universal ratification campaign’ whereby the Coalition and its members utilise advocacy methods and materials to ‘publicize the work of the Court and the importance of ratification in the target country’⁽¹⁶⁷⁾.

In order to ensure maximum effectiveness of the efforts of all actors involved in promoting the universality of the Statute – including the EU, the ICC Presidency, CICC or PGA – one suggested recommendation by an interviewee was to enhance cooperation and coordination between these actors in order to ensure by that strategies adopted by each to promote universality are consistent and complementary to each other⁽¹⁶⁸⁾.

At a regional level, through the EIDHR, the European Commission has provided funding to the International Commission of Jurists (‘ICJ’) Kenyan Section which operates across the East African region to ‘raise awareness of international criminal justice mechanisms, focusing especially on the International Criminal Court (ICC) and to empower various stakeholders to be able to engage with international criminal processes at the policy, legislative and implementation levels’. ICJ Kenya plays an important role in enhancing an understanding of the values and principles underpinning the ICC and promoting ‘cooperation, implementation and objective discourse of the Rome Statute with state governments, the East African Community and the African Union’⁽¹⁶⁹⁾. ICJ Kenya has been especially vocal with regard to clearing up misunderstandings surrounding the ICC, particularly in light of the recent ICC-Africa tensions⁽¹⁷⁰⁾.

Another example comes from CILRAP-CMN. Part of a recently awarded EIDHR project, work will focus on removing obstacles for ratification in Indonesia and Sierra Leone, with technical assistance on the drafting of ICC-related legislation to be undertaken in Mongolia⁽¹⁷¹⁾. These activities fall squarely within universality and target regions which are within both ICC and EIDHR strategic priorities.

Establishing grass roots support for the ICC, and more generally for the values and principles that the Rome Statute embodies within third states, can be an important way to build momentum in favour of ratification of the Rome Statute by mobilising demand for ratification from within or by placing pressure from outside. But even if these efforts do not directly lead to ratification of the Statute, they can play a crucial role in supporting and strengthening commitment to the rule of law, human rights and justice – values and principles the adherence to which makes violence and insecurity less likely. Funding should therefore continue to support NGOs that engage in efforts targeting the promotion of the Court’s universality.

6.3.3 Technical

The question of technical support in advancement of the promotion of the universality of the Rome Statute and its full implementation becomes pertinent once third states have indicated their political will to accede to the Rome Statute. In order to do so, they may have to make a number of legislative, and even more fundamental constitutional changes to their domestic legal system in order to ensure that it complies with the Rome Statute and to incorporate the Statute fully into domestic law. As already discussed, full implementation of the Rome Statute ensures that domestic jurisdictions have the legal capacity to investigate and prosecute international crimes and also enables states to fulfil their obligations under the Rome Statute to cooperate fully with the Court.

¹⁶⁶ Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014; Telephone interview #11 with former representative of global NGO with experience as a successful EIDHR applicant, 14.02.2014.

¹⁶⁷ See <http://www.iccnw.org/?mod=ratimp>.

¹⁶⁸ Telephone interview #11 with former representative of global NGO with experience as a successful EIDHR applicant, 14.02.2014.

¹⁶⁹ See <http://www.icj-kenya.org/index.php/international-criminal-justice>.

¹⁷⁰ See Part Three, section 12 and informal discussion with an NGO representative.

¹⁷¹ Informal interview with representative of NGO recently awarded the funding.

While Article 2(3) of the 2011 Decision places the onus on EU Member States to provide technical assistance to third states to ratify and implement the Rome Statute, the 2011 Action Plan calls upon the EU Focal Point to assist in the coordination of technical assistance provided by Member States to third states⁽¹⁷²⁾. The EU Focal Point, the Action Plan states, 'will facilitate advice and/or support to the ratification or accession process of a third state by providing updated lists of experts, relevant texts and commentaries'⁽¹⁷³⁾. Building upon this, it continues that the EU Focal Point may liaise with national focal points to provide such assistance⁽¹⁷⁴⁾, and suggests channels through which the EU itself could provide assistance. These include EU development and cooperation programmes, expert level technical consultations between the EU and the target states, or the support of civil society projects⁽¹⁷⁵⁾. Finally, the Action Plan suggests that the EU Focal Point maintains a list of experts designated by Member States that could be deployed on behalf of the EU to accomplish specific technical assistance missions⁽¹⁷⁶⁾.

Whilst the EU's support of NGOs is widely acknowledged⁽¹⁷⁷⁾, awareness of the possibility of technical assistance provided for by the EU remains relatively low amongst the NGO community in situation countries⁽¹⁷⁸⁾. Similarly, access to experts that could be utilised by local NGOs to provide drafting assistance for instance is also haphazard⁽¹⁷⁹⁾.

Greater use could therefore be made of the list of experts maintained by the EU Focal Point. In addition, as the updating of that list depends on Member States' initiative, it is not always as current as it should be⁽¹⁸⁰⁾. Due consideration should therefore be given to the possibility of an independent list of experts being created which would be public, centrally maintained on the Focal Point website, and where individual experts could also nominate themselves, subject to meeting specific qualitative criteria.

Additionally, although the European Parliament's Standing Committees already discuss issues pertaining to the ICC, where appropriate⁽¹⁸¹⁾, more use could be made of their amassed expertise externally. Visibility of the Committees' ICC-related action could be increased through improved online presence. Although the Committees' meetings documents are available on the Parliament's website, work on the ICC is not systematically presented, nor is it accessible through a single place, despite the existence of a good online search engine⁽¹⁸²⁾.

Further, looking beyond the Committee structures, better use could be made of those MEPs who, owing to their prior experience within their own national legal and political systems, might be in a position to contribute to debates outside the EP on their experience of dealing with obstacles to ICC ratification or

¹⁷² Action Plan, 2011 at p.p. 9-11.

¹⁷³ Action Plan, 2011 at p.9.

¹⁷⁴ Action Plan, 2011 at p.9.

¹⁷⁵ Action Plan, 2011 at p.9.

¹⁷⁶ Action Plan, 2011 at p.9.

¹⁷⁷ Telephone interview #01 with ICC Official, 03.02.2014; Telephone interview #03 with global NGO representative with experience as a capacity builder, a successful EIDHR applicant and as an ICC consultant, 03.02.2014; Telephone interview #04 with representative of a Non-EU Member State, ICC State Party (WEOG Group), 04.02.2014; Telephone interview #05 with ICC Official, 04.02.2014; Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014; Telephone interview #07 with representative of a non-EU Member State, ICC State Party (GRULAC Group), 06.02.2014; Telephone interview #08 with global NGO representative with experience working with a local NGO and also an unsuccessful EIDHR applicant, 06.02.2014; Telephone interview #11 with former representative of global NGO with experience as a successful EIDHR applicant, 14.02.2014; Telephone interview #12 with global NGO representative, 19.02.2014.

¹⁷⁸ Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014.

¹⁷⁹ Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014.

¹⁸⁰ Telephone interview #09 with EU official, 07.02.2014.

¹⁸¹ e.g. European Parliament Subcommittee on Human Rights, Committee Meeting 12.02.2014, Agenda Item 9: 'Exchange of views on the Kampala amendments to the Rome Statute on the crime of aggression'.

¹⁸² Telephone interview #03 with global NGO representative with experience as a capacity builder, a successful EIDHR applicant and as an ICC consultant, 03.02.2014.

enhancing implementation of the Rome Statute¹⁸³). Their presence and expertise could certainly benefit the ICC or State Parties and NGO awareness campaigns and would help further disseminate the Parliament's activities externally.

6.4 Recommendations

6.4.1 Member States

- Through the **Commission**, provide technical assistance to the four EU Member States that have yet to adopt ICC implementing legislation (use could be made of the EU's list of experts in international criminal law maintained for each country);
- Encourage the ratification among **Member States** of the amendments to the Rome Statute agreed at the Kampala Review Conference, namely the amended list of war crimes and the crime of aggression;
- Consider widening the list of crimes falling within the competence of the EU under Article 83(1) TFEU to include the core international crimes as defined in the Rome Statute in order to strengthen the effectiveness of measures to ensure internal consistency in the full implementation of the Statute.

6.4.2 EU

- The **Commission** should ensure that ratification (and implementation) of the Rome Statute is included in its proposals for the conditions imposed on candidate countries for EU accession;
- The **EEAS** should target countries from within the regional groupings that EU Member States belong to, such as the 'WEOG', or 'Eastern Europe' groups, in order to promote universality;
- The **European Parliament** should continue to call upon the US and Russia to ratify the Rome Statute;
- The **European Parliament** should keep the matter of implementing legislation on its agenda and should continue to raise the lack of implementation in EP's resolutions;
- The **EEAS** and **Commission** should adopt a consistent approach with regard to the inclusion of ICC ratification and implementation clauses in agreements concluded under the European Neighbourhood Policy;
- The **EEAS**, the **High Representative**, the **EUSRs** and delegations of the **Parliament** should raise the issue of ICC ratification and implementation, where appropriate, in bilateral dialogues and strive for consistency;
- The **EEAS** and **Commission** should conduct an assessment of the impact of the Cotonou Agreement ICC clause in order to determine its future inclusion in other similar agreements;
- The **EEAS** and **Parliament** should conduct an assessment of the efficacy of the demarches in encouraging third states to ratify and implement the Rome Statute;
- Continue to support NGOs who engage in ratification and implementation work;
- Enhance cooperation and coordination between the different actors involved in the promotion of universality – such as the Presidency of the ICC, the EU, and major NGOs such as the CICC and PGA – by ensuring that the strategies adopted by each to promote universality are consistent and complementary to each other;
- The **Commission** should amend the list of treaties the ratification of which is a condition for qualification for GSP+ status and make ratification of the Rome Statute a condition for consideration of GSP+ status;

¹⁸³ e.g. PGA, 2011.

- Target some of the funding given to the ICC to ratification outreach sessions in geographical regions where membership is low. Consider channelling funding to ICC initiatives aimed at enhancing the implementation of the Rome Statute;
- Make better use of technical support options available. Consider the creation of an independent list of experts to be publicly available through the [EEAS](#) website;
- The [European Parliament](#) should promote the work of its standing committees externally and to encourage MEPs with relevant expertise to participate in awareness raising campaigns on ICC Statute ratification and implementation.

7. INTEGRITY

7.1 General Discussion

The concept of 'preservation of the integrity of the Statute' entered the vocabulary of instruments emanating from both the EU and the ICC soon after the Court came into existence. Commitments to preserving the integrity of the Statute are consistently made by the EU and other stakeholders in the ICC system, such as Canada and Japan⁽¹⁸⁴⁾. Accordingly, despite the lack of a clear definition of the precise meaning of this concept, this section will attempt to shed some light on 'integrity' based on how it has been invoked.

At its fifth session, the ASP adopted a resolution that stated that the integrity of the Rome Statute must be preserved and that treaty obligations emanating therefrom must be fully adhered to, and encourages States Parties to the Rome Statute to exchange information and to support and assist each other to that end, particularly in situations where its integrity is being challenged and reminds States of the need to uphold the spirit of the Statute, and of their obligation to cooperate with the Court in the fulfilment of its mandate⁽¹⁸⁵⁾.

This suggests that the preservation of the integrity of the Statute is concerned with ensuring that the essence of the Rome Statute is preserved and properly observed through compliance with the obligations established therein. Ordinary use of the word 'integrity' can be taken to refer to the strength of a particular object or thing, 'the quality of being honest and having strong moral principles' or 'the state of being whole and undivided'⁽¹⁸⁶⁾. Therefore, the preservation of the Statute may be taken to concern the protection of the Statute, or more specifically the system that it embodies, from measures that could weaken or dilute the ability of that system to attain its objectives and advancing the principles in the Statute. Supporting this, the 2011 Action Plan adopted by the Council states that 'preservation of the integrity of the Rome Statute' encompasses the protection of the core principles established under the Rome Statute throughout any review process that might lead to amendments to the Statute itself and its subsidiary instruments'⁽¹⁸⁷⁾.

Looking more broadly, the 'preservation of the integrity of the Statute' may be understood in terms of Article 18 of the Vienna Convention on the Law of Treaties. This provides that states that have signed a treaty and either have declared their intention not to become a party to it, or the treaty is yet to come into force, are under an obligation 'not to defeat the object and purpose' of that treaty⁽¹⁸⁸⁾.

Examples of measures that would serve to undermine the integrity of the Rome Statute would be the granting of amnesties for those responsible for international crimes or the granting of immunity of specific individuals from prosecution, for any reason – in particular, by reason of their official status, such as head of

¹⁸⁴ Telephone interview #09 with EU official, 07.02.2014.

¹⁸⁵ Article 3, ICC-ASP/5/Res.3.

¹⁸⁶ "integrity, n.". OED Online. December 2013. Oxford University Press. 9 February 2014.

¹⁸⁷ Action Plan, 2011, at p.8.

¹⁸⁸ Article 18, Vienna Convention on the Law of Treaties (adopted 22.05.1969, and entered into force 27.01.1980) 1155 UNTS 331.

state. To do so would be to undermine the very essence of the notion of the universality of international criminal justice – all victims of crimes within the Court’s jurisdiction are entitled to justice irrespective of who was responsible. Or put differently, ultimately, no one is above the law.

Similarly, the preservation of the integrity of the Statute necessarily involves the preservation of the Court’s *judicial* character⁽¹⁸⁹⁾. Therefore, the preservation of the integrity of the Statute is closely related to the preservation of the Court’s independence (on which, see section 8). The preservation of the integrity of the Statute requires that the Court is not placed under pressure to depart from or ‘interpret with flexibility’ the Statute and its Rules of Procedure and Evidence, irrespective of political expediency. To this effect, in order to preserve the integrity of the Statute, it is essential that the legal framework agreed upon at the Rome Conference and manifested in the Rome Statute is properly respected⁽¹⁹⁰⁾. Further to that, the Court as a judicial institution is bound to abide by that legal framework⁽¹⁹¹⁾. To this effect, the task of the preservation of the integrity of the Statute may be understood in terms of reconciling the ‘eternal tension’ between the principle of legality (which is embodied by the Rome Statute and which guides the Court in its activities) and political considerations (which influence state decision making)⁽¹⁹²⁾. In the course of balancing this tension, it is necessary to ensure that the support that is provided to the Court is of a ‘principled sort’; one that understands and respects the judicial nature of the institution⁽¹⁹³⁾.

While the 2003 Common Position noted the eminent importance of preserving the integrity of the Rome Statute in its preambular paragraphs⁽¹⁹⁴⁾, it was not until the 2011 Decision that preservation of the integrity of the Statute was formally incorporated as a concrete objective in the EU’s policy on the ICC by the Council⁽¹⁹⁵⁾. Even now, with its formal recognition as an objective, the 2011 Decision provides no further elaboration upon how the EU and its Member States in fact pursue this objective beyond acknowledging the continuing relevance of Guidelines adopted in 2002 in order to respond to the initiative of a particular third state to undermine the Statute’s integrity (for further discussion, see section 7.3.1). Nevertheless, as the following discussion will demonstrate, the EU has been a global leader when acting to preserve the integrity of the Statute. Before considering the measures that the EU has taken to contribute to the preservation of the integrity of the Statute, the following sub-section will briefly consider the duties and responsibilities of EU Member States as State Parties to the Rome Statute in this regard. Once again, as in the case of the promotion of universality, the effectiveness of Member State and EU efforts to preserve the integrity of the Statute depends on the degree of consistency in their approaches. This section will demonstrate how fragmentation or disunity among its Member States can dilute the effectiveness of the measures the EU as an institution takes.

7.2 Member States

While the 2011 Decision and Action Plan only briefly elaborate upon the kind of measures that EU Member States could take in order to promote the integrity of the Statute, by and large, EU Member States have presented a united front in their response to measures by third states that could (or do) threaten the integrity of the Statute. It would be fair to say however that this apparent unity can quickly disappear when individual states have strong views over a particular issue⁽¹⁹⁶⁾. This has limited the efficacy of initiatives undertaken at the collective level (see section 7.3.1.). While EU Member States by and large appeared united on the issue of US bilateral immunity agreements (‘BIAs’), Member State disunity became particularly apparent in the context of the EU’s response to US initiatives to undermine the integrity of the Statute in the

¹⁸⁹ Telephone interview #10 with ICC official, 13.02.2014.

¹⁹⁰ Telephone interview #10 with ICC official, 13.02.2014.

¹⁹¹ Telephone interview #10 with ICC official, 13.02.2014.

¹⁹² Telephone interview #10 with ICC official, 13.02.2014.

¹⁹³ Telephone interview #10 with ICC official, 13.02.2014.

¹⁹⁴ Preambular paragraph 10, Council Common Position 2003/444/CFSP.

¹⁹⁵ Article 1(2), Council Decision 2011/168/CFSP.

¹⁹⁶ Telephone interview #05 with ICC Official, 04.02.2014.

UN Security Council. For now, it suffices to say, that both the UK and France (along with Ireland) voted in favour of the adoption of a resolution designed to grant immunity from prosecution to peacekeeping troops from non-State Parties to the Rome Statute, such as the US⁽¹⁹⁷⁾ (see section 7.3.1). As will be discussed, this lack of consistency within the EU, which may also be understood in the context of the broader divisions that emerged over the support of the US in its military operations in Iraq and Afghanistan, represented a particularly unfortunate tarnish on the EU's record when promoting the integrity of the Statute. More recently, frustration has been expressed from within the Court at the unwillingness of State Parties, including EU Member States, to express unconditional support for the ICC in the context of the backlash against the Court arising out of the Kenyan situation. Rather, what was witnessed was State Parties placing pressure on the ICC to be more 'flexible' in the interpretation of the Statute and the Court's Rules of Procedure and Evidence ('RPE'). Such equivocalness in defending the legal framework established by the Rome Statute and the Court's judicial character (including by certain EU Member States) in order to arrive at a politically satisfactory compromise was noted by some interviewees as a cause for concern⁽¹⁹⁸⁾. To this effect, a number of interviewees expressed calls for greater consistency between EU Member States and the positions that they take, particularly in the context of discussions concerning the ICC in the UN Security Council⁽¹⁹⁹⁾.

7.3 The EU as a Global Actor

7.3.1 Political

EU and US-ICC Relations

One of the most high profile instances in which the EU has acted as a global actor to protect the integrity of the Statute came soon after the Rome Statute was adopted. It concerns the EU's response to the campaign undertaken by the then US Administration to undermine the Court out of fear that an effective Court might investigate and prosecute alleged crimes by US nationals. One of the most potent measures adopted by the US was the policy of placing pressure on states ratifying the Rome Statute to sign BIAs with the US⁽²⁰⁰⁾. BIAs provided guarantees that those states that entered into them would not cooperate with the ICC in cases concerning US nationals that are within their territorial jurisdiction and have been accused of being responsible for crimes within the Court's jurisdiction. The pressure placed upon State Parties to enter into such agreements was, in some cases, considerable⁽²⁰¹⁾, with the American Service-members Protection Act ('ASPA') forbidding the US to provide economic or financial assistance to State Parties to the Rome Statute but who had not entered into BIAs with the US⁽²⁰²⁾.

In response, in September 2002, the General Affairs and External Relations Council adopted Conclusions on the ICC designed, in part, to provide guidelines to Member States regarding their response to the US policy of BIAs⁽²⁰³⁾. Although not binding on Member States, the Conclusions and accompanying Guiding Principles provided a strong statement of the EU's political support for the ICC and the principles embodied in the Statute. They represent a unified European position to US objections to the Court and reaffirmed the apolitical nature of the Court and its complementary jurisdiction to the primacy of national proceedings.

¹⁹⁷ UN SC Res 1422 (12 July 2002) UN Doc S/RES/1422.

¹⁹⁸ Telephone interview #10 with ICC official, 13.02.2014.

¹⁹⁹ Telephone interview #10 with ICC official, 13.02.2014. Telephone interview #12 with global NGO representative, 19.02.2014.

²⁰⁰ Proposed Text of Article 98 Agreements with the United States, July 2002, available at <http://www.amicc.org/docs/98template.pdf>.

²⁰¹ Roth, 2003.

²⁰² American Service-Members' Protection Act 2002, 22 U.S.C. 7.

²⁰³ Council of the European Union, Draft Council conclusions on the International Criminal Court, Brussels 30.09.2002 (12488/1/02) Annex 1: EU Guiding Principles concerning arrangements between a State Party to the Rome Statute of the International Criminal court and the United States regarding the conditions to surrender of persons to the Court (hereafter 'EU Guiding Principles, 2002').

The Guiding Principles, by not distinguishing between EU Member States and third states, constituted an important foreign policy statement addressed to all countries, outlining the EU's position with regard to BIAs and potentially informing the decision-making of third states when deciding whether to enter into a BIA with the US and on what terms. It has been stated that governments from third states, including Japan, had been looking to the EU position to provide leadership on the matter of BIAs⁽²⁰⁴⁾, with the suggestion that as one of the main proponents of the Court, the EU faces an expectation that it will provide 'moral and political guidance to which third states could align themselves'⁽²⁰⁵⁾. The Guiding Principles restated the obligation of State Parties to the Rome Statute to cooperate fully with the Court and not to enter into agreements with third states after ratification that would be inconsistent with their obligations under the Statute. Where BIAs were concluded by State Parties – including at least one EU Member State – the Guiding Principles offered suggestions as to how State Parties might mitigate the negative impact of such agreements on the integrity of the Statute⁽²⁰⁶⁾. These include clauses that guarantee that parties to the agreement will themselves conduct genuine investigations into allegations of crimes committed within the jurisdiction of the Court⁽²⁰⁷⁾, that the scope of such agreements be limited to nationals of non-State Parties⁽²⁰⁸⁾, and that, if concluded, such agreements would contain a sunset clause so that such agreements were only temporary in nature⁽²⁰⁹⁾.

In addition to issuing the Guidelines, the Council issued a statement reaffirming its commitment to the integrity of the Statute and provided information of a demarche conducted with the US addressing the US measure to undermine the integrity of the Statute and affirmed the EU's commitment to oppose such measures⁽²¹⁰⁾.

Although the US secured 102 BIAs, the practical effect of the policy was limited⁽²¹¹⁾. While it demonstrated a certain disregard for the ethos embodied by the Rome Statute, some evidence suggests that they back-fired on the US with it being unable to pursue certain foreign policy objectives, having prohibited itself from providing military and financial assistance to ICC State Parties who refused to enter into a BIA⁽²¹²⁾. With the change in US administration in 2008, and a more cooperative relationship between the US and the ICC, any remaining BIAs are now in practice obsolete. However, on 31st January 2014 President Obama issued a Memorandum stating that any and all US military forces deployed to Mali as part of the UN Stabilisation Mission will not be liable to prosecution in The Hague⁽²¹³⁾, referring both to ASPA and a Mali-US BIA. This provides a stark reminder of the continuing relevance of measures to counter lingering US hostility. The 2011 Decision also reminds the EU and its Member States of the continuing relevance of those Guidelines. Indeed, more generally, since they are drafted in general terms their potential utility is not limited to the US; if other states seek to adopt the same (or a similar) strategy, the Guidelines may once again become instructive.

²⁰⁴ Groenleer and Riiks, 2009 at p.177.

²⁰⁵ Groenleer and Riiks, 2009 at p.177.

²⁰⁶ EU Guiding Principles, 2002.

²⁰⁷ EU Guiding Principles, 2002, at p.4.

²⁰⁸ EU Guiding Principles, 2002, at p.4.

²⁰⁹ EU Guiding Principles, 2002, at p.5.

²¹⁰ Statement by the Presidency on behalf of the European Union on reaffirming the EU position supporting the integrity of the Rome Statute, Brussels 27.07.2004 (11680/04 (Presse 235)). See also, Declaration by the Presidency on behalf of the European Union on the Nethercutt amendment, Brussels, 10.12.2004 (15864/1/04 REV 1 (Presse 353)).

²¹¹ Telephone interview #11 with former representative of global NGO with experience as a successful EIDHR applicant, 14.02.2014.

²¹² Weisman, 2006.

²¹³ Presidential Memorandum – Certification Concerning U.S. Participation in the United National Multidimensional Integrated Stabilization Mission in Mali Consistent with Section 2005 of the American Servicemembers' Protection Act, US White House 31.01.2014.

Despite recent developments, during the Obama administration, there has been some positive re-engagement by the US, albeit short of ratification. For instance, the commitment to arrest Joseph Kony⁽²¹⁴⁾, the expansion of the War Crimes Rewards Programme to include ICC indictees⁽²¹⁵⁾ as well as the assistance provided with regard to the transfer of ICC indictee Bosco Ntaganda to the ICC after the latter surrendered at the US embassy in Kigali⁽²¹⁶⁾, all pointed to improvement in the ICC-US relationship.

Whereas solidarity in the EU resolve to protect the integrity of the Statute was demonstrated in the context of the BIAs, it appears to have been invisible in the context of measures pursued by the US in the UN Security Council to undermine the integrity of the Statute. In 2002, the US successfully negotiated the adoption of Security Council Resolution 1422, adopted under Chapter VII of the UN Charter and pursuant to Article 16 of the Rome Statute⁽²¹⁷⁾. This Resolution excluded from the jurisdiction of the Court acts or omissions by officials or personnel on UN established or authorised peacekeeping missions who are nationals of non-State Parties to the Rome Statute. In doing so, the US had effectively secured immunity from prosecution for any US national serving in UN authorised peacekeeping operations.

What was particularly concerning from the perspective of the EU's commitment to preserving the integrity of the Statute was the failure of a single EU state sitting on the Security Council to demonstrate its disapproval of the deferral – either by voting against the Resolution, or even abstaining from the vote, with the Resolution being adopted unanimously. Indeed, the UK – in collaboration with Mauritius – attempted to introduce an amendment to the draft text of the Resolution that would have expressed the Security Council's 'intention to renew such a request on a case-by-case basis for a further twelve month period for as long as may be necessary'⁽²¹⁸⁾. In addition to France and the UK, which as permanent members of the Security Council had the power to veto the Resolution, the Republic of Ireland was sitting as a non-permanent member⁽²¹⁹⁾. While statements were made in the open debate of the draft Resolution opposing adoption by France, Germany, Ireland and The Netherlands, the Danish statement made on behalf of the EU failed to condemn the Resolution⁽²²⁰⁾. Despite this, the Resolution was passed unanimously, and was renewed the following year for another 12 months by Resolution 1487 – this time with three abstentions, two of which by EU states, France and Germany⁽²²¹⁾. Statements in opposition to the Resolution were made by Greece on behalf of the EU, and separate statements by Germany, France and the Netherlands⁽²²²⁾.

The EU and its Member States were placed in a particularly difficult position. In June 2002, the US had vetoed a Resolution to extend the mandate of the UN Mission in Bosnia and Herzegovina, explaining that the US was unprepared to place US-national peacekeeping personnel 'at risk' from the ICC's jurisdiction over Bosnia and Herzegovina after its ratification of the Rome Statute earlier that year⁽²²³⁾. While another draft Resolution to extend the mandate was subsequently adopted, those concerned with preserving the integrity of the Statute were faced with a dilemma; on one hand, they were faced by the attempts of one state to undermine the integrity of the Statute by carving out immunity for certain individuals, on the other they were faced with the prospect of ending a vital UN peacekeeping mission with potential implications for international peace and security in the region. As recent history in the Balkans region had so devastatingly demonstrated,

²¹⁴Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate' White House Office of the Press Secretary 14.10.2011.

²¹⁵ Enhancement of State Department Rewards Programme, Office of the Spokesperson, Washington, DC, 16.01.2013 .

²¹⁶ Daily Press Briefing –18.03. 2013, Washington, DC, 18.03.2013.

²¹⁷ UN SC Res 1422.

²¹⁸ Draft Proposal by Mauritius, CICC, 2004 at p.17.

²¹⁹ Indeed, accounts of the negotiation of resolution 1422 suggest that while France criticised the US proposal, the UK actively supported it, providing the US with political support to obtain the resolution by unanimity. See CICC, 2004 at p.v.

²²⁰ UN Security Council, Press Release 10.07.2002.

²²¹ UN SC Res 1487 (12 June 2003) UN Doc S/RES/1487.

²²² UN Security Council Council, Press Release, 12.06.2003.

²²³ UN Security Council, Press Release, 30.06.2002.

the risk that crimes within the jurisdiction of the Court could be committed if that breakdown of peace and security occurred was only too real.

It was only due to the diplomatic fallout caused by the revelations of the now notorious prisoner abuse by US forces at Abu Ghraib in Iraq that the US was forced to abandon further renewal of the deferral in 2004.

EU and UN Security Council-ICC Relations

The EU and its Member States have been active in the UN Security Council on matters concerning the ability of the Security Council to refer situations to the ICC involving non-State Parties to the Statute. As Part One explained, the UN Security Council has made two such referrals; one of the situation in Darfur in 2005 by Resolution 1593, and the second in 2011, referring the situation in Libya by Resolution 1970. The adoption of Resolution 1593, with four abstentions, including of China and the US, and later in 2011, the unanimous adoption of Resolution 1970, on the face of it, represent significant milestones of the acceptance of the value and legitimacy of the ICC, even by non-State Parties. The adoption of both Resolutions represented significant successes for EU Member States, who had worked hard to raise support in the Council for both referrals.

At the same time however, a study of the terms of those Resolutions and the level of support that the Security Council has been willing to provide the ICC after having made the initial referrals suggests that there is room for improvement. One of the most problematic clauses in both referral Resolutions is the express decision to exclude the UN from bearing any of the expenses incurred by the Court in relation to the referral⁽²²⁴⁾. These provisions undermine the Rome Statute, which under Article 115(b) envisages that the UN will provide funds in relation to the expenses incurred as a result of referrals made by the Security Council. Furthermore, the preambular paragraphs to both Resolutions emphasise the existence of BIAs. More generally, it has been observed that once a referral has been made by the Council, it has not followed it up with sustained political and technical support to the Court. The Security Council has rarely responded to instances of non-cooperation with the Court in regards to proceedings arising out of referral situations, and where it has reminded states of their obligations to cooperate with the Court or comply with the Security Council resolutions referring the situations, it has done so with little force⁽²²⁵⁾.

In order to be credible, the ICC needs to be effective in fulfilling its mandate. In order to do that, it needs the necessary resources – whether that is financial, political or technical support. As has already been stated and will be discussed in more detail in section 9, the ICC relies upon the cooperation of states and other international actors in order to function. In its 2011 resolution on the EU's support for the ICC, the European Parliament has raised the matter of the support the Security Council provides the Court in respect of situations it has referred⁽²²⁶⁾. At paragraph 47, the Parliament called

on the UN Security Council members and the UN General Assembly members to find appropriate ways and means for the UN to provide the Court with financial resources to cover the costs related to the opening of investigations and prosecutions into situations referred by the UN Security Council in accordance with Article 115 of the Rome Statute.

Further, in the report accompanying the resolution, the Parliament criticised the Security Council's failure to provide the necessary financial support to accompany the referrals⁽²²⁷⁾.

One area where the EU has been successful in promoting the integrity of the Statute in the course of the proceedings of the UN Security Council has been on the matter of the Council's power to defer ICC proceedings pursuant to Article 16 of the Rome Statute. This provision acknowledges the power of the Security Council, acting under its Chapter VII mandate, to determine that a deferral of specific proceedings

²²⁴ UNSC Res 1593 (31.03.2005) UN Doc S/RES/1593, at para.7; UNSC Res 1970 (26.02.2011) UN Doc S/RES/1970, at para.8.

²²⁵ Statement by the President of the Council (16.06.2008) UN Doc S/PRST/2008/21.

²²⁶ European Parliament resolution P7_TA(2011)0507.

²²⁷ Report of the Committee on Foreign Affairs (A7-0368/2011) at p.16.

of the ICC for one year is necessary for the maintenance of international peace and security⁽²²⁸⁾. This power is renewable, and accordingly, the deferral could be renewed on an annual basis if the Security Council deemed it necessary⁽²²⁹⁾. Article 16 threatens the integrity of the Statute since it introduces the possibility that a political decision making process will influence a judicial process. In order to promote the integrity of the Statute, one measure indicated by the 2011 Plan of Action includes the monitoring of situations regarding the possible invocation of Article 16 by the Security Council⁽²³⁰⁾. EU states have worked effectively to encourage the Security Council to resist calls for it to defer ICC proceedings in the context of its investigations into the situations in Darfur and Kenya⁽²³¹⁾. For further discussion of the EU involvement in these situations, see the case study in Part Three, section 12 on how the EU has responded to the situation arising from the relationship between certain African states and the African Union and the ICC.

7.3.2 Financial

Once again, the EU's funding of NGOs and CSOs through the EIDHR has enabled those organisations to pursue campaigns and initiatives designed to promote the integrity of the Rome Statute. For example, the CICC, comprising of a coalition of NGOs ran sustained political campaigns mobilising opinion against US efforts to undermine the integrity of the Court⁽²³²⁾.

7.4 Recommendations

7.4.1 Member States

- Where possible, **EU Member States** sitting on the UN Security Council, should aim to adopt a united front to protect the integrity of the Rome Statute.

7.4.2 EU

- **All EU institutions** should continue to support the integrity of the Statute through primarily political means;
- The **EEAS**, the **High Representative** and the **Council** should continue to monitor the US-ICC relationship for any possible escalation;
- Continue to support financially organisations engaging in campaigns and initiatives to promote the integrity of the Rome Statute.

8. INDEPENDENCE, AND EFFICIENCY AND EFFECTIVENESS

8.1 General Discussion

8.1.1 Independence

The previous section focussed upon the measures that the EU and its Member States have and could take in order to preserve the values and principles that lie at the core of the Rome Statute system and which are pursued by the Court when carrying out its activities. Whereas the previous section was concerned with the efforts to pursue the integrity of the Rome Statute *system* as a whole, the focus of this objective is upon preserving the integrity of the Court.

A Court's independence is one, if not *the* defining and distinguishing feature of a justice system operating in accordance with the rule of law. The independence of the ICC was an issue that was fought long and hard over during the negotiations of the Rome Statute. On one hand, the Like-Minded Group, comprised of an alliance of states and NGOs, negotiated for a strong and fully independent Court, free from the influence or

²²⁸ Article 16, Rome Statute.

²²⁹ Article 16, Rome Statute.

²³⁰ Action Plan, 2011, at p.11.

²³¹ UN Security Council, Press Release 15.11.2013.

²³² See, for details <http://www.iccnw.org/?mod=bia>.

supervision of any particular state, group of states, or political body, such as the UN Security Council. EU states dominated this group, with 13 EU Member States and 13 states that have since joined the EU, pushing for an independent Court and an independent Prosecutor, free to investigate any alleged crime within the Court's jurisdiction without the need for prior consent by a political actor – state or institution⁽²³³⁾. In contrast, other states were far more reluctant and remained (and continue to remain) fearful of the implications of a fully independent and impartial Prosecutor, able to freely determine (within the parameters of the Court's jurisdiction) where, who and what the Court should pay attention to.

The independence of the Court and its organs permeates the entire Rome Statute – from the preamble⁽²³⁴⁾, to the obligations imposed upon judges to ensure their independence⁽²³⁵⁾. Not only is the Office of the Prosecutor ('OTP') independent from outside actors, but it is also independent from the other organs of the Court⁽²³⁶⁾. At the same time, there are concessions – the power of the Security Council to refer situations involving non-State Parties under Article 13(b) of the Statute, and its power to defer or suspend proceedings for up to a year are two areas in which the independence of the Court is qualified. While Article 13(b) of the Rome Statute opens up the possibility that the Court may exercise jurisdiction over non-State Parties, the question of when that jurisdiction may be invoked is subject to the high politics of UN Security Council decision making.

Equally important as actual independence, is the perceived independence; the Court and its organs must both be independent and be seen to be independent. The legitimacy of the ICC – the degree to which it, its investigations and trials, and its decisions, are accepted by those subject to its jurisdiction – depends to a large extent upon the degree to which the Court is perceived to be independent⁽²³⁷⁾. Challenges to the Court's legitimacy in recent years demonstrate the role that independence plays in the course of promoting the universality and integrity of the Statute and cooperation with the Court. Critics of the Court frequently raise the perception of bias to justify their action in respect to the Court – most frequently accusations that the Court is biased and is the instrument of western states or powerful actors, including states not party to the Statute. The case study on the relationship between some African states and the African Union and the ICC in Part Three, section 12, will examine in more detail how these allegations of bias have affected the effectiveness of the Court.

Having successfully fought to establish an institutionally independent ICC, the EU and its Member States must remain equally committed to ensuring that the Court continues to be independent and appear independent. To do so is essential to preserving the ICC's integrity and universality. The crucial question, however, is how the EU and its Member States should deliver their commitment to the Court's independence while at the same time preserving its autonomy. While the EU and its Member States provide invaluable support to the ICC, they must take care to ensure that that support does not unintentionally undermine that very independence. If the Court appears, or becomes disproportionately close to (or reliant upon) the political and financial support of one particular group of states or international actor, this could bear consequences for the credibility and legitimacy of the ICC as an independent and universal Court⁽²³⁸⁾.

The task for the EU, as one of the Rome Statute's staunchest proponents can thus be properly understood as on one hand continuing to support and strengthen the *system* of international criminal justice embodied by the Rome Statute, but on the other, while providing the Court with that cooperation and assistance needed to fulfil its mandate, to reinforce the Court's integrity and its autonomy.

²³³ Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the UK. For the full list, see Schabas, 2001 at p.15.

²³⁴ Preambular paragraph 9, Rome Statute.

²³⁵ Article 40 Rome Statute.

²³⁶ Article 42(1) Rome Statute.

²³⁷ Cassese, 2012, at pp.492-493.

²³⁸ Telephone interview #03 with global NGO representative with experience as a capacity builder, a successful EIDHR applicant and as an ICC consultant, 03.02.2014.; Telephone interview #10 with ICC official, 13.02.2014.

8.1.2 Effectiveness and Efficiency

The reason why any actor – State Party, international institution, non-governmental organisation – lends support to the ICC, is so as to enable it to be effective in the fulfilment of its mandate. By pursuing the universality of the Statute and preserving its integrity, and by encouraging cooperation with the Court and implementing the principle of complementarity, these actors are contributing not only to the effectiveness and efficiency of the ICC specifically, but the effectiveness and efficiency of the Rome Statute system.

Effectiveness can be measured in any number of possible ways, but in general terms, each seeks to measure the extent to which the Rome Statute system fulfils its objectives. Whereas section 10 will focus upon how the implementation of complementarity by the EU and its Member States enhances the effectiveness of the wider system of international criminal justice, this section will focus upon the effectiveness and efficiency of the ICC in particular. Therefore for the purposes of this section, the measures taken to promote the effectiveness of the ICC can be considered to be all those measures that assist and enable the Court to investigate and prosecute those responsible for the commission of crimes within its jurisdiction – providing accountability for those responsible, and justice for victims. Further, in order to be an effective deterrent to prevent the commission of crimes in the future (see Part One, section 3), the Court must demonstrate that it can and does effectively hold those responsible for crimes within its jurisdiction to account⁽²³⁹⁾.

Effectiveness and efficiency are inextricably linked. The more efficient that the Court is, the more effective it is, and the more credible it will be as a deterrent to the commission of crimes in the future. At a more practical level, the ICC is increasingly expected to achieve more with less resources. Not only has the Security Council made two referrals to the Court while at the same time explicitly refusing to provide the financial support to cover the expense that the Court incurs as a result of those situations (see section 7.3.1.), but the ASP has, on an annual basis, agreed upon cuts to the ICC's funding. In recent years, State Parties have pursued a 'zero growth strategy', whereby despite the increasing activity of the Court in all aspects, the budget has not increased⁽²⁴⁰⁾. As the EU and its Member States are the ICC's biggest providers of financial and political capital, they have a strong interest in ensuring that the ICC operates in the most efficient manner – making most effective use of the resources available to it. With the continuing effects of the global financial crisis on states – particularly those within the Union – the EU as a major stakeholder in the ICC also has a responsibility to its own Member States to ensure that the financial support it provides to the Court is used in the most effective manner⁽²⁴¹⁾. This means encouraging and supporting the Court to improve its efficiency, but at the same time ensuring that the budget reductions or freezes do not lead to resource shortages that give rise to inefficiencies caused by capacity shortfalls. As was observed, insufficient resources ultimately impact upon the ability of the Court to effectively carry out the activities necessary in order to deliver upon its mandate under the Statute⁽²⁴²⁾.

While it is necessary for the Court to continue to make efficiency savings in its operation, it is necessary to consider whether the savings made are sufficient to absorb the cost of the increase in workload and whether savings made are sustainable. For example, in the annual report to the ASP on the Court's progress regarding efficiency measures, it was noted how the pressure to make efficiency savings was resulting at times in the adoption of short term cost-saving measures – such as leaving necessary vacant posts unfilled⁽²⁴³⁾, and replacing them with 'extra-budgetary' appointments⁽²⁴⁴⁾. Not only was this under-

²³⁹ Telephone interview #09 with EU official, 07.02.2014.

²⁴⁰ CICC, 20.11.2011.

²⁴¹ Telephone interview #09 with EU official, 07.02.2014.

²⁴² Telephone interview #10 with ICC official, 13.02.2014.

²⁴³ Eighth Status Report on the Court's progress regarding efficiency measures, 4.06.2013 (ICC-ASP/12/16) at para. 8-9 (hereafter 'ASP, Eighth Status Report on Efficiency').

²⁴⁴ Informal interview with ICC Official.

resourcing unsustainable in the long term, but by placing an increased strain on existing staff, this was negatively affecting the quality of output⁽²⁴⁵⁾.

Article 3 of the 2011 Decision states:

In order to support the independence of the ICC, the Union and its Member States shall, in particular:

- a) Encourage States Parties to transfer promptly and in full their assessed contributions in accordance with the decisions taken by the Assembly of States Parties;
- b) Make every effort towards the accession or ratification by Member States of the Agreement on the Privileges and Immunities of the International Criminal Court as soon as possible and promote such accession or ratification by other States; and
- c) Endeavour to support as appropriate the development of training and assistance for judges, prosecutors, officials and counsel in work related to the ICC.

Further on the effectiveness of the ICC, Article 4(3) of the 2011 Decision directs the EU and its Member States to '[c]onsider the conclusion, as appropriate, of ad hoc arrangements and agreements to enable the effective functioning of the ICC and shall encourage third parties to do so.'

While the 2011 Decision focuses on the role that training and assistance plays in ensuring the independence of the ICC, this form of support can also promote the effectiveness and efficiency. By increasing the capacity and competency of those working with and for the ICC, this can directly lead to efficiency and effectiveness gains.

Against this backdrop, the following sections will examine what measures Member States and the Union can take to strengthen the independence of the Court and to enhance its efficiency and effectiveness.

8.2 Member States

The relationship between the State Parties and the ICC with regard to the Court's independence is a difficult one. On one hand, the Court is expected to act independently of states⁽²⁴⁶⁾, but at the same time, in order to pursue its functions, it relies on their cooperation⁽²⁴⁷⁾. In addition, the Rome Statute entrusts to State Parties the responsibility of establishing and operating a system that ensures the transparent selection, nomination and election procedures for ICC judges and prosecutors⁽²⁴⁸⁾.

The 2011 Action Plan stipulates that Member States should continue to encourage the establishment of transparent selection, nomination and election procedures for ICC judges and prosecutors. They should also make every possible effort to ensure that highly qualified candidates are nominated for positions to be filled through elections...⁽²⁴⁹⁾.

Therefore, besides transparency, the Action Plan incorporates a qualitative element for Member States to take into account when considering candidates for elected posts. This emphasis on qualified candidates is to be further encouraged in order for the ICC to be a successful institution. The perception that some Member States put national interests above the quality of the candidate, as well as the potential election of such candidates, would be detrimental to the Court⁽²⁵⁰⁾.

²⁴⁵ ASP, Eighth Status Report on Efficiency, at para.8-9.

²⁴⁶ As an ICC official put it: 'Leave the Court to the Court'. Telephone interview #01 with ICC Official, 03.02.2014.

²⁴⁷ For this reason, another ICC Official stated that he believed that the prevailing thinking within the Court was that it cannot afford to tell States Parties to 'leave the Court to the Court' for to do so would antagonise them and make their cooperation and full support less likely. Telephone interview #10 with ICC official, 13.02.2014.

²⁴⁸ Articles 36 and 42 Rome Statute and Article 42.

²⁴⁹ Action Plan, 2011, at p.12.

²⁵⁰ Telephone interview #08 with global NGO representative with experience working with a local NGO and also an unsuccessful EIDHR applicant, 06.02.2014.

Additionally, political interventions or statements that Member States may make concerning ongoing situations that are subject to investigation by the Court, may further impact its effectiveness. The ICC, like any legal institution, does not operate in a vacuum – it operates alongside a host of local, regional and international actors, each often with overlapping, and sometimes even conflicting, objectives. The ICC frequently operates in situations of ongoing insecurity, instability – even outright conflict. Therefore, when balancing the equation between peace and justice, EU Member States must remain alert to the implications that their actions may have on the work of the ICC, particularly in the context of peace negotiations⁽²⁵¹⁾.

Finally, while continuing to strengthen the support that they provided to the ICC, the EU and its Member States can play an important role in encouraging others to participate and take ownership of the Court. The EU should engage with other stakeholders in the Court in order to strengthen and improve the Court's efficiency and effectiveness. In doing so, this can enhance confidence among those who might question the Court's independence. The EU Member States should support and welcome the initiative of all State Parties to exercise their rightful ownership of the Court, to the extent that they do not undermine its integrity. Although the implications of it are yet to be seen, one such example of this cooperation might be how the EU Member States negotiated with states from the African Union at the 12th meeting of the ASP in order to adopt amendments to the RPE that could expedite trial proceedings in cases concerning accused individuals who hold positions of high office (for more detailed discussion, see Part Three, section 12)⁽²⁵²⁾.

8.3 The EU as a Global Actor

8.3.1 Political

EU institutions have been vocal proponents of the independence of the ICC. The European Parliament, in its resolutions, has reiterated both the actual independence of the Court and the importance of maintaining that independence – both for the effectiveness of the Court and also in order to promote its universality⁽²⁵³⁾. The High Representative has also underscored the independence of the ICC, in statements made responding to developments in the Court's activities, such as upon the announcement of the three arrest warrants in the Libya investigation⁽²⁵⁴⁾.

In the statement by Cyprus on behalf of the EU at the 2012 Assembly of States Parties, it was stated that a key challenge is – and has been from the very beginning – how to best protect the independence of the Court and support its effective and efficient functioning. This means also both that the Court is sufficiently funded and that existing funds are wisely spent. Since the creation of the ICC, EU Member States have been among its major contributors and the EU has provided additional direct and indirect financial support to the Court. In the current dire international economic and financial conditions, the Court's activities have to be based on careful financial assessments, taking into account what the States can provide. Also, let us not forget: funds alone are not enough to guarantee the effectiveness and efficiency of the Court. With the number of situations and cases increasing, we see a need for additional efforts from the Court to further prioritise its work and improve its procedures, so that it can continue to perform successfully its judicial mandate as set out in the Rome Statute. In this regard, we commend the Court in working with States to commence a review of the ICC criminal procedures⁽²⁵⁵⁾.

²⁵¹ Telephone interview #01 with ICC Official, 03.02.2014.

²⁵² However, this approach has also been the subject of criticism, with one ICC Official stating that the readiness of some EU Member States to accept amendments to the RPE in order to appease the Kenyan government was concerning. Telephone interview #10 with ICC official, 13.02.2014.

²⁵³ European Parliament resolution P7_TA(2011)0507, preambular paragraph E.

²⁵⁴ Declaration by the High Representative on behalf of the European Union following the ICC decision concerning the arrest warrants for Muammar Abu Minya Gaddafi, Saif Al Islam Gaddafi and Abdullah al Sanousi, Brussels 27.06.2011 (12166/2/11 Rev 2 (Presse 206)).

²⁵⁵ Statement by Mr Andrius Krivas, Vice-Minister of Foreign Affairs of the Republic of Lithuania on behalf of the European Union and its Member State, The Hague, 20.11.2013.

As this statement indicates, the EU takes an active interest in ensuring that the Court is capitalising upon the support provided by the EU and its Member States in the most efficient and effective manner. One of the interviewees felt that it was within the rights of the EU as one of the Court's largest funders to scrutinise the Court's efficiency⁽²⁵⁶⁾, whereas another exclaimed, when asked on this point, 'don't micro-manage'⁽²⁵⁷⁾. Examples of areas where such 'micro-management' has been felt include the Independent Oversight Mechanism and in some aspects of the operation of the Committee on Budget and Finance⁽²⁵⁸⁾.

As has already been referred to, the Court engages in a continual process to improve efficiency. In addition, the Registry is currently undergoing a process of internal review, which is likely to lead to reform⁽²⁵⁹⁾.

8.3.2 Financial

Through the provision of financial assistance, the EU has funded a number of initiatives that have contributed to the effectiveness and efficiency of the Court and its administration of justice. Funding through the EIDHR to the ICC's 'Trust Fund: Building Legal Expertise and Fostering Cooperation', has recently enabled the Court to host a number of training seminars⁽²⁶⁰⁾. First, the Tenth Seminar of Counsel, along with its accompanying training sessions in October 2012 provided an opportunity for legal representatives working before the Court to 'engage in a mutually beneficial dialogue to learn from colleagues' experiences and perspectives'⁽²⁶¹⁾. By also including participants working in national jurisdictions from around the world, these seminars contributed to knowledge transfer and capacity building to facilitate the effective implementation of the principle of complementarity⁽²⁶²⁾. The accompanying three day practical training sessions focussed on 'procedural and practical issues facing counsel representing the defence or victims before the Court'⁽²⁶³⁾. By enhancing the experience and expertise of counsel, the highest standards of justice are delivered by the Court. This is achieved by ensuring that all participating in the judicial process are provided with high quality legal representation. By developing expertise as to the procedural regime at the Court, the efficiency of the judicial proceedings is improved by ensuring that all those participating in the judicial process are knowledgeable about the requirements of the procedural regime. This can help expedite proceedings by reducing inefficiencies created by inexperience or a lack of knowledge or understanding.

Second, the Court hosted two Seminars for Fostering Cooperation in Nuremberg, Germany in March and June 2013, one for Anglophone participants and one for Francophone participants⁽²⁶⁴⁾. Aimed at increasing support for and cooperation with the Court by enhancing knowledge about the cooperation regime, these seminars targeted 'high level decision makers from strategically important countries', including situation countries⁽²⁶⁵⁾. Focussing on technical aspects of cooperation including the implementation of arrest warrants, evidence collection, the tracing and freezing of assets and witness protection, to name a few, these seminars were designed to directly enhance the efficiency and effectiveness of the Court's proceedings. This is by enhancing the efficiency and effectiveness of the cooperation by State Parties upon which the Court relies. In addition, the three additional Witness Protection Agreements entered into by states having attended the seminars in turn also enhance the effectiveness and efficiency by which the Court can discharge its duties to witnesses that cooperate with the Court ensuring their safety and security (see section 9.2.1).

²⁵⁶ Telephone interview #07 with representative of a non-EU Member State, ICC State Party (GRULAC Group), 06.02.2014.

²⁵⁷ Telephone interview #05 with ICC Official, 04.02.2014.

²⁵⁸ Telephone interview #01 with ICC Official, 03.02.2014; Telephone interview #10 with ICC official, 13.02.2014; Telephone interview #05 with ICC Official, 04.02.2014.

²⁵⁹ Telephone interview #05 with ICC Official, 04.02.2014.

²⁶⁰ Financial Report, Trust Fund: Building Legal Expertise and Fostering Cooperation, Period: 01.08.2012 – 31.07.2013, Project EIDHR/2012/292-809, (on file with the author) at pp.3-4 (hereafter 'ICC, Financial Report').

²⁶¹ ICC, Financial Report at p.3; Telephone interview #12 with global NGO representative, 19.02.2014.

²⁶² ICC, Financial Report at p.4.

²⁶³ ICC, Financial Report at p.4.

²⁶⁴ ICC, Financial Report at pp.4-5.

²⁶⁵ ICC, Financial Report at p.4.

8.4 Recommendations

8.4.1 Member States

- **Member States** should ensure that highly qualified candidates are nominated for all elected ICC posts.

8.4.2 EU

- The **High Representative**, the **EEAS** and the **Council** should continue to provide political support of the ICC's independence, effectiveness and efficiency through appropriate statements, demarches and communications;
- Through the **EIDHR**, the EU should continue to financially support the ICC's Trust Fund: Building Legal Expertise and Fostering Cooperation;
- Continue to monitor the implementation of the ICC's initiatives to increase efficiency and effectiveness, while at the same time respecting the Court as an independent institution.

9. COOPERATION

9.1 General discussion

Throughout this study, emphasis has been placed upon the reliance by the Court on state cooperation. When a state is unwilling or unable to conduct its own investigations and prosecutions, requiring the intervention of the ICC to ensure accountability, the ICC relies upon the cooperation of all states as well as international organisations in order to conduct its proceedings. Without cooperation, the OTP would be unable to conduct investigations and collect evidence⁽²⁶⁶⁾, nor would it be able to secure the attendance of the accused in order to conduct their trials. The Rome Statute does not permit trials *in absentia*, that is trials without the accused's presence, therefore in order to secure attendance, it is necessary to obtain the individual's compliance with a summonses or to secure the implementation of a warrant for the arrest of the individual and their surrender to the Court. Cooperation ensures the ability of witnesses to work with the Court, attend proceedings to provide evidence, and to do so in the knowledge that their personal safety and that of their family is ensured against those who may seek recrimination for their cooperation with the Court. Where a conviction is found and a sentence passed, without the cooperation of states, the Court would have no facility in which to detain its convicts to serve their sentence.

Part 9 of the Rome Statute identifies the nature of the obligations upon State Parties to the Rome Statute to cooperate with the Court. The general statement of the obligation to cooperate can be found in Article 86 of the Rome Statute – which states that State Parties shall 'cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'. In order to enable them to do so, they are under a duty to 'ensure that there are procedures available under their national law' to facilitate all forms of cooperation⁽²⁶⁷⁾. Article 93(1) of the Rome Statute elaborates in more detail upon the types of assistance and cooperation that are expected of State Parties when requested to cooperate by the Court. In addition to specific obligations of cooperation imposed by the Statute – including in respect of the arrest or surrender, detention and transfer to the custody of the Court⁽²⁶⁸⁾ – the Statute also stipulates that any 'person required

²⁶⁶ In this respect, it may be worth noting an inter-governmental initiative, 'Justice Rapid Response', that provides a 'stand by roster of active duty criminal justice and related professionals who have received specific training in international investigations' with a view to collecting evidence that may later assist legal proceedings. A number of European states participate in the initiative, with the Netherlands, Finland and Sweden currently sitting on the Executive Board. See Justice Rapid Response Fact Sheet 2014.

²⁶⁷ Article 88 Rome Statute.

²⁶⁸ Article 59 Rome Statute.

to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the privileges and immunities of the Court’⁽²⁶⁹⁾.

In 2013, in its annual report to the ASP on cooperation with the Court, the Bureau of the ASP identified four areas of priority with regard to the matter of cooperation.²⁷⁰ These are:

- The execution of arrest warrants;
- The issue of ‘non-essential contacts’ with individuals subject to an ICC arrest warrant;
- The conclusion of voluntary agreements with the Court regarding specific forms of cooperation; including that concerning the protection and, where necessary, the relocation of witnesses;
- Ratification of the Statute on Privileges and Immunities.

It was noted that cooperation by states with regard to the arrest and surrender of those subject to a warrant for arrest ‘continues to be a missing component for the effective implementation of the Court’s mandate’⁽²⁷¹⁾. Related to this is the matter of non-essential contacts with indicted persons – namely ensuring that minimal contact is made between State Parties to the Rome Statute and those subject to an arrest warrant while the warrant for their arrest is outstanding. The UN, in order to ensure that it refrains from ‘any actions that would frustrate the activities of the Court and its various organs, including the Prosecutor, or undermines the authority of their decisions’, has adopted a set of guidelines to determine when the Secretariat (including Secretariat units and offices, programmes and funds) can and cannot engage in contacts with persons subject to ICC proceedings⁽²⁷²⁾. As the rationale for the guidelines provided by the UN Secretary General suggests, non-essential contact with indicted persons can serve to undermine the integrity of the Court (see section 7). At the ASP meeting in November 2013, it was noted that there are currently negotiations within the ASP to establish a similar policy within the ASP to assist State Parties fulfil their obligations under the Statute⁽²⁷³⁾.

The Bureau has explained the implications of non-cooperation upon the integrity of the Statute and the Court’s effectiveness, stating that failures to arrest these individuals emboldens them and potential future perpetrators, and fuels the perception that they can remain beyond the reach of the Court and perpetrators can continue to commit crimes with impunity. These risk weakening the Rome Statute system and the Court in particular, undermining its credibility⁽²⁷⁴⁾.

In addition to compliance with the minimum cooperation obligations contained within the Statute, the Statute enables the Court to enter into agreements with other international actors – such as international or regional organisations and institutions – in order to facilitate additional forms of cooperation⁽²⁷⁵⁾. For example, as will be discussed in section 9.3.3., the EU has entered into two Agreements with the Court to enable it to extend certain forms of cooperation to the Court.

As has already been explained in section 5, full implementation of the Statute, including its ancillary instruments such as the APIC is necessary in order to facilitate full and effective cooperation between the Court and thus enable it to be effective⁽²⁷⁶⁾. While all EU Member States have ratified the APIC, in total, only 72 out of 122 State Parties to the Rome Statute have done so.

²⁶⁹ Article 48(4) Rome Statute.

²⁷⁰ Report of the Bureau on Cooperation, 21.10.2013 (ICC-ASP/12/36) (hereafter ‘ASP, Bureau Cooperation Report’).

²⁷¹ ASP, Bureau Cooperation Report, at para.12.

²⁷² Identical letters dated 3.04.2013 from the Secretary General addressed to the President of the General Assembly and the President of the Security Council (A/67/828-A/2013/210) 8.04.2010, Annex: Guidance on contacts with persons who are subject of arrest warrants or summonses by the International Criminal Court, at p.3.

²⁷³ ASP, Bureau Cooperation Report, at para.10.

²⁷⁴ ASP, Bureau Cooperation Report, at para.14.

²⁷⁵ Article 54(3)(d) Rome Statute.

²⁷⁶ Telephone interview #03 with global NGO representative with experience as a capacity builder, a successful EIDHR applicant and as an ICC consultant, 03.02.2014.

One particular area requiring greater cooperation by states concerns the Court's provision of appropriate witness protection for those who assist the Court in fulfilling its mandate. While the APIC, if ratified, obliges State Parties to guarantee a certain level of protection to those individuals cooperating with the Court – such as witnesses – it is often necessary for State Parties and other actors to enter into Framework Agreements with the Court to facilitate greater cooperation in matters concerning witnesses, particular on issues of a concrete logistical and operational nature.

Given the nature of the crimes concerned, the task of ensuring witness protection and providing appropriate support is extremely sensitive, particularly when witnesses remain in the situation country. Ensuring their safety and security and that they have not been interfered with is of paramount importance. However, in order to ensure that, the Court – as always – relies upon cooperation by the state to provide that protection and implement its protection programme. However, it is likely that the Court will encounter situations in which the state concerned lacks the capacity to cooperate, even if it has the will to do so. Recall that the Court's jurisdiction over a situation can only be exercised if the concerned state is either unwilling or unable to conduct effective investigations and prosecutions. States that are unable to satisfy the complementarity requirement may not have the institutional or other capacity to guarantee adequate witness protection. Where the protection of a witness cannot be guaranteed in the situation country, then the ICC witness protection programme requires that the witness be relocated. Only 13 State Parties have entered into framework agreements on witness relocation⁽²⁷⁷⁾, meaning that in the majority of instances where relocation is necessary, the Court – through the Victims and Witnesses Unit - is required to enter into protracted *ad hoc* negotiations with states in order to secure relocation⁽²⁷⁸⁾. Given the need for swift action with regard to this matter to ensure the safety and wellbeing of those who work with the Court, the need to improve efficiency in this area is of paramount concern⁽²⁷⁹⁾.

As the following sections will show (and previous sections have already demonstrated), the EU and its Member States have been committed in their cooperation with the Court. However, the EU and its Member States are well placed to enhance that cooperation in order to improve the efficiency and effectiveness of the ICC. The first section will assess concrete measures adopted within the EU in order to enhance the ability of EU Member States to cooperate with the Court. In doing so it will distinguish between cooperation among Member States and the ICC, and cooperation between EU Member States in order to enhance the effectiveness and efficiency of their cooperation with the Court. Following that, it will move on to assess how the EU as an actor supports the ICC and how it might optimise that cooperation.

9.2 Member States

9.2.1 Cooperation between EU Member States and the ICC

– General

As was explained in the previous section, EU Member States, as State Parties to the Rome Statute are obliged to cooperate with the Court in accordance with their obligations under the Rome Statute. All EU Member States have ratified the APIC, and a number of them have entered into further *ad hoc* or framework agreements to facilitate further cooperation. The most obvious is the headquarters agreement between The Netherlands – the host State for the Court - and the ICC pursuant to Article 3(2) of the Rome Statute⁽²⁸⁰⁾. Other forms of *ad hoc* cooperation agreements can relate to the enforcement of sentences and the relocation of witnesses. Of the eight states that have entered into comprehensive agreements on the

²⁷⁷ Report of the Court on cooperation, 9.10.2013 (ICC-ASP/12/35) at para.30 (hereafter 'ASP, Report of the Court on cooperation').

²⁷⁸ Telephone interview #05 with ICC Official, 04.02.2014.

²⁷⁹ International Bar Association, July 2013, at pp.35-36.

²⁸⁰ Headquarters Agreement between the International Criminal Court and the Host State, 1.03.2008 (ICC-BD/04-01-08).

enforcement of sentences, six are EU Member States⁽²⁸¹⁾, while a further four have declared conditional agreements⁽²⁸²⁾.

While cooperation by territorial states and their neighbours is one of the most obvious forms of cooperation with the ICC, the ICC is also the beneficiary of significant support from EU Member States. Of the 21 warrants of arrest issued by the ICC, 6 have been executed by EU Member States⁽²⁸³⁾. With regard to the execution of arrest warrants by third states, EU Member States, whether individually or through the Council (see section 9.3.1.), have called upon third states to fulfil their obligations under the Rome Statute and have issued statements responding to instances of non-cooperation.

- Witness Protection

Beyond entering into framework agreements addressing cooperation on matters relating to witness protection, EU Member States can play an important role in strengthening the capacity of third states – particularly situation states and their neighbours – to provide the appropriate degree of witness protection. To this effect, in 2013, under the leadership of Norwegian Ambassador Krutnes, two EU Member States – the Netherlands and Estonia – sponsored two high level witness protection seminars, one in Arusha, Tanzania for Anglophone countries⁽²⁸⁴⁾, and one in Dakar, Senegal for Francophone countries⁽²⁸⁵⁾. One of the key recommendations emerging from the seminars was the need to reinforce bilateral and regional cooperation in this field, such as through the establishment of a network of experts⁽²⁸⁶⁾. Other participants stated that they would welcome technical assistance from third states and international organisations to develop and adopt specific policy and legislative mechanisms to improve capacity to provide witness protection⁽²⁸⁷⁾.

Accordingly, this could constitute an opportunity for the EU and its Member States to utilise their experience to assist third states in strengthening their capacity in the field of witness protection. The EU and individual Member States provide significant financial and technical support to states in the context of wider justice sector reforms through initiatives designed to strengthen the rule of law (see section 10). This is a concrete area that could bring important benefits to the effectiveness and efficiency of the Court. While the adoption of Witness Relocation Agreements by EU Member States would be welcome, to strengthen local and regional capacity so that witnesses can be guaranteed protection in their home states or as close to their home state as possible, would be preferable. As the Court states

when relocation of witnesses and their families proves necessary, due account should be given to finding solutions that, while fulfilling the strict safety requirements, also minimize the humanitarian costs of geographical distance and change of linguistic and cultural environment⁽²⁸⁸⁾.

However, in some cases, safety may only be able to be guaranteed by relocating witnesses further afield, and in such cases, the conclusion of relocation agreements by states, including EU Member States, becomes of paramount importance.

On the point of regional inter-state and inter-institutional cooperation to strengthen the efficiency and effectiveness of the cooperation that the Court receives, the EU and its Member States are well placed to

²⁸¹ Those being Austria, Belgium, Denmark, Finland, Serbia and the United Kingdom.

²⁸² Those being the Czech Republic, Lithuania, Slovakia, and Spain.

²⁸³ Mbarushimana was arrested by French authorities just over a week after the warrant was issued under seal, Bemba was arrested by Belgian authorities the day after it was issued under seal, and recently three individuals accused to have committed offences against the administration of justice were arrested by Dutch (Jean-Jacques Mangenda Kabongo), French (Narcisse Arido), Belgian (Aime Kilolo Musamba) and Fidele Babala Wandu (DRC).

²⁸⁴ Summary of the Arusha Seminar on witness Protection (29-30.10.2013), 7.11.2013 (ICC-ASP/12/36/Ad.1) (hereafter, 'ASP, Summary of the Arusha Seminar').

²⁸⁵ ASP, Report of the Court on cooperation, at para.32.

²⁸⁶ ASP, Report of the Court on cooperation, at para.6.

²⁸⁷ ASP, Report of the Court on cooperation, at para.6(d).

²⁸⁸ ASP, Summary of the Arusha Seminar, at para.4.

share their experiences and best practices regarding cooperation between Member States on matter relating to justice and security. The following sub-section will examine some areas in which cooperation between EU Member States in the area of police and judicial cooperation on criminal matters can enhance the effectiveness of the cooperation that EU Member States deliver to the Court. It will identify areas which have been a particular success as well as opportunities for strengthening. Further, it might indicate where the EU might share its experiences with third states to contribute to improving the effectiveness of cooperation by other states.

9.2.2 Cooperation between EU Member States

- Genocide Network

Council Decision 2002/494/JHA provided for the establishment of a network of national contact points for the exchange of information concerning the investigation and prosecution of genocide, crimes against humanity and war crimes ('the Genocide Network'), including but not limited to those within the jurisdiction of the ICC⁽²⁸⁹⁾. The function of each contact point is to exchange between Member States any available information that may be relevant to the investigation and prosecution of international crimes and to facilitate cooperation with competent national authorities within each EU Member State⁽²⁹⁰⁾. In 2003 the Council adopted another Decision, that stated with even more clarity the objective of the network of contact points – namely, 'to maximise the ability of law enforcement authorities in different Member States to cooperate effectively in the field of investigation and prosecution of persons who have committed or participated in the commission of genocide, crimes against humanity or war crimes as defined in [the Rome Statute]'⁽²⁹¹⁾. Developing upon this, the 2003 Decision placed an obligation upon EU Member States to adopt such measures as are necessary to assist states in identifying when individuals suspected of being responsible for international crimes have applied for, or taken, residence within their jurisdiction⁽²⁹²⁾. It also obliged EU Member States to assist one another in the course of their investigations and coordinate their efforts in this field⁽²⁹³⁾. Finally, the Decision also provided for periodic meetings of all national contact points. In 2011, a Secretariat for the Network was established within Eurojust.

The Genocide Network can therefore be seen as a key structure through which EU Member States can strengthen the system of international criminal justice and accountability embodied in the Rome Statute. If used to its potential, it can enhance the effectiveness and efficiency of action taken by EU Member States to ensure that the EU area is not a safe haven for those responsible for international crimes. By facilitating cooperation and coordination between the relevant law enforcement authorities, and providing a forum within which best practices and experience can be shared between EU Member States, the Network holds the potential to consolidate and strengthen not only the commitment of EU Member States but also the EU as whole to the objectives of combating the culture of impunity, and thus support the Rome Statute system of international criminal justice. This has been acknowledged by the EU. The 2009 Stockholm programme, establishing the strategic agenda for the EU in its legislative and operational planning within the field of freedom, security and justice within the Union for the period between 2010-2014, reiterated the importance for EU institutions to promote the principle of complementarity and compliance with Rome Statute obligations within the Union⁽²⁹⁴⁾.

However, in a recent Note by the Council Working Group on General Affairs and Evaluations ('GENVAL'), a working group addressing issues of police and judicial cooperation in criminal matters, the Working Group

²⁸⁹ Article 1, Council Decision 2002/494/JHA.

²⁹⁰ Article 2, Council Decision 2002/494/JHA.

²⁹¹ Article 1, Council Decision 2003/335/JHA of 14 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, OJ L 118, 14.5.2003, at p.12 (hereafter 'Council Decision 2003/335/JHA').

²⁹² Article 2 Council Decision 2003/335/JHA.

²⁹³ Article 3(1) and 5(1) Council Decision 2003/335/JHA.

²⁹⁴ The Stockholm Programme – an open and secure Europe serving and protecting citizens, OJ C 115, 4.5.2010, at p.1, at p.17.

reported a number of challenges identified by participants in the network in their efforts to bring to justice perpetrators within their jurisdiction:

- A continuing need for improved cooperation and coordination among law enforcement services, criminal justice authorities and other relevant actors such as immigration authorities, foreign affairs authorities and civil society to increase the exchange of information on suspected perpetrators, victims and witnesses and other evidence located throughout different EU Member States and to establish secure databases in order to avoid duplication of work;
- Inadequate implementation of Council Decision 2003/335/JHA in relation to exchange of information between immigration and prosecution authorities as well as setting up designated specialist units;
- Insufficient realisation of the Stockholm programme and its Action Plan that mandated the European Commission to evaluate the implementation of internal instruments on fighting impunity by 2011;
- A constant demand for training and additional resources at national level as investigation and prosecution of serious international crimes is highly complex and specialized⁽²⁹⁵⁾.

The final observation noted an imbalance in the EU's approach towards the fight against impunity; while the EU's support for the ICC and international criminal justice is visible and effective in the framework of its external relations it is considerably less so in its internal relations⁽²⁹⁶⁾. One interviewee observed as a result of the influx of refugees and those seeking asylum arising from the ongoing conflict in Syria, it is highly likely that a significant number of individuals involved in the commission of international crimes in the course of that conflict – whether as perpetrators, victims or witnesses – will be likely to be found within European borders⁽²⁹⁷⁾. This will require effective coordination and cooperation between national European authorities in order to ensure that the EU does not become a safe haven for impunity.

As observed in the GENVAL Note and in a joint letter submitted to the Working Group by NGOs, the Genocide Network would benefit from enhanced engagement by all key EU institutions – the Commission, Council and Parliament⁽²⁹⁸⁾. While the recommendation of the adoption of an Action Plan and Task Force to increase efficiency in combating impunity within the EU – similar to the 2011 Decision and 2011 Action Plan adopted under the CFSP – is to be supported⁽²⁹⁹⁾, capacity needs to be developed in order to implement that Plan – both at the EU level and within Member States. The resources available to the Network and the Secretariat and the visibility of their activities and mandate could be improved⁽³⁰⁰⁾. A starting point, as observed in the letter to GENVAL, would be to follow up the Commission's progress with regard to the preparation of the report reviewing the implementation of the mandate of the Genocide Network, envisaged by the 2010 Stockholm Programme to be delivered in 2011⁽³⁰¹⁾. This report would be essential to informing the process of drafting an effective Action Plan.

To recall, while the ICC has been established in order to step in where states are unwilling or unable, within the Rome Statute system of international criminal justice, states are envisaged to be the primary actors in the fight against impunity. In light of this, the development of a strong Genocide Network would be a

²⁹⁵ Strengthening efforts to combat impunity within the EU and its Member States for serious international crimes – renewed engagement in the field of Justice and Home Affairs, Brussels, 19.11.2013 (16340/13) at p.3 (hereafter, 'Strengthening efforts to combat impunity, 19.11.2013').

²⁹⁶ Strengthening efforts to combat impunity, 19.11.2013 at p.3.

²⁹⁷ Telephone interview #02 with EU Official, 03.02.2014.

²⁹⁸ Joint Letter on behalf of Redress, Trial, FIDH, ASF, Euro-Mediterranean Human Rights Network, European Center for Constitutional and Human Rights, Human Rights Watch to Delegations of GENVAL, 25.11.2013 (hereafter 'Joint Letter, 25.11.2013').

²⁹⁹ Joint Letter, 25.11.2013; Strengthening efforts to combat impunity, 19.11.2013.

³⁰⁰ Telephone interview #02 with EU Official, 03.02.2014.

³⁰¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *Delivering an area of freedom, security and justice for Europe's Citizens - Action Plan Implementing the Stockholm Programme*, 20.04.2010 (COM(2010) 171 final), at p.10 (Annex).

concrete mechanism by which the EU could enhance its support for the Rome Statute system of international criminal justice.

- Europol and Eurojust

Together with Eurojust, Europol is the principal EU entity through which police and judicial cooperation in criminal matters is implemented. With the replacement of the Europol Convention in 2009 by Council Decision 2009/371/JHA, Europol was established as a formal EU agency to provide support to Member States' law enforcement agencies to facilitate and strengthen mutual cooperation in the prevention and combating of organised crime, terrorism and other serious crimes affecting two or more Member States where the 'scale, significance and consequences of the offences' require the adoption of a common approach⁽³⁰²⁾. While it does not have the authority to conduct investigations itself, Europol provides operational support to - and coordinates cooperation between - Member States' law enforcement agencies. With a wealth of experience in the context of large scale complex crimes with cross-jurisdictional implications, the ICC could derive significant benefit from working with Europol.

However, crucially, while such cooperation is envisaged from the perspective of the Rome Statute⁽³⁰³⁾, the absence of the core international crimes from the list of crimes over which Europol has competence, precludes any cooperation between the ICC and the agency. This also means that Europol does not have competence over these crimes in the context of the national proceedings of Member States.

Nevertheless, this has not precluded some cooperation between the two organisations in the form of training and technical assistance. In February 2013, the European Cybercrime Centre established at Europol, chaired an expert advisory group at the request of the OTP to evaluate the use of digital evidence and cybercrime fighting techniques in the context of the ICC's activities⁽³⁰⁴⁾. Areas discussed included best practices in online investigation and proposals to develop the use of digital evidence in the course of ICC investigations and prosecutions. Opportunities for similar collaborations in other areas could be explored.

- Mutual Recognition of Judicial Decisions

The principle of the mutual recognition of judicial decisions established by the Tampere European Council in October 1999 equips EU Member States with the enhanced capacity to effectively and efficiently carry out certain law enforcement activities related to criminal justice matters that would assist them both in terms of their domestic efforts to investigate and prosecute international crimes, but also when discharging their obligations to cooperate with the ICC⁽³⁰⁵⁾. This principle, the 'cornerstone of judicial cooperation in both civil and criminal matters within the Union'⁽³⁰⁶⁾, is aimed at facilitating efficient cooperation between authorities of EU Member States. With the free movement of persons, goods, capital and services, so too, inevitably, comes the free movement of crime and perpetrators. Combined with the increasingly cross-border nature of criminality, enhanced coordination and cooperation between the judicial systems of EU Member States appears a logical step in the entrenchment of EU integration.

From the perspective of the Rome Statute system of international criminal justice, the mutual recognition of judicial decisions in the context of asset freezing and arrest warrants is particularly important in order to effectively prosecute those who are identified through the course of investigations as being responsible for international crimes, including those within the jurisdiction of the Court. Enhanced intra-European cooperation in the form of use of the European Arrest Warrant ('EAW') and the tracing and freezing of assets not only hold the potential to strengthen the effectiveness of the ICC specifically, but also could be seen to serve the broader system of international criminal justice aimed at ensuring accountability for international

³⁰² Article 3 and Article 4(1) Council Decision 2009/371/JHA.

³⁰³ Article 87(1)(b) Rome Statute.

³⁰⁴ European Cybercrime Centre (EC3) Supports the International Criminal Court, Press Release, 14.02.2013.

³⁰⁵ Presidency Conclusions, Tampere European Council, 15-16.10.1999.

³⁰⁶ Presidency Conclusions, Tampere European Council, 15-16.10.1999, at para.33.

crimes, irrespective of where they occur. As it was observed in the GENVAL discussion paper on the strengthening of the EU Genocide Network, the EU hosts a large presence of individuals from conflict-afflicted areas where the widespread commission of international crimes has been well documented. Therefore, the number of potential victims, witnesses and even perpetrators within the EU area is likely to be significant. Indeed, as the discussion paper cites 'in 2012 alone, UK immigration authorities took action against 99 people who had applied for British citizenship, asylum or leave to remain in the UK on the basis of suspected involvement in crimes under international law'⁽³⁰⁷⁾. Given the internal freedoms within the Union, the need to enhance cooperation between states in order to secure the apprehension of suspected perpetrators once present within the EU area becomes particularly acute.

The EAW, established by Council Framework Decision 2002/584/JHA⁽³⁰⁸⁾, denotes the ability of a competent judicial authority of any EU Member State to issue a decision for the arrest and surrender of a requested person that is recognised and shall be executed by all EU Member States⁽³⁰⁹⁾. The EAW becomes available when someone wanted for arrest has left the jurisdiction in which he/she is wanted and is present within another EU Member State. The potential utility of this in the context of national efforts to investigate and prosecute international crimes should, on the basis of the foregoing discussion, be apparent.

However, in addition to enabling Member States to effectively pursue effective prosecutions at the national level, it is also possible to envisage how the EAW may assist EU Member States when discharging their duties to cooperate with the ICC under the Rome Statute. Under Article 59(1) of the Rome Statute, State Parties that have received a request for the provisional arrest and surrender of an individual subject to a warrant for arrest issued by the Court are under an obligation to take immediate steps to arrest that person. Accordingly, all EU Member States, as State Parties to the Rome Statute, are subject to this obligation. While warrants for arrest issued *by the ICC* do not fall within the scope of the principle of mutual recognition of judicial decisions – as the ICC is not a EU Member State and nor do its arrest warrants fall within the 2006 or 2008 cooperation agreements concluded between the two institutions (see section 10.3.3), the EAW does open up the possibility for any court of an EU Member State to issue an EAW pursuant to a request issued by the ICC to that state. This is particularly important given the freedom by which individuals once within the EU can move between EU Member States.

To date, the EAW has not been used to secure the arrest of an individual suspected of being responsible for international crimes – either in the context of domestic criminal proceedings or proceedings before the ICC⁽³¹⁰⁾. However, the EAW equips EU Member States with the tools needed to respond effectively and efficiently to situations that could be foreseen.

The second area of mutual recognition of judicial decisions that could enhance the capacity of EU Member States to pursue justice and accountability in an effective and efficient manner concerns the tracing and freezing of assets of those suspected of involvement in international crimes. Asset freezing is a key area where the ICC needs EU assistance given that the EU Member States have extensive experience in that respect. Asset location, freezing and recovery are important protective provisional measures that involve holding the assets of individuals subject to criminal proceedings in order to prevent them from being used either to finance further criminal wrong doing or to provide the basis for victims reparations if a finding of guilt is determined. Therefore, matters concerning the effective and efficient freezing of assets are of significant importance to the attainment of the objectives of the system of international criminal justice. Asset freezing not only relates to providing substantive justice to victims of international crimes as the Rome

³⁰⁷ See Strengthening efforts to combat impunity, 19.11.2013, at p.3, footnote 2. It continues to state 'However, only nine current police investigations were based on referrals from immigration authorities'.

³⁰⁸ Council Framework Decision 2002/584/JHA of 13.06.2002 on the European arrest warrant and the surrender procedures between Member States. OJ L 190, 19.7.2002, at p.1 (hereafter 'Council Framework Decision 2002/584/JHA').

³⁰⁹ Article 1, Council Framework Decision 2002/584/JHA.

³¹⁰ Telephone interview #01 with ICC Official, 03.02.2014; Telephone interview #02 with EU Official, 03.02.2014.

Statute provides for the payment of reparations to victims upon findings of guilt from the assets seized⁽³¹¹⁾, but can also play an important role in preventing the commission of international crimes in the future. It can also play a role in facilitating the arrest or surrender of an individual wanted by the Court. By depriving them of the financial means by which they can continue their affairs, pressure is placed on individuals to comply with summonses or cooperate with judicial and law enforcement authorities, whether it be in the context of domestic criminal proceedings or proceedings at the ICC. At the same time, the current ability of individuals subject to investigation by the Court to place assets beyond the jurisdiction of the Court has meant that currently all individuals subject to proceedings before the Court except one have been declared indigent and thus are entitled to claim legal aid for their defence costs from the Court⁽³¹²⁾.

Given the ability by which individuals may maintain assets in multiple jurisdictions and the ease by which assets can be transferred between jurisdictions, asset freezing and recovery is a matter that requires close cooperation between competent authorities. However, when in some instances the ICC has approached State Parties to help in that respect, they often maintained that the ICC request on asset freezing does not always comply with the requirements of national legislation. A dialogue at the EU institutional level to facilitate the capacity to assist the ICC in regards to asset freezing within the EU would be beneficial to the Court⁽³¹³⁾.

The EU has adopted instruments under the principle of mutual recognition of judicial decisions that facilitate such cooperation. Council Framework Decision 2003/577/JHA enables judicial authorities of EU Member States to send requests for the freezing of assets to other EU countries where that decision will be recognised and executed without requirement of intermediate formalities by the authorities of the state receiving the request⁽³¹⁴⁾. For the purposes of investigating the core international crimes, what is particularly relevant is that the Framework Decision specifically identifies 'crimes within the jurisdiction of the International Criminal Tribunal' as being exempt from the need for verification that they constitute crimes in both the jurisdiction of the requesting and the receiving states⁽³¹⁵⁾.

The efficiency by which EU Member States could respond to matters requiring the identification and freezing of assets would however be improved if, as was suggested in section 6.2, the core international crimes were included within the list of crimes over which the EU has competence under Article 83(1) TFEU. As the European Parliament observed in its 2011 Resolution, by doing so, this would open up the possibility of the measures being adopted at the EU level by the Commission and the Council to order and secure the identification and freezing of assets of those suspected of involvement in international crimes.

Cooperation between EU Member States in this context is also relevant when considering their ability to effectively and efficiently act upon requests by the ICC to identify, trace, freeze or seize assets relating to ongoing investigations and prosecutions, pursuant to Article 93(1)(k) of the Rome Statute. Given the absence of crimes within the Court's jurisdiction under Article 83(1) TFEU, and the matter also falling outside the scope of the two Agreements concluded between the EU and the ICC to facilitate cooperation (see section 10.3.3), the EU is limited in its capacity to cooperate directly with the ICC on these matters at the institutional level.

However, the mutual recognition of judicial decisions and its application to asset freezing under Framework Decision 2003/577/JHA can expedite the cooperation that ICC States Parties, *as EU Member States*, can provide to the Court in response to requests directed to States Parties. Therefore this Framework Decision can assist EU Member States to effectively and efficiently fulfil their cooperation obligation under the Rome Statute. Effective and efficient cooperation by states in turn enhances the effectiveness and efficiency with which the

³¹¹ Articles 93(1) and 75(4), Rome Statute.

³¹² Telephone interview #05 with ICC Official, 04.02.2014.

³¹³ Telephone interview #05 with ICC Official, 04.02.2014.

³¹⁴ Article 1 Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of order freezing property or evidence, OJ L 196, 2.8.2003, at p.45 (hereafter 'Council Framework Decision 2003/577/JHA').

³¹⁵ Article 3(2) Council Framework Decision 2003/577/JHA.

Court can operate. At the same time, the ability of the Union to trace, freeze and confiscate assets upon request directly from the ICC without requiring the intermediary of an EU Member State would contribute to a more streamlined process in this area, leading to expedited compliance with requests.

Relevant to the duty of Member States to act upon cooperation requests by the ICC pursuant to their obligations under the Rome Statute system are recent decisions of the Court of Justice of the European Union (CJEU). These decisions could potentially impact upon the ability of Member States of the EU to act upon requests for cooperation. The CJEU in its decision in *Kadi*, decided that when EU institutions or Member States undertake action pursuant to obligations derived from other international agreements, that action must still be lawful as a matter of EU law, which includes fundamental rights law⁽³¹⁶⁾. Therefore, while explicitly denying competence to review the legality of the resolutions of the UN Security Council⁽³¹⁷⁾, the Court considered whether the measures adopted by EU institutions and Member States in order to implement those UN resolutions was lawful as a matter of EU law. In *Kadi*, the CJEU was asked to determine whether regulations adopted by the Council to freeze the assets of the applicant individual pursuant to a UN Security Council resolution imposing sanctions on the applicant were lawful as a matter of EU law. The applicant contended that the freezing of his assets by the Council violated his rights under EU fundamental rights law, since the sanctions were ordered by the UN Security Council without the due process required by EU fundamental rights⁽³¹⁸⁾.

This has potential consequences for cooperation between EU Member States and the ICC. EU Member States must ensure that when acting upon requests for cooperation by the ICC, their acts are also compliant with all EU law. Therefore, taking the example of asset freezing, EU Member States when seeking to act upon an ICC request that an individual's assets be frozen must provide that individual with the procedural guarantees he/she is entitled to under EU law. Such rights might include the right to know the basis for the decision, the right to challenge that decision and to be heard, and the right to have that decision subject to judicial review. The observance of these rights by EU Member States could potentially impair their ability to efficiently act upon Court requests for cooperation.

However, whether EU fundamental rights law will operate to impede effective cooperation by EU Member States with the ICC is questionable. The Rome Statute of the ICC imposes stringent obligations on all organs of the Court to fully respect the rights of the accused as enshrined in Article 55, 66 and 67 of the Rome Statute. In contrast to the opaque procedures adopted by the UN Security Council and its subsidiary organs when determining who falls within their sanctions regime, a judicial institution like the ICC would naturally be expected to uphold the highest standards of due process and judicial review. Therefore, the CJEU decisions in the *Kadi* cases may⁽³¹⁹⁾ – although potentially slowing down cooperation by EU Member States – serve a more important role in strengthening the EU's wider commitment to the values and principles embodied by the Rome Statute – rule of law, the respect for human rights and fundamental rights.

³¹⁶ Judgment of 3.09.2008 in Joined Cases C-402/05P and C-415/05P: *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, at para.283-285, 299 and 303-4.

³¹⁷ Judgment of 3.09.2008 in Joined Cases C-402/05P and C-415/05P: *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, at para.225.

³¹⁸ Judgment of 3.09.2008 in Joined Cases C-402/05P and C-415/05P: *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-635, at para. 116-118.

³¹⁹ Judgment of 3.09.2008 in Joined Cases C-402/05P and C-415/05P: *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-635, along with the subsequent case Judgment of 18.07.2013, in Joined Cases C584/10P, C593/10P and C595/10P: *Yassin Abdullah Kadi v European Commission* [2010] ECR-5177.

9.3 The EU as a Global Actor

Article 21 of the TEU states that 'the Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles' that guide the EU in its external action⁽³²⁰⁾. This forms the primary legal basis for the EU's cooperation with the Court.

The Court itself has highlighted the continuing importance of political, financial and technical cooperation not only by State Parties but also by regional and international organisations – which it identifies as 'important fora for States Parties to discuss and align support to and cooperation with the Court'⁽³²¹⁾. The European Parliament, for example, has been an effective forum for EU Member States to remind each other of their obligations to provide assistance and cooperation to the Court, and the need to adopt such legislative measures necessary to do so⁽³²²⁾. The EU, by reason of the strength it takes from its membership, can be a powerful actor in terms of cooperation with the Court. Not only does it hold the potential to cooperate with the Court itself, but it can also encourage third states to strengthen their cooperation with the Court.

9.3.1 Political

From the perspective of the ICC, it has been observed that public diplomatic and political support lent to the ICC by states and international institutions such as the EU are a 'critical tool to protect and enhance cooperation with the Court'⁽³²³⁾. The Court has observed that where there exists a depleting or lack of consistent public and diplomatic support for the ICC, requests for technical cooperation are increasingly not being addressed by the appropriate stakeholders, where it is considered that cooperating with the Court would be detrimental to national, regional or international interests⁽³²⁴⁾. To this effect, the Court believes that it is important – not just for its legitimacy, but also for its effectiveness and efficiency – to

create a framework of public and diplomatic support for the Court and the Rome Statute system, strong enough to ensure that States Parties that are under a legal obligation to cooperate with the Court, but that face challenges in doing so because of political, economic, security or capacity related matters, do not have to carry alone the pressure that could result from these situations⁽³²⁵⁾.

In this regard, the EU cooperates with the ICC by providing high profile political support to the Court and its activities to encourage wider cooperation by third states.

The following paragraphs will build upon previous sections to examine the example that EU practice sets in terms of the supporting cooperation with the Court through the use of political measures such as joint statements, positions and declarations, as well as bilateral initiatives such as dialogues and demarches⁽³²⁶⁾. Given that previous sections have examined already political measures that the EU has taken to promote universality, full implementation and cooperation with the Court, this section will focus upon the EU's response to *non-cooperation* by third states.

In November 2013, the COJUR-ICC issued information on the EU's response to non-cooperation with the ICC by third states⁽³²⁷⁾. In it, it acknowledged that 'non-cooperation constitutes one of the most serious challenges to the effective functioning of the ICC'⁽³²⁸⁾. Further, by impeding its effective functioning, non-cooperation makes the ICC look less credible, which ultimately undermines its integrity. While the Security

³²⁰ Article 21(1) TEU.

³²¹ ASP, Report of the Court on cooperation, at para.57.

³²² European Parliament resolution P7_TA(2011)0507, at para.9-11.

³²³ ASP, Report of the Court on cooperation, at para.51.

³²⁴ ASP, Report of the Court on cooperation, at para.52.

³²⁵ ASP, Report of the Court on cooperation, at para.53.

³²⁶ ASP, Report of the Court on cooperation, at para.59.

³²⁷ The EU's response to non-cooperation with the International Criminal Court by third states, Brussels, 27.11.2013 (16993/13) (hereafter 'The EU's response to non-cooperation').

³²⁸ The EU's response to non-cooperation, at para.3.

Council has failed to provide the political support for the Court, the EU has issued a number of statements declaring support for the ICC with regard to all its proceedings, but in particular those concerning situations referred to the ICC by the Security Council. For example, statements are regularly issued by the EU High Representative and her spokesperson in response to failures by State-Parties to the Rome Statute to fulfil their duties to cooperate with the Court in the execution of arrest warrants. In particular, statements have been made regretting the failure of Nigeria, Chad and the CAR to act upon the warrants for the arrest of Sudanese President Omar Al Bashir and Defence Minister Abdel Raheem Muhammed Hussein upon their visits to the respective countries⁽³²⁹⁾. Most recently, on the 27th February 2014, the High Representative issued a strong statement expressing concern at President Al Bashir's visit to the DRC, a State Party to the Rome Statute and direct beneficiary of ICC proceedings, and called upon the DRC to abide by its obligations under international law with regards to the arrest and surrender of President Al Bashir⁽³³⁰⁾. The Council's inclusion of clauses that remind states of their obligations to cooperate with the Court in relevant Council Conclusions is one further way in which the EU acts to lend political support to the integrity of the Statute. For example, the Council has included clauses reminding the Sudanese Government of its obligations to cooperate with the ICC by reason of Security Council 1593, referring the situation in Sudan to the ICC⁽³³¹⁾. In contrast, where ICC warrants have been executed resulting in the arrest and surrender of individuals, the High Representative has issued statements welcoming that cooperation⁽³³²⁾.

The June 2013 information issued by the COJUR-ICC on non-cooperation appears to regularise this kind of response to non-cooperation by third states, stating that '[w]henver non-cooperation occurs or is impending, the EU and its Member States will call for cooperation with the ICC and respond to non-cooperation'⁽³³³⁾. Further, the COJUR-ICC noted that the matter of non-cooperation would become a regular item on the Working Party's agenda, with the outcomes of its discussions disseminated to other relevant Working Parties and the EU Focal Point⁽³³⁴⁾. In 2013, the Bureau of the ASP observed the lack of any 'systematic results-orientated discussion on concrete steps or measures that can be taken to facilitate arrests' and its call for 'discussions specifically focussed on cooperation to achieve arrests, with a view to producing recommendations on how to best contribute towards securing them'⁽³³⁵⁾. In light of this, it is necessary to mention the announcement by the COJUR-ICC that it is in the process of considering 'various options as to how the EU and its Member States could further systemise and strengthen their response to cases of non-cooperation with the Court'⁽³³⁶⁾. While political statements are an important aspect of the response to instances of non-cooperation, it was suggested that it is necessary that such statements are complemented by more concrete consequences for States that have not complied with their cooperation

³²⁹ Déclaration de la Haute Représentante Catherine Ashton au nom de l'Union européenne sur la visite du Ministre soudanais de la Défense, Abdel Raheem Muhammad Hussein, en République centrafricaine, Brussels, 27.08.2013 (13137/1/13 Rev 1); Statement by the spokesperson of the EU High Representative Catherine Ashton on the visit of Sudanese President Al-Bashir, Brussels, 16.07.2013; Statement by the Spokesperson of EU High Representative Catherine Ashton on the Visit of Sudanese President Al-Bashir to Chad, Brussels, 16.05.2013 (160513/3); Statement by the Spokesperson of High Representative Catherine Ashton on the visit of Sudanese Minister of National Defence, Abdel Raheem Muhammad Hussein, to Chad, Brussels, 26.04.2013 (A 227/13); Statement by the Statement by the spokesperson of EU High Representative Catherine Ashton on the visit of Sudanese President Al-Bashir to Chad, Brussels, 21.02.2013.

³³⁰ Statement by the Spokesperson of EU High Representative Catherine Ashton on the visit of Sudanese President Al Bashir to the Democratic Republic of Congo, Brussels, 27.02.2014 (140227/01).

³³¹ e.g. Council of the European Union, Council Conclusions on Sudan: 3058th Foreign Affairs Council meeting, Brussels, 13.12.2010 at para.13; Council of the European Union, Council Conclusions on Sudan: 3058th Foreign Affairs Council meeting, Brussels, 22.11.2010, at para.8.

³³² Statement by the spokesperson of EU High Representative Catherine Ashton on the transfer of Bosco Ntaganda to The Hague, Brussels, 22.03.2013 (A 162/13).

³³³ The EU's response to non-cooperation, at para.6.

³³⁴ The EU's response to non-cooperation, at para.10.

³³⁵ ASP, Bureau Cooperation Report, at para.15.

³³⁶ The EU's response to non-cooperation, at para.9.

obligations under the Rome Statute⁽³³⁷⁾. This might be an area that the COJUR-ICC may wish to look into further.

On the matter of non-essential contacts, the 2011 Action Plan states that Member States and the EU 'should avoid non-essential contacts with individuals subject to an arrest warrant issued by the ICC'⁽³³⁸⁾. This has been elaborated upon to a degree by the COJUR-ICC, which has defined 'essential contacts' as 'those which are strictly required for carrying out core diplomatic, consular and other activities and/or those activities which are UN-mandated or which arise from a legal obligation (eg. under headquarters agreements)'⁽³³⁹⁾. It further continues by acknowledging some flexibility, stating that the special circumstances of particular cases would be taken into account in order to determine on the facts what constitutes an essential contact⁽³⁴⁰⁾. Accordingly, in practice this provides little concrete guidance in determining with certainty what is and what is not 'essential' contact. Greater transparency in the guidelines applied by the EU and its Member States when implementing its policy of non-essential contacts would be of benefit not only within the Union, but also to the ICC ASP⁽³⁴¹⁾. Should the ASP act upon the recommendation of some State Parties to establish a policy at the level of the ASP to assist State Parties to comply with their obligations under the Rome Statute⁽³⁴²⁾, insight into the guidelines applied by its European State Parties would be a valuable contribution to the process of negotiating a text amenable to the ASP⁽³⁴³⁾.

9.3.2 Financial

Earlier, in section 8.3.2., it was noted that the EU contribution to the ICC Trust Fund for building legal expertise and cooperation through the EIDHR facilitated a series of seminars on 'Fostering Cooperation' in Nuremberg. As was discussed, these high-level seminars were designed to enhance knowledge on technical matters arising out of the duty to cooperate with the Court – such as the implementation of arrest warrants, asset freezing and the conduct of investigations. As a direct result of these seminars⁽³⁴⁴⁾, three states entered into Witness Relocation Agreements with the ICC, a tangible outcome of EU financial support to initiatives designed to enhance cooperation with the Court. It was also reported that a number of African Union (AU) representatives confirmed their interest in organising an ICC-AU seminar in Addis Ababa and further to cooperate with the Court on a range of other practical matters, however the AU has subsequently deferred the seminar⁽³⁴⁵⁾.

9.3.3 Technical

The EU has concluded two bilateral agreements with the ICC in order to facilitate cooperation between the ICC and the EU. In 2006, pursuant to what was then Article 11 TEU⁽³⁴⁶⁾, the EU, represented by the Presidency of the Council of the European Union concluded the *Agreement Between the International Criminal Court and the European Union on Cooperation and Assistance* ⁽³⁴⁷⁾. Explicitly not addressing matters concerning the cooperation between the ICC and individual Member States⁽³⁴⁸⁾, the 2006 Agreement is narrow in scope and

³³⁷ Telephone interview #10 with ICC official, 13.02.2014.

³³⁸ Action Plan, 2011, at p.14.

³³⁹ The EU's response to non-cooperation, at para.9.

³⁴⁰ The EU's response to non-cooperation, at para.9.

³⁴¹ Telephone interview #04 with representative of a Non-EU Member State, ICC State Party (WEOG Group), 04.02.2014.

³⁴² ASP, Report of the Court on cooperation, at para.10.

³⁴³ Telephone interview #04 with representative of a Non-EU Member State, ICC State Party (WEOG Group), 04.02.2014.

³⁴⁴ Telephone interview #05 with ICC Official, 04.02.2014; Telephone interview #04 with representative of a Non-EU Member State, ICC State Party (WEOG Group), 04.02.2014. ICC, Financial Report. See also Factsheet, Building Legal Expertise and Fostering Cooperation, EIDHR/2012/292-809_Eng Updated: 28.05.2013 (on file with the author) at p.5 (hereafter 'Factsheet: Building Legal Expertise').

³⁴⁵ ICC, Financial Report; Factsheet: Building Legal Expertise at p.5.

³⁴⁶ Post Lisbon, this is now Article 24 TEU.

³⁴⁷ Agreement Between the International Criminal Court and the European Union on Cooperation and Assistance, O.J L 115, 28.4.2006, at p.50 (hereafter EU-ICC Agreement, 2006).

³⁴⁸ Recital 10, and implicitly, Articles 2(1) and 3(1), EU-ICC Agreement, 2006.

is limited to technical elements of cooperation and assistance. It addresses the forms of cooperation as provided for in Article 87(6) of the Rome Statute, regarding the delivery of documents and information. The 2006 Agreement provides an example of a highly technical legislative instrument that facilitates direct EU cooperation with the ICC on matters directly related to the Court's investigative and prosecutorial functions. The Agreement replicates the typical practice for coordinating the process of cooperation established by international institutions and organisations, whereby the institution requesting cooperation submits a request for cooperation regarding a specific matter, and the other institution acts upon that request⁽³⁴⁹⁾. In addition to such *ad hoc* instances of cooperation, the Agreement provides for the regular exchange of information and documentation, including classified documents and information⁽³⁵⁰⁾. Further to documentary information, the Agreement also covers the exchange of information through the provision of testimony by EU staff⁽³⁵¹⁾.

In addition to cooperation concerning the exchange of information, Article 14 of the Agreement enables the EU to cooperate with the ICC in the form of providing facilities and services in the field. EU delegations have indeed assisted the ICC with the development of local and foreign contacts in the field⁽³⁵²⁾. From the perspective of the EU, the Agreement constitutes an effective mechanism to facilitate the Union's efficient cooperation with the Court while at the same time ensuring that safeguards are established to respect the confidentiality and security of EU information, particularly classified information⁽³⁵³⁾.

The EU concluded a second agreement with the ICC in 2008 specifically addressing the security arrangements for the exchange of classified information between the two institutions⁽³⁵⁴⁾. Once again, a highly technical instrument, the 2008 Agreement is designed to establish the requisite standards of security required by both institutions when exchanging information of a classified nature. It establishes the protocols to be followed by both the EU and the ICC when both making and responding to requests to both access classified information and requests for the release of such information to the Court⁽³⁵⁵⁾, as well as providing for the establishment of a designated Liaison Officer (EU) and Point of Contact (ICC) each responsible for coordinating on behalf of their respective institution⁽³⁵⁶⁾.

Other aspects of the agreement establish procedures to be adopted in cases of breaches or compromises in security, and detailing the need for necessary investigative, remedial or corrective action, and if appropriate, disciplinary action⁽³⁵⁷⁾. In sum, like the 2006 Agreement, the 2008 Agreement constitutes a prime example of concrete measures that the EU can put in place in order to ensure that it is capable of cooperating with the Court in an efficient, effective, and secure manner.

9.4 Recommendations

9.4.1 Member States

- **Member States** should promptly execute arrest warrants, when requested by the ICC;
- **Member States** should share experience, best practices and expertise on witness protection issues, help other states set up witness protection systems and encourage the signing of witness relocation agreements with the ICC;

³⁴⁹ Article 7(2) EU-ICC Agreement, 2006.

³⁵⁰ Article 7(1) EU-ICC Agreement, 2006.

³⁵¹ Article 10 EU-ICC Agreement, 2006.

³⁵² Telephone interview #10 with ICC official, 13.02.2014.

³⁵³ Article 11(3) EU-ICC Agreement, 2006.

³⁵⁴ Security Arrangements for the Protection of Classified Information Exchanged Between the EU and the ICC, Brussels, 15 April 2008 (8349/1/08) (hereafter 'EU-ICC Security Arrangement, 2008').

³⁵⁵ Articles 18-20, EU-ICC Security Arrangement, 2008.

³⁵⁶ Article 16, EU-ICC Security Arrangement, 2008.

³⁵⁷ Articles 35-37 EU-ICC Security Arrangement, 2008.

- Support the work of the **Genocide Network** to enhance the capacity of EU Member States to investigate and prosecute core international crimes within the EU;
- Consider the adoption of an Action Plan and Task Force to increase efficiency in combating impunity within the EU;
- Add core international crimes (namely, genocide, crimes against humanity, war crimes) to the list of crimes over which **Europol** has competence;
- Make use of the European Arrest Warrant for ICC-related arrests, provided that the conditions for its application are present;
- More use can be made of the asset tracing, freezing and recovery capabilities within the EU. Consider the possibility of tracing, freezing and confiscating assets upon request directly from the ICC, rather than through Member States.

9.4.2 EU

- The **European Parliament** should continue to provide high profile political support to encourage cooperation with the ICC by states (both Member States as well as third states);
- The **GENVAL** should conduct an evaluation of implementation of the mandate of the Genocide Network;
- Greater emphasis by the **EEAS** and **Commission** should be placed on adopting concrete measures to respond to non-cooperation with the ICC to complement the political statements in response to non-cooperation;
- The **Spokesperson of the High Representative** should continue to issue statements regarding non-cooperation;
- The **Council** should continue to include clauses in its statements and conclusions reminding states and parties to ongoing situations subject to ICC investigations of their obligations to cooperate with the ICC;
- Continue to encourage the work undertaken within the **COJUR-ICC** with regard to regularising the EU's response regarding non-cooperation;
- The **COJUR-ICC** should engage with the process established by the Roadmap recently adopted by the ASP in November 2013 for achieving an operative tool to enhance arrests;
- Increase the transparency in the guidelines applied by the **EU** and its **Member States** when implementing its policy of non-essential contacts.

10. COMPLEMENTARITY

10.1 General discussion

Throughout this study, emphasis has been placed upon the need to ensure the effective implementation of the principle of complementarity in order to strengthen the system of international criminal justice embodied by the Rome Statute. The ability of states to embrace the role that they have been given under the Rome Statute has significance for the effectiveness of the overall system of justice established by the ICC Statute and helps, in turn, to reinforce the ICC itself. When States fulfil their responsibility to investigate and prosecute international crimes domestically, this reduces the burden on the ICC, as a 'court of last resort'⁽³⁵⁸⁾. At the same time, an effective ICC provides the vital support that the community of states need when states are unable or unwilling to fulfil those responsibilities. According to the OTP, a 'Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing international system of justice'⁽³⁵⁹⁾.

³⁵⁸ Report of the Bureau on Stocktaking: Complementarity, at para.3.

³⁵⁹ Report on Prosecutorial Strategy, The Hague, 14.09.2006, at p.5.

Whereas in previous sections, the focus has been upon the responsibilities of Member States to implement the principle of complementarity and the measures that the EU can take to assist them in discharging that responsibility, the focus of this section is upon the concept of positive complementarity.

An idea first introduced by the ICC OTP in 2006, 'positive complementarity' entails the active encouragement of states to conduct national proceedings, and, where appropriate, to provide the necessary assistance to enable them to do so⁽³⁶⁰⁾. Until 2010, the notion of positive complementarity was primarily one of prosecutorial strategy. As explained by the OTP in 2006, this means that it 'encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation'⁽³⁶¹⁾.

In 2010, delegates to the First Review Conference of the ICC in Kampala in 2010 made positive complementarity one of the four key priorities for discussion. The outcome of those discussions was the adoption of a Resolution on positive complementarity which transformed what was previously a prosecutorial strategy into a more holistic means by which to strengthen the ICC system specifically, and the advancement of international criminal justice and the rule of law more broadly. However, rather than focussing on the role that the ICC could play in strengthening national regimes⁽³⁶²⁾, 2010 marked a shift – placing the onus upon states, international organisations and institutions and civil society to strengthen national capacity⁽³⁶³⁾. Accordingly, by its resolution, the Review Conference

- Recognised 'the need for additional measures at the national level as required and for the enhancement of international assistance to effectively prosecute perpetrators of the most serious crimes of concern to the international community'⁽³⁶⁴⁾;
- Recognised 'the desirability for States to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level'⁽³⁶⁵⁾;
- Encouraged 'the Court, States Parties and other stakeholders, including international organizations and civil society, to further explore ways in which to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of international concern'⁽³⁶⁶⁾.

Positive complementarity denotes the provision of technical and financial assistance to states in order to build their capacity to discharge their responsibilities to investigate and prosecute international crimes. Accordingly, while this may include initiatives discussed in section 6, designed to provide assistance to states in order to adopt the necessary legislative changes to domestic law in order to make it compliant with the Rome Statute and incorporate the Rome Statute, the remit of positive complementarity extends much further. Indicatively, positive complementarity can entail legislative assistance, technical assistance and capacity building, and assistance constructing physical infrastructure⁽³⁶⁷⁾. Examples of technical assistance and capacity building include the training of law enforcement and judicial officials, defence counsel, and forensic investigators; the development of capacity to ensure the protection of victims and witnesses. Such support could take the form of supplying judges and prosecutors to assist national courts, specialist international crimes divisions or hybrid tribunals or the provision of mutual legal assistance and cooperation to facilitate actual prosecutions.

³⁶⁰ Report on Prosecutorial Strategy, The Hague, 14.09.2006.

³⁶¹ Report on Prosecutorial Strategy, The Hague, 14.09.2006, at p.5.

³⁶² As the Bureau made explicit, 'the Court is not a development agency...Activities aimed at strengthening national jurisdictions as set out in this paper should be carried forward by States themselves, together with international and regional organizations and civil society, exploring interfaces and synergies with the Rome Statute system. Report of the Bureau on Stocktaking: Complementarity, at para.4.

³⁶³ ICC-ASP, Resolution RC/Res.1 (8.06.2010), at paras. 3 and 8.

³⁶⁴ Resolution RC/Res.1 at para.3.

³⁶⁵ Resolution RC/Res.1 at para.5.

³⁶⁶ Resolution RC/Res.1, at para.8.

³⁶⁷ Report of the Bureau on Stocktaking: Complementarity, at para.17.

In terms of physical infrastructure, international crimes often occur in the context of periods of conflict and protracted insecurity. In these situations, the basic physical infrastructure of justice systems – courtrooms, prisons and detention centres, police or investigative facilities are under-resourced or completely lacking. Positive complementarity can involve the provision of assistance in the (re)construction of the necessary infrastructure to establish an operational system of criminal justice⁽³⁶⁸⁾.

Whether directly or indirectly framed in terms of positive complementarity and accountability for international crimes, both the EU and its Member States have long been active in the field of strengthening the rule of law and justice-sector capacity of states, both within the Union and in its external action⁽³⁶⁹⁾. A consensus emerged among a number of interviewees, who were of the view that the area in which the EU and its Member States can make their most significant contribution to the Rome Statute system of international criminal justice is in the implementation of the principles of complementarity and positive complementarity⁽³⁷⁰⁾. The following two sections will examine both measures that the EU and its Member States have taken, and explores suggestions as to further measures they may consider taking in this regard.

10.2 Member States

The 2011 Decision simply states that the 'Union and its Member States shall, as appropriate, take initiatives or measures to ensure the implementation of the principle of complementarity at national level'⁽³⁷¹⁾. Despite the generality of this provision, which may suggest a deference to the competence of EU Member States in the area of criminal justice, it would be misleading to think that the EU has adopted a passive role in strengthening the capacity of its Member States to fulfil the principle of complementarity. The Genocide Network, established in 2002 was designed specifically to enhance the capacity of EU Member States to investigate and prosecute international crimes – including, but not limited to, those within the ICC's jurisdiction – in an effective manner⁽³⁷²⁾. As discussed in the previous section, the Network was established to enhance intra-EU cooperation and coordination in judicial matters in this regard. To that effect, the European Parliament has called upon Member States to strengthen the role of the Genocide Network to enhance its potential to improve the effectiveness of national investigations⁽³⁷³⁾.

Furthermore, the European Parliament has encouraged Member States to take measures to enhance their capacity to investigate and prosecute international crimes. This may be to adopt such legislative measures

³⁶⁸ Report of the Bureau on Stocktaking: Complementarity, at para.17(c).

³⁶⁹ Here, it can be noted that a number of EU Member States are involved in the 'Greentree Process', an initiative facilitated by the 'International Centre for Transitional Justice' (ICTJ). One of the initiatives being explored by the Greentree Process is the possibility of enhancing coordination in the implementation of the principle of positive complementarity by developing a centralised system for the assessment of capacity building needs to strengthen the rule of law and justice systems and the deployment of assistance to meet those needs. While discussions have been ongoing since the first of the three high level retreats convened at the Greentree Estate in New York in 2010, the process has yet to yield concrete outcomes. For further information, see ICTJ, Report, 7-9.12.2011.

And ICTJ, Report, 25-26.10.2012.

³⁷⁰ Telephone interview #01 with ICC Official, 03.02.2014; Telephone interview #05 with ICC Official, 04.02.2014; Telephone interview #10 with ICC official, 13.02.2014; Telephone interview #04 with representative of a Non-EU Member State, ICC State Party (WEOG Group), 04.02.2014; Telephone interview #07 with representative of a non-EU Member State, ICC State Party (GRULAC Group), 06.02.2014; Telephone interview #03 with global NGO representative with experience as a capacity builder, a successful EIDHR applicant and as an ICC consultant, 03.02.2014; Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014; Telephone interview #08 with global NGO representative with experience working with a local NGO and also an unsuccessful EIDHR applicant, 06.02.2014; Telephone interview #11 with former representative of global NGO with experience as a successful EIDHR applicant, 14.02.2014; Telephone interview #12 with global NGO representative, 19.02.2014.

³⁷¹ Article 5, Council Decision 2011/168/CFSP.

³⁷² See also, 'Fostering a European Approach to Accountability for Genocide, Crimes Against Humanity, War Crimes and Torture: Extraterritorial Jurisdiction and the European Union' Final Report, *Redress and FIDH*, April 2007.

³⁷³ European Parliament resolution P7_TA(2011)0507, at para.16.

as are necessary in order to grant their courts with jurisdiction over those crimes⁽³⁷⁴⁾. It may also involve ensuring that there exists appropriate expertise among police investigators, prosecutors, judges and military officials in order ensure that such investigations and prosecutions can be carried out in practice⁽³⁷⁵⁾, and to provide training or bilateral technical assistance to that effect.

Beyond this, although Member States are to be encouraged to engage either directly or indirectly in the implementation of capacity building and positive complementarity, there is currently little scope for further action to be taken by the EU in order to strengthen Member State implementation of the principle of complementarity.

10.3 The EU as a Global Actor

The EU has been one of the primary protagonists in the implementation of the principle of positive complementarity. Indeed, the Focal Point established by the ASP Bureau to coordinate discussions at the Kampala Review Conference identified 12 examples of pre-existing projects that have helped to strengthen domestic capacity in a way envisaged by the principle of complementarity⁽³⁷⁶⁾. Of these projects, six were either directly implemented by the EU or were enabled by funding contributions by the EU, some of which will be examined below. Whereas the 2011 Decision is relatively silent on the action that the EU could take in its external relations to implement the principle of complementarity, the 2012 Strategic Framework on Human Rights and Democracy and its accompanying Action Plan identified the promotion of, and the contribution to, the strengthening of the capacity of national judicial systems to investigate and prosecute international crimes, as one of the key action points for the EEAS, the Commission and EU Member States⁽³⁷⁷⁾.

10.3.1 Political

Emphasis on the principle of complementarity has been one of the key strategies that the EU has adopted when promoting universality of the Statute and preserving its integrity. To take one example, in response to the concerns expressed by the US as underpinning its efforts to undermine the ICC in the early years of its establishment, the EU would use the principle of complementarity to defend the Court by observing its jurisdictional limitations⁽³⁷⁸⁾. Further, while expressing its commitment to the ICC, the EU has at the same time sought to encourage national governments to establish and undertake effective domestic proceedings – such as the declaration by the Presidency on behalf of the EU in October 2009 with regard to the post-election violence in Kenya⁽³⁷⁹⁾.

In addition to encouraging Member States to implement the principle of complementarity, the European Parliament in its 2011 Resolution called upon the EU and its Member States to provide support to third states to conduct their own proceedings to investigate and prosecute international crimes⁽³⁸⁰⁾. Further to this, it called upon the EU and its Member States to mainstream the Rome Statute system of international criminal justice across all its foreign policy priorities⁽³⁸¹⁾, and in particular into all its development programmes aimed at strengthening the rule of law and to provide technical and financial assistance to third states to enhance their capacity to effectively and efficiently conduct investigations into complex

³⁷⁴ European Parliament resolution P7_TA(2011)0507, at para.42.

³⁷⁵ European Parliament resolution P7_TA(2011)0507, at para. 18.

³⁷⁶ Focal Point's compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute crimes, 30.05.2010 (RC/ST/CM/INF.2) (hereafter 'Focal Point compilation, 30.05.2010').

³⁷⁷ EU Strategic Framework.

³⁷⁸ Bosnia Mission Mandate in Question as Security Council Debates Legal Exposure of UN Peacekeepers, Press Release 10.07.2002 (SC/7445/Rev.1), statement by Ellen Margrethe Løj, Representative of Denmark speaking on behalf of the EU.

³⁷⁹ Declaration by the Presidency on behalf of the European Union on Kenya' Brussels, 1.10.2009 (13967/09 (Presse 280)).

³⁸⁰ European Parliament resolution P7_TA(2011)0507, at para.41.

³⁸¹ European Parliament resolution P7_TA(2011)0507, at para.49.

crimes such as international crimes⁽³⁸²⁾. Mainstreaming the support of the EU and the Member States in terms of positive complementarity, is at the heart of the EU's policies and should provide the necessary impetus to further concrete EU action. However, care should be taken to clarify the EU's understanding of positive complementarity, including the realisation that the concept does not really involve the creation of 'mini-ICCs' at the national level. Instead, what is required is that national jurisdictions are willing and able to deal with core international crimes at a level which is satisfactory within the judicial environment and the practical realities that the states in question operate in. In addition, it would be important for the EU to consider also how positive complementarity fits with the wider EU agenda, in particular regarding broader fair trial issues or issues that arise in other EU policies in terms of criminal justice reforms, and it should be clear as to where there are overlaps with the international criminal justice understanding of complementarity, and where there are distinctions, what those distinctions are.

10.3.2 Financial

The EU has been a major contributor to capacity building initiatives to strengthen the ability of States to fulfil their primary responsibility for the investigation and prosecution of international crimes.

Through the EIDHR instrument, the EU has funded the ICC's Trust Fund on 'Building Legal Expertise and Fostering Cooperation'⁽³⁸³⁾, NGOs and CSOs that work to promote not just ratification and implementation of the Rome Statute, but also the values and principles embodied in the Statute – such as accountability and the rule of law. By strengthening the political demand for accountability at the national level – whether it be among parliamentarians or by mobilising civil society, these organisations can help create the vital political environment in which domestic proceedings can take place. Examples of such organisations that have been funded through the EIDHR to this effect include PGA (see also section 6.3.2.) and Avocats Sans Frontières (ASF)⁽³⁸⁴⁾ and in the most recent funding cycle, CILRAP-CMN⁽³⁸⁵⁾.

The EU funding to the above-mentioned ICC Trust Fund has enabled one of the projects under the Trust Fund, the Legal Tools Project, to promote its external dissemination outside the ICC and has facilitated the provision of highly specialised training and coaching in their use. Originating out of the OTP, the Legal Tools provide a 'comprehensive online or electronic knowledge system, developed to expand an expansive library of legal document and range of research and reference tools to encourage and facilitate the efficient and precise practice of criminal justice for core international crimes'⁽³⁸⁶⁾. By making this technical resource universally available, the Project could make a significant contribution to developing national capacity⁽³⁸⁷⁾.

Until 2010, the EIDHR contributed financial assistance to the ICC Visiting Professionals and Internship Programmes. The Programmes provided an opportunity for professionals and those interested in the work of the Court and international criminal justice to spend time at the Court and gain experience in the investigation and prosecution of international crimes which could then be taken back to national systems. As the EU Focal Point has observed in its 2013 submission to the ASP on measures taken to promote the universality of the Rome Statute, the Programmes serve to strengthen awareness of the Court's mandate and how it operates – opening the potential for that knowledge to then be further disseminated by the participants⁽³⁸⁸⁾. Similar projects were funded with regard to the ICTY, where legal professionals from the former Yugoslavia with a special interest in war crimes and crimes against humanity were selected to assist the Office of the Prosecutor in the course of trial proceedings in order to develop skills and experience that would enhance the future capacity of regional authorities to respond to complex crimes⁽³⁸⁹⁾. Some

³⁸² European Parliament resolution P7_TA(2011)0507, at para.29.

³⁸³ See, ICC, Financial Report and Factsheet: Building Legal Expertise.

³⁸⁴ See Focal Point compilation, 30.05.2010.

³⁸⁵ For a project between 2013-2016.

³⁸⁶ Focal Point compilation, 30.05.2010 at p.32.

³⁸⁷ ICC, Press Release 1.11.2013.

³⁸⁸ EU reply to Plan of Action request, at p.8.

³⁸⁹ Focal Point Compilation, at p.20.

interviewees expressed concern at the discontinuation of the Visiting Professionals and Internship Programmes and the impact it has had on the recruitment of professionals and interns from regions other than the Western European and Other group⁽³⁹⁰⁾. The lack of funding means that individuals from African countries in particular, cannot afford to spend time with the Court in an expensive city. Whilst the views on the success of the VPI within the ICC differ⁽³⁹¹⁾ the long term implications of this decision may have an impact on future engagement with the ICC. Many potential participants of today may become the individuals upon whom the Court relies for cooperation in the future once they take positions in the administration of their countries⁽³⁹²⁾.

Over the years, the EIDHR funding has increasingly embraced the idea of building national capacity. In the most recent call, the implementation of the principle of complementarity was one of the listed priorities⁽³⁹³⁾. Indeed, one of the projects which was awarded funding under this Lot, the CILRAP-CMN project (in partnership with the University of Nottingham Human Rights Law Centre and the Initiative for International Criminal Law and Human Rights) entitled: 'Enhancing the Rome Statute System: Supporting National Ownership of Criminal Procedures through Technology-driven Services' falls squarely within positive complementarity. The CMN Knowledge Hub to be created under this project, will form the basis of four thematic toolkits, which will support legal work, policy and advocacy concerning core international crimes and serious human rights violations. Emphasis will be placed on ratification, implementation and cooperation; investigation and fact-finding; case mapping, selection and prioritisation; as well as case analysis. The toolkits include: Databases and Manuals; Thematic Guidelines; Advisory Papers; Technical Assistance and Capacity Development Partnerships⁽³⁹⁴⁾.

Between 2005 and 2009, the EIDHR funded the capacity building work of ASF in the DRC. Initiatives to build the justice system in the DRC included the training of judges and lawyers, the provision of legal aid and the dissemination of legal awareness through legal clinics and assisting the organisation of mobile courts to provide justice to remote regions of the country⁽³⁹⁵⁾.

All the interviewees of this study acknowledged the provision of EU funding for capacity building as being of paramount importance to the success of positive complementarity in practice⁽³⁹⁶⁾. However, as a general observation, it was noted that information on who are the recipients of grants and what is the substance of the EU-funded projects is not easily accessible on the EU website⁽³⁹⁷⁾. This does not aid the visibility of the

³⁹⁰ Telephone interview #01 with ICC Official, 03.02.2014; Telephone interview #05 with ICC Official, 04.02.2014; Telephone interview #10 with ICC official, 13.02.2014.

³⁹¹ Telephone interview #01 with ICC Official, 03.02.2014; Telephone interview #05 with ICC Official, 04.02.2014; Telephone interview #10 with ICC official, 13.02.2014.

³⁹² Telephone interview #05 with ICC Official, 04.02.2014.

³⁹³ European Commission, Restricted Call for Proposals 2012 EuropeAid/132762/ACT/Multi' Brussels, 25.09.2012.

³⁹⁴ CILRAP-CMN, 'The CMN Knowledge Hub and Thematic Toolkits on Criminal Justice for International Crimes' http://www.casematrixnetwork.org/uploads/media/CMN_Knowledge_Hub_Folder_First_Edition.pdf.

³⁹⁵ See Focal Point Complication, at p.8.

³⁹⁶ Telephone interview #01 with ICC Official, 03.02.2014; Telephone interview #03 with global NGO representative with experience as a capacity builder, a successful EIDHR applicant and as an ICC consultant, 03.02.2014; Telephone interview #04 with representative of a Non-EU Member State, ICC State Party (WEOG Group), 04.02.2014; Telephone interview #05 with ICC Official, 04.02.2014; Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014; Telephone interview #07 with representative of a non-EU Member State, ICC State Party (GRULAC Group), 06.02.2014; Telephone interview #08 with global NGO representative with experience working with a local NGO and also an unsuccessful EIDHR applicant, 06.02.2014; Telephone interview #10 with ICC official, 13.02.2014; Telephone interview #11 with former representative of global NGO with experience as a successful EIDHR applicant, 14.02.2014; Telephone interview #12 with global NGO representative, 19.02.2014.

³⁹⁷ Telephone interview #03 with global NGO representative with experience as a capacity builder, a successful EIDHR applicant and as an ICC consultant, 03.02.2014; Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014; Telephone interview #08 with global NGO representative with experience working with a local NGO and also an unsuccessful EIDHR applicant, 06.02.2014.

work being undertaken, nor does it facilitate interaction amongst organisations who may have similar mandates or interests, or which would perhaps like to form partnerships with organisations benefitting from EIDHR funding⁽³⁹⁸⁾. In addition, it does not aid transparency nor does it inspire confidence in the selection process⁽³⁹⁹⁾. Nevertheless, interviewees felt that the fact that the EIDHR funded NGOs and CSOs is perhaps one of the main strengths of EU support overall. In terms of accessibility to grants, it was felt that funding did not appear to be restricted to global NGOs and it was equally accessible to local NGOs⁽⁴⁰⁰⁾ who partner up with international partners, appropriately balancing what the states need on the ground with the needs of the ICC⁽⁴⁰¹⁾. However, it was noted by one of the interviewees that the EIDHR funding appears to be more accessible to local NGOs from situation countries, rather than other countries who have faced mass violence which however is not (yet) under ICC scrutiny⁽⁴⁰²⁾. In such instances, the only available avenues for core crimes related work, is almost exclusively through the UN Development Programme ('UNDP') which does not have a clear mandate to fund ICC-related issues⁽⁴⁰³⁾. With regard to the application process of the EIDHR funding it was observed by an assessor of EU funding applications, that although the selection criteria are clear, the indicators used to assess the impact envisaged, could be easily manipulated⁽⁴⁰⁴⁾. Applicants have become increasingly sophisticated at being able to 'speak the language' of the funder in order to be successful, regardless of any real evidence of how the anticipated results will indeed be achieved⁽⁴⁰⁵⁾. However, this is a general problem across the funding sector, and not one linked to a specific EU policy⁽⁴⁰⁶⁾.

Leaving the intricacies of funding applications to one side, the length of time between funding cycles needs to be considered as well. Whereas three year funding cycles are in fact welcomed by some beneficiaries, as they allow them to plan longer term, it should be examined whether such intervals between funding periods are appropriate for the enhancement of national capacity⁽⁴⁰⁷⁾. As the situation on the ground can be volatile and the capacity needs of national legal orders may change in ways that do not necessarily conform to funding patterns, it might be more appropriate to make more short-term funding available in a way similar to other issue-based funds⁽⁴⁰⁸⁾. Perhaps inclusion of positive complementarity work in other areas the EU influences, such as that of Conflict Prevention, Peace Building and Mediation would constitute a good avenue to enhance this type of work⁽⁴⁰⁹⁾.

10.3.3 Technical

- The Complementarity Toolkit

In 2013, the European Commission and the EEAS released a Joint Staff Working Document aimed at providing practical guidance to EU officials and Member States regarding the measures that can be taken in order to reinforce national justice systems so that they can investigate and prosecute international

³⁹⁸ Telephone interview #03 with global NGO representative with experience as a capacity builder, a successful EIDHR applicant and as an ICC consultant, 03.02.2014.

³⁹⁹ Telephone interview #08 with global NGO representative with experience working with a local NGO and also an unsuccessful EIDHR applicant, 06.02.2014.

⁴⁰⁰ Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014.

⁴⁰¹ Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014.

⁴⁰² Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014.

⁴⁰³ Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014.

⁴⁰⁴ Face to face interview #01 with EU Assessor, 29.01.2014.

⁴⁰⁵ Face to face interview #01 with EU Assessor, 29.01.2014.

⁴⁰⁶ Telephone interview #03 with global NGO representative with experience as a capacity builder, a successful EIDHR applicant and as an ICC consultant, 03.02.2014.

⁴⁰⁷ Telephone interview #03 with global NGO representative with experience as a capacity builder, a successful EIDHR applicant and as an ICC consultant, 03.02.2014.

⁴⁰⁸ e.g. Annual Action Programme 2013 for the European Instrument for Democracy and Human Rights (EIDHR) to be financed under budget line 19 04 01 of the general budget of the European Union
<http://webcache.googleusercontent.com/search?q=cache:http://www.eidhr.eu/files/dmfile/AAP2013.pdf/>.

⁴⁰⁹ Telephone interview #09 with EU official, 07.02.2014.

crimes⁽⁴¹⁰⁾. This 'Complementarity Toolkit' addresses the political, legal and development dimensions to the principle of complementarity and can be seen as a useful mechanism to assist the process of mainstreaming the implementation of the principle across all relevant EU policies and activities. A very comprehensive document, it identifies the importance of ensuring accountability for lasting peace and security and sustainable development – thereby placing it at the centre of EU foreign policy, and continues by providing a detailed guide for developing effective programmes to advance the principle of complementarity. Although it is very early to assess its effectiveness, the early signs suggest that this document will form the basis of all EU action on complementarity. Cascading the information on as many potential users of the toolkit as possible will be key to its success once implementation of the Toolkit gets underway. The document has been hailed as a positive development amongst all interviewees⁽⁴¹¹⁾. However, in-depth knowledge of its contents varied significantly. Whereas most ICC officials interviewed in the course of the study were aware of it (one however was unaware that it had been adopted⁽⁴¹²⁾), knowledge amongst state representatives varied, and was largely dependent on whether the state in question has a keen interest in the ICC and takes an active role at the ASP. Awareness of the Toolkit was also largely dependent on the geographical provenance. Awareness was significantly lower amongst NGO representatives, particularly those coming from situation countries, or outside the EU. Further promotion of the toolkit is therefore needed. Perhaps also updating the list of experts on the EU list could be beneficial in this respect (see section 6.3.3), as they could then be used to disseminate information on the Toolkit through their networks.

One interviewee, noted the absence of any discussion of international criminal justice or the ICC (and related matters) at a recent expert's event organised by the Konrad-Adenauer Stiftung and CARE International addressing the 'The EU's Comprehensive Approach in External Conflict and Crisis: From Strategy to Practice'⁽⁴¹³⁾. This was despite the fact that the meeting focussed upon response mechanisms to ongoing situations of insecurity and conflict, and in particular upon the ongoing situations in the Central African Republic and Syria – the former being subject to a preliminary investigation by the ICC OTP. Even in the case of Syria, while not currently before the ICC, it has been the subject of repeated calls, including by EU Member States, to the UN Security Council for referral to the ICC. In the view of this interviewee, when considering the effectiveness of the EU's mainstreaming of support for the ICC and the system of justice and accountability that it embodies, the area of conflict response would seem an area of priority wherein to translate political commitment into 'concrete action on the ground'⁽⁴¹⁴⁾. Accordingly, incorporating the Toolkit into the Comprehensive Approach to conflict prevention and crisis management could be one way in which to enhance the EU's mainstreaming of its support for the ICC in its external relations. A starting place, might be, for example, to update and endorse the information presented in the Factsheets within the Mediation Support Project in order to include information about the Complementarity Toolkit. ⁽⁴¹⁵⁾.

The Role of the EU delegations

EU delegations play a vital role in promoting support of the ICC, particularly in those countries currently under ICC preliminary investigation, or indeed in situation countries. They are the eyes and ears of the EU in the field and they should be able to pass on relevant information both back to Brussels, but also to those who seek their assistance for country-specific issues. Indeed the positive contribution of EU delegations to

⁴¹⁰ Joint staff working document on advancing the principle of complementarity: Toolkit for bridging the gap between international and national justice, Brussels 31 January 2013 (SWD(2013) 26 final), at p.2.

⁴¹¹ Telephone interview #01 with ICC Official, 03.02.2014; Telephone interview #02 with EU Official, 03.02.2014; Telephone interview #04 with representative of a Non-EU Member State, ICC State Party (WEOG Group), 04.02.2014; Telephone interview #05 with ICC Official, 04.02.2014; Telephone interview #09 with EU official, 07.02.2014.

⁴¹² Telephone interview #10 with ICC official, 13.02.2014.

⁴¹³ See Konrad Adenauer Stiftung, 'The EU's Approach in External Conflict and Crisis: From Strategy to Practice', Expert's Meeting, Brussels, 12.02.2014, available at <https://www.kas.de/wf/en/17.58413/>. Telephone interview #12 with global NGO representative, 19.02.2014.

⁴¹⁴ Telephone interview #12 with global NGO representative, 19.02.2014.

⁴¹⁵ e.g. 'Transitional Justice in the context of Peace Mediation, Factsheet, November 2012.

the work of capacity builders was noted by a number of interviewees⁽⁴¹⁶⁾. However, it was also noted that despite efforts to cascade information to EU delegations, sometimes knowledge of the latest EU policies on the ICC is lacking. To address this, the EEAS organised a seminar to which EU staff were invited to apply⁽⁴¹⁷⁾.

Further, there seems to be a segregation within EU delegations between personnel holding the NGO and the Government file in a given country. This may work well in most instances, but in the case of ICC capacity building provided for by NGOs that are funded by the EIDHR for the benefit of the local government, this might not be the most efficient structure of support and does not seem to match the purposes of the work that is being done⁽⁴¹⁸⁾. Whilst this is often a result of the way delegations are organised at the local level, and perhaps also dependent on individual personalities⁽⁴¹⁹⁾, greater connection between the type of work that the EU funds and the operationalisation within EU delegations in practice, would be beneficial to the overall objective of strengthening national capacity.

10.4 Recommendations

10.4.1 Member States

- Include the ICC crimes in the list of crimes over which the EU has competence under Article 83(1) TFEU in order to ensure that all EU Member States are able to implement the principle of complementarity.

10.4.2 EU

- Update the list of experts maintained by the **EU Focal Point** and disseminate its availability to EU delegations, third states, Member States and civil society organisations in order to strengthen assistance;
- Widen dissemination of the Complementarity Toolkit, particularly among State representatives and NGO organisations;
- Mainstream positive complementarity in other areas of EU external action, such as conflict prevention, stability and mediation;
- Update the Factsheets of the EEAS Mediation Support Project, in particular the document on 'Transitional Justice in the Context of Peace Mediation' in order to include information on the Complementarity Toolkit;
- Encourage funding applications by organisations working in all countries that have faced mass violence, irrespective of whether they form the basis of an ICC investigation;
- Enhance the accessibility of information on the **EIDHR** website regarding past and present grant recipients;
- Ensure that positive complementarity is mainstreamed within the context of other areas of EU activity, particularly rule of law policies and those relating to fair trial issues and criminal justice reforms.

⁴¹⁶ Telephone interview #03 with global NGO representative with experience as a capacity builder, a successful EIDHR applicant and as an ICC consultant, 03.02.2014.

⁴¹⁷ There were 37 participants in total, 12 from headquarters, 16 from EU delegation and 9 from Member States, as the seminar was also open to Member States. Telephone interview #09 with EU official, 07.02.2014.

⁴¹⁸ Telephone interview #03 with global NGO representative with experience as a capacity builder, a successful EIDHR applicant and as an ICC consultant, 03.02.2014.

⁴¹⁹ Telephone interview #09 with EU official, 07.02.2014.

11. CONSOLIDATED FINDINGS

The EU and its Member States have long been the staunchest supporters of the ICC – both politically and in terms of technical and financial support. The Union, supporting the values and principles of the ICC, was instrumental to getting the institution off the ground. A wealth of policies affecting Member States and the Union in their external relations have been put forward and have been particularly successful. In terms of visibility, there is a high degree of prominence of the EU's support for the ICC within the European geographical area, among Member States⁽⁴²⁰⁾, the Union itself⁽⁴²¹⁾, NGOs⁽⁴²²⁾, as well as situation countries where the EU has been engaged⁽⁴²³⁾. However, visibility among state representatives and NGOs from other regions varies greatly⁽⁴²⁴⁾. Some interviewees from non-EU Member States, although aware of the existence of EU policies on the ICC, were of the view that European action in support of the ICC is primarily channelled through individual European states rather than through the Union speaking in one voice⁽⁴²⁵⁾. For instance, while there is a high degree of unity visible when it comes to matters relating to cooperation, there is a perception of greater fragmentation in other areas, such as budgetary matters⁽⁴²⁶⁾.

The five areas of priority identified by the 2011 Decision have provided an effective structure through which to assess the EU's support for the ICC. Each of these areas implicates both internal (Member States) and external (the EU as a global actor) dimensions. Coordination of the implementation of these dimensions is an ongoing process. As seen in the sections above, the policy framework does not equally engage both dimensions at all times. This is down to the constitutional architecture of the Union and the type of policy involved. However, for effective mainstreaming, emphasis should be placed on those areas that have been under-utilised. Although there is greater scope for impact in the external dimension of the Union's action, attention should be directed to identifying those internal areas that would be suitable for further development.

Of particular strength have been the initiatives to promote universality through ratification of the Rome Statute. However, more work remains to be done in terms of full implementation of the Statute within national legal orders – both within Member States as well as third states. Universality can also be strengthened by ensuring that the ICC is consistently placed on the agenda and raised in the course of interactions with third states. In addition, by ensuring that these initiatives are visible and prominent as well as widely disseminated, this can catalyse action by local, regional and international actors, to entrench and enhance the goals pursued by the EU⁽⁴²⁷⁾.

⁴²⁰ Unofficial interviews with Member State representatives.

⁴²¹ Telephone interview #02 with EU Official, 03.02.2014; Telephone interview #09 with EU official, 07.02.2014.

⁴²² Telephone interview #03 with global NGO representative with experience as a capacity builder, a successful EIDHR applicant and as an ICC consultant, 03.02.2014; Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014; Telephone interview #12 with global NGO representative, 19.02.2014; Telephone interview #11 with former representative of global NGO with experience as a successful EIDHR applicant, 14.02.2014.

⁴²³ Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014. Similar views have been expressed in the course of informal interviews with African state representatives.

⁴²⁴ Telephone interview #07 with representative of a non-EU Member State, ICC State Party (GRULAC Group), 06.02.2014; Telephone interview #08 with global NGO representative with experience working with a local NGO and also an unsuccessful EIDHR applicant, 06.02.2014.

⁴²⁵ Telephone interview #04 with representative of a Non-EU Member State, ICC State Party (WEOG Group), 04.02.2014; Telephone interview #07 with representative of a non-EU Member State, ICC State Party (GRULAC Group), 06.02.2014.

⁴²⁶ Telephone interview #05 with ICC Official, 04.02.2014.

⁴²⁷ Telephone interview #08 with global NGO representative with experience working with a local NGO and also an unsuccessful EIDHR applicant, 06.02.2014.

Whereas the promotion of the integrity, independence, effectiveness and efficiency lies primarily with the ICC and the ASP as the overseeing body, some of the EU's initiatives have been influential and engagement should continue.

Member States and the EU have a significant role to play in the area of cooperation. In particular, EU initiatives can help counter instances of non-cooperation. In terms of political support, taking a strong position in public to foster cooperation with the ICC is particularly effective. In addition, the technical support that the EU can offer in order to enhance cooperation with the Court can provide tangible outcomes, for example in the context of witness protection and asset freezing. Similarly, without the EU's financial support of initiatives to promote cooperation, the ICC would have been in a much worse position.

Perhaps the area where the EU can make its greatest contribution yet is that of positive complementarity. The recent adoption of the Complementarity Toolkit is therefore of paramount importance. Besides demonstrating a strong political commitment, it is the funding that is made available to implement positive complementarity that has, and will continue to have, a transformative effect. However, the technical assistance that the Member States and the EU could provide in that respect remains under-utilised.

The main finding of this study is that with the institution building process complete, and the ICC fully functional, it is time to consider whether a shift in the EU's attention is needed. Now the EU's support is fundamental in order to ensure that the ICC can work effectively and meaningfully or else it will become 'a very expensive experiment'⁽⁴²⁸⁾. Whilst undeniably, the political support ought to remain strong, placing increased emphasis upon assisting the Court in the performance of its everyday operations as well as filling the gaps inherent in the Rome Statute system of international criminal justice, would be where the EU can leave its greatest mark. Focusing therefore on technical and financial assistance is the way forward.

Whilst acknowledging that the implementation of the Action Plan involves a step-by-step process, it would be important to identify and prioritise those aspects of the Action Plan that have not been implemented fully to date. In order to do this, each of the main players might consider the following suggestions:

- **COJUR-ICC:** Given that presidency of the COJUR-ICC rotates bi-annually with the Presidency of the Council, there is the potential that different priorities may be pursued, affecting continuity⁽⁴²⁹⁾. Consideration should therefore be given to the possibility of making technical and bilateral assistance a standing item on the COJUR-ICC's agenda, in addition to the particular priorities of a given Presidency;
- **Genocide Network/GENVAL:** To further explore the possibility of widening the list of crimes falling within the competence of the EU under Article 83(1) TFEU to include the core international crimes as defined in the Rome Statute in order to strengthen the effectiveness of measures to ensure internal consistency in the full implementation of the Statute and to enable the EU to adopt additional measures to cooperate directly with the Court. Further, they should consider the formulation of an Action Plan and Task Force to increase the efficiency in combating impunity within the EU;
- **Parliament:** To continue with the political support across all areas, but to make better use of the standing committee structure and individual MEPs who can take a leading role in adopting a more hands on promotion of universality;
- **Commission:** To keep under review the degree to which the ICC and international criminal justice related issues are mainstreamed across the different instruments;
- **EU Focal Point:** The establishment of an EU Focal Point has been instrumental to the success with which the support for the ICC and the Rome Statute system has been mainstreamed across the EU's policies. The scope of the Focal Point's remit is quite extensive. Consideration should be given to strengthening the Focal Point by offering greater support;

⁴²⁸ Telephone interview #08 with global NGO representative with experience working with a local NGO and also an unsuccessful EIDHR applicant, 06.02.2014.

⁴²⁹ Telephone interview #09 with EU official, 07.02.2014.

- In addition, the **EU Network of Focal Points** envisaged by the 2011 Action Plan, although not fully implemented to date, could be an important player in facilitating the effective and efficient delivery of technical and financial assistance. Also, updating the list of experts able to assist with this technical assistance would bring cross-cutting benefits to the implementation of the EU's policy objectives;
- **EEAS and EU Delegations:** To ensure that there is consistency in the way the ICC and the fight against impunity are raised in all actions in relation to third states, including but not limited to, ICC clauses and demarches. Full use should also be made of the local knowledge and resources of EU delegations on the ground.

PART THREE: THE EU, AFRICA AND THE ICC – PROSPECTS AND CHALLENGES

12. CASE STUDY: AFRICA AND THE ICC

When talking about 'Africa and the ICC' it is now familiar to talk about a dynamic of tension, crisis, and opposition⁽⁴³⁰⁾. Yet, from the Court's infancy, the states of the African continent have been at the forefront of shaping and supporting the development of the ICC system of international criminal justice. 34 of the 122 State Parties to the Rome Statute are African, making the African regional grouping the largest grouping of State Parties. Mali, a state subject to investigations by the ICC, is one of the State Parties to have entered into an enforcement of sentences agreement with the Court⁽⁴³¹⁾. The notion that states might make 'self-referrals' to the ICC, i.e. referrals of situations involving the state concerned, was not something anticipated by the drafters of the Statute. Yet the first three situations investigated by the Court, those of the DRC, Uganda and the CAR all arose out of self-referrals made by national governments. More recently, the investigation into the situation in Mali too was initiated on the basis of a self-referral by government authorities (see Part One, section 3). In this most recent case, one week before the self-referral, a seven member ECOWAS contact group comprising Benin, Burkina Faso, Côte d'Ivoire, Liberia, Niger, Nigeria and Togo called upon the ICC to initiate an investigation into the situation in Mali⁽⁴³²⁾.

Despite this, throughout the previous Part it was observed that many of the most pressing challenges faced by the ICC – in particular, with regard to obtaining cooperation and preserving the integrity of the Statute – have arisen out of the context of the Court's proceedings concerning African states. At the same time, despite high profile instances of non-cooperation by certain African governments in the execution of specific arrest warrants issued by the ICC against Sudanese indictees President Omar al Bashir and Abdel Raheem Muhammad Hussein, African states – as the states subject to the highest volume of formal requests for cooperation by the Court - have in the majority of cases, complied⁽⁴³³⁾.

This section will provide an overview of the current status and root causes of the tensions before moving on to consider what role the EU and its Member States can play in order to ameliorate these situations. When doing so, attention must be paid to all of the thematic objectives identified in the 2011 Decision – in particular the need to preserve the Court's independence and promote its effectiveness. While of course, EU support to the ICC on this particular topic is intended precisely to support its effectiveness, caution must be exercised so as not to unintentionally jeopardise both the Court's actual and perceived independence.

European and western support for the ICC has been misconstrued and misrepresented⁽⁴³⁴⁾. Throughout this study, it has been observed that the EU and its Member States' support for the Court has been instrumental in its achievements to date. For critics of the Court however, together with the allegations of anti-African bias, such a level of support for the Court by the EU and its Member States has itself taken to reinforce the argument that the ICC is Europe's Court for Africa, or the 'European International Criminal Court'⁽⁴³⁵⁾. Implicit in this argument is the accusation that the ICC's overwhelming reliance on European donors – whether it be the EU or its Member States – has negative consequences on the Court's independence and impartiality

⁴³⁰ ANICJ, Report, January 2014.

⁴³¹ Accord entre la Cour pénale internationale et le Gouvernement de la République du Mali concernant l'exécution des peines prononcées par la Cour, 13.01.2012 (ICC-PRES/11-01-12).

⁴³² ICC-OTP Situation in Mali, *Article 53(1) Report* (16.01.2013) at para.20.

⁴³³ See Botswana's statement voting against an AU Decision against the ICC in May 2013; discussed at Du Plessis, December 2013, at p.7.

⁴³⁴ See Kimenyi, 17.10.2013.

⁴³⁵ An illustrative example of the anti-ICC arguments include 'Who Pays for the ICC' *African Business* available at <http://www.africanbusinessmagazine.com/special-reports/sector-reports/icc-vs-africa/who-pays-for-the-icc>; Hoile, 1 March 2012. See also Kimenyi, 17.10.2013.

from those financial backers⁽⁴³⁶⁾. While little – if any – evidence has been adduced to establish a causative relationship between the source of ICC funding and the Court's activities and decisions, the mere *suspicion* (however substantiated) can itself be of damage both to the Court's credibility and that of the EU.

Interventions by the EU and its Member States on behalf of the ICC specifically (rather than the system of international criminal justice in general) and with regard to specific cases and investigations must be taken with caution and within the appropriate fora in order to avoid the risk of prejudicing the Court's independence and autonomy. Equally, from the perspective of the EU, it is important that it charts a cautious path. Given the tenor of the political debate – often drawing upon anti-colonial rhetoric – it is necessary that the EU does not get drawn into that same narrative, and, in doing so, jeopardise the partnerships that it has developed both bilaterally with African states and with the African Union⁽⁴³⁷⁾. In this context, the EU might have an important conciliatory role to play. Against the apparent tide of widening antagonism, the EU, less encumbered by the colonial legacies of some of its Member States, can play an important role in emphasising the strength in the EU-Africa partnership. To this effect, while the EU must continue to uphold its commitment to international criminal justice and the full integrity of the ICC system, it should use opportunities like the upcoming EU-Africa Summit in April 2014 to reinforce the strength of the relationship between the two regions – their common goals and commitment to the same values and principles, including international criminal justice⁽⁴³⁸⁾. At the same time, there could be room for Member States to focus on their bilateral relations with those African states with which they have stronger ties. For example, France with francophone African states, or the UK with Anglophone African states, or Germany, through development ties⁽⁴³⁹⁾.

A strong alliance between the regions – both at the bilateral and multilateral levels – will create the environment for more effective cooperation between those parties, ultimately to the benefit of the Court and the wider international criminal justice system. After all, together, African states and the EU Member States constitute of half of the State Parties to the Rome Statute; it is in the interests of both regions to work together in this regard.

Given the legal and political realities of ICC jurisdiction, it is most likely that the ICC will continue to be primarily occupied with situations that concern states with weaker justice systems and those with less political influence to thwart effective ICC investigations. At the same time, the ICC will continue to rely upon particularly the EU and its Member States to provide the necessary political, practical and financial support for it to be able to effectively pursue its activities. All individuals interviewed agreed that the question is not whether the EU should continue to take such leading role in support of the ICC system of international criminal justice, but how it should be delivered⁽⁴⁴⁰⁾.

⁴³⁶ See 'Who Pays for the ICC' *New African Business* available at <http://www.africanbusinessmagazine.com/special-reports/sector-reports/icc-vs-africa/who-pays-for-the-icc>.

⁴³⁷ As one interviewee observed, there is a limit to what the EU and its Member States can do in this regard, since their advocacy for the ICC might be misconstrued as evidence to vindicate the 'neo-colonial' or western critique of the ICC. Telephone interview #10 with ICC official, 13.02.2014. See also, Telephone interview #12 with global NGO representative, 19.02.2014.

⁴³⁸ Telephone interview #09 with EU official, 07.02.2014.

⁴³⁹ Telephone interview #05 with ICC Official, 04.02.2014; Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014.

⁴⁴⁰ Telephone interview #05 with ICC Official, 04.02.2014; Telephone interview #01 with ICC Official, 03.02.2014; Telephone interview #10 with ICC official, 13.02.2014; Telephone interview #09 with EU official, 07.02.2014; Telephone interview #12 with global NGO representative, 19.02.2014; Telephone interview #11 with former representative of global NGO with experience as a successful EIDHR applicant, 14.02.2014; Telephone interview #04 with representative of a Non-EU Member State, ICC State Party (WEOG Group), 04.02.2014; Telephone interview #07 with representative of a non-EU Member State, ICC State Party (GRULAC Group), 06.02.2014.

12.1 The Al Bashir Arrest Warrant

The emergence of discontent with the ICC's focus on African situations coincided with the issue of the Court's first warrant for the arrest of a sitting head of state, President Omar Al Bashir of Sudan in March 2009. Claiming head of state immunity, President Al Bashir and his allies have condemned the Court and have refused to cooperate. Both States Party to the Rome Statute (including Chad, Djibouti, Malawi, Nigeria, and Kenya)⁽⁴⁴¹⁾ and Non-State Parties (including Qatar, China, Libya, Kuwait and Ethiopia)⁽⁴⁴²⁾ have declined to arrest President Al Bashir upon his visit to their countries. Article 27 of the Rome Statute explicitly rejects head of state immunity for the purposes of ICC jurisdiction. Indeed, the removal of head of state immunity is one of the core principles of the Rome Statute and a cornerstone of the fight against impunity and justice for atrocities. For this reason efforts to reinstate any form of legal or de facto immunity constitute a direct threat to the integrity of the Statute (see Part Two, section 7).

For those who reject the legality of the arrest warrant, or deny a legal obligation to execute the warrant, it has been argued that because Sudan is not a party to the Rome Statute, Al Bashir is entitled to head of state immunity as a serving head of state under customary international law⁽⁴⁴³⁾. However, because the situation in Darfur was referred to the ICC by the Security Council, acting upon its Chapter VII mandate, all Member States of the UN are bound to comply with the terms of that Resolution⁽⁴⁴⁴⁾. On this basis, *through the Security Council Resolution*, the Rome Statute – including Article 27 - applies to Sudan and in effect, through the Resolution, Sudan becomes a *de facto* party to the Rome Statute. On this basis, Al Bashir does not enjoy immunity and under the ICC system states are under an obligation to comply with the arrest warrant and arrest him should he come within their jurisdiction⁽⁴⁴⁵⁾. In contrast, since Resolution 1593 only 'urges' Non-State Parties to cooperate with the Court, it does not create a binding obligation upon non-states parties, it only encourages them to do so⁽⁴⁴⁶⁾.

The apparent institutionalisation of non-cooperation among African states emerged in July 2009, shortly after the ICC issued the warrant for the arrest of President Al Bashir, when the African Union (AU) passed a decision forbidding its Member States from cooperating with Court in respect of its proceedings against President Al Bashir⁽⁴⁴⁷⁾. The AU subsequently urged its Member States to comply with that decision⁽⁴⁴⁸⁾, reminding them of the ability of the AU to impose sanctions upon Member States that fail to comply with

⁴⁴¹ Report on the Bureau on non-cooperation, 7 November 2013 (ICC-ASP/12/34) ; Report of the Bureau on non-cooperation, 1.11.2013 (ICC-ASP/11/29) ; *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision regarding Omar Al-Bashir's visit to the Federal Republic of Nigeria, 15.07.2013 (ICC-02/05-01/09-157); *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision pursuant to Article 87(7) of the Rome Statute on the failure by the Republic of Mali to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 12.12.2011 (ICC-02/05-01/09-139); *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, 27.08.2010 (ICC-02/05-01/09-107) ; *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, 12.05.2011 (ICC-02/05-01/09-129).

⁴⁴² BBC News, 27.06.2011.

⁴⁴³ Special segment as requested by the African Union: "Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation", Informal Summary by the Moderator, 27.11.2013 (ICC-ASP/12/61), speech by Professor M. Cherif Bassiouni.

⁴⁴⁴ SC Res 1593 (2005).

⁴⁴⁵ Akande, 2009.

⁴⁴⁶ See *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision Regarding Omar Al-Bashir's Potential Travel to the Federal Republic of Ethiopia and the Kingdom of Saudi Arabia, 10.10.2013 (ICC-02/05-01/09-164) at para.8.

⁴⁴⁷ Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), 1-3.07.2009 (Assembly/AU/Dec.245 (XIII) Rev.1), at para.10.

⁴⁴⁸ Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) 31.01– 2.02.2010 (Assembly/AU/Dec.296 (XV)) at para.5-6.

decisions and policies of the AU in accordance with Article 23(2) of the Constitutive Act of the African Union⁽⁴⁴⁹⁾.

Here it is important to reiterate that the concern to preserve the immunity of heads of state appears to be limited to *sitting* heads of state, rather than those who have left office – either as an outcome of the democratic process or as an outcome of non-democratic overthrow. For example, proceedings against former President of Côte d'Ivoire, Laurent Gbagbo, instituted following his deposal, have not attracted the same opposition as those against Al Bashir, Kenyatta and Ruto. Further, the amendments to the Rome Statute proposed by Kenya only sought to reinstitute immunity for state officials for the duration of their time in office⁽⁴⁵⁰⁾.

Non-cooperation with regards to the warrants for the arrest of Al Bashir not only impacts upon the Court's progress in that case, but also has implications for the integrity of the Statute. The failure to act upon the arrest warrant, especially by State Parties – reinforces a culture, or perceived acceptability, of impunity – undermining the very essence of the Statute.

12.2 The Kenyan Situation

The most pressing threat to the integrity to the Statute has arisen out of the backlash against the Court's proceedings against President Uhuru Kenyatta and his Deputy, William Ruto, of Kenya. Although also concerning the prosecution of heads of state, the Kenyan situation is notably different to that concerning the Al Bashir arrest warrant. From a legal standpoint, the uncertainties witnessed in the context of the Darfur situation as to the obligations of states – both the situation state and other states – to cooperate with the ICC, are not present in the context of Kenya. As a State Party to the Rome Statute, Kenya is under an obligation to comply and cooperate fully with the Court, and in case of doubt, Article 27 of the Statute removes any immunity from prosecution that Kenyatta and Ruto may enjoy under customary international law. Whilst indicted individuals have voluntarily answered summonses to appear before the Court and have generally been attending proceedings when required, cooperation by Kenya in other areas has not been as forthcoming⁽⁴⁵¹⁾.

The political climate surrounding the ICC proceedings against Kenyatta and Ruto has continued to deteriorate. Measures adopted by Kenyan political bodies, statements by other African states, as well as initiatives by the African Union combined with the resolute position of other stakeholders in backing the ICC proceedings against the two individuals concerned helped foster a widening rift. Those opposing the ICC position have focussed their efforts on three different avenues of action; political statements – including the motions and decisions of national and multilateral bodies, efforts to obtain a deferral of the proceedings against Kenyatta and Ruto by the Security Council under Article 16 of the Rome Statute, and finally the pursuit of amendments to the Rome Statute itself and the Rules of Procedure and Evidence. Each of these hold the potential to undermine the integrity of the Statute, as the following discussion will examine.

12.2.1 Political Attacks

Opposition to the ICC proceedings against Kenyatta and Ruto has been vocalised both internally within domestic political fora, and regionally within the African Union.

Within Kenya, since the Prosecutor announced his intention to open an investigation into the post-election violence, the ICC has been the subject of heated political debate. More specifically, in 2010, following the

⁴⁴⁹ Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC), 29-30.01.2012 (Assembly/AU/Dec/397 (XVIII)) at para.7 and 8 (hereafter 'African Union Decision Assembly/AU/Dec/397 (XVIII)'); Article 23(2), The Constitutive Act of the African Union (adopted on 1.07.2000, entered into force 26.05.2001).

⁴⁵⁰ Journalists for Justice, 11.11.2013.

⁴⁵¹ Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014. See also Mueller S., 2014.

announcement of the six individuals initially accused by the Prosecutor, the Kenyan National Assembly passed a motion calling for the withdrawal of Kenya from the ICC⁽⁴⁵²⁾. However, this motion did not result in the adoption of any legislative measures necessary to withdraw from the Statute. More recently in 2013, the Kenyan Parliament called on the withdrawal of Kenya from the ICC⁽⁴⁵³⁾. While opposition members of parliament walked out of the debate, reportedly calling the motion 'capricious' and 'ill considered', the motion passed, calling for a Bill to be presented to Parliament within a month to repeal Kenya's legislation ratifying the Rome Statute⁽⁴⁵⁴⁾. While again no such Bill has been presented to the Parliament, the motion and its coverage contributed to an increasingly anti-ICC political climate within Kenya.

Beyond Kenya, these cases have attracted the consternation of the African Union and many of its Member States. Since 2011, expressions of the Union's opposition to the ICC proceedings in Kenya were added to the now regular decisions condemning the proceedings against Al Bashir⁽⁴⁵⁵⁾. In May 2013, after the already indicted Kenyatta and Ruto were elected as President and Vice-President respectively, the African Union passed a decision regretting the failure of the Security Council to defer the proceedings with regard to President Bashir of Sudan and the cases against the Kenyan indictees⁽⁴⁵⁶⁾. At the same time, it endorsed calls for the cases to be transferred to Kenyan national authorities for investigation and prosecution, and also called upon the AU Commission and Member States and stakeholders to engage in a process of discussing the ICC's role in Africa and how to strengthen 'African mechanisms to deal with African challenges'⁽⁴⁵⁷⁾.

As the commencement of the trials of Ruto and Kenyatta grew nearer, attitudes towards the ICC's activities continued to deteriorate. In October 2013, an Extraordinary Summit was held by the African Union addressing issues relating to the ICC and Africa. In the lead up to the Summit, suggestions were circulating that delegates would be called upon to vote on a Resolution calling for a mass withdrawal from the ICC by African states⁽⁴⁵⁸⁾. While it is true that such a withdrawal would not have assisted those states from escaping their duty to cooperate with the Court with regard to any proceedings that were commenced prior to their date of withdrawal, needless to say the political impact of such a mass withdrawal would have been devastating.

In the event, the outcome of the summit was a decision condemning the 'politisation and misuse of indictments against African leaders by the ICC' and underscored the risk that these prosecutions could pose to 'sovereignty, stability, and peace [...] as well as reconciliation and reconstruction' in the situation state as well as other states in the region⁽⁴⁵⁹⁾. In the Decision, the African Union decided that 'no charges shall be commenced or continued before any International Court or Tribunal against any serving AU head of state'⁽⁴⁶⁰⁾, that the cases against Kenyatta and Ruto are to be suspended and that President Kenyatta will not appear before the ICC, and to expedite the process of extending the jurisdiction of the African Court on Human and Peoples' Rights ('AfCHPR') to cover international crimes⁽⁴⁶¹⁾. In addition it was agreed that an African Union contact group would be established comprising of five states representative of each of the

⁴⁵² Motion 144, Kenya National Assembly 2010, adopted 22.12.2010.

⁴⁵³ Motion, Special Sitting of Kenya The National Assembly, 05.09.2013.

⁴⁵⁴ BBC News, 5.09.2013.

⁴⁵⁵ Decision on the Implementation of the Decisions on the International Criminal Court, 30-31.01.2011 (Assembly/AU/Dec.334 (XVI)) 30-31.01.2011 at para.6; Decision on the Implementation of the Decisions on the International Criminal Court, 30.06-1.07.2011 (Assembly/AU/Dec.366) at para.4; African Union Decision Assembly/AU/Dec/397 (XVIII); Decision on the Implementation of the Decisions on the International Criminal Court, 15-16.07.2012 (Assembly/AU/Dec.419(XIX)).

⁴⁵⁶ Decision on International Jurisdiction, Justice and The International Criminal Court (ICC), 26-27.05.2013 (Assembly/AU/Dec/482 (XXII)) (hereafter 'African Union Decision Assembly/AU/Dec/482 (XXII)').

⁴⁵⁷ African Union Decision Assembly/AU/Dec/482 (XXII) at Para.8.

⁴⁵⁸ BBC New, 20.09.2013.

⁴⁵⁹ Decision on Africa's Relationship with the International Criminal Court, 12.12.2013 (Ext/Assembly/AU/Dec.1) at para.5 (hereafter 'African Union Decision Ext/Assembly/AU/Dec.1').

⁴⁶⁰ African Union Decision Ext/Assembly/AU/Dec.1 at Para.10(i).

⁴⁶¹ African Union Decision Ext/Assembly/AU/Dec.1 at para.10.

regions to consult with members of the Security Council on matters relating to the AU's relationship with the ICC, with particular focus upon lobbying for deferrals in the cases against Al Bashir, Kenyatta and Ruto⁽⁴⁶²⁾.

Despite this, it is important to observe that although such decisions of the African Union are intended to outwardly convey a pan-African solidarity on this matter, the situation in practice suggests a greater degree of internal fragmentation⁽⁴⁶³⁾. Botswana – a consistent and publicly vocal supporter of the ICC system –⁽⁴⁶⁴⁾ has voted against decisions hostile to the ICC⁽⁴⁶⁵⁾. The position of South Africa must also be noted. Having made the rule of law a prominent feature of its foreign policy, it is now in a delicate situation having assumed the Chair of the AU Commission, where it is required to demonstrate and defend African unity and solidarity⁽⁴⁶⁶⁾. The former German Ambassador to Kenya has noted that while South Africa has been demonstrating public solidarity with the AU calls for the Kenya proceedings to be suspended, 'behind the scenes, it is working hard to prevent collective withdrawal from the Rome Statute'⁽⁴⁶⁷⁾.

Similarly, other African states have been expressing concern at the current trajectory of the attitude towards the ICC among African states⁽⁴⁶⁸⁾. In particular, a rift between Anglophone and Francophone countries appears to be emerging, with the latter being pro-ICC⁽⁴⁶⁹⁾. While political pressure upon these states has precluded their willingness to take a robust position in public, it is acknowledged that behind closed doors, these states have been working to encourage a more constructive engagement with the ICC indictments that is in line with the principles, values and obligations under the Rome Statute⁽⁴⁷⁰⁾. Indeed, cracks in the apparent solidarity between African States at the AU are beginning to appear in public. In its most recent Resolution on the matter of the ICC's proceedings against sitting heads of state in January 2014, included in the decisions set out in paragraph 12 are pointed reminders to African states that 'African States Parties should comply with African Union Decisions on the ICC and continue to speak with one voice'⁽⁴⁷¹⁾, and further that there 'is an imperative need for all Member States to ensure that they adhere to and articulate commonly agreed upon positions with their obligations under the Constitutive Act of the African Union'⁽⁴⁷²⁾. While this is likely to be also referring to internal divisions emerging behind the public façade of the Union, it is most probably a response to public statements by the Botswanan President in the lead up to January's Annual Summit. In interviews with media organisations, he was reported as observing in response to questions whether sitting heads of states should have to appear before the ICC, that a number of past and present leaders have been in office for decades⁽⁴⁷³⁾. He reportedly continued to question whether victims of crimes for which those leaders are responsible should have to wait until those leaders vacate office before

⁴⁶² African Union Decision Ext/Assembly/AU/Dec.1 at para.10(iii).

⁴⁶³ Hellwig-Böte, January 2014 at p.2 and similar views have been expressed in the course of informal interviews with European and African state representatives.

⁴⁶⁴ KTN Kenya, 29.05.2013. Further, see recent comments by the Botswanan President reported at Mutimukulu, 26.01.2014.

⁴⁶⁵ Decision on International Jurisdiction, Justice and the International Criminal Court (ICC), 26-27.05.2013 (Assembly/AU/Dec.482 (XXI)).

⁴⁶⁶ Hellwig-Böte, January 2014 at p.2-3 and similar views have been expressed in the course of informal interviews with European and African state representatives.

⁴⁶⁷ Hellwig-Böte, January 2014 at p.2-3.

⁴⁶⁸ Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014. Similar views have been expressed in the course of informal interviews with representatives of situation country states.

⁴⁶⁹ Namunane, 13.10.2013.

⁴⁷⁰ Telephone interview #05 with ICC Official, 04.02.2014; Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014. Similar views have been expressed in the course of informal interviews with representatives of situation country states.

⁴⁷¹ Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court, 30-31.01.2014 (Assembly/AU/Dec.493 (XXII)) at para.12(ii) (hereafter 'African Union Decision 'Assembly/AU/Dec.493 (XXII)').

⁴⁷² African Union Decision 'Assembly/AU/Dec.493 (XXII) at Article 12(ii).

⁴⁷³ Reported at Mutimukulu, 26.01.2014.

obtaining justice. It is reported that he concluded 'being president shouldn't protect us from appearing before the Court'⁽⁴⁷⁴⁾.

Such robust public defences by supporters of the Court – particularly those within the African Union community – should be encouraged where defenders are forthcoming and able to sustain the political cost they may incur. At the same time, the EU and its Member States should provide equal support to those states that are working behind the scenes both in their bilateral relations and within the AU to defend the ICC's integrity and to promote cooperation with the ICC⁽⁴⁷⁵⁾. Despite strong statements *en bloc* at the AU, African states have long been divided – not only over the Kenyan situation, but also with regards to the Al Bashir arrest warrant⁽⁴⁷⁶⁾. A failure by EU Member States and the Union to engage with individual African states and their individual positions on these issues would be to fall victim to the 'ICC v Africa' narrative that certain African leaders have an interest in advancing⁽⁴⁷⁷⁾.

12.2.2 Article 16: Security Council Deferral

Both Kenya and the African Union have consistently pursued efforts to secure a deferral of the proceedings against Kenyatta and Ruto under Article 16 of the Statute.

Since the establishment of the AU Contact Point on the matter of Africa and the ICC⁽⁴⁷⁸⁾, the AU and a number of its Member States have expended considerable diplomatic capital in order to lobby for an Article 16 deferral. Most notably, in November 2013, one week before the annual session of the ASP was to consider specifically the issue of prosecuting serving heads of state, the Security Council was presented with a draft resolution to be adopted under Chapter VII to defer the proceedings against Ruto and Kenyatta for one year⁽⁴⁷⁹⁾. While it was made clear by three of the permanent five members of the Council that this Resolution would not be allowed to pass (Resolutions requiring the affirmative vote of at least nine council members and no veto by a P5 member), the vote forced by Rwanda once again heightened the tension leading up to the 2013 ASP meeting a week later. With seven Council members voting in favour of the deferral (Azerbaijan, China, Morocco, Pakistan, Russia, Rwanda and Togo), the draft failed to meet the requisite number of votes needed to be adopted⁽⁴⁸⁰⁾. However, notably, not a single state voted against the Resolution, choosing instead to abstain⁽⁴⁸¹⁾.

From a political perspective, the decision to abstain rather than to vote against the Resolution may be seen as an attempt to mitigate the effect of the draft Resolution upon relations between Kenya and the states opposed to a deferral. The statements in explanation of the vote provide some suggested consequences of the vote; the representative of Guatemala stated that the vote 'had erected a "barrier of distrust" between the countries submitting the draft in full knowledge that it would not be adopted and those opposed to making a deferral⁽⁴⁸²⁾. Had states voted against the Resolution or a P5 Member exercised the veto – themselves knowing that was unnecessary given that there were already insufficient votes in favour of the deferral, it may have unnecessarily exacerbated the sense of division that appears to have taken hold. EU Member States who abstained explained that the draft Resolution's sponsors had failed to demonstrate that the ICC proceedings against the Kenyan leaders pose a threat to international peace and security – the requisite threshold for the exercise of the Council's Chapter VII power⁽⁴⁸³⁾, while France's representative

⁴⁷⁴ Reported at Mutimukulu, 26.01.2014.

⁴⁷⁵ Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014.

⁴⁷⁶ Du Plessis, 15.09.2010.

⁴⁷⁷ Telephone interview #01 with ICC Official, 03.02.2014.

⁴⁷⁸ African Union Decision Ext/Assembly/AU/Dec.1 at para.10(iii).

⁴⁷⁹ UN Security Council, Press Release 15.11.2013.

⁴⁸⁰ UN Security Council, Press Release 15.11.2013.

⁴⁸¹ The abstaining states were Argentina, Australia, France, Guatemala, Luxembourg, Republic of Korea, United Kingdom and France. UN Security Council, Press Release 15.11.2013.

⁴⁸² UN Security Council, Press Release 15.11.2013.

⁴⁸³ UN Security Council, Press Release 15.11.2013, Statement in explanation of the vote by the UK Representative.

stated that the vote was inappropriate given the ongoing dialogue of the Council with African states, including those on the Council⁽⁴⁸⁴⁾. In contrast Rwanda, speaking after the vote stated 'let it be written in history that the Council failed Kenya and Africa on this issue', while statements condemning the outcome were also made by the representative of Kenya, and the representative of Ethiopia in his country's capacity as Chair of the African Union⁽⁴⁸⁵⁾.

12.2.3 Mediation Attempts: Special Segment at the ASP Meeting

By November 2013, with the Ruto trial underway and the Kenyatta trial due to commence, the increasingly entrenched political division meant that by the annual meeting of the ASP at the end of the month, there was a sense that this meeting would be critical in determining the future of relations between African states and the ICC. To this effect, with the support of African State Parties, a specific debate was included in the agenda of the meeting to discuss the matter of indictments of sitting heads of state and government⁽⁴⁸⁶⁾. This served as a forum for frank and open debate on the issues and enhanced the understanding of the different viewpoints but in many respects also entrenched the different positions. The meeting however paved the way for a discussion of amendments which will be examined in the section that follows.

12.2.4 Direct Challenges to the Rome Statute: Amendments

A leaked draft agenda outlining Kenya's suggestions indicated that its objectives for the outcome of the session would be the adoption of certain amendments to the Rome Statute⁽⁴⁸⁷⁾. The amendments envisaged were first, to include a qualification to Article 27 of the Statute (removing immunity for officials) so as to exempt serving heads of state from prosecution for the duration of their time in office. Second, was to increase the grounds upon which an accused may be excused from their required continuous presence during the trial, and third, in response to allegations of prosecutorial impropriety in the investigations concerning the Kenyan situation and the briefing of witnesses, an amendment to Article 70 of the Rome Statute that would acknowledge that organs of the Court can commit offences against the administration of justice as well as be the subject of offences committed by others⁽⁴⁸⁸⁾.

While the benefit of these proposed changes, had they been adopted, to the Kenyan cases is unclear – given the Statute's inclusion of a year delay on the entry into force of any amendments⁽⁴⁸⁹⁾ these proposals established the parameters of the issues at stake at the Session. Fearing that the hitherto largely rhetorical political opposition to the Court's proceedings may turn into actual non-cooperation by Kenya, there was a strong sentiment among all stakeholders in the ICC and its proceedings that there was a need for the ASP to arrive at an outcome that would alleviate the political tensions while at the same time ensure that all states comply with their obligations under the Rome Statute.

As a result, the outcome of the ASP was a compromise. While defending against changes to the Rome Statute itself – and in doing so avoiding the risk of establishing a precedent for the dilution of the Rome Statute every time a politically sensitive issue arose – the ASP agreed upon changes to the Court's Rules of Procedure and Evidence ('RPE'). Adopted by consensus, Resolution 7 inserts three additional clauses that build upon Rule 134 of the RPE. Rule 134, concerning the conduct of trial proceedings and the ability of the Trial Chamber to rule on issues relating to the conduct of proceedings.

⁴⁸⁴ UN Security Council, Press Release 15.11.2013, Statement in explanation of the vote by the French Representative.

⁴⁸⁵ UN Security Council, Press Release 15.11.2013, Statements in explanation of the vote by the Rwanda, Kenya and Ethiopia.

⁴⁸⁶ Special segment as requested by the African Union: "Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation", Informal Summary by the Moderator, 27.11.2013 (ICC-ASP/12/61).

⁴⁸⁷ Journalists for Justice, 11.11.2013.

⁴⁸⁸ Journalists for Justice, 11.11.2013.

⁴⁸⁹ Article 121(4), Rome Statute.

- Rule 134*bis*: allows an accused who may request to attend trial proceedings through the use of video-technology, thereby not requiring them to be physically present during proceedings;
- Rule 134*ter*: In contrast to rule 134*bis*, this provision enables an accused to request to be excused from attending during part or parts of their trial, and instead to be represented by counsel;
- Rule 134*quater*: Where the individual accused is someone mandated to fulfil extraordinary public duties at the highest level of public office – such as heads of government – that individual may apply to the Chamber to be excused from trial proceedings and to be instead represented by their counsel.

All three clauses are applicable only to accused individuals who are subject to summons to appear, and therefore are not available to those who have been detained in the Court's custody following the execution of an arrest warrant issued against them.

Since the adoption of these amendments, the Trial Chamber has already been called upon to decide upon an application by Ruto under Rule 134*quater*. In December 2013, the defence submitted a request pursuant to Article 63(1) of the Rome Statute and Rule 134*quater* to claim exceptional circumstances to justify an excusal of Ruto from attending his trial⁽⁴⁹⁰⁾. The Prosecutor's response to this application highlights an important point when considering the practical implications of the amendments on the ability of accused individuals to recuse themselves from physical attendance of their trial⁽⁴⁹¹⁾. In sum, the point to be acknowledged is that Rules 134*bis-quater* merely grant the Chamber the *power* to authorise such recusals and only when stringent conditions on the exceptionality of the circumstances of the particular application are met. Even more importantly, the Rome Statute obliges the Chambers of the Court to interpret the RPE in accordance with the Statute, directing the Chambers to give precedence to the Statute over the Rules where a conflict between the two exists. Accordingly, in practice, the Statute effectively grants the ICC judges the power to review the legality of the RPE, including any amendments adopted by the ASP, according to their compliance with the Rome Statute. Therefore, while it remains to be seen in practice, the harm to the integrity of the Statute by these amendments may be limited.

These Rule changes identify and respond to legitimate questions of practicality raised by the unprecedented indictments of sitting heads of state, namely how to enable them to fulfil both their obligations to the State and their obligations under the Rome Statute, whilst also ensuring that the presumption of innocence is respected until final judgment is reached. If it may be recalled, the EU's commitment to international criminal justice and the ICC stems, in part, from its mandate to promote stability, the rule of law, democracy and human rights. Where – in particular in the Kenyan situation – the individuals cooperating with the Court do have a democratic mandate to govern their country, there is a responsibility for State Parties to the Rome Statute to reconcile the integrity of the Statute with the wider objectives that the international criminal justice system seeks to promote.

At the same time, while the practical effect of these amendments is still to be seen, there are indications to suggest that this has emboldened efforts to push for further amendments to both the Rules of Procedure and the Statute itself, thereby raising clear concerns for the preservation of the Statute's integrity⁽⁴⁹²⁾. While the compromise attained at the 2013 ASP in terms of the amendments to the RPE did successfully defuse the immediate tension⁽⁴⁹³⁾, a number of interviewees noted – with differing degrees of concern⁽⁴⁹⁴⁾ – the AU's

⁴⁹⁰ *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Defence Request pursuant to Article 63(1) of the Rome Statute and Rule 134 *quater* of the Rules of Procedure and Evidence to excuse Mr William Samoei Ruto from attendance at trial, 16.12.2013 (ICC-01/09-01/11-1124).

⁴⁹¹ *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Prosecutor Response to Defence Request pursuant to Article 63(1) of the Rome Statute and Rule 134 *quater* of the Rules of Procedure and Evidence to excuse Mr William Samoei Ruto from attendance at trial, 8.01.2014 (ICC-01/09-01/11-1135).

⁴⁹² Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014; Telephone interview #01 with ICC Official, 03.02.2014.

⁴⁹³ Telephone interview #01 with ICC Official, 03.02.2014; Telephone interview #05 with ICC Official, 04.02.2014; Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014.

declared commitment to pursuing further amendments to the Statute in the course of the coming year, including at the AU-EU Summit scheduled for 2014⁽⁴⁹⁵⁾. One interviewee observed that many African states receive substantial economic support from other states – such as China and the Gulf states that impose fewer, if any, human rights or international criminal justice conditions, upon their bilateral agreements⁽⁴⁹⁶⁾. Another mentioned that the RPE amendment provided the necessary encouragement to African states to push for further amendments, which would also include Statute provisions⁽⁴⁹⁷⁾. In this context, it is vital that at the upcoming Summit, the EU and the AU reaffirm the strength of their partnership and do not let the ICC dominate the EU-Africa relationship⁽⁴⁹⁸⁾.

12.3 Ownership

The success with which momentum has been generated against the ICC with regard to the matter of immunity of heads of state lies in the effectiveness with which the opponents of the proceedings against certain leaders have drawn upon popular and populist critiques of the ICC and its supporters, particularly those in the West. In brief, these concerns can be understood in terms of ownership. These concerns build upon two sentiments – first is the perceived anti-Africa bias too easily encouraged by the absence of any non-African situations under investigation by the Court⁽⁴⁹⁹⁾. Second, is a frustration at the failure to realise the early expectations that the ICC would empower economically and politically weaker states against their stronger counterparts⁽⁵⁰⁰⁾. These two concerns are in turn compounded by a third element – namely, the risk that the ICC's reliance upon such extensive (and much needed, and welcome) support from the EU and its Member States may be interpreted as undermining the actual or perceived independence of the Court from those backers. Irrespective of whether these criticisms and concerns are well founded, the issues that they raise for the universality of the Statute and the values and principles that it embodies should give rise to concern.

With regard to the criticism of bias, it is important to recall that the ICC operates within a much broader system of international criminal justice. While it is true that the ICC has only opened investigations into African situations, the ICC operates alongside separate tribunals dealing with the former Yugoslavia (the ICTY), Lebanon (the Special Tribunal for Lebanon), and Cambodia (the Extraordinary Chambers in the Courts of Cambodia)⁽⁵⁰¹⁾. Therefore, understood more broadly, the system of international criminal justice, of which the ICC is only one part, cannot be said to be 'anti-Africa'. Irrespective of this, and even accounting also for the self-referrals originating from African states themselves, the failure of the ICC to open additional investigations into situations occurring elsewhere in the world, creates a perception of anti-African bias⁽⁵⁰²⁾. Without doubting the need for accountability in the situations under investigation by the Court, the ICC's exclusive focus on African situations while apparently not paying similar attention to situations of equal concern to the international community provides critics of the Court's interventions into African situations with a compelling argument to level against the Court. As reportedly stated by one Rwandan official, 'there is not a single case at the ICC that does not deserve to be there. But there are many cases that belong there, that aren't there'⁽⁵⁰³⁾. Accordingly, critics have used the rhetorically powerful language of colonialism and racism in order to attack the Court's proceedings⁽⁵⁰⁴⁾. However, while these emotive statements have been

⁴⁹⁴ Telephone interview #01 with ICC Official, 03.02.2014; Telephone interview #05 with ICC Official, 04.02.2014; Telephone interview #04 with representative of a Non-EU Member State, ICC State Party (WEOG Group), 04.02.2014.

⁴⁹⁵ Article 11 and 12 of the January 2014 decision of the AU.

⁴⁹⁶ Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014.

⁴⁹⁷ Telephone interview #06 with representative of a local NGO with experience in ICC situation countries, 04.02.2014.

⁴⁹⁸ Telephone interview #09 with EU official, 07.02.2014.

⁴⁹⁹ Du Plessis, December 2013.

⁵⁰⁰ Mukum Mbaku, January 2014 at p.9.

⁵⁰¹ Hellwig-Böte, January 2014 at p.4.

⁵⁰² Du Plessis, December 2013; Roth, 6 February 2014; Bosco, 29.03.2013.

⁵⁰³ Reported in Bosco, 29.03.2013.

⁵⁰⁴ e.g. references to 'race hunting' and the Court being 'the toy of declining imperial powers' in: BBC News, 12.12.2013.

used in multilateral fora such as the African Union, when speaking to state officials at the bilateral level the same hostility is not apparent and there are few misunderstandings regarding the independence of the Court and its lack of bias⁽⁵⁰⁵⁾.

A more nuanced take on this critique is one of disenchantment. The potential for the establishment of jurisdiction over the crime of aggression resonated strongly with those states that had experienced military, political and financial domination by stronger states⁽⁵⁰⁶⁾. On this basis, the Court was seen as holding both a preventative and responsive potential – it would deter stronger countries ‘preying’ on weaker countries for risk of prosecution. A permanent international criminal court with potentially universal jurisdiction was foreseen as a mechanism by which stronger states could be held accountable for crimes for which they were responsible – not only for conduct in African states, but across the globe. Conflict at the dawn of the 21st Century was not unique to the African sub-continent. Global powers such as the US, accompanied by leading proponents of the ICC – many of them European states and most prominently the UK – entered into controversial conflicts in Iraq and Afghanistan⁽⁵⁰⁷⁾. As the years progressed, instances of grave abuses by the members of the armed forces of those powerful states came to light. Yet, for those (not just from Africa) who had looked to the ICC as a mechanism to hold to account the conduct of these powerful states, the Court’s failure to engage with these situations caused undoubted disappointment.

The reasons for the ICC’s failure to open investigations into situations involving powerful states are numerous. As has already been discussed in Part Two, the failure of certain states to ratify the Rome Statute is the primary obstacle to the Court’s universality, or where ICC membership is not an issue, it is likely that the complementarity threshold will not be met. By assisting African states to strengthen their capacity to conduct effective investigations and prosecutions, positive complementarity can help build a stronger sense of ownership over international criminal justice and will discredit the argument that international criminal justice is a ‘white man’s law’.

Importantly however, while there may be a sense of a lack of ownership among African states, that has not resulted in disengagement, either with international criminal justice in general or the ICC in particular. Although the systematic non-cooperation on the execution of the arrest warrant for President Al Bashir does represent a clear disregard for Rome Statute obligations in that respect, in the context of the Kenyan situation, African states have taken up their grievances using legitimate avenues envisaged by the Rome Statute system – whether it be lobbying (unsuccessfully the UN Security Council for a deferral) or to seek amendments of the Statute and Rules of Procedure at the Assembly of States Parties. So far, while threats of disengagement have circulated, they are yet to gain any traction as states continue to profess their allegiance to the values and principles embodied by the Rome Statute, but for the stance on head of state immunity.

Moreover, there are ongoing consultations within the African Union with regard to plans to extend the jurisdiction of the African Court of Peoples’ and Human Rights to grant its criminal jurisdiction over crimes including, but not limited to, the core international crimes of war crimes, crimes against humanity, and genocide. While being conceived as an ‘African solution to African problems’, agreement upon the details – including what crimes should fall within its jurisdiction, and how it will be funded – remains elusive. Nevertheless, the continued presence of the plan for the African Court on the AU’s agenda, and reference to it being included in each of its relevant decisions on the ICC, gives reason to suggest that despite the

⁵⁰⁵ Telephone interview #01 with ICC Official, 03.02.2014; Telephone interview #05 with ICC Official, 04.02.2014; Telephone interview #10 with ICC official, 13.02.2014. Similar views have been expressed in the course of informal interviews with African state representatives.

⁵⁰⁶ Mukum Mbaku, January 2014 at p.9.

⁵⁰⁷ Most recently, a number of human rights advocates and scholars have submitted a communication to the OTP to open an investigation into alleged abuses by UK forces in Iraq – see Owen, 12.01.2014; European Center for Constitutional and Human Rights, 10.01.2014.

disillusion with the ICC, there is still widespread commitment to the wider system of international criminal justice.

12.4 Recommendations for the EU and its Member States

- The **EU** should focus on emphasising the strength of the partnership between the EU and Africa;
- The **EU** and its **Member States** should preserve the integrity of the Statute and in particular, adopt a firm and consistent position in defence of the core principle of the rejection of head of state immunity;
- **Member States**, and where appropriate, the **EU**, need to demonstrate a genuine willingness to engage openly with regional partners within Africa who share an equal commitment to the values the ICC embodies;
- **Member States** should continue to explore options within the scope of the Statute that could both serve to enhance the efficiency of Court proceedings and also address the practical concerns of State Parties;
- The **EU** and its **Member States** should engage with those African states that are strategically positioned to influence other African Union members.
- The **EU** and certain **Member States** should strengthen their partnerships with particular African states;
- Continue to support key civil society organisations who can bring about change from the ground through clearing up misunderstandings about the ICC;
- Strengthen the implementation of positive complementarity initiatives that reinforce the capacity of African states to conduct national proceedings.

13. CONCLUSION

This study has found that when taking together the political, financial and technical forms of support that the EU and its Member States have provided the ICC system of international criminal justice, it is clear that the EU and its Member States have been, and continue to be, the strongest supporter of the ICC system of international criminal justice. The EU's sustained political and financial commitment to the Court was integral to its establishment and to obtaining the level of participation within the Rome system of international criminal justice witnessed today.

Further, this study has found that the adoption of the 2011 Decision and the accompanying Action Plan were both necessary and successful measures to enhance the effectiveness of the support that the EU delivers to the Court. In particular, strengthening the mandate of the EU Focal Point has worked well to develop greater consistency and coordination in the implementation of the EU's policies concerning international criminal justice.

This study was designed to assess the success with which the EU has mainstreamed its support for the ICC in all its policies to date. At the outset, it observed that because of its very nature, given that it cannot be a Party to the Rome Statute, in order to effectively deliver support to the Court, it must act *through* its Member States. Therefore, in order to assess the success of EU mainstreaming, it was necessary to consider the measures taken in both the internal and the external dimensions. In light of this, one of the objectives of this study was to assess whether this piecemeal approach nevertheless has given rise to a consistent and coherent (and therefore effective) European approach.

The findings of this study indicate that while the 2011 Decision provides a useful framework through which to structure EU activity, it highlights that consistent implementation across the internal and external dimensions needs to be strengthened. An area of particular success – both in the internal and external dimension, has been the promotion of the universality of the Statute. While promoting full implementation is an ongoing process, it can be seen alongside – and contributing to – enhancing and facilitating greater cooperation with the Court and the implementation of complementarity. Looking to the future, the success

with which the EU and its Member States pursue these two objectives will determine their continuing role as the foremost supporters of the Court. While the provision of continued and consistent political support will be necessary, focus must turn to technical and financial forms of assistance.

The main body of the study concluded by observing a number of specific measures that EU actors may consider undertaking in order to ensure the comprehensiveness of the EU's implementation of the 2011 Decision. Given that presidency of the **COJUR-ICC** rotates bi-annually with the Presidency of the Council, there is the potential that different priorities may be pursued, affecting continuity. Consideration should therefore be given to the possibility of making technical and bilateral assistance a standing item on the COJUR-ICC's agenda, in addition to the particular priorities of a given Presidency. Related to this, the **EU Focal Point** is likely to play an important role in the delivery of such technical and financial assistance. To this effect, consideration should be given to strengthening the Focal Point through the provision of extra support to enable it to fulfil its mandate effectively and efficiently. Furthermore, updating the list of experts managed by the Focal Point would bring cross-cutting benefits to the implementation of the EU's policy objectives.

In order to strengthen the ability of EU Member States to cooperate with the Court, strengthening of the **Genocide Network** should be considered. In particular, **GENVAL** and other competent institutions should further explore the possibility of widening the list of crimes falling within the competence of the EU under Article 83(1) TFEU to include the core international crimes as defined in the Rome Statute. This would strengthen the effectiveness of the measures to ensure internal consistency in the full implementation of the Statute. Further, it would enable the EU to adopt additional measures to cooperate directly with the Court. GENVAL should consider the formulation of an Action Plan and Task Force to increase the efficiency in combating impunity within the EU.

In order to build upon the EU's success in the promotion of the universality of the Statute, the **EEAS and EU Delegations** should ensure that there is consistency in the way that the ICC is incorporated into the fight against impunity in all actions in relation to third states, including but not limited to, ICC clauses and demarches. Full use should also be made of the local knowledge and resources of EU delegations on the ground. Building upon this, the **Parliament** should continue to provide political support across all areas, and to make better use of the standing committee structure and individual MEPs who can take a leading role in adopting a more hands on promotion of universality.

Finally, the **Commission** should continue to keep under review the degree to which the ICC and international criminal justice related issues are mainstreamed across the different instruments and to monitor the successful implementation of the 2011 Decision.

The final part of this study turned to consider contemporary challenges facing the ICC – in the form of the current tensions between certain African states and the ICC - and focused on what role there might be for the EU and its Member States in supporting the ICC to meet those challenges. It identified that although some work towards defusing the Africa-ICC tension has been undertaken, (e.g. amendment of the ICC's Rules of Procedure and Evidence) the issue giving rise to these tensions is the Court's proceedings against sitting heads of state. Observing that the primary European actors in this context should be **EU Member States** – as State Parties to the Rome Statute – the study concluded that the key priority should be to continue to pursue open and constructive dialogue with all partners in the African region, while in the course of doing so ensuring that the integrity of the Statute is preserved.

14. LIST OF RECOMMENDATIONS

14.1 Universality

14.1.1 Member States

- Through the **Commission**, provide technical assistance to the four EU Member States that have yet to adopt ICC implementing legislation (use could be made of the EU's list of experts in international criminal law maintained for each country);
- Encourage the ratification among **Member States** of the amendments to the Rome Statute agreed at the Kampala Review Conference, namely the amended list of war crimes and the crime of aggression;
- Consider widening the list of crimes falling within the competence of the EU under Article 83(1) TFEU to include the core international crimes as defined in the Rome Statute in order to strengthen the effectiveness of measures to ensure internal consistency in the full implementation of the Statute.

14.1.2 EU

- The **Commission** should ensure that ratification (and implementation) of the Rome Statute is included in its proposals for the conditions imposed on candidate countries for EU accession;
- The **EEAS** should target countries from within the regional groupings that EU Member States belong to, such as the 'WEOG', or 'Eastern Europe' groups, in order to promote universality;
- The **European Parliament** should continue to call upon the US and Russia to ratify the Rome Statute;
- The **European Parliament** should keep the matter of implementing legislation on its agenda and should continue to raise the lack of implementation in EP's resolutions;
- The **EEAS** and **Commission** should adopt a consistent approach with regard to the inclusion of ICC ratification and implementation clauses in agreements concluded under the European Neighbourhood Policy;
- The **EEAS**, the **High Representative**, the **EUSRs** and delegations of the **Parliament** should raise the issue of ICC ratification and implementation, where appropriate, in bilateral dialogues and strive for consistency;
- The **EEAS** and **Commission** should conduct an assessment of the impact of the Cotonou Agreement ICC clause in order to determine its future inclusion in other similar agreements;
- The **EEAS** and **Parliament** should conduct an assessment of the efficacy of the demarches in encouraging third states to ratify and implement the Rome Statute;
- Continue to support NGOs who engage in ratification and implementation work;
- Enhance cooperation and coordination between the different actors involved in the promotion of universality – such as the Presidency of the ICC, the EU, and major NGOs such as the CICC and PGA – by ensuring that the strategies adopted by each to promote universality are consistent and complementary to each other;
- The **Commission** should amend the list of treaties the ratification of which is a condition for qualification for GSP+ status and make ratification of the Rome Statute a condition for consideration of GSP+ status;
- Target some of the funding given to the ICC to ratification outreach sessions in geographical regions where membership is low. Consider channelling funding to ICC initiatives aimed at enhancing the implementation of the Rome Statute;
- Make better use of technical support options available. Consider the creation of an independent list of experts to be publicly available through the **EEAS** website;

- The **European Parliament** should promote the work of its standing committees externally and to encourage MEPs with relevant expertise to participate in awareness raising campaigns on ICC Statute ratification and implementation.

14.2 Integrity

14.2.1 Member States

- Where possible, **EU Member States** sitting on the UN Security Council, should aim to adopt a united front to protect the integrity of the Rome Statute.

14.2.2 EU

- **All EU institutions** should continue to support the integrity of the Statute through primarily political means;
- The **EEAS**, the **High Representative** and the **Council** should continue to monitor the US-ICC relationship for any possible escalation;
- Continue to support financially organisations engaging in campaigns and initiatives to promote the integrity of the Rome Statute.

14.3 Independence, Effectiveness and Efficiency

14.3.1 Member States

- **Member States** should ensure that highly qualified candidates are nominated for all elected ICC posts.

14.3.2 EU

- The **High Representative**, the **EEAS** and the **Council** should continue to provide political support of the ICC's independence, effectiveness and efficiency through appropriate statements, demarches and communications;
- Through the **EIDHR**, the EU should continue to financially support the ICC's Trust Fund: Building Legal Expertise and Fostering Cooperation;
- Continue to monitor the implementation of the ICC's initiatives to increase efficiency and effectiveness, while at the same time respecting the Court as an independent institution.

14.4 Cooperation

14.4.1 Member States

- **Member States** should promptly execute arrest warrants, when requested by the ICC;
- **Member States** should share experience, best practices and expertise on witness protection issues, help other states set up witness protection systems and encourage the signing of witness relocation agreements with the ICC;
- Support the work of the **Genocide Network** to enhance the capacity of EU Member States to investigate and prosecute core international crimes within the EU;
- Consider the adoption of an Action Plan and Task Force to increase efficiency in combating impunity within the EU;
- Add core international crimes (namely, genocide, crimes against humanity, war crimes) to the list of crimes over which **Europol** has competence;
- Make use of the **European Arrest Warrant** for ICC-related arrests, provided that the conditions for its application are present;
- More use can be made of the asset tracing, freezing and recovery capabilities within the EU. Consider the possibility of tracing, freezing and confiscating assets upon request directly from the ICC, rather than through Member States.

14.4.2 EU

- The **European Parliament** should continue to provide high profile political support to encourage cooperation with the ICC by states (both Member States as well as third states);
- The **GENVAL** should conduct an evaluation of implementation of the mandate of the Genocide Network;
- Greater emphasis by the **EEAS** and **Commission** should be placed on adopting concrete measures to respond to non-cooperation with the ICC to complement the political statements in response to cooperation;
- The **Spokesperson of the High Representative** should continue to issue statements regarding non-cooperation;
- The **Council** should continue to include clauses in its statements and conclusions reminding states and parties to ongoing situations subject to ICC investigations of their obligations to cooperate with the ICC;
- Continue to encourage the work undertaken within the **COJUR-ICC** with regard to regularising the EU's response regarding non-cooperation;
- The **COJUR-ICC** should engage with the process established by the Roadmap recently adopted by the ASP in November 2013 for achieving an operative tool to enhance arrests;
- Increase the transparency in the guidelines applied by the **EU** and its **Member States** when implementing its policy of non-essential contacts.

14.5 Complementarity**14.5.1 Member States**

- Include the ICC crimes in the list of crimes over which the EU has competence under Article 83(1) TFEU in order to ensure that all EU Member States are able to implement the principle of complementarity.

14.5.2 EU

- Update the list of experts maintained by the **EU Focal Point** and disseminate its availability to EU delegations, third states, Member States and civil society organisations in order to strengthen assistance;
- Widen dissemination of the Complementarity Toolkit, particularly among State representatives and NGO organisations;
- Mainstream positive complementarity in other areas of EU external action, such as conflict prevention, stability and mediation;
- Update the Factsheets of the EEAS Mediation Support Project, in particular the document on 'Transitional Justice in the Context of Peace Mediation' in order to include information on the Complementarity Toolkit;
- Encourage funding applications by organisations working in all countries that have faced mass violence, irrespective of whether they form the basis of an ICC investigation;
- Enhance the accessibility of information on the **EIDHR** website regarding past and present grant recipients;
- Ensure that positive complementarity is mainstreamed within the context of other areas of EU activity, particularly rule of law policies and those relating to fair trial issues and criminal justice reforms.

14.6 Africa and the ICC

- The **EU** should focus on emphasising the strength of the partnership between the EU and Africa;

- The **EU** and its **Member States** should preserve the integrity of the Statute and in particular, adopt a firm and consistent position in defence of the core principle of the rejection of head of state immunity;
- **Member States**, and where appropriate, the **EU**, need to demonstrate a genuine willingness to engage openly with regional partners within Africa who share an equal commitment to the values the ICC embodies;
- **Member States** should continue to explore options within the scope of the Statute that could both serve to enhance the efficiency of Court proceedings and also address the practical concerns of State Parties;
- The **EU** and its **Member States** should engage with those African states that are strategically positioned to influence other African Union members.
- The **EU** and certain **Member States** should strengthen their partnerships with particular African states;
- Continue to support key civil society organisations who can bring about change from the ground through clearing up misunderstandings about the ICC;
- Strengthen the implementation of positive complementarity initiatives that reinforce the capacity of African states to conduct national proceedings.

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