Selected Legal and Policy Implications Arising from the EU–ICC Agreement of 2006

Gerhard Hafner

Abstract The cooperation between the EU and the ICC is regulated by the EU–ICC Agreement (2006) and deals with matters of mutual interest. It regulates cooperation and assistance, attendance to meetings, exchange of information, testimony, cooperation between the EU and the prosecutor and privileges and immunities. The Common Foreign Security Policy (CFSP) covers all ICC-related acts. With regard to sharing information, the ICC is held to ensure the regular exchange of information and documents. The central problem in this aspect, according to the author, is the delivery of sensitive information. The Agreement mentions two types of information. First, the type that could endanger the safety or security of former EU staff, proper conducts or any EU activity;. the second type is classified information that requires protection from unauthorized disclosure. The ICC decides on the retention of this information. The author questions whether this is appropriate, as the ICC decides if a transfer of information could endanger the EU. He claims that the EU should at least be involved in making this decision. The author concludes that since the Agreement is one-sided, uncertainty is created for the EU about how sensitive information would be treated by the ICC.

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G. Hafner (✉)
University of Vienna, Vienna, Austria
e-mail: gerhard.hafner@univie.ac.at

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Contents

1 Introduction

My contribution will discuss some of the issues relating to one of the principal foci of the EU's foreign policy, the International Criminal Court.[1] It will also draw on some personal experiences collected in the course of the negotiations leading up to the Rome Statute.[2]

2 History of the EU's Policy Towards the ICC

The engagement of the EU in the matter of the ICC resulted especially from the activities of the "like-minded group", a group of mostly small and medium sized States, but including—for historical reasons—also Germany.[3] This group sup-

[1]See on the EU's policy with respect to the International Criminal Court (ICC): Article 2 of the Council of the EU (11 June 2001) Common Position 2001/443/CFSP on the International Criminal Court; see also Ford 2011, p. 965 (analyzing expenditures on international criminal justice institutions by region, noting that European countries "will be the driving force behind spending by 2015"); see also generally J. Wouters and S. Basu S, *The Creation of a Global Criminal Justice System: the European Union and the International Criminal Court*. Leuven Center for Global Governance Studies Working Paper No. 26. http://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp136e.pdf. Accessed 25 June 2013; Groenleer and Rijks 2009, as well as Strapatsas 2002.

[2]Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute).

[3]See e.g. Kirsch and Holmes 1998, pp. 3–39; Schabas 2011, pp. 18–19; Schiff 2008, pp. 70–71; Washburn 1999, pp. 367–368.

ported the establishment of the ICC ever since the draft of the Statute was submitted to the GA by the ILC in 1994.[4] By 1996, this group of ICC supporters already encompassed almost all member states of the EU—consisting of 15 members at the time—with the exception of the UK and France. Only after the Labor Party was voted into government in the UK and Tony Blair became the Prime Minister did that country join the group. This addition was mostly welcomed, particularly because the UK was the first permanent member of the Security Council to become a member. As of then, the group enjoyed the backing of two major States, namely Germany and the United Kingdom. Nevertheless, the position of the EU remained less than clear with regard to the ICC, and common statements were the exception even during the first half of the Rome Conference in June 1998. Nevertheless, since 1995, the EU had provided some funding to NGOs advocating the creation of the ICC.[5]

Only when Austria took over the presidency of the Council of the EU by the beginning of July 1998 did the situation change substantially. At that time, with the Rome Conference underway,[6] the presidency was called on to elaborate substantial common positions in favor of the ICC, guided also by the Political Committee (PC, later became the Political and Security Committee, PSC) acting within the Common Foreign and Security Policy (CFSP). After France had succeeded in obtaining the exception under Article 124 at the Rome Conference,[7] all EU member states were able to support the establishment of the ICC and voted in favor of the final text that was submitted to a vote on 17 July 1998.

Since that moment, the EU has become very active in its support of the ICC and the Court became a major target of its CFSP. The discussions in the EU on the topic were first held in the Working Party on Public International Law (COJUR), and subsequently in the ICC Sub-area of the Working Party (COJUR-ICC).

[4]UN ILC (1994) Draft Statute for an International Criminal Court. GAOR 49th Session Supp 10, 29.

[5]General Secretariat of the Council (May 2010) The European Union and the International Criminal Court. http://www.consilium.europa.eu/uedocs/cmsUpload/ICC_may%2010_internet.pdf. Accessed 25 June 2013, p. 16.

[6]The Rome Conference took place in Rome from 15 June to 17 July 1998.

[7]Article 124 (Transitional Provision) of the Rome Statute provides as follows: "Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1."

3 Legal Acts Concerning the EU's Policy Towards the ICC

In the course of its policy in support of the ICC, the EU adopted various legal acts: the first legal act was the Common Position of 11 June 2001, which was followed by Common Positions, adopted in 2002 and 2003 and supplemented by a 2004 Action Plan.[8] Only after the Lisbon Treaty finally entered into force, the Council adopted a new Council decision on the ICC on 21 March 2011.[9] The legal nature of the most recent decision is that of a "decision defining [the EU's] position on a particular matter […] not [requiring] a particular action to be carried out by the EU institutions".[10] These legal acts were supplemented by various conclusions and declarations emanating from the Council, and other EU institutions, reinforcing the EU's position with respect to the ICC.[11]

In 2006, the ICC and the EU concluded an agreement on cooperation and assistance, including an Annex governing the "release of EU classified information by the EU to an organ of the Court" (Article 9 and Annex).[12] On 31 March 2008, and on the basis of the Agreement, the joint EU–ICC "security arrangements for the protection of [exchanged] classified information" came into effect.[13]

4 The EU–ICC Agreement (2006)

The Agreement regulates a number of specific matters relating to cooperation and assistance "on matters of mutual interest". It raises several points worthy of discussion, particularly in light of the increasing engagement of the EU in crisis situations where the commission of crimes within the jurisdiction of the ICC has

[8]Council of the EU (28 January 2004) Action Plan to follow-up on the Common Position on the International Criminal Court. Doc. 5742/04. http://register.consilium.europa.eu/pdf/en/04/st05/st05742.en04.pdf. Accessed 25 June 2013.

[9]Council of the EU (11 June 2001) Common Position 2001/443/CFSP on the International Criminal Court; Council of the EU (20 June 2002) Common Position 2002/474/CFSP amending Common Position 2001/443/CFSP on the International Criminal Court; Council of the EU (16 June 2003) Common Position 2003/444/CFSP on the International Criminal Court; Council of the EU (21 March 2011) Council Decision 2011/168/CFSP on the International Criminal Court and repealing Common Position 2003/444/CFSP.

[10]Koutrakos 2013, p. 37 (noting that "Council Decision 2011/168/CFSP on the International Criminal Court" provides an example of a "decision defining its position on a particular matter […] not require[ing] a particular action to be carried out by the EU institutions".).

[11]See General Secretariat of the Council (May 2010) The European Union and the International Criminal Court, n. 5 above.

[12]Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, Doc. ICC-PRES/01-01-06, entered into force on 1 May 2006.

[13]Council of the EU (15 April 2008) Security Arrangements for the Protection of Classified Information Exchanged between the EU and the ICC, Doc. 8349/1/08. http://register.consilium.europa.eu/pdf/en/08/st08/st08349-re01.en08.pdf. Accessed 25 June 2013.

become conceivable. Accordingly, it cannot be excluded that persons engaged in an operation directed or staffed by the EU could be asked to appear before the ICC either as witnesses or, although this might rarely be the case, as suspects under a warrant of arrest. Even peacekeepers under UN command can be held responsible before the commission of such crimes since otherwise the Security Council would not have considered it necessary to take a decision for the exclusion of the jurisdiction of the ICC for such personnel in 2002 and 2003.[14] The Agreement has to be scrutinized with respect to both of the above scenarios.

In addition, questions have been raised as to the effect the Agreement could have on the likelihood that the US will join the ICC. It was argued that agreements providing for the transmission of classified documents from the ICC to the EU would put further obstacles in the way of an eventual accession by the US to the Rome Statute. If true, this fear creates a dilemma for the EU: on the one hand, the EU has consistently advocated universal accession to the Rome Statute, and the US's support for the ICC is seen as an important element in this strategy. On the other hand, the EU seeks to contribute to the day-to-day work of the ICC, and the exchange of information, which is usefully placed on a legal basis and can facilitate the ICC's work.

My contribution will first examine the competence of the EU to conclude an agreement dealing with matters relating to cooperation and assistance and concerning the exchange of information, including classified types of information, as well as privileges and immunities. Second, my contribution will survey several specific issues relating to the transmittal of documents by the ICC to the EU and vice versa. Third, the contribution will consider the question of the waiver of immunities by the EU, including the question of hearings.

5 The EU's Competence to Conclude the EU–ICC Agreement

Since the beginning of its engagement with the ICC, the EU has based the competence to deal with ICC-related matters on the Articles in its constitutive treaties that relate to the CFSP. The first legal act of the EU in this respect, the 2001 Common Position, already referred to the then Article 15 of the TEU which provided that "[c]ommon positions shall define the approach of the Union to a particular matter of a geographical or thematic nature" and that "Member States shall ensure that their national policies conform to the common positions".[15] It could certainly be asked whether the EU's activities regarding the ICC would not rather

[14]United Nations Security Council Resolution 1422 (12 July 2002) UN Doc. S/RES/1422; United Nations Security Council Resolution 1487 (12 June 2003) UN Doc. S/RES/1487.

[15]Article 15 of the TEU provided as follows: "The Council shall adopt common positions. Common positions shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the common positions."

fall within the ambit of Justice and Home Affairs, formerly the third pillar, than into the CFSP. In the 2001 Common Position, the EU explicitly acknowledged that the ICC's mandate contributes to "freedom, security, justice and the rule of law". However, since the competences under Title VI (Provisions on Police and Judicial Cooperation in Criminal Matters) focus on the cooperation among the member states and not between the EU and other foreign institutions like the ICC, the only legal basis could be found in the CFSP (Title V). According to Article 24 of the TEU[16] which defines the competence of the EU in this field, the CFSP encompasses any relations in the field of foreign policy, although the adoption of "legislative acts" is excluded. The Article provides that "[t]he Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security […]."

However, in view of the broad competence regarding the CFSP and the necessity to cover also the matters that could reach beyond the EU's competences under Justice and Home Affairs, ICC-related acts were placed under the heading of the CFSP. The treaty-making competence in the field of the CFSP is theoretically unlimited, provided that the respective agreement does not fall within the treaty-making power in other fields of external actions of the EU, such as external trade policy.[17] As long as this is not the case, the EU is entitled, within the ambit of international law, to conclude any agreement with third States or foreign organizations. That such agreements are not concluded against the will of the MS is ensured by the requirement of unanimity for the conclusion of these agreements.

The ICC–EU Agreement only differs from other agreements insofar as it explicitly stipulates that it does not create obligations for the member states. This provision seems to contradict Article 218(7) TFEU according to which agreements concluded by the EU are binding not only on the EU, but also on the member states, thus creating the impression that any agreement concluded by the EU establishes obligations also with respect to the member states. Since agreements do not belong to primary EU law and, accordingly, are unable to amend it, a conflict seems to arise between the Agreement and primary EU law. However, this contradiction does not arise here if we assume that the substance of the EU–ICC Agreement, including the clause regarding the scope of the obligations (Article 4), is binding on the member states. For in that case, the binding effect of the Agreement on the member States is to be distinguished from the obligations incumbent on them.[18]

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[16]Consolidated version of the Treaty on European Union, Official Journal 115, 9 May 2008, 13–45. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008M/TXT:EN:HTML. Accessed 25 June 2013.

[17]See e.g. Craig and De Búrca 2011, pp. 79–83.

[18]Article 4 (Obligation of cooperation and assistance) of the EU-ICC Agreement reads as follows: "The EU and the Court agree that, with a view to facilitating the effective discharge of their respective responsibilities, they shall cooperate closely, as appropriate, with each other and consult each other on matters of mutual interest, pursuant to the provisions of this Agreement while fully respecting the respective provisions of the EU Treaty and the Statute. In order to facilitate this obligation of cooperation and assistance, the Parties agree on the establishing of appropriate regular contacts between the Court and the EU Focal Point for the Court."

6 The Substance of the EU–ICC Agreement

The Agreement regulates questions of cooperation and assistance, attendance at meetings, the exchange of information, testimony, including the problem of classified information, the cooperation between the EU and the Prosecutor, and privileges and immunities. In its structure it follows *cum grano salis* the UN–ICC Agreement, which is, however, much more detailed.[19] The substance of the agreement raises certain problematic issues that result from the fact that the Agreement affects not merely the two Parties to the Agreement, but also, indirectly, the MS, irrespective of the restriction of the effect of the obligations since no international organization can act entirely autonomously without the involvement of its MS.

7 Major Controversial Issues

7.1 The Exchange of Information

According to Article 7 of the Agreement, the ICC "shall, to the fullest extent possible and practicable" ensure the regular exchange of information and documents. This part of the Agreement is based on Article 5 of the UN–ICC Agreement.[20] The EU committed itself to providing the ICC with such information upon a request in accordance with Article 87(6) of the Rome Statute. This provision entitles the ICC to seek information or documents from any intergovernmental organization. The Agreement obliges the EU to comply with such a request, within the limits of its own responsibilities and competence. However, the ICC itself is bound to provide information relating to pleadings, oral proceedings, judgments and orders of the ICC to the EU, as far as it is in the interest of the EU. Although this provision does not define who is competent to determine the EU's interests,[21] it is hardly controversial. This determination can be only within the powers of the EU as it would be unthinkable that the ambiguity could be resolved in a way as to allow the ICC to define the Union's interests and, thus, also the scope of its obligations unilaterally.

[19]Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Doc. ICC-ASP/3/Res.1, entered into force on 22 July 2004. http://www.iccnow.org/documents/ICC-ASP-3-Res1_English.pdf. Accessed 25 June 2013.

[20]Article 5 (Exchange of information) of the EU–ICC Agreement reads as follows: "1. Without prejudice to other provisions of the present Agreement concerning the submission of documents and information concerning particular cases before the Court, the United Nations and the Court shall, to the fullest extent possible and practicable, arrange for the exchange of information and documents of mutual interest. In particular: […]."

[21]See in this context also Article 18 (Settlement of disputes) of the EU–ICC Agreement which reads as follows: "All differences between the EU and the Court arising out of the interpretation or application of this Agreement shall be dealt with through consultation between the Parties."

The central problem in this regard is the delivery of sensitive information. The Agreement distinguishes two different categories of information: First, information that could endanger the safety or security of current or former staff of the EU or otherwise the security of proper conducts of any operation or activity of the EU (Article 8). Second, "classified information", defined in the Annex as "any information […] or material determined to require protection against unauthorised disclosure and which has been so designated by a security classification […]".

The first category of documents relates to those that could affect operations and activities of the EU. In view of the increased operational activities of the EU through its civil and military conflict management operations this constitutes a rather important issue. The regulation is modeled on Article 15(3) of the UN–ICC Agreement. In both situations, it is within the power of the ICC to decide on the retention of such information by the other party, albeit in particular on request from the side of the EU, respectively the UN. It is questionable whether this solution is appropriate since the decision on whether the transfer of documents could endanger activities of the EU should be reserved to the latter, or at least involve the latter as the EU would be in the best position to assess the risk posed by such documents. It can only be expected that the EU would be in a position to explain in a sufficiently convincing manner to the ICC the risk entailed by the delivery of such documents. However, the Agreement contains other sufficiently broad clauses that permit the denial of the delivery of documents. So, for instance, Article 7(1) ensures the exchange of documents only to the "fullest extent possible and practicable", and the EU committed itself in Article 7(2) to deliver documents only "with due regard to its responsibilities and competence under the EU Treaty". The reference to "competence" ensures that only documents of the EU and not of the member states can be delivered to the ICC. This conclusion is also supplemented by the reference in Article 7(2) to documents being "in its possession", implying that documents still remaining in the possession of a member state cannot be delivered to the ICC. The reference to "responsibilities" obviously entails the duty to observe the security regulations of the EU itself. Thus, the delivery of classified documents within the possession of the EU is subject to the confidentiality regulations of the EU relating to this category of information, i.e., documents "determined to require protection against unauthorized disclosure and which has been so designated by a security classification".[22]

The basis of the Agreement in EU law as far as classified documents are concerned is Article 12 of Council Decision of 31 March 2011 on the security rules for protecting EU classified information, which addresses the issue of the exchange of classified information with third States and international organizations. In accordance with this provision, the Council concludes relevant agreements (called "security of information agreements") whereas the Secretary-General of the Council concludes administrative arrangements. The decision to release classified information is a matter left to the Council on a case-by-case basis.

[22]See para 1 of the Annex to the EU–ICC Agreement.

The Agreement itself refers in its Article 9 to the Annex where the further rules on this issue are contained. In particular, the Court is required to grant such documents the same protection as is provided by the EU. Documents classified CONFIDENTIEL UE can be distributed only to persons who have been security cleared. Their delivery must be recorded and further security arrangements must be entered into by the Security Office of the Court, the Security Office of the General Secretariat of the Council, as well as the European Commission Security Directorate. These Security Arrangements ensure that "classified Information exchanged with the other Party is protected to a level which is at least equivalent to the relevant minimum standards set out in the providing Party's security rules and regulations". Accordingly, documents classified CONFIDENTIEL UE/ICC CONFIDENTIAL or above are only granted to persons in possession of a valid personnel security clearance. The relevant "Security Arrangements" which were agreed in 2008[23] specify that the release of EU classified information to the ICC is allowed up to the level of RESTREINT UE in hard copy and that "no EU classified information may be transmitted by electromagnetic means to the ICC" (para 34) unless there exists a special arrangement. Accordingly, information classified as TRÈS SECRET UE, SECRET UE or CONFIDENTIEL UE must not be delivered in hard copy.

Thus, there is a cascade of legal acts relating to the security of documents starting from the Agreement, including its Annex. The latter authorizes the security offices of the EU to conclude an arrangement with the parallel institution of the ICC and is still supplemented by a relevant[24] document approved by the Council's Security Committee and the ICC. The reference to the responsibilities of the EU in Article 7(2) of the Agreement amounts to a reference to the security documents of the EU such as Council Decision of 31 March 2011 on the security rules for protecting EU classified information.[25] However, the EU cannot benefit from the clause on the protection of national security information in Article 72 of the Rome Statute (Protection of national security information), since the EU is not a party to the Rome Statute and neither the Agreement nor the Security Arrangements contain a reference to this provision.

Notwithstanding this legal regime which seeks to ensure that the confidentiality provided by the EU for certain documents is respected by the ICC criticism has been expressed. According to the American Non-Governmental Organizations Coalition for the International Criminal Court ("American NGOs CICC"), this exchange of documents "could create the fear that, if the US ratifies the Rome Statute, thus

[23]Council of the EU (15 April 2008) Security Arrangements for the Protection of Classified Information Exchanged between the EU and the ICC, Doc. 8349/1/08. http://register.consilium.europa.eu/pdf/en/08/st08/st08349-re01.en08.pdf. Accessed 25 June 2013.

[24]Ibid.

[25]Council Decision of 31 March 2011 on the security rules for protecting EU classified information, Doc. 2011/292/EU, L 141/17, 27 May 2011. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:141:0017:0065:EN:PDF. Accessed 25 June 2013.

expanding the Court's jurisdiction over US citizens, the EU could have access to documents related to the proceedings whose contents could be harmful to the US."[26] There is no real safeguard against this since the formulation regarding the documents "which may be of interest to the EU"[27] is very broad. Certainly, this criticism is not totally unfounded, as it is within the power of the ICC to decide which documents are transferred to the EU, provided they are of interest to the EU. Accordingly, documents could be delivered to the EU that relate to proceedings against US citizens, something that is lawful even at present if such a person commits a crime within the jurisdiction of the ICC in the territory of a State Party to the Rome Statute. To assuage such fears, it would have been useful to include a clause concerning the withholding of certain types of information that could prejudice third parties, and to provide a procedure by which other States or persons, possibly prejudiced by an exchange of information, could challenge the exchange of certain documents. The 2008 Security Arrangements contain a procedure for the disrespect of confidentiality, which can be instituted only by the two parties so that third States or individuals cannot interfere. It is quite interesting that, in contrast to the agreement with the EU, the agreement of the ICC with the UN provides a certain guarantee in this respect. According to its Article 20 ("Protection of confidentiality") any information that the UN is requested by the ICC to provide the ICC with that was disclosed to it "in confidence by a State or an intergovernmental, international or non-governmental organization or an individual," requires the consent of the originator. This clause offers at least certain protection to the rights of third parties.

7.2 The Testimony of EU Staff

Article 10 of the EU–ICC Agreement deals with the issue of "the testimony of an official or other staff of the EU" and aims to ensure that the testimony of such persons may be heard by the ICC if the latter requests so.[28]

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[26]American Non-Governmental Organizations Coalition for the International Criminal Court (Simge Kocabayoglu) (4 March 2005) Paper on the Agreement between the ICC and the European Union. http://www.amicc.org/docs/EU-ICC-Agreement.pdf. Accessed 25 June 2013, p. 2.

[27]Article 7, para 3 of the Agreement.

[28]Article 10 (Testimony of staff of the European Union) of the EU–ICC Agreement reads as follows: "1. If the Court requests the testimony of an official or other staff of the EU, the EU undertakes to cooperate fully with the Court and, if necessary and with due regard to its responsibilities and competencies under the EU Treaty and the relevant rules thereunder, to take all necessary measures to enable the Court to hear that person's testimony, in particular by waiving that person's obligation of confidentiality.
2. With reference to Article 8, the Parties recognise that measures of protection might be required should an official or other staff of the EU be requested to provide the Court with testimony.
3. Subject to the Statute and the Rules of Procedure and Evidence, the EU shall be authorized to appoint a representative to assist any official or other staff of the EU who appears as a witness before the Court."

This provision already raises the problem of the definition of the EU staff who should not be put at risk by giving testimony. It must be determined whether all persons engaged in operations of the EU belong to this category, in particular persons seconded by the member states. The Agreement does not contain any definition of "staff" so that this term has to be interpreted by reference to other relevant instruments, first of all the Status of Forces Agreement concluded by the member states.[29] This agreement addresses, in particular, "the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context". It defines as military staff personnel seconded by the member states to the EUMS, or for the purpose to provide temporary augmentation for the preparation and performance of the Petersberg tasks, whereas civilian staff refers to civil personnel seconded by the member States for the preparation and execution of such tasks. Such personnel would be the first to have knowledge of facts that are important to the ICC with regard to its investigations so that, taking into account the object and purpose of the Agreement, namely the support of the effective functioning of the ICC by the EU,[30] the term staff as used in the Agreement must be given a broad understanding as used in the EU SOFA.

However, the EU–ICC Agreement goes beyond the UN–ICC Agreement insofar as it not only obliges the EU to waive the respective person's obligation of confidentiality, but also to "take all necessary measures to enable the Court to hear that person's testimony". The extent such measures may take is unclear. In any case, they are limited by the EU's competencies. However, for instance, measures such as disciplinary measures—which could arguably be deemed "necessary"—could lead to problems especially with regard to persons that are subject to different legal regimes, that of the EU and that of their State, regarding their services such as military personnel. According to Article 17 of the EU SOFA it is the sending State that exercises "all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over military as well as over civilian staff where those civilian staff are subject to the law governing all or any of

[29]Council Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA). Doc. 2003/C 321/02, 31 December 2003.

[30]Preambule para 7 of the EU-ICC Agreement reads as follows: "CONSIDERING that the European Union is committed to supporting the effective functioning of the International Criminal Court and to advance universal support for it by promoting the widest possible participation in the Rome Statute."

the armed forces of the sending State, by reason of their deployment with those forces." Accordingly, it is hardly apparent which measures the EU can take in order to force a staff member to testify before the ICC, unless measures in connection with an applicable contract of service between the individual and the EU would be applied. Moreover, it is also hardly conceivable that the tasks for which such persons were seconded would also include testimony before the ICC.

The situation of staff members or officials of the EU who are subject to the Staff Regulations[31] is different insofar as they are subject to disciplinary measures by the EU under Articles 86 to 89. Accordingly, a clearer picture is only offered if staff is merely understood as persons addressed by the EU's Staff Regulations, namely officials, i.e., "any person who has been appointed, as provided for in these Staff Regulations, to an established post on the staff of one of the institutions of the Union by an instrument issued by the Appointing Authority of that institution".[32] This solution would, however, exclude persons seconded by the Member States, in particular those persons that are engaged in military and civil operations of the Union and would have the best insight in situations that are likely to be discussed in the ICC. Nevertheless, it is again hardly conceivable that the duties of such persons would include also the obligation do give testimony before the ICC so that the only measures the EU could take is to waiver the obligation of confidentiality and, if the EU understands immunities in this sense, also that of immunities.

Accordingly, this article of the Agreement is of limited applicability insofar as it opens the possibility for a testimony before the ICC, but not of a necessary appearance before the Court. The duty of cooperation envisaged by this provision possesses only a permissive dimension, but not a duty of appearance.

7.3 Seconded Staff

According to Article 13 of the Agreement, the Court may employ the expertise of gratis personnel offered by the EU, to assist with the work of any of the organs of the Court. This provision corresponds to Article 44(4) of the Rome Statute according to which the Court may employ gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations. During the

[31]European Commission (1 May 2004) Unofficial, consolidated version of the Staff Regulations of Officials of the European Communities and Conditions of employment of other servants of the European Communities. http://ec.europa.eu/civil_service/docs/toc100_en.pdf. Accessed 25 June 2013.

[32]Idem. Article 1a(1) Staff Regulations reads as follows: "1. For the purposes of these Staff Regulations, "official of the Communities" means any person who has been appointed, as provided for in these Staff Regulations, to an established post on the staff of one of the institutions of the Communities by an instrument issued by the Appointing Authority of that institution."

negotiations on the Rome Statute discussions arose with regard to this provision and it is said to have a "long and controversial history".[33] On the one side, the possibility of such gratis personnel was welcomed since it was expected to lead to lower costs for the ICC state parties. On the other side, the fear was expressed that such personnel was not sufficiently independent from particular states and could disturb the geographical balance of the staff. It was argued that the institution could come under particular influence of the States offering such personnel. In any case, the reference to Article 44(4) of the Rome Statute ensures that the limitations provided in the Rome Statute apply also to gratis personnel offered by the EU and that such personnel has the same status with the ICC as any other personnel hired under Article 44(4) of the Rome Statute.

Nevertheless, the doubts expressed by S. Kocabayoglu on behalf of the American NGO CICC regarding a draft Article 11 of the future agreement between the ICC and the EU[34] that was aimed at including the support of the EU in training for Court staff, judges and other ICC personnel could also be applied to Article 13 of the Agreement.

The NGO paper noted that draft Article 11 was considered "as exerting too much European influence on the operations of the Court".[35] It also raised "the fear that the combination of common and civil law principles in the Court's procedure and practice will become unbalanced in favor of the latter".[36] The same fear was expressed during the negotiations of the Rome Statute also with respect to Article 44(4) of the Rome Statute since a great influence by developed-country NGO's personnel on the ICC was expected.[37] It was for this reason that the possibility of using such personnel became extremely circumscribed and subject to the decision of the ICC organs. The application of these limits to the personnel offered by the EU should suffice to remove such fears of the US.[38] The present formulation of

[33]See Lee 1999, p. 17; Lachowska 2009, p. 392 et seq.

[34]American Non-Governmental Organizations Coalition for the International Criminal Court (Simge Kocabayoglu) (4 March 2005) Paper on the Agreement between the ICC and the European Union. http://www.amicc.org/docs/EU-ICC-Agreement.pdf. Accessed 25 June 2013.

[35]Ibid.

[36]Ibid.

[37]It can be noted that an analogous discussion occurred in the context of the WTO discussions relating to the participation of NGOs as *amici* in WTO Panel and Appellate Body proceedings.

[38]However, it should be noted that the reality of geographical, gender-based or other disparities in representation in the ICC have also been subject to empirical analysis. See for some empirical data: ICC Assembly of States Parties (3 December 2010) Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court. Doc. ICC-ASP/9/30. http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-30-ENG.pdf. Accessed 25 June 2013; see also Schabas 2011, p. 603.

Article 11 on the cooperation between the EU and the ICC does not give rise to similar expectations: comparable provisions can be found in the Accord de Coopération entre la Cour pénale internationale et l'Organisation international de la Francophonie of 28 September 2012 (Article 8),[39] as well as in the Memorandum of Understanding Between the International Criminal Court and the Commonwealth on Cooperation (Article 8).[40] Hence, it seems to be unlikely that this provision on cooperation would lead to further criticisms for political reasons.

8 The Waiver of Immunities by the EU

Similar to Article 19 of the ICC–UN Agreement, Article 12 of the ICC–EU Agreement provides, *inter alia*, for a waiver of "any" immunities and privileges enjoyed under "the relevant rules of international law" by a person "alleged to be criminally responsible for a crime within" the ICC's jurisdiction. The logic of this provision is very unclear. Neither does it describe the "persons" addressed with sufficient specificity, nor does it identify the character of the immunities and privileges. Moreover, it does not specify which measures ("all necessary measure") should be taken in order to enable the Court to exercise its jurisdiction, but merely highlights "waiving such immunities" as a particular measure.

As to the persons, the only definitional criterion is that the person must be alleged to be responsible for a crime within the jurisdiction of the ICC and enjoy any privileges and immunities under international law. Defined in this sense, this group of persons would comprise an extremely broad range of persons since diplomats of any state could fall under this category so that additional criteria are to be applied.

One of these criteria is the privileges and immunities enjoyed by these persons; since the EU is called to waive these rights, these privileges and immunities can be only those that are possessed by the EU. The EU undoubtedly enjoys immunities and privileges the beneficiaries of which are certain Union officials. The basis of such rights is Protocol No. 36 of 1965 on the privileges and immunities of the European Communities.[41]

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[39]Accord de coopération entre la cour pénale internationale et l'organisation internationale de la francophonie, Doc. ICC-PRES/13-03-12, entered into force on 28 September 2012. http://www.icc-cpi.int/iccdocs/oj/AgreementwithInternationalFrancophonieOrganisation.pdf. Accessed 25 June 2013.

[40]Memorandum of Understanding between the International Criminal Court and the Commonwealth on Cooperation, Doc. ICC-PRES/10-04-11, entered into force on 13 July 2011. http://www.icc-cpi.int/NR/rdonlyres/F9569B18-0AF3-499E-9352-4D5C91373B31/283598/MOUwithCommonwealthoncooperation13072011.pdf. Accessed 25 June 2013.

[41]Protocol annexed to the Treaties establishing the European Community and the European Atomic Energy Community—Protocol (No. 36) on the privileges and immunities of the European Communities (1965) OJ C 321 E, 29 December 2006, pp. 318–324.

However, although, in this regard, the EU officials are granted immunities in the territory of the member states with regard to official acts (Article 12(a)[42]), it is nevertheless doubtful whether this also applies to international institutions in the territory of a member state, such as the ICC. Quite a lot of considerations militate against the assumption that the immunities addressed by this provision are those enjoyed in relation to the ICC. This latter institution, being a third-party subject of international law not party to this Protocol, cannot—under the law of treaties—be bound by it and is not obliged to grant immunity to EU officials, irrespective of the location of these institutions on the territory of a member state. One state cannot endow its officials with immunity if the other State in which the immunity should provide a bar to the exercise of jurisdiction over the official does not accept such a legal regime. This conclusion does not contradict to a mutual recognition of the legal personality of these two organizations, the EU and the ICC, already through the conclusion of EU–ICC Agreement.

A similar conclusion would be applicable to the military and civil personnel participating in the area operations of the EU. Their status in these countries is regulated by Status of Forces Agreements (SOFAs). These SOFAs, however, such as the SOFA with Afghanistan, only grant immunity with regard to the authorities of the host State. Within the EU, their status is again governed by the EU SOFA.[43] Its Article 8 provides immunity to the personnel in the sense of the SOFA, i.e., including personnel seconded by the member states, without stating against whom such immunity should be applicable.[44] A further difficulty results from the fact that this immunity belongs to both, the EU and the sending State and both are required to waive the immunity "enjoyed by military or civilian staff seconded to the EU institutions where such immunity would impede the course of justice and where such competent authority and relevant EU institution may do so without prejudice to the interests of the European Union". Although this duty seems to be in line with Article 12 of the EU–ICC Agreement, the EU SOFA nevertheless differs from the Agreement insofar as it requires the waiving by the EU and the sending State (Article 8(3)) whereas the EU–ICC Agreement imposes such a duty only

[42]Ibid. Article 12 of Protocol No. 36 reads as follows: "In the territory of each Member State and whatever their nationality, officials and other servants of the Communities shall: (a) subject to the provisions of the Treaties relating, on the one hand, to the rules on the liability of officials and other servants towards the Communities and, on the other hand, to the jurisdiction of the Court in disputes between the Communities and their officials and other servants, be immune from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written. They shall continue to enjoy this immunity after they have ceased to hold office; […]".

[43]EU SOFA, Doc. 2003/C 321/02, 31 December 2003; see generally Sari 2008.

[44]Article 8 of the EU SOFA reads as follows: "1. Military or civilian staff seconded to the EU institutions shall enjoy immunity from legal process of any kind in respect of words spoken or written, and of acts performed by them in the exercise of their official functions; that immunity shall continue even after their secondment has ceased. […]".

on the EU. Accordingly, if seconded personnel are included in the purview of Article 12 of the Agreement, difficulties cannot be excluded once the need of such a waiver arises.

Finally, a fundamental question arises concerning the need for such a provision. The norm of international law regarding immunities has evolved as a bar to the exercise of national jurisdiction. When the ICJ dealt with the question of whether state officials enjoy immunities, it did so only with regard to national jurisdiction.[45] As to international criminal jurisdiction, the ICJ noted that even the legal instruments creating international criminal tribunals[46] that denied the immunity of persons having an official capacity did "not enable it to conclude that any such an exception exists in customary international law in regard to national courts."[47] This statement indicates that the immunity as rooted in customary international law exists only with regard to national courts, but not in respect of international courts or tribunals. This is confirmed by the ICJ's later finding that "an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."[48]

Accordingly, members of the staff of the EU cannot invoke immunity before the ICC irrespective of the fact that the EU is not bound by the Rome Statute and its Article 27(2) regarding immunity. In the same vein, Article 27(2) of the Rome Statute itself seems superfluous or only of declaratory nature. Certainly, in the *Simić* Case the ICRC claimed immunity before the ICTY. However, this was not accepted by the Prosecutor who denied that the ICRC could prevent any of its former employees from testifying by means of immunity.[49] The Prosecution in *Simić* argued as follows (para 6):

> [First,] the ICRC does not enjoy immunity from the jurisdiction of international courts as a matter of general international law (such immunity does not flow from the ICRC's functional international legal personality, nor does it have any basis in treaty or customary law); and
>
> [Second,] the assertion that an ICRC employee giving evidence in any judicial proceeding would jeopardise the ICRC's ability to carry out its humanitarian mission is not proven.

[45]Cf. Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*) (Judgment) (14 February 2002) [2002] ICJ Rep. 3.

[46]Referring to the Charter of the International Military Tribunal of Nuremberg (Article 7), the Charter of the International Military Tribunal of Tokyo (Article 6), the Statute of the International Criminal Tribunal for the former Yugoslavia (Article 7(2)), the Statute of the International Criminal Tribunal for Rwanda (Article 6(2)), as well as the Rome Statute of the ICC (Article 27).

[47]Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*) (Judgment) (14 February 2002) [2002] ICJ Rep. 3, para 5.

[48]Ibid., para 61.

[49]*Prosecutor v. Simić Case* (IT-95-9), Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness (27 July 1999). http://www.icty.org/x/cases/simic/tdec/en/90727EV59549.htm. Accessed 25 June 2013, para 2.

However, in the further discussion, the ICRC no longer argued on the basis of immunity but rather on that of neutrality and confidentiality and the Tribunal decided in its favor (para 76).[50] Similarly, Rule 73(4) of the Rules of Procedure and Evidence of the ICC,[51] which provides that information offered by ICRC officials or employees is privileged, no longer refers to any immunity of the ICRC, but merely to the latter's privileged position.[52] When certain Headquarter Agreements of the ICRC such as those with Croatia, Belgium, Kuwait, the Philippines, Switzerland, the Russian Federation, Rwanda and Turkmenistan refer to immunity, this immunity is to be understood only with respect to the local national authorities. So, for instance, the Trial Chamber notes in Footnote 34 that Article 10(3) of the Headquarter Agreement with Croatia provides that the members of the ICRC

> […] shall enjoy immunity from personal arrest or detention and from seizure of their personal baggage, and in respect of words spoken or written and all acts done by them in the discharge of their official duties, immunity from legal process of any kind, even after they have left the service of the delegation. They shall not be called as witnesses.[53]

Accordingly, the EU SOFA addresses the immunity only with regard to competent authorities or judicial bodies of member states, since Article 8(5) of the EU SOFA only refers to member state bodies or authorities in relation to the abuse of immunities.

It must also be recognized that the problem of immunity before international tribunals is only of recent nature due to the relatively short existence of such institutions and therefore a rule of customary international law could hardly have been expected to solidify. Prior to the emergence of such tribunals, no need arose to develop such a rule since international judicial instances dealt with disputes between States. Where individuals were allowed to become parties, such as in the

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[50]Ibid. The Trial Chamber concluded as follows (para 76): "It follows from the Trial Chamber's finding that the ICRC has, under international law, a confidentiality interest and a claim to non-disclosure of the Information, that no question of the balancing of interests arises. The Trial Chamber is bound by this rule of customary international law which, in its content, does not admit of, or call for, any balancing of interest. The rule, properly understood, is, in its content, unambiguous and unequivocal, and does not call for any qualifications. Its effect is quite simple: as a matter of law it serves to bar the Trial Chamber from admitting the Information."

[51]ICC Rules of Procedure and Evidence, Doc ICC-ASP/1/3 (Part II-A), entered into force 9 September 2002.

[52]Article 73(4) of the ICC Rules of Procedure and Evidence reads as follows: "The Court shall regard as privileged, and consequently not subject to disclosure, including by way of testimony of any present or past official or employee of the International Committee of the Red Cross (ICRC), any information, documents or other evidence which it came into the possession of in the course, or as a consequence, of the performance by ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement, unless: (a) After consultations undertaken pursuant to sub-rule 6, ICRC does not object in writing to such disclosure, or otherwise has waived this privilege; or (b) Such information, documents or other evidence is contained in public statements and documents of ICRC."

[53]*Prosecutor v. Simić Case*, n. 50 above, footnote 34.

case of mixed claims commissions, regional human rights courts and tribunals, or in the investment treaty arbitration context, they acted as claimants and not as respondents. The stipulations in the various Statutes of such institutions about the denial of immunity cannot be seen as evidence of the existence of a contrary rule under customary international law, but rather as confirmation of such a rule. As the ICJ acknowledged,

> […] none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity.[54]

The above statement confirms that in customary international law immunity is a bar to proceedings before national and not international judicial instances. Accordingly, if a staff member of the EU is likely to be prosecuted by the ICC, neither can this person invoke immunity nor can the EU waive it. If the person is alleged to have committed a crime under the jurisdiction of the ICC, he or she has the same status as any other person within the jurisdiction of the ICC. Otherwise, staff members of the ICC would be in a better position than State officials, in particular those not enjoying the benefits of a head of State immunity.

Accordingly, if Article 12 of the EU–ICC Agreement should make sense, it must be interpreted as a commitment of the EU to waive the immunity in relation to national instances. Under this perspective, Article 12 stands in contrast to Article 98 of the Rome Statute which seeks to protect immunities.[55] Pursuant to this latter provision, States are not obliged to waive immunity, but the ICC has to exercise certain restriction if confronted with immunities. Irrespective of the different interpretations of this provision, the duty of a State Party to waive immunity can only be derived from the general duty of cooperation with the Court under Article 86 of the Rome Statute.[56]

However, it is not clear whether the intention of the authors of the EU–ICC Agreement was to endow Article 12 with such an effect by committing the EU

[54]Arrest Warrant of 11 April 2000, n. 48 above, para 58.

[55]Article 98 (Cooperation with respect to waiver of immunity and consent to surrender) of the Rome Statute reads as follows: "1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

[56]Article 86 (General obligation to cooperate) of the Rome Statute reads as follows: "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."

to waive the immunity in relation to national authorities of States. The parallel Agreement of the ICC with the United Nations contains a similar provision (Article 19) that raises similar problems and does not offer further clarifications. It remains to be seen how these ambiguities will be resolved in practice.

9 Conclusion

My contribution has sought to discuss a few specific questions of law and policy that have resulted from the EU's engagement with the ICC during the last two decades and in particular the EU–ICC Agreement of 2006. It is clear that through this and other legal acts, as well as the EU institutions' supportive policies towards the ICC, the EU has attempted to promote its international status in pursuance of its goals of fighting impunity and enhancing the rule of law. Some of the ambiguities and questions that arise from the EU's ICC-related legal acts, in particular the EU–ICC Agreement, and that I have discussed above may well be explained by the dominance of considerations of policy rather than legal minutiae in the EU's approach.

However, this approach and its consequences come at some cost: Insofar as the Agreement is one-sided—placing the obligations of confidentiality only on the side of the ICC, not on that of the EU—it creates uncertainty about how confidential information will be treated by the ICC. As such, one unexpected but not too farfetched possible consequence of the one-sidedness the 2006 Agreement could be to impede the intensification of the already "reluctant engagement" of the US[57] with the ICC. Ironically, this result would run counter to the EU's overall strategy of promoting universal adherence to the Rome Statute.

Case law, legislation and documents

Case law

Prosecutor v. Simić Case (IT-95-9), Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness (27 July 1999). http://www.icty.org/x/cases/simic/tdec/en/90727EV59549.htm. Accessed 25 June 2013

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[57]See e.g. generally Kielsgard 2010.

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