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THE CREATION OF A GLOBAL CRIMINAL JUSTICE SYSTEM: THE EUROPEAN UNION AND THE INTERNATIONAL CRIMINAL COURT

Jan Wouters* and Sudeshna Basu**

1. INTRODUCTION

The adoption of the Rome Statute in 1998 marked the creation of a global criminal justice system.[1] It demonstrated the will of the international community to create a culture of individual criminal accountability by bringing those individuals responsible for committing the most serious crimes known to humanity to justice. The International Criminal Court (the 'ICC' or the 'Court'), however, cannot accomplish this alone. The Court is very much dependent upon universal ratification and preservation of integrity of the Rome Statute in addition to general support for its independent and effective functioning. The underlying nature of the ICC of being complementary to national criminal justice systems thus necessitates a system of international cooperation, which is the very crux – and the Achilles heel – of the newly established global criminal justice system. States, civil society, international and regional intergovernmental organisations all have an important role to play in this regard.

The European Union (the 'EU' or the 'Union') has been, and continues to indisputably be, one of the strongest and most consistent supporters of the ICC. This has been confirmed through its technical, financial and institutional support and contributions. The EU's endeavour to consolidate the ICC's effectiveness has entailed the Union to take measures in all three of its Pillars on a wide range of levels, which illustrates the complexity of the case at hand. The

* Professor of International Law and International Organizations, Director of the Leuven Centre for Global Governance Studies and the Institute for International Law, University of Leuven.

** Junior Member of the Leuven Centre for Global Governance Studies and Institute for International Law, University of Leuven.

1 L.M. Ocampo, 'The International Criminal Court: Seeking Global Justice,' 40 *Case Western Reserve Journal of International Law* 215 (2007–2008).

present contribution will first provide an overview of the EU's approach to international criminal justice, including mechanisms to promote individual criminal accountability such as the ICTY and ICTR. It will subsequently provide a brief introduction to why there was a need for a permanent international criminal court and the variables that determine the Court's effectiveness. The following section will explore the means and instruments the EU is utilising to ensure that the Court is functioning effectively and that individual criminal accountability is being endorsed on a global scale. To conclude, the contribution will use the findings from the preceding section to yield insights into how the Union is contributing to strengthening the functions of the ICC in addition to what it can do to further enhance the overarching global criminal justice system.

2. THE EU AND INTERNATIONAL CRIMINAL JUSTICE

The fight against impunity for serious international crimes has advanced significantly in the last twenty years. It is believed that the end of the Cold War permitted the development of international judicial institutions that had previously been rejected because of the fear they would be used for political purposes by one ideological bloc against the other. Accordingly, since then, the international community, particularly the EU, has observably strived hard to enhance international criminal justice.

It has been globally recognized that perpetrators of the most serious crimes under international law, namely, genocide, crimes against humanity and war crimes must be held accountable for their actions. In parallel, there is international consensus that victims of such crimes have the inherent right to a remedy and adequate, prompt and effective reparation.[2] These two levels of consensus in essence require the state that the crime took place in to provide the judicial fora to bring justice to the victims and to give rise to individual criminal accountability by trying the perpetrator in question. This however is not always carried out in practice for a number of reasons ranging from the inability to unwillingness of a state to do so. This as a result has demanded the international community to take collective action to put an end to impunity and to enhance individual criminal accountability.

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2 United Nations General Assembly Resolution 60/147 "*Basic Principles and Guidelines on the right to a Remedy and Reparations for victims of gross violations of international human rights law and serious violations of international humanitarian law*," 16 December 2005. See REDRESS & FIDH 'Fostering a European Approach to Accountability for Genocide, Crimes Against Humanity, War Crimes and Torture: Extraterritorial Jurisdiction and the EU,' Final Report, April 2007.

Ending impunity for the most serious crimes is of concern to the international community and is a priority for the EU.[3] Through its Common Foreign and Security Policy (CFSP), the Union has demonstrated its will to do so through adopting a number of guidelines supporting the respect for international human rights law and humanitarian law and through taking measures to establish a system of cooperation based on such principles between the EU institutions, its Member States and also between third countries and international organizations. Moreover, since the Treaty of Amsterdam coming into force the management of the EU's external borders, judicial cooperation in civil matters, and police and judicial cooperation in criminal matters have been covered by both the first and third pillars. This has *inter alia* been observed in the Framework Decision on the European Arrest Warrant (third pillar)[4] and also in the inclusion of an ICC clause in the Cotonou Agreement (first pillar)[5], both of which will be further elaborated below. As all of its three pillars display – be it in quite different manners – the competences to promote and further international criminal justice, the EU is in a strong position to take a leadership role in the fight against impunity.

2.1. EU GUIDELINES: A FRAMEWORK TO PROTECT AND PROMOTE INTERNATIONAL HUMANITARIAN/ CRIMINAL LAW IN THIRD COUNTRIES

The EU, being based upon and defined by the universal principles of liberty and democracy, respect for the rule of law, human rights and fundamental freedoms[6], has in adherence to these principles adopted a number of Guidelines to provide a basis for the EU and its institutions to promote compliance outside its borders with international humanitarian law and international human rights law. The Guidelines on torture and other inhumane or degrading treatment[7] and the Guidelines on children in armed conflict[8] are both of considerable value in this regard. However, the EU Guidelines on Promoting Compliance with International Humanitarian Law[9] (IHL) may be viewed as the most significant

3 See Statement on behalf of the EU by HE Ambassador Sanja Stiglic, Security Council, Reports of the ICTY and ICTR, New York. 4 June 2008.

4 See below note 105.

5 See below note 81.

6 Article 6(1) TEU.

7 Guidelines to the EU policy toward third countries, on torture and other cruel, inhuman or degrading treatment or punishment, adopted by the General Affairs Council, Luxembourg, 9 April 2001.

8 EU Guidelines on Children and Armed Conflict, 9 December 2003 (Doc 15634/03).

9 EU Guidelines on Promoting Compliance with International Humanitarian Law (IHL), 2005/C 237/04, 23/12/2005, Official Journal C 327/4.

with respect to enhancing international criminal justice.[10] The IHL Guidelines explicitly lay out operational dimensions on reporting, assessment and recommendations for action requiring EU bodies to monitor situations within their areas of responsibility where IHL may be applicable.[11] In the same context, the Guidelines oblige EU Heads of Mission and appropriate EU representatives including EU Military Operations and EU Special Representatives to include an assessment of the IHL situation in their reports about a given State or conflict. Suggestions of possible measures to be taken by the EU are on occasion also included in such reports.[12] The IHL Guidelines significantly also place an emphasis on individual responsibility, stipulating that

> "*Individuals bear personal responsibility for war crimes. States must, in accordance with their national law, ensure that alleged perpetrators are brought before their own domestic courts or handed over for trial by the courts of another State or by an international criminal tribunal, such as the International Criminal Court*."[13]

Furthermore, the Guidelines outline a variety of means of action at the EU's disposal to fulfil its objectives to promote compliance with IHL including political dialogues, general public statements, demarches, restrictive measures/ sanctions, cooperation with other international bodies notably the UN and ICRC, crisis management operations, etc. In addition to these Guidelines it is important to highlight here that all EU Member States are parties to the Geneva Conventions and their Additional Protocols, thus obliging them to abide by their rules. Accordingly, the adherence at the international and EU levels to promote and enhance international criminal justice sets the foundation for the EU to take an active role in furthering individual criminal accountability and supporting international criminal justice mechanisms.

2.2. THE EU'S APPROACH TO INTERNATIONAL CRIMINAL JUSTICE MECHANISMS: ICTR AND ICTY

The EU's support for international criminal justice mechanisms did not simply arise at the time of Rome Statute deliberations. The EU has long supported tribunals enforcing international humanitarian and criminal law. Its support for the International Criminal Tribunal for the former Yugoslavia (ICTY) established

10 REDRESS & FIDH 'Fostering a European Approach to Accountability for Genocide, Crimes Against Humanity, War Crimes and Torture: Extraterritorial Jurisdiction and the EU,' Final Report, April 2007.
11 Article 15(a) above 9.
12 Article 16(b) above 9.
13 Article 14 above 9.

in 1993 and the International Criminal Tribunal for Rwanda (ICTR) established in 1994 are the two most noteworthy both in financial and operational respects. Both tribunals enjoy the financial support of the EU. They are also endowed with the privileges arising from the EU's Common Position on Rwanda and Common Positions and Council Regulation on the ICTY.

The EU's Common Position on Rwanda[14] of 2002, repealing its 2001 Common Position, defines its objectives and priorities to stimulate and support Rwanda's process of recovering from genocide[15], to protect human rights and fundamental freedoms[16] and to support its transition into democracy.[17] Article 4(i-ii) of the respective Common Position, in accordance with its objectives, is dedicated to supporting the work of the ICTR and in particular renew its efforts to ensure that all States surrender to the ICTR all those indicted by it for genocide and other serious violations of international humanitarian law. Furthermore the EU has committed itself to urge the Government of Rwanda to comply fully with its obligations to cooperate with the Tribunal including providing information asked by the ICTR. Since August 1994 the EU, under the 6th and 7th European Development Fund (EDF), has implemented large scale rehabilitation programmes in the country. More recently, the EU, through linking genocide-related justice and reconciliation with equitable economic growth, poverty reduction and consolidation of democracy, has in its 10th EDF allocated 290 million Euros for the period of 2008–2013.[18] A prime example of this is the EU funded Haute Intensité de Main d'Oeuvre (HIMO) project (under the 10th EDF), which has been instrumental in reconciling the survivors and perpetrators of the Rwandan Genocide at the community level. The project, revolving around rural and infrastructural development, involves the implementation of a given project by local residents, more specifically, ex combatants and widows. The project also includes rehabilitation support for prisoners on genocide charges. It has been claimed that "doing part of their sentence in community service has helped in peace building".[19]

The EU has also been an avid supporter of the ICTY. It has adopted three Common Positions and a Council Regulation in direct support of the effective implementation of the Tribunal's mandate by i) imposing the freezing of funds

14 Council Common Position of 21 October 2002 on Rwanda and repealing Common Position 2001/799/CFSP (OJ L 285, 23.10.2002, p 3–6).

15 *Id.*, Article 1(a).

16 *Id.*, Article 1(c).

17 *Id.*, Article 1(d).

18 See website of the European Commission, DG Development, 'Geographical Partnerships: EU Relations with Rwanda', 22 April 2008. Can be found at: http://ec.europa.eu/development/geographical/regionscountries/countries/country_profile.cfm?cid=rw&type=short&lng=en.

19 See B. Batamuliza, 'EU-Funded Project Targets Community Reconciliation,' *The New Times*, Rwanda's First Daily Issue: 13846, March 2009.

and economic resources[20] and ii) restrictions on admission of persons who help persons indicted by the ICTY to evade justice.[21] The latter aims to prevent individuals that are engaged in activities helping those at large who continue to evade justice for crimes which the Tribunal has indicted them to enter into, or transit through, EU territory. This also applies to those individuals obstructing the ICTY's effective implementation of its mandate. In addition to the EU's common positions it has adopted a conditionality approach towards the region in support of the Tribunal. The Union's influence on Yugoslavia's successor states through making EU membership contingent upon cooperating with the tribunal has played a significant role in the effective functioning of the ICTY. EU conditionality has been claimed by many as being one of the most crucial tools for the facilitation of state cooperation with the Tribunal. Carla Del Pointe on various occasions has praised the EU for its conditionality approach and has claimed that "90 percent of those in custody are there as a direct result of EU conditionality and that it has in recent years been the most effective tool to obtain the transfer of ICTY fugitives".[22] In view of the absence of formal enforcement mechanisms, the Union's conditionality approach in essence has made the EU a "surrogate enforcer"[23] in pressing states to handover criminals to the Tribunal. Its surrogate enforcer role may also be observed in the conditions attached to EU bilateral relations with countries of the region, in which the EU has explicitly stipulated that

> "*co-operation with the ICTY, with a view to bringing war criminals to justice, is a basic condition for any progress in the development of bilateral relations in the areas of commercial exchanges, financial assistance and economic co-operation as well as contractual relations between the EU and the countries of the region*".[24]

Serbia is a prime example of this where the EU's rhetoric was put into practice in May 2006. Following a negative assessment of state cooperation of Serbia and Montenegro and its failure to locate, arrest, and transfer Ratko Mladic to The Hague, submitted by the ICTY, the EU halted the negotiations of a Stabilisation

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20 Common Position 2004/694/CFSP (OJ L 315, 14.10.2004, p 52); Common Position 2007/635/CFSP (OJ L 256, 2.10.2007, p 30); Council Regulation (EC) no 1763/2004 (OJ L 315, 14.10.2004, p 14).

21 Common Position 2004/293/CFSP (OJ L 94, 31.3.2004, p 65); Common Position 2008/223/CSFP (OJ L 70, 14.3.2007, p 22).

22 See statement by Carla Del Ponte in the European Parliament 'Serbia must deliver war criminals before signing stabilisation agreement with the EU', 26.6.2009.

23 V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, Cambridge, Cambridge University Press, 2008, 12.

24 See ICTY Press Release 'The New President of the EU will make cooperation with the ICTY a basic condition for any progress in the development of the relations between the EU and the countries of the region,' The Hague, 3 July 1997 (CC/PIO/223-E).

and Association Agreement with Serbia which was originally launched in October 2005.

Against the backdrop of the EU's competences, endeavours and capacity to support international criminal justice mechanisms, it is not surprising that the EU was at the forefront in establishing the ICC. The EU alongside other members of the international community recognized, through observing the difficulties arising from holding individuals accountable for the most serious international crimes in addition to certain drawbacks of ad hoc tribunals, that there was a strong need for a permanent international criminal court in order to shift from a culture of impunity to a culture of accountability.

3. THE NEED FOR AN INTERNATIONAL CRIMINAL COURT

The 20th century, described by many as the "century of violence"[25], witnessed terrible crimes and extreme atrocities go unpunished primarily because of the disappointing performances of national courts not investigating crimes sufficiently and at times even failing to investigate crimes altogether. Moreover, the absence of a permanent international criminal tribunal having the competence to try such grave crimes markedly contributed to the perception that the world accommodates a "culture of impunity which protects perpetrators".[26] Accordingly, the international community responded by establishing the ICC in efforts to end and prevent the impunity for the most serious crimes of global concern: genocide, crimes against humanity and war crimes.[27]

The creation of the ICC may be seen as the most "significant recent development in the international community's long struggle to advance the cause of justice and rule of law".[28] There are two main reasons why there was a need to establish a permanent international criminal court. First, when observing the period before the creation of ad hoc tribunals, the international criminal legal system functioned only within the legal system of each State and accordingly States either had the authority or duty to for example extradite or prosecute offenders of serious international crimes. This may be observed in the principle of *aut*

25 J.L. Blaint, 'An empirical study of conflict, conflict victimization and legal redress,' (1998) 14 *Nouvelles Etudes Penales* 10. Blaint's study claims that there have been 250 armed conflicts involving 170 million people since the Second World War.

26 P. Kirsch, 'The International Criminal Court: A New Necessary Institution Meriting Continued International Support,' 28 *Fordham International Law Journal* 292 (2004–2005).

27 Above n. 1.

28 Kofi Annan, Report of the Secretary-General, 'The rule of law and transitional justice in conflict and post-conflict societies' New York, 23 August 2004, (S/2004/616) at 50.

dedere aut judicare. The principle confers on national legal systems the obligation and right to prosecute individuals who have committed serious international crimes. However, international practice shows that there are significant limitations in this regard, notably the limited number of international crimes which it applies to, the inability of states having to make a clear choice between prosecution and extradition[29] and issues surrounding accessing evidence for a court outside the country the crime was committed in. The principle of *aut dedere aut judicare*, while indeed closely associated with "universal jurisdiction"[30], nevertheless functions differently.[31] Both principles however are important to take into consideration when looking at the drive behind establishing the ICC. The adoption of the principles of *aut dedere aut judicare*

29 See G. Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanism*, The Hague, Martinus Nijhoff Publishers, 1998.

30 See Restatement (THIRD) § 404. In *Demjanjuk* v. *Petrovsky*, 776 F.2d 571 at 581 (6th Cir.1985) it defines 'universal jurisdiction': 'A state has jurisdiction to define and prescribe punishment for certain offences recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism (…)'.See also Brussels Group for International Justice, 'Brussels Principles Against Impunity and for International Justice,' Brussels, 11–13 March 2002. I. Quijera, F. Andreu, M. Carreras, C. Fernandez, E. David, C. Debrulle, E. Gillet, P. Jaspis, S. Parmentier, and J. Wouters define universal jurisdiction as the 'right of a state to institute legal proceedings and to try the presumed author of an offence, irrespective of the place where the said offence has been committed, the nationality or the place of residence of its presumed author or of the victim.'.

31 Cherif Bassiouni defines *aut dedere aut judicare* as a principle which is commonly used to 'refer to the alternative obligation to extradite or prosecute which is contained in a number of multilateral treaties aimed at securing international cooperation in the suppression of certain kinds of criminal conduct. This obligation essentially requires a state which has hold of someone who has committed a crime of international concern either to extradite the offender to another state which is prepared to try him or else to take steps to have him tried before its own courts.' See M.C. Bassiouni, E. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law,* Dordrecht/Boston/London, Martinus Nijhoff., 1995, and A.H. Butler, 'The Doctrine of Universal Jurisdiction: A Review of the Literature,' 11 Criminal Law Forum 33 (2000). Cassese demonstrates the linkages between the two concepts by outlining two different versions of how the principle of universal jurisdiction has been upheld. First, only the state where the accused is in custody can prosecute him or her. Cassese defines this class of jurisdiction of being accepted at the level of customary international law, with regard to piracy. At the level of treaty law he confirms the principle has been upheld with regard to grave breaches of the 1949 Geneva Conventions, torture as well as terrorism and international drug trafficking (eg Article 8 of the 1979 Convention against the taking of hostages). This version of the principle has also been upheld by national legislations of States in their obligation to prosecute or extradite the accused (*aut dedere aut judicare*) (eg Article 65.1.2 of the Austrian Penal Code and under the traditional construction of the German Penal Code Articles 6.9 and 7.2) Second, a state may prosecute persons accused of international crimes regardless of their nationality, the place of commission of crime, the nationality of the victim, and even of whether or not the accused is in custody in the forum State. This version of the principle has also been upheld by national legislations of States (eg Article 23 of the Spanish Law on Judicial Powers of 1985). See A. Cassese, *International Law*, Oxford, Oxford University Press, 2001, 261–261 and A. Cassese, *International Criminal Law*, Oxford, Oxford University Press, 2008, 338.

and universal jurisdiction on the one hand "departed from the aspiration for a truly international justice system, to be exercised by an international court".[32] Yet on the other hand, these principles rely on the criminal jurisdictional bodies of States to act as the decentralized instrument to enforce international law.[33] Leanza sums it up as "while at the prescriptive level international criminal law does exist, this is not the case at the institutional and procedural levels as long as State courts exclusively exercise the right to prosecute international crimes".

Second, it was recognized that ad hoc international criminal tribunals are not the ideal solution for a variety of reasons. They are only set up after gross crimes have been committed and their jurisdiction is limited to a particular situation and thus correspondingly is circumscribed geographically and in time. Moreover, the establishment of such tribunals in essence is dependent upon the political will of the international community, and makes them vulnerable to criticism of selectivity and double standards. Furthermore, the costs entailed in creating a new tribunal as severe violations occur are quite substantial. For these reasons ad hoc tribunals do not provide the culture of accountability or prevention capacity at the global scale which is needed to end and prevent impunity for the most serious international crimes. There are advancements, however, that have been made by ad hoc tribunals such as the ICTY and ICRT which should not be overlooked; the first real implementation of international humanitarian law, its contribution to the development and elaboration of international criminal law, advancements with respects to gender based crimes including rape and sexual violence, all in addition to the fact that their mere existence demonstrates that international criminal justice can indeed work in practice.[34]

4. THE ESTABLISHMENT OF THE ICC AND VARIABLES THAT DETERMINE ITS EFFECTIVENESS

The Rome Statute in its entirety was adopted by 120 states[35] on 17 July 1998 and entered into force on 1 July 2002. Its establishment while indeed an achievement

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32 U. Leanza, 'The Rome Conference on the Establishment of the International Criminal Court: A Fundamental Step in the Strengthening of International Criminal Law', in F. Lattanzi and W.A Schabas (ed), *Essays on the Rome Statute of the International Criminal Court*, Volume 1, Il Serente, Italy, 1999, 9.

33 *Id*.

34 Above n. 26.

35 Of the 160 states that participated and voted 21 abstained and seven voted against. See P. Kirsch, 'The International Criminal Court: A New Necessary Institution Meriting Continued International Support,' 28 *Fordham International Law Journal* 292 (2004–2005).

in itself has a long road ahead to demonstrate its effectiveness. Individual criminal accountability is at the heart of the ICC's success, but arguably, this very nature of accountability is also one of its underlying constraints.[36] There has been a pattern in states undergoing democratic reform processes to favour truth and reconciliation commissions to hold *governments* accountable over trials to hold *individuals* accountable. Interstate accountability and individual criminal accountability bears a significant dichotomy in this regard. Cambodia is a prime example of this where it did not hesitate to proceed with a truth commission, yet when the Khmer Rouge Trial Task force was instituted in 1997 to try the surviving Khmer Rouge leaders for crimes against humanity and war crimes including genocide, the Cambodian government at the time was reluctant to bring those perpetrators to trial.[37] Further, limited funding seemingly hindered its operations which as a result tainted its overall functions. The will of the state visibly played and continues to play the ultimate role. In view of this and other observations made in similar cases, the Rome Statute adopted a complementary[38] approach to national criminal jurisdiction, making the admissibility of a case dependent upon the State's inability or unwillingness to genuinely prosecute the person concerned.[39] The principle of complementarity is what defines the boundaries of the relationship between States and the Court.[40] Under this principle the ICC's proceedings will co-exist with existing national judicial mechanisms and will serve to supplement such mechanisms. Accordingly, it may not assert its primacy, unlike the ICTY and ICTR. The regulation of issues such as competing requests, simultaneous proceedings in the requested State concerning other crimes and challenges with regard to *ne bis in*

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36 Above n. 26.

37 Even prior to the the UN Group of Expert's presentation of their report in 1999 the Cambodian government had already decided against its likely recommendation to model a tribunal on the existing adhoc tribunals situated near but not in Cambodia. C. Etcheson, *Khmer Rouge, including After the Killing Fields: Lessons from the Cambodian Genocide*, Westport, CT, Praeger, 2005, and E. Gottesman, *Cambodia After the Khmer Rouge: Inside the Politics of Nation Building*, New Haven, Yale University Press, 2003. See also S. Ratner, 'The UN Group of Experts for Cambodia,' 93 *American Journal of International Law* 948 (1999), and B. Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975–79*, Yale University Press, 2nd ed, 2002. In 2006 however the Cambodian judicial body approved UN and Cambodian judges to preside over the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea (Cambodia Tribunal) to try senior surviving members of the Khmer Rouge for crimes against humanity. See C. Etcheson, '**Justice Initiatives**: "A Fair and Public Trial: A Political History of the Extraordinary Chambers', Open Society Justice Initiative, April 2006, 7–24.

38 Article 1 Rome Statute.

39 Article 17 Rome Statute.

40 J. Kleffner and G. Kor, *Complementary views on Complementarity*, Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court, Amsterdam, 25/26 June 2004, The Hague, Asser Press, 2006.

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idem as a result may arise[41]; because national investigations and prosecutions have priority in accordance with the principle. "The ICC therefore plays a residual role, whereas the national courts are the forum of first resort".[42] Further, the ambiguity surrounding "unable" and "unwilling" also raises an area of concern with regard to how the Court will assert its jurisdiction.[43] Moreover, as the Court is reliant upon state cooperation, should a State be deemed "unable" or "unwilling" to try a perpetrator the likelihood of the state concerned to cooperate is not very high.

Individual criminal accountability, unlike interstate accountability, brings forth a wide range of challenges that may be unavoidable.[44] For example, issues surrounding illnesses, age, and gaining custody of an individual have the capacity to pose problems notably because the ICC will not hold trials in absentia. Further, the rules of evidence in criminal matters are much more extracting than in civil matters and as such have the potential to make for lengthy trials, as has been observed in the ICTY.[45]

Turning to a broader spectrum, the effectiveness of the ICC is very much dependent upon the ratification status of the Rome Statute.[46] Countries with some of the poorest human rights records still have yet to ratify the Statute. This raises serious concerns about the impact and role the ICC can play especially considering the conditions for the exercise of jurisdiction are based on the exercise of nationality jurisdiction or territorial jurisdiction.[47] Moreover, the United States not being a party to the Statute raises additional concerns.[48]

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41 R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2007, 413.

42 R. Kerr and E. Mobekk, *Peace and Justice: Seeking Accountability after War*, Blackwell Publishers, 2007, p 63.

43 M. Benzing, '*The Complementarity Regime of the International Criminal Court*: International Criminal Justice between State Sovereignty and the Fight Against Impunity', 7 *Max Planck Yearbook of United Nations Law* 591 (2003).

44 S. Ratner, 'The International Criminal Court and the Limits of Global Jurisdiction', 38 *Texas International Law Journal* 445 (2003). See also D. McGoldrick, P. Row and E. Donnelly, *The Permanent International Criminal Court Legal and Policy Issues, Studies in International Law*, Oxford, Hart Publishing, 2004, 9–45, and D.J. Brown, 'The ICC and Trial in Absentia,' 24 *Brooklyn Journal of International Law* 763 (1999).

45 See D. McGoldrick, 'Criminal Trials Before International Tribunals: Legality and Legitimacy' in D. McGoldrick, P. Row and E. Donnelly (eds), *The Permanent International Criminal Court Legal and Policy Issues, Studies in International Law*, Oxford, Hart, 2004, 22–34.

46 As of June 2008, 108 countries have ratified the Rome Statute.

47 See J.D. van der Vyver, 'Personal and territorial jurisdiction of the ICC,' 14 *Emory International Law Review* 1 (2000). Exceptions to this do exist. In accordance with Article 13(b) of the Rome Statute the UN Security Council acting under Chapter VII of the UN Charter may refer a case to the Prosecutor.

48 The Clinton Administration signed the Rome Statute on the last day it was open for signature in 2000. The Bush Administration in 2002 nullified the US signature claiming that the Court would be used as a political instrument to prosecute US nationals. Since then the US has been seeking to conclude Bilateral Immunity Agreements under Article 98 of the Rome Statute.

Furthermore, as the majority of States that are a party to the Rome Statute have relatively strong human rights records, should the occasion arise for them to try a perpetrator the likelihood of them needing the ICC, against the background of its complementarity principle, would not be very high. Lastly, the extent to which those who have ratified the Statute will steadfastly hand over individuals to the Court is also of primary concern.[49] In order to overcome these challenges and guarantee the ICC's effectiveness an established system of international cooperation at the levels of government, civil society, NGOs and international organizations is required.

5. A GLOBAL CRIMINAL JUSTICE SYSTEM BASED ON INTERNATIONAL COOPERATION

The establishment of a *permanent* international criminal court by its very nature created a global criminal justice system. It demonstrated the will to end and prevent impunity of the most serious crimes through a novel system of interaction among States, international and regional organizations and global civil society. It was recognized that a prerequisite for the Court to be successful in holding those responsible for violating crimes within the jurisdiction of the Court[50] (the crime of genocide; crimes against humanity; war crimes) was a general legal obligation to cooperate. The Rome Statute thereby commits parties to the agreement to not only apply this framework within their own borders but also to cooperate fully with the Court in its investigation and prosecution of crimes within the ICC's jurisdiction.[51]

Furthermore, the US has been using this as leverage by for example cutting International Military and Education Training aid (IMET) to ICC parties that will not conclude a Bilateral Immunity Agreement with them. As of December 2006 46 state parties to the Rome Statute have concluded Bilateral Immunity Agreements with the US and 24 of the 56 that did not sign lost US aid in FY 2005. See 'Status of US Bilateral Agreements,' Coalition for the International Criminal Court, 14 December 2006, 1.

49 Above n. 44 at 449. Ratner argues that at first sight it may be difficult to see how the ICC will contribute to human rights protection based on two main reasons: 1) in the long term the ICC may well cause human rights abusers to stay at home- at home in states that do not ratify and where they will continue to enjoy immunity and 2) that traditional diplomacy is more important and effective than working through the route of the ICC (as seen in Indonesia with East Timor).

50 Article 5 Rome Statute.

51 Article 86 and 87 Rome Statute. See G.A. Knoops, *Surrendering to International Criminal Courts: Contemporary Practice and Procedures*, Ardsley, NY, Transnational Publishers, 2002; V.P. Oosterveld and J. M. McManus, 'The Cooperation of States with the International Criminal Court' 25 *Fordham International Law Journal* 3 (2002); H.R. Zhou, 'The Enforcement of Arrest Warrants by International Forces: from the ICTY to the ICC,' 4 *Journal of International Criminal Justice* 2 (2006); H. Zsolt, 'The Making of the Basic Principles of the Headquarter Agreement', 25 *Fordham International Law Journal* 3 (2002).

The ICC is an independent body that is not a part of the UN system but nevertheless has a link with it through a 'Negotiated Relationship Agreement between the International Criminal Court and the United Nations'.[52] The agreement obliges the ICC and UN to cooperate on the basis of institutional relations and cooperation and judicial assistance.[53] Different facets of the UN system play a key role in efforts to make the ICC an effective body. The UN Security Council for example plays a very important and unique role in this system of cooperation as it has the authority, acting under Chapter VII of the UN Charter, to refer cases to the Prosecutor[54] in addition to serving as a platform for discussion on issues relevant to the ICC. Furthermore, the UNSC under article 16 of the Rome Statute has the authority to suspend or defer, for a period up to 12 months with (indefinite) renewal, any investigation or prosecution. The UN General Assembly also contributes to this system of cooperation through adopting a resolution on the ICC at every annual session. Furthermore, some of the UNGA Committees debate and adopt resolutions relevant to the ICC such as extrajudicial, summary or arbitrary executions.

The Court's effective functioning is also dependent upon the cooperation of institutions beyond the UN system such as the EU. As previously mentioned, universal ratification is a key facet for the success of the ICC, accordingly international organisations like the EU have the capacity to encourage and place pressure in its bilateral relations- as observed above in its bilateral relations with Serbia- with given states that are not a party to the Rome Statute. Moreover, the EU has the capacity to help the ICC establish a culture of accountability by facilitating cooperation at different levels, support, exchange of information, consultations in matters of mutual interest and above all provide technical assistance to third states in the ratification and implementation of the Rome Statute.

6. THE EU AND THE INTERNATIONAL CRIMINAL COURT

6.1. WHY DOES THE EU SUPPORT THE ICC?

The EU has been a staunch supporter of the ICC since its creation in 1998.[55] Some have argued that because of the EU's constitutional features and

52 ICC-ASP/3/Res.1, 4 October 2004, adopted on the basis of Article 2 of the Rome Statute.

53 *Id.*, Article 3.

54 Article 13(b) Rome Statute. The UNSC referred the situation of Darfur, Sudan to the ICC on 31 March 2005. This was the first case that was referred to the Court by the UNSC with 11 in favour and 4 abstaining. UNSC Resolution 1593, 31 March 2005.

55 Since the launch of the first EU Annual Human Rights Report in 1999 the EU has systematically on an annual basis included a section on its commitment to fight against

dependence on the criminal justice systems of its Member States the Union runs the risk of wasting its invested political capital in supporting the ICC and will thus be unsuccessful in doing so.[56] In practice, however, the EU has not only rhetorically[57] supported the Court from the off-set but has also confirmed its commitment through its diplomatic capital and use of financial instruments. The EU has and continues to demonstrate an "unconditional attitude"[58] of support for the ICC. This may be observed in its measures taken within the Union, in its external relations and also between the EU and ICC at the institutional level.[59] Bearing in mind that the Rome Statute does not have a Regional Economic Integration Organisation clause (REIO) and can only be ratified by states, the EU nevertheless holds a special position in the ICC's overarching system of international cooperation.[60]

The EU's vested interest in the effective functioning of an ICC may be explicated on various levels. First, looking at the Treaty on European Union, its objective to "develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms"; "to preserve peace and strengthen international security" and "to promote international cooperation"[61] goes hand in hand with the mandate of the ICC. Moreover, the serious crimes under the jurisdiction of the Court and the fight against impunity of perpetrators are a common concern. Correspondingly, the Union itself has on many occasions articulated and reinforced the fact that "the principles of the Rome Statute of the ICC as well as those governing its functioning, are fully in line with the principles and objectives of the Union".[62] Furthermore the EU in its 2003 European

impunity and its support for the ICC. See EU Annual Report on Human Rights 1999, Section 5.6, p 30. For a more recent account see EU Annual Report on Human Rights 2008, Brussels, 27 November 2008, (14146/2/08), Section 4.6, p 76. See also C. Ryngaert, 'Universal Jurisdiction in an ICC Era: A Role to Play for EU Member States with the Support of the European Union' (2006) 14 European Journal of Crime, Criminal Law and Criminal Justice 46.

56 A. Antonidiadis & Olympia Bekou, 'The European Union and the International Criminal Court: an awkward symbiosis in interesting times', 7 International Criminal Law Review 621 (2007).

57 The EU in various international fora 'reiterates its strong support for the work of the Court'. See Statement by H.E. Antonios Cascais on behalf of the EU, ICC Sixth Session of the Assembly of State Parties, New York, 3 December 2007. See also EU Statement on the International Criminal Court in OSCE Permanent Council no.401, 5 July 2002.

58 V. Martin, 'The two faces of impunity: the EU and the International Criminal Court', FRIDE Comment, December 2007.

59 Above n. 56.

60 Article 87 (6) Rome Statute stipulates the role for intergovernmental organisations as follows: 'The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.'.

61 Article 11 TEU.

62 Recital 3 Council Common Position 2001/443/CFSP 11 June 2001 (O.J.L 155/19, 12.6.2001).

Security Strategy and more recently in its 2008 Report on the Implementation of the European Security Strategy highlights its support[63] and endeavour to broaden its efforts to strengthen the international justice system and human rights through making the ICC more effective.[64] This all has a spill-over effect in the EU's ultimate goal towards creating an international order based on "effective multilateralism"[65] and respect for the (international) rule of law.

The complex architecture of the EU, notably in respects to its pillar structure and corresponding competences, necessitates measures to be taken by the Community, the Union and its Member States as the subject at hand overlaps between the first (Community), second (Common Foreign and Security Policy) and third (Police and Judicial Cooperation in Criminal Matters) pillars.[66] Instruments provided for within each of the pillars have all contributed and played a mutually re-enforcing role in supporting the ICC. The underlying framework for the Union's established relationship with the ICC may be observed in the EU's 2001–2003 Common Positions on the International Criminal Court[67], adopted under the second pillar. The Common Position, the latest version of which dates from 2003, aims to "support the effective functioning of the Court and to advance universal support for the Court by promoting the widest possible participation in the Statute."[68] The adoption of a Common Position on the ICC is significant at both the EU and international levels as it not only defines the approach of the Union in regards to the Court itself but places an obligation on EU Member States to ensure that their national policies are also conformed to the common position.[69] At the international level, it demonstrates its commitment, through a "one voice" approach in its external relations, to the fight against impunity and prevention of the worst crimes known to humanity *inter alia* through an effective functioning international criminal court. In

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63 A Secure Europe in a Better World – The European Security Strategy, Brussels, 12 December 2003, p. 11.

64 Report on the Implementation of the European Security Strategy- Providing Security in a Changing World, Brussels, 11 and 12 December 2008, p. 12.

65 Above n. 63.

66 If the Lisbon Treaty should enter into force the intergovernmental pillar system would be abolished however the Common Foreign and Security Policy would retain its special voting procedures. Furthermore, the EU would acquire legal personality in its external relations. See J. Wouters, D. Coppens and B. De Meester 'The European Union's External Relations after the Lisbon Treaty' in S. Griller and J. Ziller (eds), *Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty*, Springer, 2008, 143.

67 Council Common Position 2003/444/CFSP, 16 June 2003 (OJ L 150/67, 18.6.2003). The 2003 Council Common Position succeeded the Common Position of 20 June 2002 (2002/474/CFSP) (OJ L 164/1, 22.6.2002) and the Common Position of 11 June 2001 (2001/443/CFSP).

68 *Id*. The adoption of the revised Common Position received praise from a number of NGOs leading some to claim that through adopting such a position the EU has 'bolstered international criminal justice'. See Human Rights Watch, 'EU Strengthens ICC Support', Brussels, 16 June 2003.

69 Article 15 TEU.

efforts to follow up the Common Position an Action Plan[70] was adopted in 2004 underlining three main areas: 1) coordination of EU activities 2) universality and integrity of the Rome Statute; and 3) independence and effective functioning of the ICC. In order to carry out and fulfil these three areas, the EU has had to apply instruments from all three pillars which are at its disposal.

6.2. EU-ICC COOPERATION

The first part of the Action Plan focuses on the institutional dimension of the EU and highlights the fact that the pre-requisite to achieving the universality and integrity of the Rome Statute[71] and independence and effective functioning of the ICC[72] is the coordination of EU activities.[73] The purpose of such an institutional focus is to ensure that the various EU bodies (*e.g.* European Commission and European Parliament) are informed of ICC related activities; to facilitate an exchange of views and ideas among EU bodies; to avoid unnecessary duplication; to maximize impact by coordinating EU based initiatives; and to mainstream the ICC within EU activities pertinent to this field.[74] A key instrument in this regard is the EU and national ICC focal points. The EU-ICC Focal Point's responsibilities revolve around facilitating effective coordination and maintaining the consistency of information. This is to be achieved through a number of means, as outlined in the Annex of the Action Plan, such as: establishing appropriate contacts and exchanging information between the ICC, international organizations, third countries and NGOs; identifying opportunities for the inclusion of the ICC on the draft list of issues to be discussion in negotiations and political dialogues; and to liaise with the National Focal Points for the purpose of coordinating the activities of the Union and its Member States. The National Focal Points are established by each Member State to assist with the exchange of information that may be relevant in the implementation of the Common Position. Further, an ICC Sub-area of the Public International Law Working Party (COJUR/ICC) is convened by the EU Presidency a minimum of twice every semester to serve as a coordinating platform to discuss initiatives falling within their respective competence

70 Action Plan to follow up the Common Position, 4 February 2004, Doc 5742/04.

71 Article 2 Council Common Position 2003/444/CFSP, 16 June 2003 (OJ L 150/67, 18.6.2003).

72 *Id*., Article 3.

73 Article 4 of the Common Position confers the task of coordinating measures by the EU and its Member States to the Council for the implementation of Articles 2 and 3. Furthermore, Article 6 notes the Commission's intentions to direct its action towards achieving the objectives and priorities of this Common Position, where appropriate by pertinent Community measures.

74 Section A 1(ii) Action Plan to follow up the Common Position, 4 February 2004, Doc 5742/04.

concerning the ICC. It is the only Working Group that has the tradition to invite NGOs to provide debriefs in the exchange of views, making it unique fora of all of the Council's Working Groups. The effectiveness of the Working Group meetings and decisions taken within very much depends on who is holding the EU Presidency how it prioritises the work of the ICC and the fight against impunity in its agenda. Thus efforts and outcome in this regard vary from semester to semester.[75] Member State coordination in multilateral fora, especially in the ICC's Assembly of State Parties, is also vital for achieving the EU's objectives pertaining to the ICC. In parallel, the European Commission and European Parliament play a more consultative role in its system of institutional cooperation. Lastly, there is a clear ICC related mandate for EU Special Representatives (EUSR)[76], markedly for Sudan, which requires the EUSR to follow the situation and maintain regular contact with the Office of the Prosecutor of the ICC.[77] In view of the recent arrest warrant issued by the ICC for Sudanese President Omar Hassan al-Bashir the EUSR has the potential to play a very important role.[78]

6.3. THE EU AND THE UNIVERSALITY AND INTEGRITY OF THE ROME STATUTE

To achieve the universality and maintain the integrity of the Rome Statute the EU has many instruments at its disposal including political dialogues, demarches, bilateral relations and statements in multilateral bodies. In its efforts to safeguard the integrity of the Statute the EU adopted "Guiding Principles" following the US's proposals to sign bilateral non-surrender agreements with ICC state parties in respect to the conditions to surrender those US nationals that are suspects to the Court. The Principles provide guidelines for Member States that are considering entering into an agreement with the US. It advises those with the intention to do so to include 'appropriate operative provisions

75 The Slovenian Presidency for example was seen as one of the most active in the fight against impunity and proposing initiatives to support the work of the ICC notably with regard to Darfur. Interview conducted with a member of CICC, 6 April 2009, Brussels. This has also been confirmed in Mr Luis Moreno Ocampo's Statement to the United Nations Security Council pursuant to UNSCR 1593 (2005), 5 June 2008, where he stated "The Slovenian presidency has been outstanding in putting impunity at the forefront of the EU agenda".

76 There are a total of 9 EUSR's that cover the following regions and countries: Afghanistan, the African Great Lakes Region, Bosnia and Herzegovina, Central Asia, the Former Yugoslav Republic of Macedonia, the Middle East, Moldova, the South Caucasus and Sudan.

77 Article 3 (f) of Council Joint Action 2007/108/CFSP of 15 February 2007 extending the mandate of the European Union Special Representative for Sudan (OJ L 46 of 16.02.2007).

78 Above n. 75.

ensuring that persons who commit crimes falling within the jurisdiction of the Court do not enjoy impunity'.[79]

The EU has also been very active in promoting the widest possible ratification of the Rome Statute. Since 2002 the EU has carried out over 275 demarches targeting more than 110 third countries and international organizations.[80] The EU has also raised the issue with a number of third countries in its bilateral political dialogues including the EU- China Summit in September 2006 and the EU-India Summit in October 2006. EU efforts to mainstream the ICC in its external relations have become more and more prevalent throughout the years. This may be observed in its recent political initiatives such as the Africa-EU Strategic Partnership: A Joint Africa-EU Strategy[81] and the EU's Strategy for Central Asia[82], both of which encourage ratification of the Rome Statute and effective functioning of the ICC. Additionally, and more remarkably, a first pillar instrument, namely the Cotonou Agreement, has and continues to play a role in promoting principles of international criminal law in 79 African, Caribbean and Pacific countries. The Agreement, amended in 2005, is at present the only legally binding instrument that includes an ICC clause.[83] The clause however is only a "standard clause" which is to be adhered to by the EU in its negotiations of other agreements. This may be observed in its Partnership and Cooperation Agreements (PCAs)[84] and in its Trade, Development and Cooperation Agreements (TDCA).[85] Further, within the framework of the European Neighbourhood Policy the European Commission has included an ICC clause in Action Plans with a selected number of countries.[86] The clause in principle has and continues to only serve the purpose of an "advocacy tool" and arguably has

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79 See the website of the European Commission, External Relations, 'The EU's Human Rights and Democratisation Policy: The International Criminal Court and the Fight Against Impunity,' last updated November 2006. Can be found at: http://ec.europa.eu/external_relations/human_rights/icc/index.htm.

80 For a list of those countries and organisations see Annex of General Secretariat of the Council, 'The European Union and International Criminal Court,' February 2008.

81 Africa-EU Strategic Partnership: A Joint Africa-EU Strategy, Lisbon, 8 and 9 December 2007 (Doc. 16433/07). The Africa-EU partnership demonstrated the commitment of both parties in its fight against impunity.

82 EU Strategy for Central Asia, Brussels, June 2007 (Doc 10113/07). In view of the underrepresentation of Central Asian States in the system of the ICC the EU includes the ratification of the Rome Statute as an objective to be pursued in its partnerships with Kazakhstan, the Kyrgyz Republic, Tajikistan, Turkmenistan and Uzbekistan. Above n. 80, at 11.

83 Article11 Cotonou agreement (OJ L 317, 15.12.2000, p 3–353, amended by OJ L 209, 11.8.2005, p. 27–64.

84 An ICC clause is being negotiated with Indonesia, Thailand, Singapore, Brunei Darussalam, Malaysia, Vietnam and The Philippines. Above n. 80, at 14.

85 An ICC clause is being negotiated with South Africa.

86 These countries include Armenia, Azerbaijan, Georgia, Egypt, Lebanon, Jordan, Moldova and Ukraine.

not been overly effective as it is difficult to implement.[87] The inclusion of such a clause has been read by EU diplomats and analysts in different ways notably with regard to Central Asia; "on the one hand it can be seen as a continuation of the stronger human rights push of EU countries, on the other hand some view it as 'window dressing' to appease criticism".[88] While there has been no recorded impact following the inclusion of these clauses, it nevertheless demonstrates the EU's will and commitment to achieve universal ratification. Other concrete measures taken by the EU include financial and technical assistance to third countries.[89] The framework for technical assistance relies heavily on the deployment of experts by EU Members States, however, EU experts may also be mandated to provide technical assistance such as assisting a third country with technical issues in its implementation of the Rome Statute. With regard to financial assistance the European Commission to promote the adoption of the Rome Statute funded civil society organizations as far back as 1995 under the framework of the now European Instrument for Democracy and Human Rights.[90] Since the adoption of the Rome Statute the Commission has contributed more than 17 million Euros to civil society working and campaigning for universal ratification.[91] Furthermore, EU Member States have been the main contributors of the ICC amounting to 57.4% of the total contributions.[92]

6.4. UNIVERSALITY OF THE ROME STATUTE AND THE CASE OF THE CZECH REPUBLIC

It must be acknowledged that the EU has indeed focused a lot of attention and effort to achieve universal ratification of the Rome Statute outside its borders. However, when looking within its borders the same story cannot be told. One of the EU's own Member States, the Czech Republic, still has yet to ratify the Rome Statute. Although the Common Position was adopted prior to the 2004 enlargement the acceding states nevertheless expressed their will to implement the Common Position[93] even though it would be adopted a year prior to their

87 Above n. 75.

88 A. Rettman, 'EU keen to bring international criminal court to Central Asia,' EU Observer, 14.06.2007.

89 Sections B.3 (ix)-(xi), above n. 70.

90 The 1994 European Initiative on Democracy and Human Rights was succeeded by the European Instrument on Democracy and Human Rights in 2006 (EC) No 1889/2006.

91 Above n. 80, at 16. It should however be highlighted here that since the establishment of the Court the budget lines for such campaigns and projects have decreased.

92 Above 80, at 18. Prior to Japan's ratification in 2007 EU Member State contributions amounted to 75.6% of the total contributions to the ICC.

93 This may be observed in Article 9 of the Common Position in which the Council notes that the acceding countries intend to apply this Common Position as from the date of its adoption.

actual accession to the Union. The Czech Republic was the only country not to comply arguing that it had doubts with whether the Statute was in line with the Czech constitutional order. The necessary attention was not paid to this as it failed to even be mentioned in the 2003 Commission's monitoring report on state preparedness of EU membership.[94] As there is no enforcement instrument[95] at the EUs disposal to force the Czech Republic to ratify the Rome Statute no unconditional pressure was placed on it to do so. Remarkably, this has not affected the EU's credibility to the extent one would expect in multilateral fora, nor in its bilateral relations when putting the issue of universal ratification of the Rome Statue on the table for discussion.[96]

Progress with regard to ratification however has been made, arguably because the Czech Republic would assume the rotating Presidency of the Council of the EU as of January 2009. The Government of the Czech Republic on 23 January 2008 gave its approval to ratify the Rome Statute and submitted its proposal to its Senate accordingly.[97] The Upper Chamber of its Parliament on 16 July 2008[98] endorsed the proposal following proceedings on 17 April in its Permanent Commission of the Senate for the Constitutional Act which deemed the proposal "not unconstitutional".[99] The decision then rested in the hands of the Chamber of Duties (Lower Chamber of the Czech Government), which only recently, on 29 October 2008, approved the ratification of the Rome Statute. The Czech Republic is therefore believed to become the Court's 109th state party.

6.5. THE EU AND THE INDEPENDENT AND EFFECTIVE FUNCTIONING OF THE INTERNATIONAL CRIMINAL COURT

The third part of the Action plan focuses on the independent and effective functioning of the ICC. In this context inter-institutional cooperation between the EU and ICC provides the basis for achieving its objectives. In April 2006 an

94 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 November 2003, (COM (2003)675 final).

95 Against the background of the Common Position being adopted under second pillar matters, the ECJ cannot exercise its powers (Article 46 TEU) in this regard.

96 The ratification status of the Czech Republic has been kept on a lower profile, both by NGOs and the EU itself, compared to that of many non-EU countries such as the US. It has been reported that the Czech Republic's ratification status has thus far never negatively impacted EU demarches to third countries. Above n. 75.

97 Czech Republic Government Resolution no.63 of 23 January 2008.

98 Resolution of the Senate No. 437 of 16 July 2008.

99 Resolution of the Permanent Commission of the Senate for the Constitutional Act and Parliamentary Proceedings No. 8 of 17 April 2008.

ICC agreement on cooperation and assistance[100] was concluded by the EU, marking the first time a regional organizations has ever signed such an agreement with the Court. The agreement underlines a general obligation to cooperate and provide assistance to the Court through for example a regular exchange of information[101], cooperating with and providing information to the Prosecutor[102], the development of training and assistance for judges, prosecutors, officials and counsel in work related to the Court[103] and to take the necessary measures to waive any privileges and immunities, in accordance with all relevant rules of international law, of alleged criminals responsible for a crime within the jurisdiction of the Court.[104] Further to the EU-ICC Cooperation and Assistance Agreement an EU-ICC Implementing Arrangements was finalised in March 2008 for the exchange of classified information.[105] The Agreement as such is more technical in nature and the legal obligations enshrined therein are subject to the Union's responsibilities and competences of the EU Treaty and relevant rules there under.[106] Therefore the likelihood of a legal impasse is not high. Even in regards to the clause on privileges and immunities, as the Community has a Protocol on the Privileges and Immunities[107], a waiver can only be permitted if it is in line with interests of the Communities.[108] The application of the agreement thus provides a balanced approach to achieving an independent and effective functioning Court.

In addition to the EU-ICC agreement, measures have been also taken at the internal EU level. Against the background of efforts to strengthen cooperation between EU Member States in the context of implementing the Common Position, three noteworthy Decisions in the area of Freedom, Security and Justice were adopted under the Third Pillar: a decision setting up a European network of contact points in respects of persons responsible for genocide, crimes against humanity and war crimes[109]; a framework decision on the European Arrest Warrant (EAW) and surrender procedures between Member States[110]; and a

100 EU-ICC Cooperation and Assistance Agreement, 10 April 2006 (OJ L 115 of 28.04.2006). This agreement does not apply to requests made by the ICC to individual EU Member States (Recital 10 of the Agreement) nor does it impact EC competence to achieve its objectives through measures independent of this agreement.

101 *Id.*, Article 7.

102 *Id.*, Article 11. The EU has assisted the Office of the Prosecutor on the situations in Darfur and the Democratic Republic of Congo.

103 *Id.*, Article 15.

104 *Id.*, Article 12.

105 Security arrangements for the protection of classified information exchanged between the EU and the ICC, Council of the EU, Brussels, 15 April 2008 (8349/1/08 REV 1).

106 Article 10 and 12.

107 Protocol on the Privileges and Immunities of the European Communities (OJ 167, 13.7.1967).

108 Article 18 of the EU-ICC Cooperation and Assistance Agreement.

109 Decision 2002/494/JHA of 13 June 2002 (OJ L 167/1, 26.6.2002).

110 Framework Decision 2002/584 of 13 June 2002 (OJ L 190/1, 18.7.2002).

decision concerning the investigation and prosecution of genocide, crimes against humanity and war crimes.[111] These instruments bring forth indispensable elements to the ICC as it provides a solid foundation to bring perpetrators of grave international crimes to justice at both the EU and international levels. Furthermore the decisions have the capacity to facilitate EU Member States to address and deal with such cases nationally.

6.5.1. European network of contact points in respects of persons responsible for genocide, crimes against humanity and war crimes

The European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes is a tool to facilitate cooperation between all 27 Member State through a designated contact point from each State for the "exchange of information concerning the investigation of genocide, crimes against humanity and war crimes"[112] as defined in Articles 6–8 of the Rome Statute. The role of the contact point is to provide, on request and in accordance with applicable national law, any available information relevant to investigations into genocide, crimes against humanity and war crimes.[113] They are also to facilitate cooperation with the competent national authorities.[114] Furthermore, the contact points can exchange information without a request as long as it is within the limits of the applicable national law.[115] The EU's initiative to establish a network of national contact points and specialised units has led various international actors to praise the EU in taking a "leading role in encouraging states to institutionalize their commitment to fight impunity for international crimes".[116] Challenges however have arisen when attempting to operationalise the network of contact points in a systematic fashion. Difficulties including motivating Member States to convene regular meetings, no follow-up sessions in between meetings and an underlying disconnect between the members of the network and the decision makers seemingly continue to arise. To help rectify some of these challenges a permanent secretariat is being considered by the EU in the framework of this network.[117]

6.5.2. EU Framework Decision on the European Arrest Warrant

The framework decision on the European Arrest Warrant exceptionally includes a clause listing "crimes within the jurisdiction of the ICC" as an offense that is in

111 Decision 2003/335/JHA of 8 May 2003 (OJ L 118/12, 14.5.2003).
112 Article 1 (1) above 109.
113 *Id*., Article 2(1).
114 *Id*.
115 *Id*., Article 2(2).
116 Human Rights Watch, 'Universal Jurisdiction in Europe', Section IV Conclusion, 26 July 2006.
117 Above n. 75.

scope of the EAW.[118] The EAW thus provides EU Member States with not only an additional tool for locating and extraditing a person who has been requested by the ICC but also the means to "comply without delay its obligation to cooperate with the ICC as prescribed in Articles 86 and 89 of the Rome Statute".[119]According to this Decision crimes under the jurisdiction of the ICC are not subject to the double criminality[120] requirement to hand over a suspect thus the judicial authority of any Member State is assisted in prosecuting an individual who is suspected of committing an international crime and has moved into another Member State's territory.[121] The very nature of the EAW has the capability to foster enhanced cooperation between Member States themselves and between Member States and the ICC.[122]

6.5.3. EU Framework Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes

The EU's Framework Decision on the the investigation and prosecution of genocide, crimes against humanity and war crimes promotes cooperation between national units to maximise cooperation between law enforcement authorities between "Member States 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 Articles 6–8 of the Rome Statute".[123] In accordance with the Decision Member States are to consider setting up or designating specialist units within the "competent law enforcement authorities with particular responsibility for investigating and, as appropriate, prosecuting the crimes in question"[124] This has been established in Belgium, The Netherlands and Denmark[125] and since 2001 such units have handled more than "80 percent of all international crime cases that have resulted in a conviction of the perpetrator".[126]

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118 Article 2(2) Framework Decision 2002/584 of 13 June 2002 (OJ L 190/1, 18.7.2002).

119 L. Vierucci, 'The European Arrest Warrant and the Prosecution of Crimes Falling within the Jurisdiction of the ICC Statute' in C. Bakker, E. G. Krishnan, L. Vierucci and P. M. Dupuy (eds), *Selected Issues in International Criminal Law*, EUI Working Paper Law no. 2005/02, at 30. See also L. Vierucci, 'The European Arrest Warrant: An Additional Tool for Prosecuting ICC Crimes,' 2 *Journal of International Criminal Justice* 275 (2004).

120 Above n. 118.

121 M. Politi and F.Gioia (eds), *The International Criminal Court and National Jurisdictions*, Aldershot, Ashgate, 2008, 127.

122 Article 16(4) of the Framework Decision, above n. 118. In the event of multiple requests made by a Member State and the ICC the State is to hand over the suspect if the ICC declares that it falls within the jurisdiction of the Court.

123 Article 1 of the Decision, above n. 111.

124 *Id.*, Article 4.

125 For an elaboration of the structures of the respective country's units see Above n. 10 at 27.

126 *Id.*, at 28.

6.5.4. Summary

The three Decisions reinforce a cooperative approach to fighting impunity for the most serious crimes. They moreover provide the means for each Member States to operationally fulfil their obligations as prescribed in the Rome Statute in addition to the EU's Common Position objectives. Although Framework Decisions do not have a direct binding effect[127] they nevertheless have the potential to shape Member State legal systems by "making it compulsory to reach the requested result and set a standard level by which to interpret different national criminal legislations".[128] Such interpretation could as a result generate a harmonizing effect on national criminal legislation within the Union thus allowing for an even stronger and founded form of cooperation in this regard.

CONCLUSION

At present it is difficult to assess the true effectiveness of the International Criminal Court as the ICC's first trial of Thomas Lubanga Dyilo only commenced on 29 January 2009 and the Court still has yet to win its first conviction. While indeed "the measure of success will never be merely its number of prosecutions or convictions, but the degree to which it contributes to establishing a culture of accountability"[129], the future will only be able to inform us about: 1) the extent the ICC serves as a preventative mechanism (ie should the number of cases referred to the ICC decrease that would be one indicator in itself); and 2) the extent articles 86 and 87 of the Rome Statute can be carried out successfully and the impact it can have on a global scale. The recent issuing of the arrest warrant on 4 March 2009 for Omar al-Bashir on charges of war crimes and crimes against humanity will also play a vial role in determining the effectiveness of the Court as without the cooperation of governments it will be nearly impossible to bring him to justice.[130]

The EU's efforts to achieve universal ratification of the Rome Statute and guarantee the effective functioning of the ICC however are something that can be assessed. The EU, as mentioned above, has been a staunch supporter of the ICC since the beginning. Prior to even the adoption of the Rome Statute the EU through its EIDHR budget lines provided funds to civil society for universal ratification campaigns. Since the adoption of the EU's Common Position the

127 Article 34(2)(b) TEU.

128 Above n. 121, at 129. Judgment of 16 June 2005, Case 103/05, Criminal Proceedings against Maria Pupino, ECR I-5825.

129 Above n. 26.

130 See Aegis Trust 'The Enforcement of International Criminal Law,' UK, 9 February 2009. See also The Economist ' Braced for the aftershock,' 7 March 2009.

Union became even more active in its pursuit to achieve the objectives outlined in both the Common Position and EU-ICC Agreement on Cooperation and Assistance. The EU has in each of the pillars adopted measure to ensure the widest possible coverage of all areas relevant to the ICC, notably, its three Decisions adopted under the third pillar. The utilization of financial instruments, political dialogues, demarches and the inclusion of an ICC clause in a broad range of arrangements including the legally binding Cotonou Agreement have all contributed to the universality and integrity of the Rome Statute and the independent and effective functioning of the ICC. It is therefore not surprising that many have and continue to hail the EU as a *frontrunner* in the establishment and processes of the ICC.[131] However, one shortcoming has gone unsaid, this being, internal credibility. Although the failure of the Czech Republic to ratify the Rome Statute after all these years, even while being a part of the EU, hasn't directly impacted EU credibility in its external relations thus far, it nevertheless demonstrates a significant gap/inadequacy at the internal level which does have an impact, for example, in EU Presidency agenda setting. Fortunately this gap is now in the course of being rectified by the government of the Czech Republic, especially seeing that a genuine export of norms can only be truly successful if all EU Member States contribute to its "one voice". As the EU continues in its enlargement it is essential for the EU to take greater account of candidate country approaches to the ICC and international criminal law as such. The situation with the Czech Republic has the potential to repeat itself again with EU candidate country Turkey who also has yet to ratify the Rome Statute.

In spite of all of its positive contributions towards the ICC, the EU can nevertheless enhance its efforts both at the internal and external levels. At the internal level the EU can benefit from fostering a more coherent internal policy. As it has already been observed, each EU Presidency strongly influences how aspects and issues surrounding the ICC get addressed and put on the agenda, accordingly, through making sure a consistent approach is taken in each Presidency concerning ICC matters, more concrete initiatives on a systematic basis could potentially be yielded. The EU can also ameliorate its internal policy in regards to encouraging more coherence between the Member States in respecting international legal obligations and in ensuring that they are using instruments which are at their disposal to the widest extent. One of the most

131 M.L.P Groenleer and L.G. van Schaik, 'The EU as an 'Intergovernmental' Actor in Foreign Affairs: Case Studies of the International Criminal Court and the Kyoto Protocol,' CEPS Working Documents No. 228, 1 August 2005. The Coalition for the International Criminal Court claims that the EU has been a 'leading force in the establishment and strengthening of the ICC'. See website of CICC, European Union. Can be found at: www.iccnow.org/?mod=eu. See also Amnesty International's 'Recommendations on improving the effectiveness of international justice', 31 August 2007 (IOR 53/010/2007) in which it states: 'The EU has played a crucial role in the past two decades in strengthening international justice'. .

noteworthy instruments in this respect is the EU network of contact points, which as previously discussed, does not meet on a regular basis and is also dependent upon who holds the EU Presidency.[132] The assembly of the contact points is a fundamental complementary tool which provides a forum to exchange information and experiences about cases and information for law enforcement professionals and thus has a significant role to play in supporting the ICC.[133] Accordingly, it could be of great value for both furthering EU internal cooperation and towards bringing rise to individual accountability.

At the external level, the EU can benefit from devising specific strategies on key countries with regard to the ratification of the Rome Statute and the obstruction of work of the Court. Firstly, the EU should take a more proactive approach with the US[134], China and Russia in its ratification process, or lack thereof, of the Rome Statute. All three countries are permanent members of the UN Security Council and thus also have veto power. In view of the established role and relationship of the ICC and UNSC it would be of imperative value to bring such members who are in quintessence responsible for international peace and security, in the long term as parties to the Court. Their accession to the Statute, for this very reason, can significantly enhance the effective functioning of the Court. The US, Russia and China being "strategic partners" of the EU places the Union in a position to more stringently encourage ratification, which has not been the case thus far. Furthermore, the EU should develop specific strategies on countries under ICC investigation (e.g. Uganda, DRC and Sudan).[135] This will not only hep bring justice to the victims but will also, in general, strengthen the Union's cooperative approach with the Court.

In sum, the EU has the competence, instruments and capacity to strengthen the ICC and may even be seen as an invaluable institutional partner. The EU can however, through a variety of means, enhance its efforts to further individual criminal accountability both internally and in its external relations. The global criminal justice system holding international cooperation at its crux requires active participants, like that of the EU, to lead by example and to play the role of "surrogate enforcer".[136] And only then can the International Criminal Court and global criminal justice system be effective.

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132 Above n. 10.

133 Above n. 116.

134 See Amnesty International's 'Recommendations on improving the effectiveness of international justice', 31 August 2007 (IOR 53/010/2007), Part D: Integrity of the Rome Statute.

135 Above n. 75.

136 Above n. 23.