

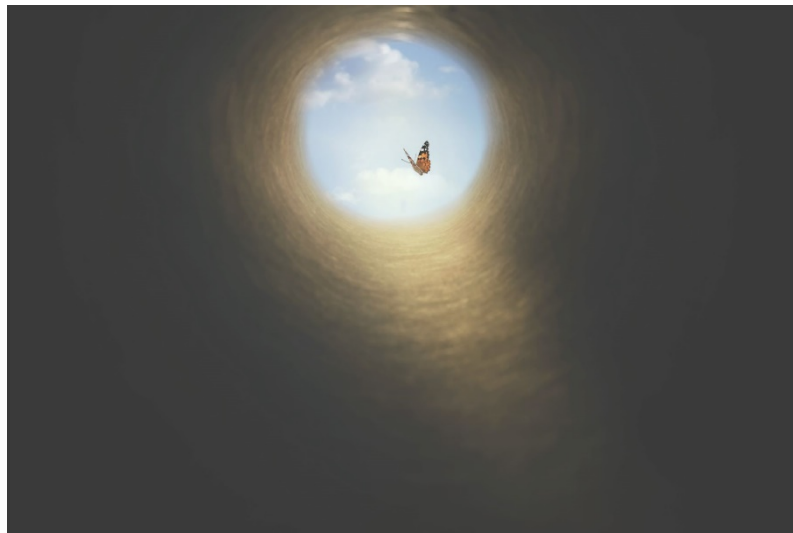
WORKSHOP

Requested by the DROI Subcommittee



Workshop

Envisioning International Justice: what role for the ICC?



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Policy Department for External Relations
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WORKSHOP

Envisioning International Justice: what role for the ICC?

ABSTRACT

The workshop discussed future scenarios for the International Criminal Court (ICC) and the EU's engagement with the court. Against the background of an ongoing review of the Court and the Rome Statute system, the workshop was organised upon the request of the European Parliament's Subcommittee for Human Rights, and followed the appointment of a new ICC Prosecutor. Speakers identified key challenges for the Court, including: the unstable and fragmented political support by states; the mismatch between resources and growing demands for legal action, requiring difficult and well justified choices by the Prosecutor; allegations of bias and of politicisation; and the need for effective communication with victims and affected communities. The workshop underscored the central role of the EU in upholding the ICC as a central pillar of the multilateral system, but drew also attention to complementary avenues for accountability, such as the use of universal jurisdiction. This report brings together the background briefings prepared by law experts for the workshop and a summary of the debate with Members, academics, civil society experts and EU representatives.

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BRIEFING

The role of the ICC since its foundation and possible scenarios for the future: political support and cooperation by states

The European Union (EU) and its Member States have consistently supported the International Criminal Court (ICC), collectively providing political, diplomatic, technical and financial assistance. The EU has shown leadership in the face of challenges such as non-cooperation, and has provided staunch political support to the Court. In an increasingly hostile environment, including political attacks on the Court's existence, the EU has a critical role in combatting contemporary and future challenges. Taking a forward-looking approach and accounting for the outcomes of the Court's recent Independent Expert Review process, this briefing considers how the EU's role could be developed in relation to political support for and cooperation with the ICC. It offers recommendations to guide related future EU policy, which include enhancing the capacity of vital bodies, such as the Focal Point on the ICC, as well as engaging with States to complete cooperation agreements.

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1 Introduction and methodology

The European Union (EU) has taken a leading role in supporting the International Criminal Court (ICC, the Court) from its inception and establishment through to the present day. This support via *inter alia* political, financial and technical means, reflects the EU's commitment in combatting impunity for core international crimes and ensuring that Europe is not a safe haven for perpetrators. With the ICC facing intensifying political attacks on its identity, its staff and overall ability to conduct its mandate, the EU's role in tackling such challenges and generating political support is becoming increasingly important.

The ICC was established in 1998 with the adoption of the Rome Statute, to fight impunity for 'the most serious crimes of international concern', also known as the core international crimes – genocide, crimes against humanity, war crimes and aggression (Articles 1 and 5, Rome Statute 1998). At the time of writing, the ICC counts 123 States Parties: 33 African States, 19 Asia-Pacific States, 18 Eastern European States, 28 Latin American and Caribbean States and 25 Western European and other States. Whilst ratification of the Rome Statute by 123 states is a significant achievement, nevertheless approximately one third of the world's States and territories still remain outside the Court's jurisdiction.

Operating without its own police force or enforcement capabilities means that the ICC is reliant on the cooperation of States to fulfil its mandate. Upon becoming States Parties to the Rome Statute, States are under a general obligation to cooperate with the Court, which includes an obligation to: arrest and surrender; gather evidence; and establish national procedures that would enable them to execute all forms of requested cooperation (Articles 86 and 88, Rome Statute 1998). Despite this, non-cooperation remains a significant challenge for the ICC, particularly in regard to the arrest and surrender of suspects (UNGA, 2020; Bekou, 2019; Zhou, 2006). States' refusal to fulfil arrest warrants or investigate and prosecute alleged crimes not only hinders progress on situations (such as Libya) but also undermines the Court's ability to deliver its mandate (ICC, 2021f; Tladi, 2015). States' cooperation and support for the Court in the face of non-cooperation are therefore vital; this includes consistent political and diplomatic support from the EU and its Member States (ICC, 2019a; UNGA, 2020).

Challenges facing the Court regarding cooperation and political support are combined with an increasing workload and limited resources. The ICC has opened preliminary examinations into 27 situations:

- 16 were completed with a decision to open an investigation (Uganda; Democratic Republic of the Congo; Darfur, Sudan; Central African Republic I; Kenya; Libya; Côte d'Ivoire; Mali; Central African Republic II; Georgia; Burundi; State of Palestine; Bangladesh/Myanmar; Afghanistan and the Republic of Philippines; Venezuela I)
- 6 ended with a decision not to proceed (Registered Vessels of Comoros, Greece and Cambodia; Gabon; Honduras; Republic of Korea; Iraq/UK; Colombia)
- 3 are ongoing (Bolivia; Guinea; and Venezuela II)
- 2 preliminary investigations (Nigeria and Ukraine) were completed with the decision on opening an investigation to be discussed with new Prosecutor Mr Karim A.A. Khan QC (ICC, 2020).

To date, there have been 30 cases before the ICC and a total of 46 defendants (ICC, 2021a; 2021b).

In 2020 an Independent Expert Review (IER) took place which focused on identifying ways to strengthen the ICC and the Rome Statute System in order to 'promote universal recognition of their central role in the global fight against impunity and enhance their overall functioning' (IER, 2020). Accounting for this as well as the likely outcome of the ICC's internal review process and resultant Action Plan, this Briefing begins by examining the main historic trends in global political support for the Court (ICC, 2021e). It then suggests likely developments and possible scenarios in relation to universality, respect for the integrity of the Court

and cooperation with investigations by States Parties. The future role of the EU as well as recommendations will be integrated throughout these sections. The final section of the Briefing specifically explores the EU's future role in supporting initiatives which strengthen political support for and combat attacks on the ICC, before making related recommendations for the EU.

This Briefing is based largely on desktop research, which involved sourcing primary and secondary documents emanating from: the EU and its Member States; the ICC and its States Parties; and third countries. Other sources include reports by international, regional and non-governmental organisations (NGOs), as well as academic publications. Possible scenarios for the ICC have been developed through a qualitative analysis of historic trends, which takes into account both the Court's forward planning and the global political context.

2 Key trends in global political support for the ICC

As the first international organisation to sign a cooperation agreement with the Court, the EU has consistently shown leadership both on cooperation and political support (ICC, 2006). This includes working closely with the ICC, consulting and exchanging information on matters of mutual interest, as well as encouraging Member States to comply with all Court requests and adopt its framework agreements to enhance cooperation (European Parliament, 2011; Austrian Presidency, 2018). Accordingly, with all EU Member States being States Parties to the Rome Statute, the EU is one of the ICC's strongest supporters. The EU's efforts to enhance cooperation and strengthen global political support for the ICC remain vital as the Court has, in recent years, faced challenges with regard to achieving universality, preserving its integrity and tackling non-cooperation by States.

Activities of the Court such as preliminary examinations and investigations have an effect on political support for the Court, including efforts to achieve universality. There is a negative effect where universality aims have been undermined by the withdrawal or threat of withdrawal by some States Parties who have been the subject of preliminary examinations or investigations. For example, in response to ICC proceedings against its sitting president and vice-president, Kenya proposed an ICC withdrawal strategy to the African Union (AU). This included an attempt to amend the Rome Statute so as to grant immunity to sitting heads of State and led to the Kenyan parliament passing a law on withdrawal, which has yet to be enacted (Bekou, 2018; Mills and Bloomfield, 2017). This is part of a trend, with some States withdrawing political support for and cooperation with the Court upon coming under its scrutiny. Between 2016 and 2018, Burundi, the Gambia, the Philippines and South Africa all gave formal notice of their intention to withdraw from the Statute (Rome Statute, 2016a; 2016b; 2017; 2018). However, the Gambia revoked its decision to withdraw in February 2017, while South Africa has instead pursued a 'compliance road map' (ICC, 2017a; Rome Statute, 2017; ICC, 2017c; Keppler, 2017).

The withdrawal of Burundi and the Philippines became effective on 27 October 2017 and 17 March 2019, respectively (ICC 2017d; 2021g). Both States withdrew from the Rome Statute after rejecting the ICC's decision to open preliminary examinations (and then investigations) on their territories (ICC, 2021g; 2021i; Singh, 2019). However, the ICC still has jurisdiction to investigate crimes committed from the date of a State's ratification until the date of its withdrawal (ICC, 2017b). Notably, shows of strong political support for the Court in response to withdrawals or threats of withdrawal mean that there has not been a 'mass exodus', as may at one point have been feared (BBC, 2017). For example, whilst support for and cooperation with the ICC severely declined within the Philippines, its decision to withdraw sparked widespread condemnation (ICC, 2018; Coalition for the ICC, 2018). Similarly, whilst Burundi's withdrawal was detrimental for universality aims, it did not start a trend of African States' withdrawals and there has since been increased support for the Court within the Gambia and the AU (Reinold, 2018). Notably, the African Union adopted its Transitional Justice Policy in 2019, which includes provisions on prosecuting serious crimes and in particular the adoption of relevant laws which are reflective of international crimes (AU,

2019). The EU also played a prominent role by demonstrating its commitment to the Court through statements which expressed support for the Court and regret for State withdrawals (EEAS 2018; 2017).

The Court has also faced withdrawal of political support and a lack of cooperation from three of the five permanent members of the United Nations Security Council (UNSC), namely, China, Russia and the United States (USA). The 2020 IER found that in recent years 'attitudes in the [Security] Council to the Court have become distinctly less positive' (IER, 2020). ICC-UNSC relations were already limited as China has neither signed nor ratified the Rome Statute, whilst the USA and Russia had signed but not ratified the Statute. However, their signatures have since been withdrawn with Russia strongly criticising the ICC following publication of the 2016 Report on Preliminary Examination Activities, which detailed the Ukraine situation (ICC, 2016; Walker and Bowcott, 2016). Although Russia's withdrawal of its signature has no legal or practical impact on the work of the Court, it was symbolic and sent a clear political message. In response, former EU High Representative Federica Mogherini made a statement confirming continuing EU support for the Court and regretting Russia's decision (Reuters, 2016).

Whilst it appears that there is little prospect of Russia acceding to the Rome Statute, there have been some positive steps taken in neighbouring states which could extend the ICC's influence in the area and increase political support for the Court. Most notably, in October 2021 Ukraine confirmed its commitment to ratify the Rome Statute (EC, 2021b). This followed a lengthy period of engagement with the Court, beginning in 2007 when Ukraine became the first non-ICC member state to ratify the Agreement on Privileges and Immunities of the ICC. The ICC Prosecutor then opened a preliminary investigation of the situation in Ukraine during 2014 which was concluded in December 2020 and is currently awaiting authorisation from the Pre-Trial Chamber (ICC, 2020). Similar positive steps have also been taken in Georgia who ratified the Rome Statute in 2003 and subsequently implemented legislation to allow for full cooperation with the Court. A *proprio motu* investigation was then opened in 2016 and remains ongoing. Although this was the first ICC investigation outside of Africa, progress has been slow which may have a negative impact on future cooperation (IER, 2020). As such, the EU should provide political and diplomatic support to the ICC's preliminary examination in Georgia in order to encourage compliance with ICC requests and a swift conclusion of the investigation.

As Belarus has neither signed nor ratified the Rome Statute, there is reliance on a referral by the UNSC to provide the ICC with jurisdiction to investigate alleged crimes, such as arbitrary imprisonment, torture, inhuman treatment and enforced disappearances (Busol, 2020). As Russia is a permanent member of the UNSC with veto power and has close ties to Belarus, it is likely to block any attempt to pursue such a referral. Despite this, steps have been taken to address the allegations of abuses within Belarus, which could lead to future ICC action. More specifically, in September 2021 the European Parliament (EP) issued a resolution on the situation in Belarus (European Parliament, 2021e). This followed a period of extended EU support, including EU Council conclusions on the situation and EU support to the International Accountability Platform for Belarus (IAPB), an organisation which seeks to collect, verify and preserve evidence of serious human rights violations within Belarus (EEAS, 2021; EC, 2021a). The EU should continue to engage in such initiatives, thereby urging Belarus to address the allegations of human rights abuses and fostering political support for the ICC within this area.

The importance of political support for the Court and the impact which Court activities can have on political relations is perhaps best illustrated by the USA-ICC relationship. Whilst the USA had communicated its intention not to ratify the Rome Statute in 2002, it had since supported ICC activities, being for instance a critical actor in the transfer of Bosco Ntaganda and Dominic Ongwen to the Court in 2012 and 2015, respectively (HRW, 2020). The USA has also supported the Court by offering rewards for information on fugitives and sharing information (US Department, 2013; Clark, 2018; Ntaganda, 2019). However, USA-ICC relations deteriorated during the Trump administration, which actively opposed the Court. In response to

the Palestine preliminary examination and the Afghanistan investigation, the USA engaged in political attacks including an Executive Order issued on 11 June 2020 which authorised visa restrictions and economic sanctions on certain persons associated with the ICC (Executive Office of the President, 2020; Scheffer, 2020). This prompted a show of political strength in support of the Court, with commentators calling, in particular, for the EU and its Member States to show leadership on this issue (Leicht, 2020).

Although USA-ICC relations have since improved under the Biden administration, including the removal of US sanctions, the USA has continued to oppose the ICC's attempts to investigate the Afghanistan and Palestine situations (HRW, 2020). Whilst the EU has typically supported the ICC's investigation into Palestine, not all EU Member States support this decision. Hungary has disputed the ICC Prosecutor's statement and the Court's affirmation of its jurisdiction in the situation (Coalition for the ICC, 2021). Despite this, the EU's ongoing commitment, including restating its 'unwavering' support for the Court, has provided a significant rebuttal in the face of political attacks (HR/VP, 2020b). This support remains vital, particularly given the ICC Prosecutor's recent decision to resume investigations in Afghanistan but limit the focus to alleged crimes carried out by the Taliban and so-called Islamic State – Khorasan Province (IS-K) (ICC, 2021k). Whilst this announcement to deprioritise investigations into US actions in Afghanistan may improve USA-ICC relations, the decision was almost immediately met with allegations of selectivity, double standards and bias, even among those who have long supported the Court (ACLU, 2021; Deutsch and Berg, 2021; Al Jazeera, 2021).

The ICC must also maintain a relationship with China as an active non-State party. Whilst China has neither signed nor ratified the Rome Statute, it did engage in negotiations on the establishment of the Court, providing advice and making influential suggestions (Jianping and Zhixiang, 2005). Since then, China has maintained a dialogue with the ICC and remained involved in its developments (Zhu, 2020). This has included engaging in meetings of the Assembly of States Parties (ASP) as an observer and contributing to discussions of the Special Working Group on the Crime of Aggression (Zhu, 2015). However, despite these positive engagements, China has also been critical of the Court, questioning its application of rules as well as the partiality of preliminary examinations and investigations (ASP, 2017). On 6 July 2020, the Court received a communication alleging that Chinese officials are responsible for acts amounting to genocide and crimes against humanity being committed against Uyghurs and other Turkic minorities (ICC, 2020). The communication asserted that these acts fall within the territorial jurisdiction of the Court because the crimes (including deportation) are in part occurring on the territories of States Parties, Tajikistan and Cambodia (ICC, 2020). However, the Office of the Prosecutor found that the Court did not have territorial jurisdiction, since the *actus reus* of each alleged crime appears to have been committed solely by nationals of China within the territory of China (ICC, 2020). The senders have since communicated a request for reconsideration pursuant to Rome Statute Article 15(6), on the basis of new facts or evidence (ICC, 2020).

In response to allegations of acts amounting to core international crimes, the EU has imposed sanctions on four Chinese individuals and a Chinese entity, resulting in counter-sanctions by the People's Republic of China against Members of the European Parliament (MEPs), European diplomats and think tanks (European Parliament, 2021c; HRW, 2021c). On announcing their counter-sanctions, China's Foreign Ministry spokesperson described the EU's allegations as 'nothing but lies and disinformation' which 'severely harm[s] China's sovereignty' (Ministry of Foreign Affairs of the PRC, 2021). The spokesperson then urged the EU to 'reflect on itself', redress its 'mistake' and 'stop lecturing others on human rights and interfering in their internal affairs' (Ministry of Foreign Affairs of the PRC, 2021). This communication indicates that the pursuance of an ICC case on this situation will likely increase political friction and has the potential to further polarise EU-China positions. Despite this, alongside stronger measures, such as sanctions, the EU should seek to include discussion of the treatment of Uyghurs and Turkic minorities in its relations with China and keep the issue prominent. The EU should also take into account the EP Resolution of September 2021 which urged the EU to adopt a new EU-China strategy that focuses on the Chinese government's human rights violations (European Parliament, 2021d).

While some States have threatened to withdraw as a result of ICC activities, others have called into question the integrity of the Court. Criticisms about alleged selectivity in deciding which situations to investigate and prosecute have also created political tensions which have negatively affected political support for the ICC. In particular, the AU has made numerous allegations of selectivity, with several members lamenting a perceived bias against Africa (Mills and Bloomfield, 2017). However, there is no consensus, as various AU States have also supported the Court and, of the 10 investigations into AU States, only Kenya, Côte d'Ivoire and Burundi were opened following *proprio motu* initiatives by the Prosecutor. Sudan and Libya were referred by the UNSC, while Democratic Republic of the Congo, Uganda, Central African Republic I, Mali and Central African Republic II were opened following self-referrals. The argument of selectivity or bias against African States is therefore weakened by the fact that only three of the ten investigations into AU States were initiated by the ICC Prosecutor, while the other seven stem from referrals.

Furthermore, the AU has also taken steps towards a regional mechanism for implementing international criminal law through the Malabo Protocol which, if it comes into effect, will empower the Statute of the African Court of Justice and Human Rights (ACJHR) to exercise jurisdiction over international crimes (Chella, 2021). If ratified, the Protocol could complement the ICC and provide assistance by laying the foundation to link mid-level to senior perpetrators (Nimigan, 2019). However, the Protocol is not without problems, with Article 46(a)bis granting immunity to serving Heads of State and senior state officials, questions around resources and a lack of formal recognition from the ICC (Chella, 2021).

One clear trend is the correlation between political support for the Court and the cooperation of States with investigations. This may be evident where States have failed to comply with their cooperation obligations (such as South Africa) and subsequently withdrawn political support for the Court, or where States have withdrawn their political support for the Court and subsequently stopped cooperating (such as the Philippines). Additionally, political support from other States and regional organisations (notably the EU) can increase cooperation with ICC requests. The US Bush administration, for example, put other governments under pressure to enter into bilateral agreements requiring them not to surrender US nationals to the ICC (HRW, 2020). However, this undermined US credibility and hence it subsequently prompted the USA to become more supportive, *inter alia* by voting for the UNSC to refer the situation in Libya to the Court in 2011 (HRW, 2020).

Whilst the Court has acknowledged that its decisions on how and where it undertakes activities will create tensions with States and other organisations, it has also recognised that these tensions will be an inevitable feature of executing its mandate (ICC, 2019a). As such, the Court is planning strategies to: foster political support; engage in and promote dialogues with situation countries; mitigate the effects of a volatile work environment; monitor evolving situations; and manage risk (ICC, 2019a). It will be important for the EU to engage with these activities and assist the Court in efforts to encourage global political support.

Hence, it becomes clear that political support for the ICC is vital not only for ensuring fulfilment of its mandate but also increasing States' cooperation with ICC requests. Accordingly, there are several emerging trends about political support for the Court which are of concern for the EU's future role: States using their status as parties to the Rome Statute as leverage and threatening to withdraw or withdrawing from the Rome Statute; a lack of cooperation and withdrawal of political support by some permanent members of the UNSC; and States or regional organisations, such as the African Union, questioning the ICC's impartiality and integrity.

Additionally, another future trend of which the EU should also be mindful is the potential recognition of the newly defined 'ecocide' as an international crime. An Independent Expert Panel for the Legal Definition of Ecocide defined it as 'unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts' (IEP, 2021). The EU should therefore remain engaged in discussions on this proposed new crime,

including potential clarifications or amendments to the draft definition. Whilst the inclusion of ecocide as a new international crime has received noticeable support from a large majority of States, it may not be well received by all States, in particular China, given President Xi's noticeable absence at the recent 2021 UN Climate Conference (COP26) (Harvey, 2021). The EU should therefore be willing to assist in navigating both the definition and any future issues which the Court may face within the wider context of the global community. It should also be mindful of alternative ways in which environmental harm could be prosecuted by the ICC, including through an application of the current offences of war crimes and crimes against humanity (Gillett, 2017). However, the Court has a recognised mandate gap with only one direct reference to the natural environment in the Rome Statute under Article 8(2)(b)(iv), which prohibits: 'Intentionally launching an attack in the knowledge that such attack will cause [...] widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated' (Rome Statute, Article 8). Whilst this provision directly prohibits attacks on the environment, it is problematic to implement owing to a high cumulative threshold requiring 'widespread, long-term and severe' damage, a challenging 'clearly excessive' proportionality test as well as the requirement of intent. Additionally, the provision applies only to international armed conflicts.

3 Future developments in political support for the ICC

In light of these trends, expanding workload and an increasingly hostile environment, the Court's reliance on the political will of States, the collective support of the international community and supportive EU initiatives is as critical as ever to delivering its mandate. This is especially so given the recognised relationship between political support and cooperation with the Court by States. As such, there are three interconnected or overlapping areas in which political support is vital: achieving universal ratification of the Rome Statute; ensuring respect for the ICC's integrity; and encouraging cooperation with ICC activities. In particular, political support can challenge non-cooperation with investigations or obligations which has hindered the arrest and surrender of suspects (such as the outstanding warrant for former President of Sudan, al-Bashir), as well as stifled progress on specific situations, such as Libya (Bekou, 2019; Zhou, 2006; ICC, 2019b; 2021f; Tladi, 2015). Cooperation will continue to be vital for the Court and the issue of non-cooperation is likely to maintain its current trend of being related to political support. Simultaneously, with an increasing trend of situation countries making political attacks on the Court or challenging its integrity in the face of Court activities, political support will become increasingly crucial to both combat attacks and support the Court in executing its mandate. Moreover, ratification of the Rome Statute and the pursuit of the Court's universality aims will continue to be a key trend which must be supported.

3.1 Ratification of the Rome Statute and universality aims

The Rome Statute is open to ratification or accession by all States. Achieving universal ratification would provide the Court with a global reach, enhance ability to carry out its mandate and improve cooperation by increasing the number of States with which the Court works. Having achieved 123 States Parties, the ratification rate has slowed down with only four countries added since 2013: Côte d'Ivoire in May 2013; Palestine in April 2015; El Salvador in June 2016; and Kiribati in November 2019.

Achieving universality continues to be a strategic priority for the Court's organs, with Strategic ICC Presidency priorities including external relations, such as steering the Court's efforts to promote global ratification of the Rome Statute (ASP 2020; 2021). Similarly, the Judiciary's expected results, performance indicators and targets for 2021, specifically objectives 5-8 (strategic Goals 4-5 from the Registry Strategic Plan 2019-2021) include: further accession to/ratifications of the Rome Statute; coordinating efforts with other stakeholders to highlight the importance of universality and encourage States to ratify the Rome Statute; and achieving one new accession to the Rome Statute (ASP, 2020; ICC 2019a). The Division of External Operations' expected results, performance indicators and targets for 2021 also include the

promotion of universality, with 24 States engaged in processes such as communications, meetings and missions leading towards ratification/accession of the Rome Statute (ASP, 2020). Currently, one of the most noticeable developments in ratification includes the Sudanese Council of Ministers' historic announcement that Sudan intends to ratify the Rome Statute (PGA, 2021; Mahdi and Maunganidze, 2021). This has been followed by the signing of a new Memorandum of Understanding between Sudan and the ICC, which seeks to ensure greater cooperation (ICC, 2021i). The ICC is therefore on target to achieve one more accession/ratification if the Sudanese Council is willing and able to continue the ratification process. It has been argued that what is now essential, along with fulfilling the ratification process, is for the Sudanese Council to translate its commitment to the ICC into action by also transferring outstanding fugitives, al-Bashir, Haroun and Hussein (HRW, 2021b). Notably, it is not possible to posit future scenarios with Sudan as a State Party to the Rome Statute owing to the military coup which took place in October 2021 and created uncertainty around the fulfilment of commitments to the Court. However, open dialogues, such as the recent UN Human Rights Council Special Session on Sudan, should continue to be undertaken in order to support relations with the Court (UNHRC, 2021). One future scenario which the EU should consider in order to build upon Sudanese developments is the ability of the Union and its Member States to work with the ICC to establish dialogues with other non-States Parties. Such dialogues would seek to highlight the benefits of joining the Rome Statute including: strengthening States' own criminal justice systems; demonstrating commitment to international law; supporting victims; and preventing or deterring future crimes (ICC, 2021d).

Another future scenario for EU consideration is the continuation and upscaling of strategies which seek to overcome obstacles to universality, with a focus on tackling related political challenges. In particular, the failure by three of the five permanent UNSC members to ratify the Rome Statute will remain a major setback in efforts to achieve universality and hinder the UNSC's ability to make referrals to the Court, as seen with Myanmar and Syria (Sweeney, 2019). In order to counter some of these limitations brought about by the most powerful States, the EU could build upon its re-commitment to defending the Court from external interference, which should include urging the USA to engage with the Court (EEAS, 2020a). Moreover, the EU could also become involved with calls for the USA to view ICC investigations into Afghanistan and Palestine through the broader lens of a global fight against impunity and relate the ICC's work to US policy goals (HRW, 2021a). To achieve such aims, the EU must also ensure that its own Member States are striving to achieve universality. Currently, that includes increasing ratification of the Kampala amendments (see European Parliament, 2021a). Hence, the EU must call upon both Member States and third States to ratify the aggression amendments, which currently have only 39 ratifications.

Finally, it will be important for the EU to continue with existing aspects of its universality campaign, which has seen 'ICC clauses' included in 15 agreements with third States and international organisations. Serving as an opening for political dialogue and enhanced political support for the Court, ICC clauses should remain part of the EU's future perspective in light of their ability to prompt domestic legislation developments on core international crimes and provisions for cooperation. This should form part of a multipronged approach by the EU which combines ICC clauses in treaties and negotiations with political pressure.

3.2 Respect for the ICC's integrity

The Rome Statute's integrity is one of four key priorities within the EU's current policy framework on support to the ICC, for which the EU is adopting a multi-pronged approach. Respect for ICC integrity implies protecting core principles as well as reconciling tensions between the principle of legality and political considerations (Bekou, 2014; Council of the EU, 2015). To achieve these aims, the EU conveys political support through statements and resolutions on important developments, such as: elections to the Court's organs; issuance of arrest warrants; transfer of the accused; delivery of judgments; and submission of

referrals (HR/VP 2011a, 2011b, 2011c, 2021; European Parliament, 2018). The EU's support regarding integrity is vital in the context of increased political opposition to the Court, which, as the IER also recognised, has seen questions raised about integrity of the Judiciary and Office of the Prosecutor (OTP) (IER, 2020). One future scenario for the EU is an effort to both continue fostering as well as upscaling its current engagements with the Court, particularly through the ICC Focal Point (within the European External Action Service – EEAS) as well as the EP's activities, which should continue meeting with the ICC Prosecutor to be directly appraised of the challenges facing the Court (via its Human Rights Subcommittee – DROI).

The EU has also taken a clear stand when the ICC's mandate has been put at risk by practices adopted by non-States Parties, such as the aforementioned bilateral immunity agreements pushed by the USA (Benzing, 2004). As such challenges will continue to arise, the EU should operate mindful of a future scenario in which there is a growing need to respond to challenges on the Court's mandate or integrity. In relation to US bilateral immunity agreements, the European Parliament was requested to assess compatibility with the Rome Statute, expressly finding such immunity agreements to be inconsistent (Council of the EU 2003c; European Parliament 2002b). Similarly, in response to US sanctions on ICC personnel, the EU High Representative Josep Borrell released a statement expressing concern about the measures, with some EU Member States (Belgium, Estonia, France, Germany), who are/were also members of the UNSC, holding a virtual stakeout in support of the Court (EEAS, 2020a; 2020b). This was further buttressed by a statement in support of the ICC, released by 67 States Parties, including all EU Member States apart from Hungary and Poland. The EU authorities' actions in this instance thus helped preserve the ICC system's integrity and should be replicated in the future with any similar scenarios to continue promoting respect for the Court's integrity. More importantly, wherever possible, the EU should work towards a future perspective in which the Union is able to adopt a common statement on such issues, ensuring that it also engages in dialogues with Member States who do not agree with the growing consensus, in order to work towards unanimity. This is particularly so in the case of fundamental issues such as the Court's integrity, in relation to which a lack of unanimity would weaken the EU's stance.

The Court's integrity has also been challenged with allegations of selectivity. The EU should therefore consider related future scenarios in which there will be a growing need to counter such arguments by increasing public education about the Court, thereby combatting mis-information or anti-ICC propaganda. This could include: disseminating public information; engaging in workshops and seminars; as well as providing clarity for Court activities. The EU should also continue to exert political pressure on non-Member States to ensure that the ICC is not perceived as a political institution and that no States are beyond the Court, as can be seen for example regarding the situation in Syria. Indeed, in its Council conclusions and a 2017 EP resolution, the EU has repeatedly called for the Syrian situation to be referred to the ICC. Similarly, when China and Russia vetoed a 2011 draft resolution to refer this situation to the ICC, the European Parliament deplored the veto's use, calling for reform of the UNSC (European Parliament 2017b; Sweeney 2019). More recently, the European Parliament has again condemned Russia's 16 vetoes, with the support of China, recalling that the ICC 'should remain the primary jurisdiction for international justice' for core international crimes (European Parliament, 2021b). The EU should therefore continue to call for reform in relation to the veto's use and seek to decrease any political implications stemming from Court activities. Additionally, where situations of grave concern continue to occur without recourse, the EU should continue to call for ICC referral, for example in the case of Syria. This might include encouraging Member States to exert political pressure on the two vetoing States within the UNSC (European Parliament, 2021b).

3.3 Cooperation by States Parties with ICC investigations

The ICC is reliant on States' cooperation, given the absence of enforcement capabilities. Although States are under a general obligation to cooperate with the Court, non-cooperation will remain a significant challenge for the ICC, particularly in relation to: the fulfilment of arrest warrants; the undertaking of

preliminary examinations; and support for ICC investigations (Bekou, 2019; Zhou, 2006). For example, regarding the two UNSC referrals (Sudan and Libya), the IER found at least 15 instances of non-cooperation by States Parties (IER, 2020). Despite this, positive steps have more recently been taken towards greater cooperation by States Parties through instruments such as cooperation agreements and memoranda of understanding. Most noticeably, in October 2021 the ICC concluded its preliminary examination of the Colombian situation by setting up a Cooperation Agreement with the Government (ICC, 2021m). Furthermore, in November 2021 the ICC Prosecutor signed a Memorandum of Understanding with Venezuela to facilitate cooperation and assistance with its investigation (ICC, 2021n; Human Rights Watch, 2021d). This continues the new Prosecutor's approach, having also completed a cooperation agreement with Sudan, and suggests that such agreements will be a key future aspect of the Court's work.

The EU has actively encouraged Member States to adopt framework agreements to enhance cooperation (European Parliament, 2011; Austrian Presidency, 2018). The Council has also included cooperation among the top four priorities in the EU-ICC relationship, ensuring that it is a regular item on the International Criminal Court sub-area of the Public International Law Working Group's agenda (Council of the EU, 2011a; 2013). Similarly, the Commission has supported the ICC in efforts to counter non-cooperation, providing funding for booklets which explain arrest procedures as part of a broader, arrest-focused, media campaign (UNGA, 2020). Accordingly, the EU should seek to build on its existing initiatives, mindful of a future scenario in which it seeks not only to remedy cooperation issues, but also to ensure that the Court receives political support in the face of non-cooperation. This should include consistent political and diplomatic support by the EU and its Member States.

One ongoing issue which the EU must factor into its future perspectives is the failure of some States to arrest or surrender suspects (Bekou, 2019; Zhou, 2006). Potentially all future scenarios will be affected by issues in relation to arrest and surrender, which may be a perennial problem for the Court, and will require efforts to address outstanding warrants as well as political pressure to ensure that new requests are fulfilled. By 10 September 2021, the Court had issued 36 arrest warrants, of which: 20 have been implemented; 3 have been withdrawn following the suspects' deaths; and 12 remain outstanding, with suspects still at large (ICC, 2021a). The ICC has recognised that these outstanding arrest warrants as well as the arrest and surrender of individuals subject to ICC warrants constitute a 'critical challenge' (UNGA, 2020). It has encouraged States Parties to provide the necessary cooperation and assistance to execute arrests and surrender those individuals whose warrants remain outstanding (UNGA, 2020). The EU should therefore continue to urge States to comply with requests by the Court, taking all necessary steps to facilitate cooperation (European Parliament, 2011). This should include applying political pressure on States Parties to comply with arrest warrants or transfer suspects into ICC custody.

The EU's future perspective should include tactful approaches on cooperation issues which address root causes. For example, the IER found that lengthy preliminary examinations (as is the case with Georgia which has been ongoing for 8 years) lessen the potential for future cooperation, alongside having negative effects for victims and witnesses, as well as the limited Court's limited resources (IER, 2020). The EU should therefore work with the Court in considering ways of expediting justice.

Additionally, increased clarity should be considered in relation to cooperation, as the lack of timelines or benchmarks for states during examinations has led to some states intentionally delaying providing assistance to the OTP, manifested in minimal cooperation and 'inconsistent, insufficient, irrelevant, or delayed information' (IER, 2020). As such, the IER recommends that the OTP should consider adopting an overall strategic plan for preliminary examinations, which should be a living document prepared on the basis that the duration of such examinations should not exceed two years (IER, 2020). It was recognised, though, that imposing such time limits could be counterproductive if they are misused by governments and other parties who oppose ICC intervention. Such an imposition could result in delayed cooperation in

order to exhaust the time limit deliberately (IER, 2020). Hence, rather than imposing strict deadlines, benchmarks could be used to increase cooperation and discourage intentional delays by those who seek to frustrate the Court's work (IER, 2020).

The EU should similarly consider the IER suggestion that greater transparency on preliminary examinations would improve the prospects of cooperation from States Parties and non-States Parties (IER, 2020). In order to acquire greater cooperation for evidence collection activities and build stronger partnerships, it has been suggested that there needs to be greater awareness of the Court's mandate, particularly regarding its Investigations Division, through dissemination of a draft policy paper on principles, practices, standards and strategies used in OTP investigations (IER, 2020). More specifically, long-term situation-specific investigative strategies could be developed which would include 'cooperation prospects, partners and stakeholders' alongside investigation goals and necessary resources (IER, 2020).

Beyond the preliminary examination stage, ICC investigations also require cooperation from States Parties, national governmental authorities and other key entities. In particular, the IER recognised that requests for judicial cooperation and a strong cooperation framework relating to witnesses are also of particular importance (IER, 2020). Given the ICC's limited resources and broad mandate, the EU should continue working towards establishing and strengthening cooperation agreements with national authorities in order to conduct effective and efficient investigations (IER, 2020). As previously recognised, this may include discussion of such agreements during the EU's bilateral negotiations and relations. This need for increased cooperation has also been recognised in the OTP's Strategic Plan (ICC, 2019a). The EU should focus particularly on areas where it can provide significant support. For example, giving political support for cooperation in line with IER Recommendation 272, which states that the OTP should develop strong partnerships and enter into Memoranda of Understanding with States Parties as well as other key actors (IER, 2020). Furthermore, the EU can also support or engage with knowledge exchange activities (through cooperation with Special Advisors appointed by the Prosecutor), following IER Recommendation 273 that the OTP should consider requesting assistance from the ASP in raising awareness of its needs to States Parties (IER, 2020; ICC, 2021j).

4 The role of the European Union

The EU is recognised as one of the ICC's strongest supporters and has made ratification of the Rome Statute a condition for Membership. It has shown strong diplomatic and practical leadership on: human rights and the rule of law; the observance of international law; and the promotion of peace and security (Art 2, 3 and 21 of the Treaty on European Union (EU, 2012)). The EU has a wealth of tools at its disposal both to enhance political support for the Court and encourage cooperation with Court requests. These tools include policies, bodies, funding, technical expertise and political leverage. The EU's commitment not only to preventing core international crimes, but also to accountability and the promotion of international justice mechanisms are all reiterated mainly in Common Foreign and Security Policy instruments (EEAS, 2016). This includes the EU Global Strategy and the Implementation Plan on Security and Defence.

Through these frameworks, the EU significantly supports the ICC, with the Council adopting a robust policy framework for engagement with the Court (Council of the EU, 2011a; 2011b). The EU has also constructed a comprehensive approach, using the Rome Statute principles, with four thematic areas of focus: universality, integrity, cooperation and assistance, and the principle of complementarity (Bekou, 2014). In relation to universality, the EU should continue and enhance its current initiatives including direct engagement with non-States Parties through *démarches*, offers of technical assistance, Human Rights Dialogues and multilateral meetings. In order to combat specific regional concerns and increase political will, the EU can expand these initiatives to include major regional organisations such as the African Union. The EU should continue to work with its Member States to increase the effectiveness of these tools and ensure that future efforts are cohesive. For example, EU efforts towards universality can be coordinated with initiatives undertaken by Member States. The EU should draw on all of its organs and bodies to

maximise impact. For example, the European Parliament can provide political impetus for universality aims by calling on Member States to ratify the Kampala amendments and urging third countries to accede to the Rome Statute.

The EU has made protecting the integrity of the ICC one of its key priorities and has subsequently provided assistance including political, diplomatic and financial support. Given that the Court is operating in the face of attacks on its integrity and increasingly limited resources, the EU should scale up its diplomatic, political and financial assistance including its use of Human Rights Dialogues and *démarches*. The EP should also continue supporting efforts regarding integrity through resolutions which could, for instance, call on Member States to work towards adopting unanimous positions on key issues to strengthen the EU's stance. Additionally, the EU and its Member States should continue to focus on responding to non-cooperation, which is viewed as one of the most serious challenges to the ICC's effective functioning (Bekou, 2014; Council of the EU, 2011a; 2013). In order to enhance cooperation, the EU should continue to pursue existing activities, *inter alia* by providing technical assistance to both Member States and third States who wish to adopt cooperation agreements with the ICC. The EU's future role could include cross-cutting initiatives which seek to link efforts to strengthen political support for increasing cooperation with Court requests. Accordingly, in the face of increasing challenges, the EU should consider the need to enhance resources and personnel capacity of EU units entrusted with supporting the ICC, including the EU Focal Point for the ICC. The EU should put to use every tool at its disposal, including ICC clauses, which not only further universality aims, but can also act as sources of developments in domestic implementing legislation and help to increase political support for the Court. Furthermore, the EU should continue to raise specific cooperation issues in bilateral and multilateral fora, such as non-execution of ICC arrest warrants and avoidance of contact with indicted individuals.

4.1 Supporting initiatives for fighting back against attacks

The ICC has recognised that in the most recent reporting period (2019-20), it has faced an unprecedented number of threats and attacks, which undermine its effectiveness (UNGA, 2020; IER, 2020). The Court has therefore recognised that to fulfil its mandate and safeguard its independence, it needs the international community's strong and consistent backing (UNGA, 2020; IER, 2020). The EU will have an important role to play not only in leading rebuttals of attacks on the Court and its staff, but also by working together with its Member States to encourage strong collective support for the ICC.

The IER has recognised that because of the Court's reliance on cooperation with States, international organisations and other key actors, the Court should have a 'dynamic and comprehensive communications strategy' (IER, 2020). Accordingly, a joint or integrated communications strategy would also be a useful tool in countering external threats, including responding to attacks or criticisms against the Court and promoting the Court's image (IER, 2020). Whilst IER recommendations (such as R163) focused on the ICC developing an internal communications strategy and promoting public information responses to issues, the EU should engage with the Court in achieving these aims and coordinate approaches to issues of mutual interest. The IER also recommended (R163) that the Court develop regional and country specific outreach plans for each situation. Again, the EU and its Member States could support the development of these plans and the dissemination of information in an attempt to combat attacks and foster global political support. More specifically, the EU could conduct public outreach activities such as conferences, seminars and media engagements in order to explain what the Court is and what it is trying to achieve (IER, 2020). The EU and its Member States could also engage in taking concerted action on behalf of the Court, including issuing timely responses to any attacks, based upon a formalised crisis management policy, which the IER recommends (R170) that the ICC adopts to clarify responsibilities, chains of command and processes (IER 2020).

Similarly, the IER identifies civil society organisations (CSOs), in particular NGOs, as an important group for ‘strengthening support for, and spreading information about the activities of the Court at the national, regional and global level’ (IER, 2020). The EU should therefore work to support CSOs, particularly those within situation countries, in order to acquire or improve cooperation from State-based political organisations. It could also support efforts from civil society and States Parties in relation to defence in order to create more robust and fair trials. This would enhance efforts to strengthen national systems, in line with the complementarity principle, whilst simultaneously supporting the overall credibility and legitimacy of the ICC’s legal processes. Greater cooperation could also be achieved through support to the Trust Fund for Victims; the Trust Fund for Family Visits (to which the EU donated EUR 20 000 in November 2021); or through the EU Genocide Network, which could be a useful point of contact for information sharing and knowledge exchange (UNGA, 2019; 2020; Genocide Network 2021; ICC Registry, 2021). Similarly, EU support for State’s investigations and prosecutions of core international crimes could also greatly assist ICC work, thereby strengthening complementarity and overall support for the Court’s activities. This may be especially important in light of the Court’s recognised increasing workload, as well as the need to engage with the organisational re-structuring undertaken by the new Prosecutor, Karim A. A. Khan (ASP, 2021). Accordingly, the EU should be mindful of the need to develop its approach to engaging with and supporting the Court, in line with structural and organisation culture changes which may occur under the new Prosecutor.

Joint communication strategies and the dissemination of coordinated public information materials could therefore be a useful counter to non-cooperation and attacks against the Court, whilst simultaneously strengthening political support for the ICC. It would also be in keeping with the ASP’s findings that the issuing of such information and communication is the shared responsibility of the Court and States Parties (ASP, 2019). The EU should therefore adopt a perspective for the future which explicitly recognises the importance of political support for the Court and the crucial role which States Parties must play in both cooperating with and defending the Court in order to ensure its effective and efficient functioning. Furthermore, the EU can utilise the platforms of its representatives to support these initiatives as well as provide public support for the Court. For example, the EU Special Representative for Human Rights, speaking at the Annual Ministerial Network at the UN General Assembly, condemned ‘self-interested’ attacks on the Court and reiterated the important role which the ICC plays in ensuring accountability for violations of serious international crimes (Gilmore, 2021).

4.2 Strengthening Political Support

The EU has adopted various initiatives to engage with Member States in coordinating action and developing common approaches, thereby strengthening political support for the ICC. As part of these efforts, in 2001 the EU adopted a Common Position on the ICC, which was reviewed and replaced in 2011 via a Decision of the Council, with a revised Action Plan supporting its implementation (Council of the EU, 2011a; 2011b). The EU’s Decision aims to: advance universal support for the Rome Statute; preserve the Court’s integrity and independence; ensure the ICC’s effective and efficient functioning; support cooperation with the ICC; and implement the principle of complementarity.

In addition, the EU Focal Point on the ICC, which sits within the EEAS, assists in coordinating EU action on the ICC among Member States, non-Member States, non-governmental organisations and other entities, including the ICC itself. The Focal Point strengthens political support for the ICC by: establishing appropriate contacts; fostering information exchange; preparing programmes and activities; as well as ensuring that support for the ICC is kept on the agenda (Council of the EU, 2011a). The European Parliament also plays a key role in strengthening support for the ICC by providing political impetus through resolutions in support of international criminal justice and activities of the informal group of MEPs ‘Friends of the ICC’ which promotes support for the ICC in EU policies (European Parliament 1999, 2002a, 2002b, 2017a; Bekou,

2014). The EU should continue to support both the EU Focal Point and the 'Friends of the ICC' in order to keep strengthening political support.

The EU could also engage in the development of a uniform cooperation framework for all EU Member States, which would support IER Recommendations (including R274) that States Parties should endeavour to adopt a joint cooperation framework (IER 2020). Whilst the ICC has argued that this recommendation would only partly be actionable, given the varying domestic constitutional and legal norms, the EU has previously encouraged Member States to adopt a robust policy framework for engagement with the Court; hence, pursuing a European or regional framework may be feasible (Council of the EU, 2011a, 2011b; ICC, 2021e). Given the EU's experience of developing policies for engagement with the ICC, it could encourage a more cohesive approach among States Parties, *inter alia* through a template for cooperation with the Court, best practices and operating procedures for cooperation. Such an approach can also support non-Member States by providing a repository of support resources on which they may draw (ICC, 2021e).

Similarly, as a result of repeated instances of non-cooperation, the EU has engaged in diplomatic talks with the Central African Republic, Chad, Malawi and Nigeria, reminding States of their obligations to arrest and surrender individuals indicted by the ICC (COJOUR-ICC, 2013; HR/VP, 2018b). Member States have also supported these efforts by avoiding non-essential contact with individuals subject to arrest warrants issued by the Court (Council of the EU, 2011a; 2013). These initiatives demonstrate strong political support for the Court and aim to increase pressure on States to comply with ICC arrest warrants. It is therefore recommended that the EU continues not only to apply this policy and but also engage, where possible, with States Parties, to remind them of their obligations.

The EU's diplomatic and political involvement is also buttressed by financial assistance, thereby further strengthening political support for the Court. The EU provides several forms of assistance including funding for ICC outreach activities and technical events which aim to strengthen the Court's ability to implement its mandate as well as increasing diplomatic support and awareness of the ICC's mandate and activities (UNGA, 2020). In the future, building upon this financial assistance, the EU and its Member States could also engage in discussions about the ICC's budget, helping to coordinate States views before the Assembly of States Parties. This would be in line with IER Recommendation 139, which states that reaching a consensus on the ICC's budget prior to the ASP would allow the session to be dedicated to 'high-level political participation' (IER, 2020). In this way, greater opportunities for strengthening political support for the Court would be presented by opening up the space for further discussions of greater importance or interest to States Parties.

Furthermore, prioritising budget discussions prior to the ASP could also help avoid the ASP using its power to approve or reject the budget to deal with frustrations some States Parties hold against the Court (IER, 2020). In particular, the IER found that there is a level of mutual distrust and suspicion between States Parties and the Court, in part because of its unique nature and States' expectations that interactions and cooperation with the ICC would be similar to that within the UN forum (IER, 2020). In order to overcome this distrust and rebuild confidence in the ICC, it is essential that there is improved cooperation between States Parties, along with stronger political support from States to the Court when it is faced with attacks (IER, 2020). The EU could therefore work with its Member States and other States Parties to implement IER recommendations and continue to build stronger political support for the Court through diplomatic, political and financial assistance.

5 Conclusions

Exploring the EU's future role in regard to States' links with the ICC has revealed an important relationship between political support and cooperation. When political support for the Court is high, so too is cooperation with its requests and similarly, when a State withdraws political support, cooperation levels

fall. States such as the USA have also previously made efforts to prevent other States from cooperating with ICC requests, highlighting the importance of collective political support to overcome such challenges. It is clear that the EU should continue to demonstrate leadership, by taking a prominent role in challenging attacks on the Court and its staff, as well as working together with its Member States to encourage strong collective support for the ICC. This will be particularly important as current Court activities – and the reactions of States – suggest that future developments in relation to China, Russia and the United States will have a strong political element. The Court will therefore require sensitive diplomatic and political support from the EU and its Member States in order to effectively deliver its mandate whilst retaining a working relationship with key actors within the international community. At the same time, developments on the African continent such as the potential future ratification of the Malabo Protocol will also require political and diplomatic support to encourage an improved relationship with the AU as well as working to ensure the cohesive functioning of multiple mechanisms for delivering international criminal justice.

Having focused on political support for the Court regarding universality, integrity and cooperation, we have been able to explore the EU's possible future role in fighting attacks on the Court and strengthening political support. Considering universality, the EU should continue its current initiatives including direct engagement with non-States Parties through *démarches*, offers of technical assistance, Human Rights Dialogues and participation in multilateral meetings. In order to combat specific regional concerns and increase political will, the EU should expand these initiatives to include regional organisations, as for example the AU. It should continue to work with its Member States to increase these tools' effectiveness and ensure that future efforts are cohesive. For example, this will include coordinating EU efforts towards universality with the initiatives of Member States. The EU should ensure that it draws on all organs and tools at its disposal, from EP resolutions and political support through to the negotiation of 'ICC clauses' within agreements with third countries and international organisations. Similarly, with integrity being considered a priority, the EU should also continue to provide – and scale up – support for the Court, including political, diplomatic and financial assistance. This may include Human Rights Dialogues and *démarches* as well as resolutions from the European Parliament, with a view to adopting unanimous positions on all issues.

The EU should also continue to promote the adoption of cooperation agreements and, where appropriate, provide technical assistance to States. Additionally, the EU should keep applying political pressure on the issue of cooperation by raising specific points in international fora. Ultimately, the EU has a wealth of tools at its disposal both to enhance political support for the Court and encourage cooperation with ICC requests. This includes policies, bodies, funding, technical expertise and political leverage. In the face of increasing challenges, the EU should consider the need for enhancing resources and personnel capacity of the EU bodies entrusted with supporting the ICC, as well as providing robust resources for the implementation of its policies.

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Annex I: Recommendations for Future EU Action

- Continue to provide political, diplomatic, technical and financial support to the ICC;
- Continue to provide financial assistance to ICC outreach activities and technical events;
- Take a multipronged approach which combines measures such as ICC clauses with political pressure;
- Engage with the ICC's efforts which seek to foster political support, engage in and promote dialogues with situation countries, mitigate a volatile work in environment, monitor evolving situations and manage risk;
- Remain committed to challenging political attacks on the ICC;
- Continue to utilise the Union's political weight in response to political attacks, in conjunction with the work of individual Member States;
- Support the development of a coordinated ICC communication strategy to respond to attacks against the Court and promote the Court's image;
- Seek to increase public education about the Court in order to counter political attacks. This may include disseminating public information, engaging in workshops and seminars as well as providing clarity about Court activities;
- Continue to engage in diplomatic talks with State Parties to remind them of their cooperation obligations to the ICC;
- Engage uncooperative States in bilateral relations and consider exerting political leverage in support of the ICC;
- Exert political pressure on non-Member States to ensure no States are beyond the Court, for example, in relation to the power of veto in the UNSC;
- Strengthen efforts to promote the adoption of cooperation frameworks which seek to facilitate coordination, information-sharing and knowledge-exchange;
- Continue to apply the policy of no non-essential contact with individuals subject to an ICC arrest warrant;
- Seek to enhance existing initiatives for universality of the Rome Statute, including diplomatic demarches, offers of technical assistance, Human Rights Dialogues and ICC clauses in agreements between the EU and other States;
- Support the implementation of recommendations from the Independent Expert Review, for example, encourage States Parties to reach a consensus on budgetary matters prior to the ASP aimed at creating space for more high-level political participation;
- Consider developing a uniform or regional approach to cooperation frameworks for EU Member States;
- Seek to support the development of long-term situation-specific investigative strategies;
- Take a tactful approach to cooperation issues which addresses root causes, for example, by working with the Court to consider ways of expediting justice;
- Develop cross-cutting initiatives which seek to link efforts in regard to strengthening political support for increasing cooperation with Court requests;

- Continue to raise specific cooperation issues, such as non-execution of ICC arrest warrants, in bilateral and multilateral fora;
- Consider conducting public outreach activities such as conferences, seminars and media engagements in order to explain what the Court is and what it is trying to achieve;
- Support CSOs, in particular those within situation countries, in order to acquire or improve cooperation from the political organisations within the State;
- Consider joint communication strategies and the dissemination of coordinated public information to counter attacks against the Court and strengthen political support for the ICC;
- Continue to support and consider enhancing initiatives, including the EU Focal Point and 'Friends of the ICC' in order to strengthen overall political support.

Annex II: Recommendations for the European Parliament

- Continue calling upon third States to accede to the Rome Statute;
- Call on former ICC States Parties to re-join the ICC;
- Call on signatory States to ratify the Rome Statute;
- Call on Member States and third States to ratify the Kampala Amendments;
- Continue providing political support for upholding the ICC's integrity amid attacks by third countries, such as through statements;
- Work towards adopting a common approach to issues such as the Court's integrity, in order to strengthen the EU's position. This may include encouraging Member States to adopt a unanimous position on the ICC's integrity through appropriate political interventions, such as calls for support and statements;
- Continue to show political leadership on arising issues which affect the ICC's integrity through targeted resolutions and statements;
- Work with Member States to ensure that no States are beyond the Court, this may include statements, calls or resolutions on key issues, such as use of the power of veto in the UNSC;
- Seek to increase awareness of the Court's mandate and its organs, such as through the dissemination of a draft policy paper on principles, practices, standards and strategies used in OTP investigations;
- Continue to urge both Member States and third countries to cooperate with ICC requests. This may include a comprehensive resolution on cooperation which calls for Member States to adopt cooperation frameworks which seek to facilitate coordination, information-sharing and knowledge-exchange;
- Urge Member States who have not yet done so to adopt relevant domestic legislation implementing the Rome Statute;
- Support knowledge-exchange activities between States in relation to implementing the Rome Statute within domestic legal systems.

BRIEFING

The role of the ICC since its foundation and possible scenarios for the future: case selection and prioritisation

ABSTRACT

Since the International Criminal Court (ICC) was established in 1998, its Office of the Prosecutor (OTP) has grappled with decisions on where to channel its scarce resources. Early signs indicate that the new Prosecutor, who took office in 2021 for a nine-year tenure, looks likely to: reduce the number of situations under preliminary examination; prioritise 'positive complementarity' through supporting national authorities to investigate and prosecute cases; close, de-prioritise, or 'hibernate' ongoing investigations (or particular aspects thereof); and focus on cases which are considered to have the highest likelihood of conviction. These decisions may impact the Court's perceived credibility and legitimacy. The European Union (EU) should continue to act as a strong defender of the Court's mandate, by providing ongoing financial support for outreach activities and civil society organisations actively engaged in the fight against impunity. It should persist with encouraging Member States as well as third countries to ratify and fully implement the ICC Statute, *inter alia* through providing support and training which will enable these countries to pursue domestic prosecutions of international crimes.

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1 Introduction

Looking forward over the next nine years of the new Prosecutor's tenure, this Briefing aims to provide a prognosis on the International Criminal Court's (ICC) future focus and how it could shape its preliminary examinations and investigations, as well as evolutions in the Prosecutor's selection of cases. In doing so, a number of issues are examined: trends to date in the selection of situations and cases; possible scenarios for the future selection of situations and cases; how those scenarios may impact on the credibility of and support for the Court; as well as the European Union's (EU) continuing role in supporting the Court and fighting impunity for serious international crimes.

This study further relies on an analytical approach based on both primary and secondary sources, including: the ICC's law and practice; the Office of the Prosecutor's (OTP) working documents; the Independent Expert Review of the ICC and the Rome Statute System (IER); and the EU's relevant legislation. A thorough literature review of secondary sources was undertaken to provide scholarly insights into relevant questions.

2 Trends to date in the selection of situations and cases

Looking at matters being brought before the ICC, 'situations' are generally defined by geographical and/or temporal parameters (for example, crimes allegedly committed in a particular country or region and crimes committed in a region since a particular date). A 'case', on the other hand, refers to specific incidents and the alleged criminal conduct of a suspect in relation to those incidents, within a particular situation, that allegedly give rise to criminal liability (ICC Appeals Chamber, 2014, para. 62).

2.1 Situation selection

Preliminary examinations for the ICC are the first stage in the lifecycle of situation selection and prioritisation (Independent Expert Review, 2020, para. 635). There are four phases to a preliminary examination:

- **Phase 1** is a preliminary review of all communications received by the OTP, aimed at filtering out those that manifestly fall outside of the Court's jurisdiction (OTP, 2013, paras. 78-79). Many communications do not proceed beyond this phase. Of 813 communications received by the OTP from 1 November 2019 to 31 October 2020, only 26 were deemed to warrant further analysis (OTP, 2020, para. 30). 175 such communications related to ongoing investigations or prosecutions, while 612 were found to be manifestly outside the Court's jurisdiction. For example, in relation to alleged crimes of genocide and crimes against humanity committed against Uyghurs and members of other Turkic minorities, the OTP noted that many of the alleged crimes were apparently committed by Chinese nationals on the territory of China, which is not a party to the ICC Statute (OTP, 2020, paras. 70-76). Unless China ratifies the ICC Statute or accepts the jurisdiction of the Court through an Article 12(3) declaration, or the Security Council refers the situation, the ICC cannot exercise jurisdiction over crimes allegedly committed on the territory of China by its nationals (ICC Statute, 1998, Art 12).
- **Phase 2** is a detailed analysis of whether the ICC's jurisdictional requirements would be met. This includes the temporal, personal, subject-matter and territorial jurisdiction of the Court (Sadat, 2010). This phase entails a 'thorough factual and legal assessment of the alleged crimes committed in the situation at hand, with a view to identifying potential cases falling within the jurisdiction of the Court' (OTP, 2020, para. 15).
- **Phase 3** involves an analysis of potential cases' admissibility, analysing whether the requirements of *gravity* and *complementarity* are satisfied. Gravity means that the alleged crimes are of such a scale, nature or impact to warrant prosecution by the ICC (De Guzman, 2020). Complementarity requires that

the alleged crimes are not already being investigated and/or prosecuted in a genuine fashion by national authorities. In October 2021, the OTP closed the 17 year-long preliminary examination of the situation in Colombia that had commenced in 2004, on the basis that national justice mechanisms were actively pursuing accountability for crimes falling within the Court's jurisdiction (OTP, 2021a).

- **Phase 4** analyses the final consideration, which is whether or not it would be in the interests of justice to proceed with an investigation. Even where the alleged criminal conduct falls within the ICC's jurisdiction and meets admissibility requirements, the Prosecutor may determine that there are substantial reasons to believe that an investigation would not serve the interests of justice and may decide not to initiate an investigation on that basis (ICC Statute, 1998, Art 53).

If the requirements of jurisdiction, admissibility (gravity and complementarity) and the interests of justice are met, the preliminary examination will conclude. Where the situation was not referred by a State Party or the Security Council, the Prosecutor must demonstrate to a Pre-Trial Chamber that there is a reasonable basis to proceed with the investigation (ICC Statute, 1998, Art 15).

The exercise of an independent prosecutorial power to initiate investigations was a point of some contention in the drafting of the ICC Statute (Schabas 2008; Bergsmo and Pejić 1999). In the Court's early years, many situations under investigation followed referrals from either States Parties or the Security Council. The first Prosecutor started his first *proprio motu* investigation only in 2010 (Kenya). Until late 2019, investigations initiated by the Prosecutor accounted for four of the eleven situations under investigation (Kenya, Côte d'Ivoire, Georgia, and Burundi). The authorisation of investigations into situations in the Philippines (2021), Afghanistan (2020) and Bangladesh/Myanmar (2019) increased the number of investigations that were not state or Security Council referrals.

Another trend in recent years has been the opening of investigations outside the African continent, which has been important to address some of the criticisms of the OTP's early focus on situations in Africa. With the opening of an investigation in Venezuela I in November 2021, six of the sixteen situations under investigation at the time of writing (November 2021) were from outside of the African continent.

In March 2021, the OTP published a draft policy on situation completion. This noted that when the Prosecutor deems that the (confidential) strategy for a situation has been satisfied by the Pre-Trial Chamber's approved docket of cases, investigations will cease unless new criminality emerges or new evidence comes to light (OTP, 2021b, paras 21-22). In principle, the conclusion of an investigation should be made known by the Prosecutor (OTP, 2021b, para. 30; paras. 36-39).

2.2 Case selection

As with situation selection, the Prosecutor must consider the criteria of jurisdiction, admissibility (including complementarity and gravity) and the interests of justice, in determining whether to proceed with a case.

In 2016, the OTP published a Policy Paper on Case Selection and Prioritisation (OTP, 2016), where it noted that gravity was the foremost case selection criterion (OTP, 2016, para. 6). Gravity does not imply that *only* high-ranking perpetrators can be tried by the ICC (ICC Appeals Chamber, 2006, paras. 73-74). In practice, the OTP has taken a holistic and at times inconsistent view of gravity, noting for example that it may be beneficial to prosecute mid-level offenders in the interests of 'building upwards' to those most responsible at a later stage (OTP Strategic Plan 2019-2021, 2019, para. 24). The OTP will also assess the gravity of offences in light of its own strategic objectives (e.g., its Policy Paper on Sexual and Gender-Based Crimes) and operational prioritisation considerations (OTP, 2016, paras. 36; 50-51). The new structure of the OTP includes a Gender and Children's Unit, signalling a likely continued focus on gender-based violence and crimes against children, as does the appointment of four thematic Special Advisors, on: Crimes Against and Affecting Children, Gender Persecution, Sexual Violence in Conflict and Slavery Crimes (ICC, 2021c).

Future prosecutions may seek to further emphasise the prosecution of crimes by adding an element of environmental destruction, considering increasing concerns about the degradation of the natural environment worldwide, particularly if the Association of States Parties decides to adopt a crime of 'ecocide' into the ICC Statute (Independent Expert Panel for the Legal Definition of Ecocide, 2021; Pereira, 2020). Even if the proposed new crime of ecocide were not incorporated into the ICC Statute, some acts of environmental destruction may already fall within the jurisdiction of the Court, such as the war crime of causing widespread, severe and long-lasting damage to the environment (ICC Statute, 1998, Art 8(2)(b)(iv)) or the genocidal act of deliberately inflicting conditions of life intended to bring about the destruction of a group (ICC Statute, 1998, Art 6(c)).

In addition to gravity considerations, cases will also be inadmissible if the case is being or has been investigated or prosecuted by a state (i.e., the complementarity principle). Furthermore, if a person has already been tried for the same conduct, the *ne bis in idem* ('double jeopardy') principle will generally render a case inadmissible. As well as admissibility, the Prosecutor must determine whether: (1) cases selected for investigation and prosecution fall within the Court's jurisdiction; and (2) it would be in the interests of justice to prosecute in relation to the incidents, persons and conduct identified as falling within that jurisdiction.

While feasibility is not a factor under the ICC Statute, the OTP has a stated policy of applying for an arrest warrant or summons to appear if 'there is a reasonable prospect of conviction at the end of trial' (OTP, 2021, para. 35). The IER considered whether considerations of 'feasibility', such as the likelihood of arrests, should have a bearing on situation and case selection (IER, 2020, paras. 651-655). It ultimately determined that feasibility should *not* be considered, given not only the perverse incentive that such a policy might give to those who wish to shield alleged perpetrators from justice, but also the fact that feasibility is not a fixed factor and can change over time.

3 Possible scenarios for the future focus of the Court's preliminary examinations and investigations

In June 2021, the ICC's new Prosecutor, Karim A. A. Khan QC, began his nine-year term of office (ICC Statute, 1998, Art 42(4)). The OTP's Policy Papers on Preliminary Examinations, Situation and Case Selection as well as Situation Completion, discussed in Section 2 above, are not legally binding and may be revised at any time. At this early stage in Prosecutor Khan's tenure, it is difficult to predict how the OTP will make decisions on situation and case selection under his leadership. However, possible themes can be deduced from the Prosecutor's comments, statements to date and public speeches.

This section also introduces relevant suggestions from the IER. The Prosecutor has not followed the IER's recommendations in other respects, such as its recommendations on the OTP's structure (Goldstone 2021). Nevertheless, the IER's key recommendations are worthy of brief note as offering a possible guide to the future direction of travel for the OTP under the new Prosecutor's leadership, especially when they are in line with statements from the Prosecutor himself.

3.1 Scenario 1: Reducing the number of situations under preliminary examination/investigation

In a May 2021 interview, the Prosecutor noted the Court's resource constraints, saying:

'Expectations have been raised because of the number of preliminary examinations around the world. But we need to be candid with States and with victims about the limit of the Court's resources and how they will be prioritised. [...] The worst scenario would be trying to do it all and ending up doing nothing.' (Charania, 2021)

This suggests that the Prosecutor may seek to reduce the number of ongoing preliminary examinations, an aim already stated by his predecessor, who made a commitment to conclude as many preliminary examinations as possible by the end of her tenure (Bensouda, 2019). This may be achieved by a conclusion of existing preliminary examinations, as evidenced by the OTP's recent closure of the Colombia preliminary examination in light of ongoing domestic accountability proceedings in place in the country (OTP, 2021a). The number of preliminary examinations can also be reduced by progressing from the preliminary examination phase to a full investigation. This was the case in the situation in Venezuela ('Venezuela I'), where a memorandum of understanding was signed with the government in November 2021, confirming that the OTP had concluded its preliminary examination and determined it appropriate to open an investigation in accordance with the ICC Statute (ICC, 2021b).

A reduction in the number of preliminary examinations may also be achieved through a more stringent approach to gravity at an earlier stage. Considering resource constraints and the high number of preliminary examinations that result in investigations, the IER recommended that the Prosecutor should consider gravity at the very earliest stage of preliminary examinations and should develop a policy on the opening of preliminary examinations (IER 2020, R226-R227). If implemented, this recommendation may result in a smaller number of preliminary investigations. However, as noted in Section 3 below, the OTP's approach to gravity has so far been inconsistent (see also Rashid, 2020; Longobardo, 2016; SáCouto and Cleary, 2008).

3.2 Scenario 2: Closing, de-prioritising or 'hibernating' investigations

A renewed focus on positive complementarity might see the Prosecutor concluding or hibernating investigations where national proceedings are ongoing, to allow domestic justice mechanisms to take precedence. This is the case, for instance, in Colombia which had been under preliminary examination since June 2004. In 2020, the OTP noted that the Colombian authorities had taken meaningful steps to address ICC crimes through ongoing investigations and prosecutions. In October 2021, the Prosecutor officially closed the preliminary examination by signing a Cooperation Agreement with the Government of Colombia. In doing so, he decided not to start a formal investigation, leaving to Colombian authorities the competence to investigate and prosecute core crimes.

Conversely, as detailed in section 4.3 below, in September 2021 the Prosecutor announced his intention to hibernate certain aspects of the Afghanistan investigation, to enable the OTP to focus its investigations on crimes allegedly committed by the Taliban and Islamic State groups. This cannot be linked to a positive complementarity strategy, given that those de-prioritised aspects of the investigation have not been subject to any meaningful domestic investigation or prosecution (Human Rights Watch 2020).

The IER contained numerous recommendations on the need for situation-specific strategic plans, case selection documents and wider, more systematic, input from OTP staff (IER, 2020, R240-R242). The Review also recommended putting in place a clear implementation and completion strategy for each new investigation, with Key Performance Indicators (KPIs) and a policy for the prioritisation, de-prioritisation and hibernation of investigations (IER, 2020, R243-R250). The IER also had several relevant recommendations on external communications and outreach that apply to questions of how the Court and OTP communicate on the progress of ongoing preliminary examinations and investigations (IER, 2020, R163-168). One criticism against Prosecutor Khan's September 2021 statement on Afghanistan was his failure to communicate the decision to de-prioritise aspects of the investigation to lawyers representing victims of those alleged crimes (Schultz, 2021).

3.3 Scenario 3: Focusing on cases perceived as having a higher prospect of conviction

The Prosecutor has emphasised an objective to pursue those cases that, from his perspective, bear a realistic prospect of success:

'To have impact, you need to prioritise against the greatest need, taking into account the gravity of the crimes committed and the jurisdictional issues in play. The Office of the Prosecutor (OTP) cannot act like an NGO [non-governmental organisation] nor as a university, only producing long interesting academic or policy papers which shine a light on atrocities but with no real ability to take action against those crimes. It must make an impact and make inroads in terms of accountability.' (Charania, 2021)

The IER recommended that the OTP considers pursuing narrower, more focused cases for which evidence is strongest (IER, 2020, R234-R235). The Prosecutor has also emphasised the need for the OTP to pursue only those cases with strong evidentiary grounding, noting that '[W]e cannot raise expectations so high and achieve so little, so often in the courtroom. As an office, we need a greater realisation of what is required by the burden of proof and the obligation to prove the case beyond reasonable doubt.' (Khan, 2021)

There is a potential contradiction between the criteria of gravity and feasibility. The IER recommended that the OTP should consider establishing a hierarchy among the criteria, in the following order of importance: (1) gravity; (2) strength and diversity of evidence; and (3) potential suspects' degree of responsibility (IER, 2020, R230). Prosecutor Khan's statement on Afghanistan, while it did emphasise the gravity of the alleged crimes to be focused on, may be read as suggesting that the prospect of conviction is the paramount concern in deciding which aspects of a situation to prioritise:

*'I am cognizant of the limited resources available to my Office relative to the scale and nature of crimes within the jurisdiction of the Court that are being or have been committed in various parts of the world. I have therefore decided to focus my Office's investigations in Afghanistan on crimes allegedly committed by the Taliban and the Islamic State – Khorasan Province ("IS-K") and to deprioritise other aspects of this investigation. The gravity, scale and continuing nature of alleged crimes by the Taliban and the Islamic State, which include allegations of indiscriminate attacks on civilians, targeted extrajudicial executions, persecution of women and girls, crimes against children and other crimes affecting the civilian population at large, demand focus and proper resources from my Office, **if we are to construct credible cases capable of being proved beyond reasonable doubt in the courtroom.**'* (OTP, 2021, emphasis added)

From the perspective of this gravity assessment, it is worth noting that other deprioritised aspects of the investigation include allegations of torture. The prohibition against torture represents a peremptory norm of international law (*jus cogens*). Despite the seriousness of torture as a war crime and a crime against humanity, the OTP has now twice decided not to prioritise such investigation and prosecution of alleged responsible of both the United Kingdom (UK) and the United States (US) torture programmes in the Iraq and Afghanistan situations, respectively (Meloni, 2021; Mariniello, 2021).

On case selection criteria, the IER recommended more transparency on the OTP's approach to assessing who it deems 'most responsible' (IER, 2020, R232). The Review did not explicitly recommend against prosecuting mid-level suspects as part of a broader situation strategy, noting that it 'might' be appropriate to do so in some circumstances, especially where such cases may strengthen investigations or prosecutions against suspects occupying higher ranks in an organisation deemed to bear responsibility for crimes (IER, 2020, R233-R234). The Prosecutor's approach to mid-level perpetrators remains to be seen. His August

2021 visit to Sudan and the signing of a Memorandum of Understanding with the government, suggested that the OTP would pursue at least some prosecutions of the most senior leaders alleged to be responsible for international crimes, including former President Omar Al-Bashir (Goldstone, 2021). Prosecutor Khan's visit to Sudan in August 2021 also suggested that a cooperative, collaborative approach with states will be employed to secure the transfer of evidence and suspects to the Court (ICC, 2021a). This can be seen as a strategy to overcome previous experiences, where a lack of state cooperation has hampered prosecutions. However, in October 2021, a military coup overthrew the government, rendering the likelihood of trials in the Darfur, Sudan situation uncertain once again (Kersten, 2021).

3.4 Scenario 4: Supporting domestic investigations and prosecutions

One clear theme from the Prosecutor's statements and activities prior to and since his election has been an emphasis on 'positive complementarity' (Ambos 2021). This was also clearly emphasised by the IER, which highlighted positive complementarity as a strategy for all stages of proceedings, not just preliminary examinations, but also after an investigation has been authorised and completion strategies are being designed (IER 2020, R262-R265).

Positive complementarity can be defined as supporting states to investigate and prosecute crimes falling within the ICC's jurisdiction (European Commission 2013). In a 2021 interview, the Prosecutor noted that, 'Dealing with atrocity crimes requires creative solutions. There are many ways to seek to end impunity beyond the ICC, including sharing the burden with national and regional mechanisms' (Charania, 2021).

It looks likely, under Prosecutor Khan's leadership, that the OTP will seek to engage with national authorities, providing assistance as well as support for domestic investigations and prosecutions, as it has done in Colombia (OTP, 2021a). In an interview reflecting on his time as head of the United Nations Investigative Team for Accountability of Da'esh/ISIL (UNITAD), the Prosecutor noted that, 'I don't think it matters too much for most victims where justice takes place as long as it takes place' (Asymmetrical Haircuts, 2021) and in his swearing-in speech he stated:

'Wherever possible, we should be trying to have trials in the country or in the region wherever possible. Of course, it is easier for survivors and victims. It can save costs, reduce the carbon footprint, but also importantly, it shows we are not in the export business. We are not. We are involved in a body of law that is owned by humanity. It is not of the West or of the East. It is not of the global North or of the South; it belongs to each and every one of us.' (Khan, 2021)

Together with the new Prosecutor's 2020 Letter to the Assembly of States Parties explaining his motivation for applying for the role, this gives a clear indication that the OTP is likely to emphasise complementarity of jurisdiction as an important strategic objective moving forward (Khan, 2020). By adopting such a policy, the OTP and the Court would be able to focus on cases where domestic authorities are genuinely unwilling or unable to prosecute. This stands in contrast to earlier practice, where cases pursued have involved defendants (e.g., Lubanga, Katanga, Al-Senussi, Simone Gbagbo) who have also been investigated or prosecuted by national authorities, but not always for conduct deemed 'substantially the same' as the ICC case (Rastan, 2017).

4 Impact of the selection process on the credibility of and support for the Court

4.1 Reducing the number of situations under preliminary examination/investigation

This scenario would clearly have an impact on victims, states and advocacy groups who feel disappointed by the Prosecutor's decision not to pursue investigations. It may also impact upon the perceived global reach of and support for the Court, should the remaining situation countries tend to focus more on a particular geographic region. Lastly, as the OTP noted in its response to the IER, if a preliminary examination is concluded in a timely manner but then finds it lacks the resources to carry out a full investigation and is forced to hibernate it on that basis, this may disappoint victims and civil society *more* than leaving a PE open for a number of years with few developments (ICC, 2021d, para. 466).

On the other hand, the Court's resources are finite and hence the more situations there are, the more likely it is that there will be fewer cases per situation. That, in turn, could have a bearing on the perceived comprehensiveness of any situation as well as the impact of Court activities on victims and affected regions. The IER noted that a more streamlined approach could positively impact active investigations and lead to a more consistent implementation of Outreach strategies (IER, 2020, paras. 642-643).

4.2 Closing, de-prioritising or hibernating investigations

The potential impact of closing, de-prioritising or suspending investigations as a response to the Court's external legitimacy and level of support is likely to be determined by the circumstances surrounding each decision. Closing investigations completely gives more certainty than leaving them open indefinitely but affected populations may feel aggrieved by a perceived incompleteness of the Court's activities in any given situation. De-prioritising or hibernating investigations leaves a situation open to developments, with experience demonstrating that situations can evolve quite rapidly (e.g., in Sudan). By contrast, having many 'unfinished' situations may hamper the Court's external image in regard to its effectiveness. Furthermore, important evidence-gathering operations may be missed in periods of de-prioritisation or hibernation.

On 27 September 2021, the Prosecutor announced that his Office was seeking authorisation to resume investigation into the Afghanistan situation in relation to alleged crimes committed by the Taliban and IS-K. At the same time, without informing the Legal Representatives of victims, he announced a de-prioritisation of war crimes allegedly committed by US members of the Central Intelligence Agency (CIA) and armed forces, as well as alleged crimes perpetrated by members of the (former) Afghan Armed Forces. While this decision to 'hibernate' investigations into US nationals' alleged crimes may be interpreted as having resulted from a pragmatic strategy aimed at normalising the Court's relationship with the USA (Karnavas, 2021), it has immediately been seen as a surrender to US political pressure, which had also publicly threatened the Court on a number of previous occasions, and as a clear setback for equal application of the rule of law (Trahan, 2021; Amnesty International, 2021).

Civil society and legal representatives of victims have strongly criticised this decision by arguing that it has the discriminatory effect of denying justice to certain victims of alleged crimes in this situation and have urged the Prosecutor to reconsider his strategy as a matter of urgency in order to ensure that accountability is pursued without further delay. According to Amnesty International, de-prioritising the well-documented US cases of torture in Afghanistan sends a dangerous message that the most powerful human rights abusers are able to avoid ICC investigation and prosecution (Amnesty International, 2021). The Prosecutor's redefinition of the Afghanistan investigation's scope appears to perpetuate the asymmetrical

application of international criminal law by an institution claiming universal aspirations while emphasising the criminality of some individuals and ignoring that of others (Amnesty International, 2021; Nouwen, 2012). By feeding perceptions of a practice supporting a justice of the powerful, the Prosecutor's policy of de-prioritisation of alleged crimes committed by US nationals may contribute to fuelling a crisis of legitimacy for the Court (Mégret and Jurdi, 2016).

4.3 Focusing on cases perceived as having a higher prospect of conviction

The OTP's Policy Paper and the Independent Expert Review both focused on gravity as the primary criterion to drive case selection. However, as seen above, the OTP's interpretation and application of 'gravity' has been characterised by contradictions and inconsistencies leading to external criticisms (Mariniello, 2019; Mégret, 2013). The Prosecutor's September 2021 statement on Afghanistan mentioned in the previous section, with its particular focus on resource justifications, has been criticised as giving the impression that prioritisation may appear to be based on whether investigating certain powerful perpetrators would be more challenging or resource intensive (Amnesty International, 2021). There may be good public policy reasons to pursue particular types of crime that are typically more difficult to prove (e.g. sexual and gender-based violence; torture; genocide), rather than pursue more 'winnable' cases purely to enhance the OTP's perceived 'success rate' of convictions. If a crime of ecocide were to be added to the ICC Statute, proving the *mens rea* (mental element) of the offence is likely to be challenging (Heller, 2021; Alberro & Daniele, 2021).

In the past, as was seen with the Iraq situation, gravity has generally been invoked by the Prosecutor as justification for *refusing* to undertake some cases, rather than grounds for selecting those cases on which to proceed (Schabas, 2008). Hence, whilst there is a need to maintain the Prosecutor's independence, at the same time the Court's credibility could benefit from being presented as having clear and transparent criteria that are being applied consistently (Delmas-Marty, 2006).

It remains to be seen whether or not the Prosecutor will follow the IER's recommendation to implement a hierarchy of case selection criteria, with a case's gravity as the paramount concern, to be followed by the strength of evidence. This may be a difficult balance to strike in practice; the strongest evidence may be available for direct perpetrators but it may not be in the interests of justice to pursue prosecutions against them. Conversely, prosecuting high-level suspects with cases that have a weak evidence base which cannot be expected to meet the standard of proof would discredit both the Prosecutor and the Court. The Prosecutor will have to use his discretion for this delicate balancing exercise.

4.4 Supporting domestic investigations and prosecutions

The Prosecutor clearly favours supporting domestic states to carry out their own investigation and prosecution of crimes within the Court's jurisdiction, where it is possible and in the interests of justice to do so. Such an approach may be criticised where domestic procedures fall short of the 'highest standards of fairness' by which the ICC purports to try defendants, or where the state in question imposes the death penalty (McDermott, 2016). Criticisms may also be raised about the completeness of domestic prosecutions and how much they reflect the extent to which any crimes in question are crimes against humanity.

Conversely, the ICC is not a human rights court and hence considering such factors may be perceived as prosecutorial overreach and thus outside any statutory remit of the ICC Statute's complementarity regime (Rojo, 2006). In supporting domestic trials, the OTP can provide advice on charging and fair labelling. However, generally speaking positive complementarity is necessary in allowing the ICC to be accepted as a Court of last resort and thereby attracting the support of states, who will be able to see that the ICC does not exercise its jurisdiction where cases are being genuinely pursued by national authorities.

5 The EU's role in supporting the ending of impunity and mobilising sufficient resources

The EU has been a strong supporter of the ICC since its establishment. The Council of the EU has highlighted that, as an essential tool for preventing the most serious crimes, the Court plays a central role in promoting respect for international humanitarian law and human rights as well as preserving international peace and security (Council of the EU, 2011, Article 1). The European Parliament (EP) recently called for further commitment 'to provide the ICC with strong diplomatic, political and proper financial resources to enable it to fulfil the tasks within its mandate' (European Parliament, 2021). The 2020-2024 EU Action Plan on Human Rights and Democracy stresses the importance of supporting 'the International Criminal Court as a cornerstone in fighting impunity and building networks to promote the universality and integrity of the Rome Statute and its principle of complementarity' (European Commission, 2020). Recognising the EU's staunch support for the ICC, this Briefing provides European institutions with some recommendations on how best to promote the Court's effectiveness and efficiency.

5.1 Cooperation

The EP should encourage Member States to appoint a national focal point for cooperation with the ICC. These officials should be responsible for receiving and implementing ICC cooperation requests as well as transferring information and documents on matters of ICC interest, supporting the EU focal point in this regard.

The EU has been the first regional organisation to sign a cooperation agreement with the ICC (ICC-EU Agreement). The EP should invite the European Commission to report on effective implementation of the 2006 Agreement on Cooperation and Assistance between the EU and the ICC. This agreement establishes, *inter alia*, the regular exchange of information and documentation of mutual interest between the EU and the ICC. While respecting the confidential nature of relevant materials from ICC proceedings, the EP should ask the European Commission to report on the *system* adopted to catalogue, store and transfer to the Court information that may be significant in relation to preliminary examinations, investigations or prosecutions, in accordance with the Rome Statute and ICC Rules of Procedure and Evidence.

The EU should promote among its Member States and third countries all agreements on cooperation and assistance with the ICC. Using the EU list of experts in international criminal law maintained for each country, the EU might also consider providing both States Parties and third countries with technical assistance on the adoption of framework agreements on cooperation with the ICC.

5.2 Complementarity

Considering the likely central role of positive complementarity (see above) in the Court's scenarios over the next nine years, the EP should encourage all States Parties to adopt (comprehensive) implementation of the Rome Statute legislation. At the time of writing, some EU States Parties have yet to translate into their domestic systems either substantive provisions of the Rome Statute (i.e., definitions of the crimes, the sanctions and the general principles of law relating to international crimes) or procedural obligations to cooperate fully with the Court. The EU could also promote, through the Human Rights and Democracy programme under the Global Europe instrument, an independent study that aims to systematise and analyse States Parties' legislation as well as their approaches to the investigation and prosecution of core crimes. This study would enable the EU not only to monitor the status of States Parties' implementation of the ICC legal regime, but also share among international governmental and non-governmental organisations best practices on the investigation and prosecution of core international crimes.

The EU should contribute to ensuring that third countries, particularly those where core crimes have been allegedly perpetrated, are able to put in place comprehensive justice and accountability systems. In light of this ambition, the EU should continue to promote the following undertakings:

- funding **key domestic justice mechanisms**, such as the Special Criminal Court in the Central African Republic;
- **offering technical support** to third countries both for the adoption of ICC implementing legislation and investigation of core crimes;
- **organising workshops and expert missions** in beneficiary states on the correct transposition, implementation or enforcement of the ICC legal regime. Tools such as the Technical Assistance and Information Exchange Instrument of the European Commission (TAIEX) might be used to train national officials, including investigative judges, prosecutors and investigators.

The EP may contribute to the fight against impunity by encouraging Member States to establish specialised units within their judicial systems and joint investigative teams (JITs) for the investigation of core international crimes. The use of dedicated staff who are specifically trained on macro-criminality contributes to enhancing investigations and prosecutions of core crimes (Aksamitowska 2021; Bekou 2020), while JITs can play a central role in advancing cooperation among States Parties in the fight against impunity. States may also receive operational, financial and legal support from Eurojust for the establishment of JITs. Incentives such as the Europol Analysis Project on Core International Crimes (AP-CIC) provide necessary training and assistance for domestic war crimes units and should continue to be supported.

The EP should consider joining the Genocide Network as an Observer, not only to be informed of developments in domestic jurisdictions investigating and prosecuting core crimes but also be involved in consultations on accountability with other EU bodies, Member States and third countries (Bekou 2020). The Genocide Network can provide resources, practical guidance as well as comparative analysis of domestic investigations and prosecutions. EU agencies such as Europol and Eurojust already have Observer Status within the Network, as does the ICC Prosecutor.

5.3 Financial support to the ICC

Whilst the number of situations and cases continue to increase, there has been considerable pressure to reduce funding for the Court. Resource constraints would undoubtedly have an adverse impact on the quantity and quality of activities that could be undertaken by the Court. For this reason, although the ICC's budget falls within the exclusive competence of States Parties, the EU should nevertheless continue to provide a financial contribution to support the ICC's mandate and strengthen its role in the fight against impunity, while at the same time respecting the Court as an independent institution. In particular, it is essential that the EU continues to fund a number of undertakings:

- Through the Human Rights and Democracy programme under the Global Europe instrument, **outreach activities** that enable the Court to engage with different stakeholders, including communities affected by crimes under investigation by the ICC, civil society groups and non-governmental organisations (NGOs) that support Court activities in the field, local media, as well as legal and academic communities. Outreach makes it possible for affected communities to follow trials and also raise questions and concerns throughout all stages of the judicial proceedings.
- **Justice initiatives of NGOs** working in countries where core crimes have allegedly been perpetrated. In line with the Complementarity Toolkit, the Human Rights and Democracy programme under the Global Europe instrument can for instance be crucial in supporting vital activities undertaken by civil society, such as ensuring victims' rights and monitoring the judiciary's independence. In particular, the

EU could consider providing grants that NGOs may use to catalogue and process potential evidence as well as establishing databases to ensure that information is securely transferred either to the Court or domestic authorities investigating and prosecuting core crimes.

- **Training of counsel** admitted to the Court's List of Counsel and List of Assistants to Counsel. This activity constitutes a unique opportunity for participants to be informed about central legal issues in ongoing ICC cases and share experiences along with matters of mutual interest.
- **Internship and Visiting Professional Programmes**, which already exist to enable students, graduates and experts (particularly from under-represented countries) from different fields to provide a valuable contribution to the Court's work.
- **Technical events** (workshops, conferences, expert missions, etc.) that contribute to raising awareness about the Court's mandate and activities, as well as enhancing judicial cooperation and diplomatic support for the ICC.

The EU should also consider **starting to fund**, or encouraging Member States to fund:

- The **Trust Fund for Victims (TFV)**, supporting and implementing programmes that address harm resulting from core crimes. The TFV implements reparations orders and provides physical, psychological as well as material support to victims and their families. In different cases (see Lubanga, Katanga and Al Mahdi), reparations orders remain under-funded (Scheffer, 2018). The Court has also established that the TFV must provide victims with reparations in the Ntaganda case (Trial Chamber IX), while it has issued an order for submissions on reparations in the Ongwen case (Trial Chamber VI). Hence, the growing need to support victims' reparations calls for the EU to increase its financial contribution to the TFV.
- The **Trust Fund for Family Visits (TFFV)**, which is considerably underfunded. In this way, the EU may contribute to strengthening the Court's legitimacy by ensuring that conditions of detention are consistent with international human rights standards. Indeed, the TFFV provides an essential contribution to the psychosocial well-being of detainees, whose families could not otherwise afford to visit them, by enabling them to receive visits during their time in detention, which may last several years. In November 2021, following the presentation of this briefing to the EP Subcommittee on Human Rights (DROI) in October 2021, the EU donated EUR 20 000 to the TFFV, through a project of *Avocats Sans Frontières* promoting access to justice and human rights in the Central African Republic.
- **Training activities** for Court staff. These activities would, for instance, permit Court staff to become familiar with national legal systems and domestic regimes in their investigation and prosecution of core crimes.

5.4 Other measures to ensure accountability

The EP should invite Member States sitting on the United Nations (UN) Security Council and the UN Human Rights Council to support the establishment and work of international Commissions of Inquiry (ColIs) that are tasked to investigate serious violations of international humanitarian law and international human rights law. An increasing number of UN ColIs receive an *accountability driven mandate* that includes identifying the alleged perpetrators of international violations and ensuring that they are held to account. The UN ColIs' work constitutes a significant source at the pre-investigative phase of ICC proceedings since it offers general situation overviews and reveals the (alleged) existence of international crimes' contextual elements. For this reason, ColIs' investigations have to date had a strong influence on the Court's (pre-trial) proceedings, particularly regarding the Prosecutor's decision to start an investigation and the Pre-Trial

Chambers' findings in authorising an investigation or issuing arrest warrants and summonses to appear (Mariniello, 2017).

The EP should invite Member States sitting on the UN Security Council to promote referral to the ICC of situations where core crimes have allegedly been committed. Security Council referral is indeed necessary to trigger the Court's intervention in relation to alleged core crimes being perpetrated in the territory of a country that has not yet ratified the Rome Statute or accepted the Court's jurisdiction.

In light of its commitment to the global fight against impunity, the EU should continue to support the work of UN investigative bodies mandated to collect, preserve and analyse evidence of the most serious international crimes allegedly committed in some specific contexts. These bodies include: the Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (ITAD); the International, Impartial and Independent Mechanism for Syria (IIIM); and the Independent Investigative Mechanism for Myanmar (IIMM).

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Annex: Summary of recommendations to the EU

Cooperation

- The EP should encourage Member States to appoint a national focal point for cooperation with the ICC and should continue to support the EU focal point in their work.
- The EP should invite the European Commission to report on effective implementation of the 2006 Agreement on Cooperation and Assistance between the EU and the ICC.
- The EU should promote among Member States and third countries all agreements on cooperation and assistance with the ICC.
- The EU might also consider providing both States Parties and third countries with technical assistance on the adoption of framework agreements on cooperation with the ICC.

Complementarity

- The EP should encourage all States Parties to adopt (comprehensive) implementation of the Rome Statute legislation.
- The EU could also promote, through the Human Rights and Democracy programme under the Global Europe instrument, an independent study that aims to systematise and analyse States Parties' legislation as well as their approaches to the investigation and prosecution of core crimes.
- The EU should contribute to ensuring that third countries, particularly those where core crimes have been allegedly perpetrated, are able to put in place comprehensive justice and accountability systems.
- To uphold the complementarity principle, the EU could organise workshops and expert missions in beneficiary states on the correct transposition, implementation, or enforcement of the ICC legal regime.
- The EP should encourage Member States to establish specialised units within their judicial systems and joint investigative teams for the investigation of core international crimes.
- The EP should consider joining the Genocide Network as an associate member.

Financial Support to the ICC

The EU should continue to provide a financial contribution to support the ICC's mandate and strengthen its role in the fight against impunity. In particular, it should fund the following undertakings:

- Through the Human Rights and Democracy programme under the Global Europe instrument, outreach activities that enable the Court to engage with different stakeholders.
- Justice initiatives of NGOs working in countries where core crimes have allegedly been perpetrated.
- Training of counsel admitted to the Court's List of Counsel and List of Assistants to Counsel.
- Internship and Visiting Professional Programmes for students, graduate and experts (particularly from under-represented countries).
- Technical events (workshops, conferences, expert missions, etc.) that contribute to raising awareness about the Court's mandate and activities, as well as enhancing judicial cooperation and diplomatic support to the ICC.
- The EU could also consider funding or encouraging Member States to fund the TFV and the TFFV.
- Training activities for Court staff.

Other Measures to Ensure Accountability

- The EP should invite Member States sitting on the UN Security Council and the UN Human Rights Council to support the establishment and work of international CoIs that are tasked to investigate serious violations of international humanitarian law and international human rights law.
- The EP should invite Member States sitting on the UN Security Council to promote referral to the ICC of situations where core crimes have allegedly been committed. Security Council referral is indeed necessary to trigger the Court's intervention in relation to alleged core crimes occurred in the territory of a country that has not yet ratified the Rome Statute or accepted the Court's jurisdiction.
- The EU should continue to support the work of UN investigative bodies, such as UNITAD, IIMM and IIMM.

II. Workshop proceedings

WORKSHOP PROCEEDINGS

Envisioning International Justice: what role for the ICC?

WORKSHOP

POLICY DEPARTMENT, DG EXPO
FOR THE SUBCOMMITTEE ON HUMAN RIGHTS
(DROI)




Thursday, 28 October 2021 – **09:00-11:00**

ALTIERO SPINELLI BUILDING, ROOM **3G3**

BRUSSELS - **VIA WEBSTREAMING**

CONTACT: poldep-expo@ep.europa.eu

A photograph of a butterfly with orange and black wings flying through a dark, circular tunnel. The tunnel's walls are made of a textured material, possibly wood or stone, and the light at the end of the tunnel creates a bright, glowing effect. The butterfly is positioned in the center of the tunnel, flying towards the viewer.

Envisioning international justice: what role for the International Criminal Court?

Maria ARENA

Chair of the Subcommittee on Human Rights (DROI)

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Programme

For the Subcommittee on Human Rights (DROI)

WORKSHOP

Envisioning International Justice: what role for the International Criminal Court?

28 October 2021

9.00 -11.00

Brussels, Altiero Spinelli Building, room 3G3, Brussel / via webstreaming

PROGRAMME

Introductory remarks

- **Maria Arena**, MEP, Chair of the Subcommittee on Human Rights

Academic expert presentations

Political support and cooperation by States:

- **Olympia Bekou**, Professor of Public International Law, Head of School, School of Law, University of Nottingham

Case selection and prioritisation by the Court:

- **Triestino Mariniello**, Associate Professor, Liverpool John Moores University, currently Senior Research Fellow at the Humboldt University of Berlin
- **Yvonne McDermott Rees**, Professor of Legal Studies, Hillary Rodham Clinton School of Law, Swansea University

Input from stakeholders/ human rights defenders

- **Alison Smith**, Director for International Justice, No Peace Without Justice
- **Rodney Dixon QC**, Lawyer - Temple Garden Chambers, London/The Hague
- **Mamtimin Ala**, Writer and human rights activist

Debate

Concluding remarks by the Chair

End

1. Introduction

This report summarises the proceedings of a workshop organised by the European Parliament's Policy Department for External Relations for the Subcommittee on Human Rights (DROI). The workshop took place in Brussels on 28 October 2021 with remote participation and was chaired by **Isabel Wiseler-Lima**, Member of the European Parliament (MEP) and Vice-Chair of DROI (EPP, Luxembourg). The aim of the workshop was to discuss prospects for the International Criminal Court (ICC) based on the historic trends since its foundation in 1999, taking into account the likely outcomes of the current internal review process and the main positions of key stakeholders, such as the Court's organs, States Parties and civil society. The workshop should also provide an opportunity to identify options for the EU to support a mid and long-term future that strengthens the ICC as a court of last resort for international crimes.

To this end, legal academic experts, civil society experts and human rights defenders were invited to share their views on the subject. Two academic briefings were prepared as a basis for the discussion and were presented at the workshop.

In her introductory remarks, **Isabel Wiseler-Lima** MEP stated that the appointment of the new prosecutor (Karim A. A. Khan QC who took office in summer 2021 for a nine-year term), the ongoing review of the Court, and many high-profile investigations rendered it necessary and timely to reflect on the future prospects of the Court. She highlighted the fact that the prosecutor has difficult choices to make with regard to case selection, since the ICC is increasingly occupied with victims of grave human rights abuses, while resources and political support are limited. Ms Wiseler-Lima also referred to the possible addition of the crime of ecocide to the Court's mandate – a suggestion that Parliament and many experts support. She emphasised that the workshop feeds into upcoming committee work, since the ICC Prosecutor has been invited to an exchange of views and DROI plans to visit the Court in The Hague in 2022. She then invited the experts and practitioners to share their experiences and analysis, and to offer their recommendations on how the EU and its Member States can contribute to a stronger and more effective ICC.

2. Academic Experts' Presentations

2.1 Olympia Bekou, Professor of Public International Law, Head of School, School of Law, University of Nottingham: Political support and cooperation by States

Olympia Bekou presented the main points of her written briefing (see part xx of this workshop report) by outlining the growing challenges that the ICC faces. These include an increasing workload, limitations on its resources and political attacks on its existence. She also highlighted the relevance of the Independent Expert Review, which took place in 2020, with the objective of identifying ways to strengthen the ICC and the Rome Statute system. Professor Bekou then focused on the role of the EU in generating political support for the Court and on ways to enhance cooperation.

She outlined several trends starting with the Court's aim of achieving universal ratification of the Rome Statute. Here, the EU should continue to work with the ICC to establish dialogues with non-state parties, which currently make up approximately one third of the world's states. The EU should also call upon Member States and non-EU States to ratify the Kampala amendments on the crime of aggression. She highlighted the lack of cooperation with and the decline in political support for the

Court by veto powers in the UN Security Council, primarily China and Russia, but also the US. With regard to China, the EU should support Parliament's resolution of September 2021¹, which proposed a new EU-China strategy with a focus on human rights. Professor Bekou gave some examples where the EU should continue to restate its support for the Court's investigations, such as the situation in Georgia, Belarus, Afghanistan and Palestine. In particular, the EU should urge the US to view the investigations (in Palestine and Afghanistan) through the broader lens of the global fight against impunity. Another emerging trend concerns the Court's integrity, which is challenged by attacks and allegations of bias or a lack of impartiality. To counter such political attacks and increase cooperation, the EU should continue to reiterate its unwavering support for the Court. Professor Bekou emphasised that once political support for the Court was strong, so too would the level of cooperation.

Speaking about the EU's role in facilitating and increasing cooperation with the Court, Professor Bekou highlighted the Union's ability to provide political, diplomatic and financial support. She also emphasised the EU's crucial role in providing global leadership to increase political support for the Court, enhance cooperation and combat attacks on the Court's integrity and existence. Future initiatives could include coordinated communication strategies for providing rebuttals against attacks, countering non-cooperation and promoting the Court's mandate. The Union should remain committed to supporting the global fight against impunity for the gravest crimes of concern to the international community. Hence, the EU should also remain engaged in the discussion on the recently proposed crime of ecocide.

Olympia Bekou concluded by describing the EU as an essential actor whose role will grow in importance as the ICC seeks allies and assistance in tackling contemporary and future challenges.

2.2 Yvonne McDermott Rees, Professor of Legal Studies, Hillary Rodham Clinton School of Law, Swansea University and Triestino Mariniello, Associate Professor, Liverpool John Moores University, currently Senior Research Fellow at the Humboldt University of Berlin: Case selection and prioritisation by the Court

Professors Triestino Mariniello and Yvonne McDermott Rees presented their briefing (see part xx of this workshop report) on case selection and prioritisation by the ICC Prosecutor. They began by highlighting the fact that the Court is at a critical juncture – with the arrival of a new prosecutor – and that new dynamics are expected in response to pressing challenges. The 2020 report of the Independent Expert Review of the ICC raised concerns about the increasing number of situations before the Office of the Prosecutor (OPT) and the lack of resources available to manage the situations the OPT may wish to pursue. This dynamic leads to a delicate balancing act for the prosecutor who has to manage the expectations of his office, and the credibility and legitimacy of the Court through its prosecutorial activities.

Yvonne McDermott Rees elaborated on the process of situation and case selection before outlining some future scenarios and recommendations from their report. The process of case selection generally begins with the opening of a preliminary examination of *situations* – currently there are seven examinations into situations in Colombia, Venezuela, Guinea, Bolivia, Ukraine and Nigeria. In

¹ Texts adopted, P9_TA(2021)0382.

this phase, the prosecutor determines whether the conditions (evidence and jurisdiction) and criteria (gravity, the interests of justice, complementarity) to proceed and launch a full investigation are met.

Following a full investigation, the prosecutor may decide to hibernate the investigation with the possibility of re-launching further investigations at a later date, or they may select individual suspects for prosecution. The criteria for *case selection* are the same as those for *situation selection* – jurisdiction, admissibility and the interests of justice.

Yvonne McDermott Rees outlined four possible future scenarios how the new prosecutor might pursue situation and case selection, and prioritisation. Firstly, the prosecutor might seek to reduce the number of situations under preliminary examination or investigation. Secondly, there might be a dynamic of ‘positive complementarity’ – supporting states to undertake domestic investigations and prosecutions of crimes falling within the jurisdiction of the ICC, which would emphasise its role as a Court of last resort. Thirdly, the prosecutor might seek to close, hibernate or de-prioritise full investigations or certain aspects of investigations in order to reduce the number of ongoing investigations. Fourthly, the focus might increasingly be directed to cases with the strongest evidentiary footing.

Triestino Mariniello elaborated on the external credibility of the Court by starting with a particular reference to Afghanistan. He stated that the prosecutor’s decision to ‘de-prioritise’ US war crimes raised criticisms as it was perceived as surrendering to one of the most powerful countries. According to Professor Mariniello, this case once again underlines the importance of and need for the prosecutor to consistently apply clear and transparent criteria in the selection of situations and cases.

He further highlighted the fact that international organisations should support the Court and outlined some recommendations for the EU on cooperation, complementarity and financial support. Moreover, he emphasised that EU support for outreach activities would enable the Court to engage with different stakeholders, including communities affected by crimes under investigation by the ICC. The EU could also invest more in technical events (workshops, conferences, expert missions, etc.) that contribute to raising awareness about the Court’s mandate and activities, as well as in enhancing judicial cooperation and diplomatic support for the ICC.

3. Civil Society Representatives and Human Rights Defenders

3.1 Alison Smith, Director for International Justice, No Peace Without Justice

In her contribution, Alison Smith focused on three points:

1. the ICC’s impact;
2. the EU’s political support;
3. the EU’s financial support.

According to Ms Smith, the ICC is a service provider for justice and redress for victims. Its clients are not States Parties, civil society or the international community as a whole, but they are victims, survivors and communities who have suffered Rome Statute crimes. States Parties’ financial contributions provide the resources for justice to be delivered to the victims, not to themselves. The

Independent Expert Review identified many areas that are preventing the ICC from delivering justice and redress. They relate to a) the inner workings of the ICC – such as working culture and practices, and b) the impact the ICC can have on the ground due to shortcomings in communications and outreach, specifically communication with victims and affected communities. Recent research² conducted by No Peace Without Justice and the International Federation for Human Rights about outreach under the tenure of Prosecutor Bensouda details similar findings. Challenges in outreach – including a lack of outreach during the preliminary examination stage – have a direct impact on perceptions of the ICC in those countries. This in turn has a negative impact on the capacity of the ICC to deliver meaningful justice.

Ms Smith also highlighted, however, that even if the ICC were the best institution it could possibly be, it would still not be able to deliver justice for all victims in all situations around the world. This impunity gap can be addressed in two ways. Firstly, the ICC can ensure a ‘representative’ case selection which people whose suffering is not the direct subject of ICC proceedings can still relate to. Secondly, the ICC can act as a catalyst for proceedings in other jurisdictions.

Concerning political support, Ms Smith highlighted two areas which the EU should become active in. Firstly, the EU and its Member States should refuse to meet individuals who are the subject of an ICC arrest warrant and who are therefore fugitives from justice. Secondly, targeted sanctions should be applied against ICC fugitives as a legal process has concluded that there are reasonable grounds to believe that the specific individual has committed serious crimes such as those covered by Magnitsky-type legislation. Hence, automatically including ICC fugitives in these sanctions regimes would send a strong signal.

Finally, Ms Smith addressed the issue of financial support. She described a resource crisis at the ICC, both with its budget and unpaid arrears, which has led to a vicious circle. For several years, the ICC has presented a budget below its needs. States Parties then cut that budget citing poor performance. The ICC then under-delivers in terms of performance, blaming a lack of resources. This will only start to change when the ICC starts performing better and demanding the resources it genuinely requires. She explained that the EU should not fund supplementary aspects of the ICC’s budget that are normally covered by its budget, for instance outreach.

Instead, she recommended that the EU should contribute to voluntary funds³, support the broader Rome Statute system, including through support for civil society working on the ICC and related issues, and contribute to reversing the cyclical situation within the ICC budgetary process (i.e. dropping the zero growth approach).

EU Member States can also support other aspects of the international justice system, such as the international mechanisms for Myanmar and Syria, human rights monitoring and documentation processes established through the UN Human Rights Council and elsewhere, and through direct support to states seeking to investigate and prosecute Rome Statute crimes within their national systems including through the use of universal jurisdiction.

² This is part of a broader report by the International Federation for Human Rights (FIDH) and No Peace Without Justice that focuses also on sexual and gender-based violence and preliminary examinations that is due to be released in December 2022.

³ The Trust Fund for Victims, the Trust Fund for Family Visits and the Trust Fund for the participation of the least developed countries in the activities of the Assembly.

3.2 Rodney Dixon, QC, Temple Garden Chambers, London/The Hague

Rodney Dixon, a lawyer with extensive practical experience with international courts, including the ICC, stated that the Court is at a crossroads. How the Court will deal with the overwhelming number of allegations and violations, and what it chooses to investigate (and not) are the central issues at stake. Yet, the ICC is not alone in this since the European Court of Human Rights and national courts face similar dilemmas. From his perspective as practitioner in the field, Mr Dixon has developed three criteria which should be applied in the decision-making process to ensure that the Court has a real impact on the international legal stage.

Firstly, Article 15 procedures under which the prosecutor decides to launch an investigation are an important feature of the Court. While they should be used carefully, such investigations must be launched where significant crimes have occurred which shock humankind and where large numbers of victims are without any remedy. Secondly, the prospects of gathering evidence and making arrests must be sufficiently high. In fact, such cases also help to create momentum and increase international support for other cases. Thirdly, the prospects of international support and cooperation must be genuine and tangible. Here, the EU plays a key role in choosing when and where to support ICC investigations. It is also essential to look at ongoing crimes where the Court has a chance to stop human rights violations.

Mr Dixon then used the communication under Article 15 on alleged genocide and crimes against humanity against the Uyghur people as a case study. He explained why, in line with the stated criteria, an investigation should be launched by the ICC Prosecutor:

1. The case involves mass allegations of genocide and crimes against humanity with worldwide condemnation, including in some parliaments.
2. There is jurisdiction since part of the alleged crime was committed on the territory of an ICC State Party and there is cogent, accessible and even public evidence that there is a reasonable basis to believe that a genocide is happening. There is a real prospect of making arrests and commencing trials as the alleged perpetrators are Chinese officials who are travelling around the world.
3. There is widespread international support for action to be taken. He also highlighted that universal jurisdiction must be deployed in parallel with national jurisdictions.

Mr Dixon concluded with three recommendations:

1. the ICC should submit clear and transparent criteria on case selection and prioritisation;
2. where there is overwhelming evidence, the Court must take up the case even if there is no state referral;
3. he called for more and wider support, and additional funding.

He concluded by once again emphasising the need for the prosecutor to focus on the impact the ICC can have and to take up and pursue the most important cases.

3.3 Mamtimin Ala, Writer and Human Rights Activist

Dr Mamtimin Ala made a brief statement about his experience as a member and activist from one of the Uyghur groups who initiated the communication to the ICC citing alleged crimes committed by Chinese officials. He stated that he was an indirect victim of the crimes committed against the

Uyghur communities. He argued that there is evidence that China's rights abuses constitute an ongoing genocide as defined in the Geneva Genocide Convention. He stated that currently millions of Uyghurs are detained in Chinese concentration camps, deceptively called 're-education centres', where numerous serious crimes are committed, such as rape, organ harvesting, brainwashing, murder and slave labour.

Mr Ala noted that international and domestic companies benefit financially from Uyghur exploitation. He acknowledged Parliament's awareness of the subject, citing its 2019 resolution calling for the EU to ban products that have been produced through the use of Uyghur forced labour⁴. Mr Ala also reported that organ harvesting is being carried out on an industrial scale, that there is a widespread practice of separating children from their families and ongoing persecution of Uyghur intellectuals, who have a key role in preserving Uyghur culture. Mr Ala argued that China's collective criminalisation of the Uyghurs was used to justify the genocidal policies.

He emphasised his quest for justice for these atrocities and highlighted the crucial role of the ICC investigation. Such an investigation would provide hope for universal justice and would also set a precedent for the genuine application of international law and for other international law agencies to prevent future genocides and punish those who are held responsible.

Furthermore, he argued that, since the workshop sought to outline ways to improve the role and functioning of the ICC, the Uyghur genocide constitutes a litmus test for the renewed efforts of the ICC to adhere to the spirit and practice of international law as a defender of universal justice.

4. Debate

Nacho Sánchez Amor MEP (S&D, ES) underscored the need to send a message of political support to the ICC and those working with it, and to protect the Court against attacks and criticism. In fact, the ICC is one of the key components in the EU's defence of multilateralism. Mr Sánchez Amor echoed the experts' opinion that the EU has an interest in the proper and effective functioning of the Court. The European Parliament should do everything in its power to support the Court politically and try to block or minimise the negative effects of attacks on its work, alongside the financial support it provides. Some MEPs have suggested awarding the Noble Peace Prize to the ICC in order to strengthen its international position. Mr Sánchez Amor called on Parliament to consider this idea. He further pointed out that all EU Member States should completely align their policy on contact with persons wanted by the Court. Ultimately, the Court has never had an 'easy' time and does not have many supporters around the world. Hence, the political and financial support offered by the EU and its Member States is essential to the ICC. The ICC depends on the EU in order to maintain multilateralism globally. The EU and Parliament should speak up and defend the Court.

Tineke Strik MEP (Greens/European Free Alliance, NL) agreed that the EU should play a vital role in terms of political support, cooperation and funding, and highlighted the most important question for the EU to address: how can it provide stronger support to the ICC – not only politically but also financially? She pointed out that the EU (and its Member States) should use their leverage and unified voice at UN level to generate more global support for the ICC. Ms Strik further expressed particular interest in the possibility of Member States using universal jurisdiction in order to close global accountability gaps. While this is a national competence, she asked the guest speakers for ideas on how the EU could encourage the use of universal jurisdiction in its Member States.

⁴ OJ C 255, 29.6.2021, p. 60.

Giuliano Pisapia MEP (S&D, IT) thanked his colleagues and the speakers for their contributions. He recalled his past activity in Italy to ensure that the ICC could take on the crucial role it has today and receive the necessary financial and political leverage, and support. He also highlighted important victories in the battle to abolish the death penalty and limiting life sentences to cases of exceptional gravity. He further pointed out the decision of the Court of Justice of the European Union to take steps against Poland for its infringements against the rule of law. Parliament is determined to ensure that Poland pays the fines imposed and Mr Pisapia indicated that Parliament could see that this would benefit the ICC's budget. Mr Pisapia raised two issues on which he wanted to hear the speakers' opinion:

1. the presumption of innocence and whether those who have been accused of serious charges, such as torture, face any problems with the right of defence;
2. the prosecutor's extensive discretionary powers in terms of initiating proceedings and setting priorities.

Isabel Wiseler-Lima MEP asked two questions:

1. What are the chances that the case submitted against Chinese officials regarding the Uyghurs moves forward to an investigation and what impact could that have on China's stance towards the Court?
2. The term 'ecocide' is sometimes problematic but there seems to be consensus about the gravity of environmental crimes. Is there ongoing work regarding the definition of 'ecocide' that could elicit a broader consensus?

Olympia Bekou pointed out that the use of universal jurisdiction is for a national jurisdiction or authority to decide. There is a resurgence of universal jurisdiction. Germany is taking the lead on a number of cases regarding Syria. The first universal jurisdiction cases regarding Libya have been taken up in Switzerland this year.

On the presumption of innocence, Professor Bekou argued that this is very well protected at the ICC and that all accused have their right to a fair trial respected.

Referring to the Rome Statute, she explained that China has not signed or ratified the Statute. She was moved by the presentation of Mr Ala, but stressed the difficulties in bringing the Uyghur case to the ICC due to jurisdictional hurdles. Firstly, the ICC can only deal with crimes that occur in the territory of States Parties, therefore only those which occurred in Tajikistan or Cambodia, for example. Secondly, while the UN Security Council could refer the case to the ICC this was highly unlikely to happen as China would veto such a decision as one of the five permanent members (P5).

According to Professor Bekou, ecocide is much discussed now and a definition has been already suggested. She stressed that there are distinctive advantages of including the crime of ecocide in the Rome Statute but also a number of challenges: for example, the proposed definition includes the concept of an illegal or wanton act, where 'wanton' means 'with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated'. Yet it could be difficult to determine what is 'clearly excessive' and what the implications are. Is damage which is not 'clearly excessive' allowed? She suggested further discussion of the threshold was required.

Triestino Mariniello focused on prosecutorial discretion, which is an important principle in international crimes. He stated, however, that the exercise of prosecutorial discretion at the ICC was problematic as it is not subject to judicial review. One of the main criticisms is the asymmetrical

implementation of international criminal justice by an international organisation that aspires to be universal. He highlighted the fact that the current system of justifying the OPT's case selection and prioritisation through internal documents and policy papers has failed, and therefore other instruments should be explored. One possibility was to put stricter forms of judicial review of the prosecutor's discretionary power in place, which, eventually, would have an impact on the legitimacy and credibility of the Court (i.e. when decisions are not based on clear and transparent criteria).

Yvonne McDermott Rees underlined the importance of universal jurisdiction as an avenue to address international crimes, particularly in light of the jurisdictional hurdles the ICC faces regarding the Uyghur case. Regarding EU support for universal jurisdiction, she pointed out two developments:

1. the Europol Analysis project which facilitates the cooperation and coordination of EU Member States and third parties' efforts to identify and investigate perpetrators of core international crimes;
2. the Eurojust genocide network which supports domestic war crimes units through training and information sharing.

Referring to the question from MEP Pisapia regarding the presumption of innocence, she stated that the success of the Court is sometimes rated on the basis of the low number of convictions. However, according to her, acquittals demonstrate 'fairness' and fair trial practices rather than failures by the Court

Taking the work on accountability for deforestation in the Amazon into account, **Alison Smith** saw a clear advantage in incorporating ecocide into the Rome Statute. This would set the standard for the national level, which is essential in order to reduce deforestation and effectively fight climate change. She also called on States Parties to hear the views of victims and affected communities, such as indigenous people, in the discussion over ecocide.

Ms Smith argued that it was not a problem that the OPT had too much discretion but rather that there was a lack of clear criteria, consistent decision-making and consideration of victims. For example, in the case of Afghanistan, the problem was not the decision in itself but the fact that a message was sent to some victims that they were not a priority, which was very unfortunate.

Rodney Dixon stated that many national authorities do not embrace universal jurisdiction and that it was difficult to get these investigations off the ground. Member States could play a vital role in providing political backing and sending a signal that they embrace the concept of universal jurisdiction. Moreover, there is a need for a more coordinated approach and harmonisation among Member States.

He further highlighted that the presumption of innocence is a cornerstone of criminal law, as is the right to a full defence. In the case of the Uyghurs for example, Chinese officials would be heard fairly. They should not disregard the Court but should submit their arguments and evidence.

According to Mr Dixon, the concept of 'continuing crimes' would help establish ICC jurisdiction in the Uyghur case, even though China has not ratified the Statute. If the alleged crimes began outside China but under ICC jurisdiction, and then the crimes continued on Chinese territory, they would still fall under ICC jurisdiction. With this in mind, Mr Dixon reiterated his call for the EU to support the launch of an investigation into the alleged crimes committed against the Uyghurs as soon as possible. It should do so based on the existing evidence but not prejudge the outcome, in accordance with the principles of a fair trial.

Mamtimin Ala agreed that the jurisdictional issue and China's status as one of the P5 constitute great challenges for the ICC regarding the Uyghur investigation. It seems as if the entire weight of the case has been placed on the ICC while other international organisations and major powers have remained silent. He called for complementarity – international organisations should help the ICC to facilitate investigations into the Uyghur genocide. He stated that the Uyghur case requires international cooperation owing to its unprecedented nature, its continuing nature and complexity.

Roberta Dariol, European External Action Service, Human Rights Division, EU Focal Point for the ICC, commented that the briefings presented were particularly timely and relevant because they identified the key challenges the ICC was facing and would face, i.e. state cooperation and prioritisation for investigations.

She noted that many recommendations insisted on the need for the EU to implement and build on current initiatives and actions, such as universality campaigns, use of ICC clauses or technical assistance. Indeed, during the last year, the EU had continued its direct support to the Court and also indirect support through accountability mechanisms, human rights dialogues and démarches. She pointed out that the EU tried to follow up on the recommendations from the study on impunity, which had been commissioned by the DROI committee in the previous year. In particular, the EU tried to promote the conclusion of agreements with the ICC among the Member States and non-EU States, not only the Agreement on Privileges and Immunities but also ad hoc agreements on cooperation in various areas. The EU also worked to improve cooperation between Member States and the EU on the universality campaigns, and also tried to increase logistical assistance to the Court.

She underlined the need for the EU to continue to support the ICC. This support must be both consistent i.e. the EU needs to speak with one voice, even if Court decisions are unwelcome and controversial, and shield the ICC from attacks.. The support must also be constant - providing political, diplomatic and financial support, even if there is no crisis, and keeping the ICC high on the agenda. For this, Parliament and civil society are key players.

Jonathan van Meerbeek European Commission, DG International Partnerships, welcomed the timeliness of the exchange, since the Commission was currently preparing the priorities for cooperation for the next seven years. In fact, the ICC is one of the main priorities within the Human Rights and Democracy programme under the Global Europe Instrument, which is worth EUR 1.5 billion.

He took note of the recommendations to support outreach activities and highlighted the fact that much had been done in this regard in the past with an annual budget of EUR 1 million. He acknowledged that more could be done to support the broader Rome Statute system and in particular to bolster the crucial work of non-governmental organisations (NGOs).

The Independent Expert Review had confirmed the important role NGOs play in fostering cooperation and the EU supports them in advocacy and providing support, such as Parliamentarians for Global Action, which facilitates cooperation through contacts with fellow parliamentarians. He also stressed the importance of a knowledge base on accountability. Based on Parliament's proposal for an EU observatory on impunity the Commission had launched a scoping study.

Regarding complementarity, the EU directly supports justice systems in partner countries. Support to victims is another key issue, which could have been stressed more in the briefings. The EU supports, among others, the work of NGOs that provide legal aid to victims and help bring their cases to the ICC, national courts, regional courts or UN human rights mechanisms. Mr van Meerbeek stressed the importance of EU support for these other international mechanisms which though often underfunded play a very important role in the fight against impunity, such as the

Office of the United Nations High Commissioner for Human Rights and its procedures and operations, the UN investigative mechanisms and regional human rights courts.

Ms **Isabel Wiseler-Lima** concluded the debate by thanking all the speakers for their contributions and recommendations.

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