

# The International Criminal Court: A European Success Story?

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# The International Criminal Court: A European Success Story?

Mitja Mertens

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## About the Author

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## **Abstract**

In light of the 2010 Review Conference of the Rome Statute not only the International Criminal Court (ICC) itself but also the support of the European Union (EU) for the Court must stand up to scrutiny. To what extent has it been effective? This paper elaborates a tailor-made yardstick to measure 'effectiveness' and then follows a two-pronged approach. First, it scrutinises the Union's support for the ICC, showing that, despite numerous challenges, the EU's policy of broadening, strengthening and deepening the Rome Statute system has become more effective in the last decade. Second, it evaluates the effectiveness of the ICC itself, commending its relatively advanced institutional set-up, its growing socio-democratic legitimacy and its relative independence from political interference, while pointing to its suboptimal efficiency, its difficult cooperation with relevant partners and the delicate inclusion of elements of restorative justice. The results of this review lead to six policy recommendations to enhance the effectiveness of the EU's promotion of the ICC.

## 1. Introduction: effective EU support for the ICC?<sup>†</sup>

The 2010 Review Conference took stock of the turbulent years of the International Criminal Court since the entry into force of the Rome Statute in 2002.<sup>1</sup> Marking the 'beginning of a new era in international law',<sup>2</sup> in which the concept of personal immunity no longer shields state officials from prosecution for genocide, crimes against humanity and war crimes,<sup>3</sup> the ICC has rapidly evolved alongside international developments. On 4 March 2009, the issuance of an arrest warrant<sup>4</sup> against the incumbent head of state of Sudan, Omar al Bashir, caused significant diplomatic hassle. On 31 March 2010, a pre-trial chamber granted the request of the Prosecutor to open investigations into 2007 post-election violence in Kenya;<sup>5</sup> for the first time, the Prosecutor initiated investigations *proprio motu*.<sup>6</sup> On 1 November 2010, the Seychelles became the 112<sup>th</sup> state party of the Rome Statute.<sup>7</sup> In the near future, the phasing out of the *ad hoc* tribunals, that is the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), will raise questions concerning the future of international criminal justice.

In these interesting times, not only the ICC itself but also the support of the European Union<sup>8</sup> for the Court must stand up to scrutiny. The ICC is sometimes described as an 'EU Court'<sup>9</sup> – but is the ICC really a European 'success story'? To what extent has the EU's support for the ICC been effective?

To answer this question, chapter 2 elaborates a tailor-made yardstick to measure effectiveness, providing a basis for the following two-pronged approach: First, chapter 3 scrutinises the EU's support for the ICC. Prior research in this field has mainly concentrated on the ratification process. This paper adopts a more

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<sup>†</sup> The author would like to thank Prof. Monica den Boer for her valuable guidance and the interviewees for their remarkably sincere and direct answers. All electronic resources were last retrieved on 22 December 2010.

<sup>1</sup> International Criminal Court, *Review Conference*, <http://www.icc-cpi.int/Menu/ASP/ReviewConference/Review+Conference.htm>.

<sup>2</sup> N. Deitelhoff, "Deliberating CFSP: European Foreign Policy and the International Criminal Court", *RECON Online Working Paper*, no. 10, 2008, p. 1.

<sup>3</sup> Art. 27 Rome Statute.

<sup>4</sup> International Criminal Court, *Case The Prosecutor v. Omar Hassan Ahmad Al Bashir*, <http://www.icc-cpi.int/Menu/Go?id=90ee1a29-75c8-4834-8b34-56355b0c35f8&lan=en-GB>.

<sup>5</sup> International Criminal Court, *ICC judges grant the Prosecutor's request*, <http://www.icc-cpi.int/NR/exeres/D81AA5AF-CD76-4B3C-A4FC-AA7819569B44.htm>.

<sup>6</sup> See Art. 13-15 Rome Statute.

<sup>7</sup> International Criminal Court, *Seychelles*, <http://www.icc-cpi.int/NR/exeres/BAA909C9-3E7B-4156-ACA0-B63225DC8E40.htm>.

<sup>8</sup> Although this paper sometimes refers to the member states of the EU, it focuses on the EU itself, which is not a signatory of the Rome Statute.

<sup>9</sup> M. Groenleer & D. Rijks, "The European Union and the International Criminal Court: The Politics of International Justice", in K. Jørgensen (ed.), *The European Union and International Organizations*, London, Routledge, 2009, p. 167.

comprehensive approach, arguing that the EU's support for the broadening, strengthening and deepening of the Rome Statute system has become more coherent and more effective in the last decade despite its numerous challenges and shortcomings. Second, fuelled by the idea that support for the ICC must consider the actual set-up and functioning of the Court and take account of the beneficiary's needs, chapter 4 evaluates the effectiveness of the ICC itself. It faces two major challenges, namely the politico-legal complexity of the matter and the lack of empirical data. On the one hand, this paper has to disregard the historical development of international criminal justice<sup>10</sup> and substantive provisions.<sup>11</sup> It can only focus on a couple of core procedural elements to measure the effectiveness of the Court. On the other hand, the ICC remains a 'justice start-up'.<sup>12</sup> By 2010, eight years after the entry into force of the Rome Statute, investigations into the situations in Uganda, the Democratic Republic of the Congo, the Central African Republic, Sudan and Kenya, and two trials against three Congolese nationals have been opened but not a single trial has been concluded yet. The evaluation of effectiveness as outlined in this paper will therefore be a provisional one. Nevertheless, the first years of a new institution are decisive for its future development. This evaluation must thus take emerging trends of the ICC into account. It demonstrates that the ICC has the potential to fight impunity effectively if it overcomes a number of policy dilemmas. Drawing on these findings, the conclusion presents six policy recommendations for a more effective European support for the ICC.

## 2. A tailor-made yardstick to measure effectiveness

To what extent does the EU's support for the ICC qualify as a success story? In order to answer this question, it is first necessary to determine how to measure 'success'<sup>13</sup> or 'effectiveness', the latter term being more commonly used in political

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<sup>10</sup> See A. Cassese, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court", in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, pp. 4-15.

<sup>11</sup> Art. 5-9, 22-33 Rome Statute.

<sup>12</sup> C. Chung, in *The Reckoning: The Battle for the International Criminal Court*, P. Yates, Skylight Pictures, 2009.

<sup>13</sup> Identical to the definition of effectiveness, a common definition of success reads: "the achieving of the results wanted or hoped for", Cambridge Advanced Learner's Dictionary, *success*, <http://dictionary.cambridge.org/dictionary/british/success>.

science. Both the ordinary meaning of effectiveness<sup>14</sup> as well as its use in public policy analysis<sup>15</sup> refer, simply put, to the actual implementation of one's objectives.

In an attempt to provide for a transparent goal-achievement analysis, the following sections will make the objectives of the actors involved explicit, and systematise and deconstruct them in order to identify different points of reference on the yardstick of effectiveness. They elaborate a tailor-made framework to measure the effectiveness of the EU's support for the ICC and of the work of the ICC itself. This will allow for the comparison of objectives with actual implementation in chapters 3 and 4.

## 2.1 A yardstick to measure the effectiveness of the EU's support for the ICC

Various ways are conceivable to systematise the EU's declared objectives. This paper takes the 'recipient's view' as a reference point. During a speech in 2010, the President of the ICC identified three main areas in which states parties and partners can contribute to the ICC: the broadening, strengthening and deepening of the Rome Statute system.<sup>16</sup> 'Broadening' refers to the addition of new states parties to the Rome Statute.<sup>17</sup> 'Strengthening' relates to enhanced cooperation of partners with the ICC by arresting suspects, blocking their bank accounts and liaising with the ICC in other fields as a matter of routine.<sup>18</sup> 'Deepening' corresponds to the empowerment of national jurisdictions to deal with mass atrocities at the domestic level.<sup>19</sup>

The EU's declared objectives, as expressed in the Council Common Positions of 2001<sup>20</sup>, 2002<sup>21</sup> and 2003,<sup>22</sup> and as specified in the Action Plan of 2004,<sup>23</sup> can be categorised according to this trichotomy:

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<sup>14</sup> See Cambridge Advanced Learner's Dictionary, *effectiveness*, [http://dictionary.cambridge.org/dictionary/british/effective\\_1](http://dictionary.cambridge.org/dictionary/british/effective_1).

<sup>15</sup> K. Jørgensen, "The European Union's Performance in World Politics: How Should We Measure Success?", *European University Institute Working Papers Robert Schuman Centre*, no. 69, 1997, p. 3.

<sup>16</sup> S. Song, President of the ICC, speech and panel discussion, *The Future Development of International Criminal Justice: An Interdisciplinary Approach*, Bruges, College of Europe, 15 April 2010.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> Council of the European Union, *Council Common Position 2001/443/CFSP of 11 June 2001 on the International Criminal Court* (CP 2001/443/CFSP), <http://www.consilium.europa.eu/uedocs/cmsUpload/icc0en.pdf>.

<sup>21</sup> Council of the European Union, *Council Common Position 2002/474/CFSP of 20 June 2002 on the International Criminal Court* (CP 2002/474/CFSP), <http://www.consilium.europa.eu/uedocs/cmsUpload/ICC25EN.pdf>.

1. As regards 'broadening', the first Council Common Position called for an early entry into force of the Rome Statute.<sup>24</sup> The subsequent documents were more ambitious, seeking to advance 'universal participation' both in the Rome Statute<sup>25</sup> and in the Agreement on the Privileges and Immunities of the Court (APIC).<sup>26</sup>
2. As to 'strengthening', the Union and the member states shall ensure 'cooperation with the Court in accordance with the Rome Statute'.<sup>27</sup>
3. With regard to 'deepening', EU member states shall 'share with all interested States their own experience'<sup>28</sup> and lend political,<sup>29</sup> technical and financial<sup>30</sup> support to third countries.

Having outlined the criteria for chapter 3, this paper will now turn to those to be applied in chapter 4.

## 2.2 A yardstick to measure the effectiveness of the ICC

Following the goal-achievement approach used above, this paper takes the objectives expressed in the Rome Statute itself as a starting point to measure the effectiveness of the ICC. The preamble to the Rome Statute, reflecting the objectives of the states parties and thus the mandate of the ICC itself, indicates some elements essential for the effective working of the ICC: international cooperation shall ensure the 'effective prosecution' of the most serious crimes,<sup>31</sup> enforce international justice,<sup>32</sup> and put an end to impunity.<sup>33</sup>

In order to substantiate these objectives, this paper draws upon prior systematisations developed to measure the democratic legitimacy of institutions. *Scharpf* in particular distinguishes between input-oriented and output-oriented

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<sup>22</sup> Council of the European Union, *Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court* (CP 2003/444/CFSP), [http://consilium.europa.eu/uedocs/cmsUpload/L\\_15020030618en00670069.pdf](http://consilium.europa.eu/uedocs/cmsUpload/L_15020030618en00670069.pdf).

<sup>23</sup> Council of the European Union, *Action Plan of 4 February 2004 to follow-up on the Common Position on the International Criminal Court* (AP 2004), <http://www.consilium.europa.eu/uedocs/cmsUpload/ICC48EN.pdf>.

<sup>24</sup> Art. 1.2, CP 2001/443/CFSP.

<sup>25</sup> AP 2004, p. 5; Art. 1.2 CP 2002/474/CFSP.

<sup>26</sup> Art. 3, CP 2003/444/CFSP.

<sup>27</sup> Art. 5 CP 2003/444/CFSP; see AP 2004, p. 5.

<sup>28</sup> Art. 2.3 CP 2001/443/CFSP.

<sup>29</sup> AP 2004, p. 6.

<sup>30</sup> Art. 2.3 CP 2002/474/CFSP.

<sup>31</sup> Preamble 4 Rome Statute.

<sup>32</sup> Preamble 11 Rome Statute.

<sup>33</sup> Preamble 5 Rome Statute.



criteria.<sup>34</sup> On the one hand, input-oriented criteria refer to 'government by the people', that is to mechanisms of participation and consensus.<sup>35</sup> *Den Boer, Hillebrand and Nölke* distinguish between democratic<sup>36</sup>, legal<sup>37</sup> and social<sup>38</sup> legitimacy. On the other hand, output-oriented criteria relate to 'government for the people', that is to the capacity to solve problems requiring collective solutions.<sup>39</sup> *Den Boer, Hillebrand and Nölke* distinguish the elements of efficiency and effectiveness.<sup>40</sup>

These concepts, developed to measure the democratic legitimacy of institutions at the national or supranational level, may only be applied *mutatis mutandis* to courts set up by multilateral treaties between states. Unlike national or supranational institutions, the ICC is part of the international judiciary: its set-up outside the framework of any state or any other international organisation<sup>41</sup> and the granting of international legal personality<sup>42</sup> shall ensure its independence and the fair trial of the accused. Furthermore, its different organs<sup>43</sup> fulfil a multitude of different tasks, which do not parallel the national understanding of separation of powers, namely representative (the Presidency<sup>44</sup>), judicial (the Appeals, Trial and Pre-Trial Divisions<sup>45</sup>), executive (the Office of the Prosecutor<sup>46</sup>) and administrative tasks (the Registry<sup>47</sup>). Additionally, the Court has significantly less executive powers than national or supranational institutions, as it relies entirely on the cooperation of states to prosecute the most serious crimes and enforce decisions and sentences.<sup>48</sup>

Acknowledging that an exhaustive evaluation of the ICC is beyond its scope, this paper identifies a set of six core elements crucial to measure the effectiveness of the Court. First, three *input-oriented* core elements contribute to the effectiveness of the Court: its institutional set-up, socio-democratic legitimacy and independence.

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<sup>34</sup> F. Scharpf, *Governing in Europe: Effective and Democratic?*, Oxford, Oxford University Press, 1999, p. 6.

<sup>35</sup> *Ibid.*, p. 7.

<sup>36</sup> M. den Boer, C. Hillebrand & A. Nölke, "Legitimacy under Pressure: The European Web of Counter-Terrorism Networks", *Journal of Common Market Studies*, vol. 46, no. 1, 2008, p. 105. The authors mention parliamentary control over policy plans and budgets and ministerial accountability as criteria.

<sup>37</sup> *Ibid.*, p. 107. The authors mention the adoption of a binding legal instrument and mechanisms of legal accountability and judicial redress as indicators.

<sup>38</sup> *Ibid.*, p. 108. The authors mention transparency, independent monitoring and the inclusion of citizens in consultation and debate as elements.

<sup>39</sup> Scharpf, *op.cit.*, p. 11.

<sup>40</sup> Den Boer, Hillebrand & Nölke, *op.cit.*, p. 104.

<sup>41</sup> Art. 2 Rome Statute.

<sup>42</sup> Art. 4 Rome Statute.

<sup>43</sup> Art. 34 Rome Statute.

<sup>44</sup> Art. 38 Rome Statute.

<sup>45</sup> Art. 39 Rome Statute.

<sup>46</sup> Art. 42 Rome Statute.

<sup>47</sup> Art. 43 Rome Statute.

<sup>48</sup> Art. 86-111 Rome Statute.

1. The most important criteria for the institutional set-up of the Court, which provides the framework for the understanding of the other five core elements, are its legal status, its competences and its composition.
2. As to the socio-democratic legitimacy of the Court, which enhances its worldwide acceptance, the participation rate in the Rome Statute, the transparency of ICC procedures and its monitoring mechanisms are taken into account.
3. The independence of a court from political interference allows for its recognition as being *super partes* and is therefore a crucial element for its effectiveness. It can be measured by evaluating the trigger mechanisms to open investigations, the provisions to safeguard the neutrality of the judges and the prosecutor, and the hierarchy between the ICC and national jurisdictions.

Second, three *output-oriented* elements, difficult to assess for the reasons indicated above, are also indicators of the Court's effectiveness: its efficiency, its proper cooperation with relevant partners, and its potential contribution to conflict resolution.

4. Efficiency, decisive for any international bureaucracy to justify the contributions of all stakeholders to its budget, refers to the use of resources needed for the organisation and functioning of the Court.<sup>49</sup>
5. States, non-governmental organisations (NGOs), the United Nations (UN) and arguably the ICTY are the most relevant partners for the ICC. Their cooperation with the ICC, essential for a court that depends entirely on other actors to implement its decisions,<sup>50</sup> may be assessed by considering the relevant legal provisions and the practice of cooperation.
6. As the ICC has not concluded any trial yet, its contribution to conflict resolution, i.e. its *raison d'être*, is particularly difficult to assess. Yet, considering the broader discussion on and the deterrent effect of international criminal justice, its potential to resolve conflicts by including victim communities and elements of restorative justice may be taken into account.

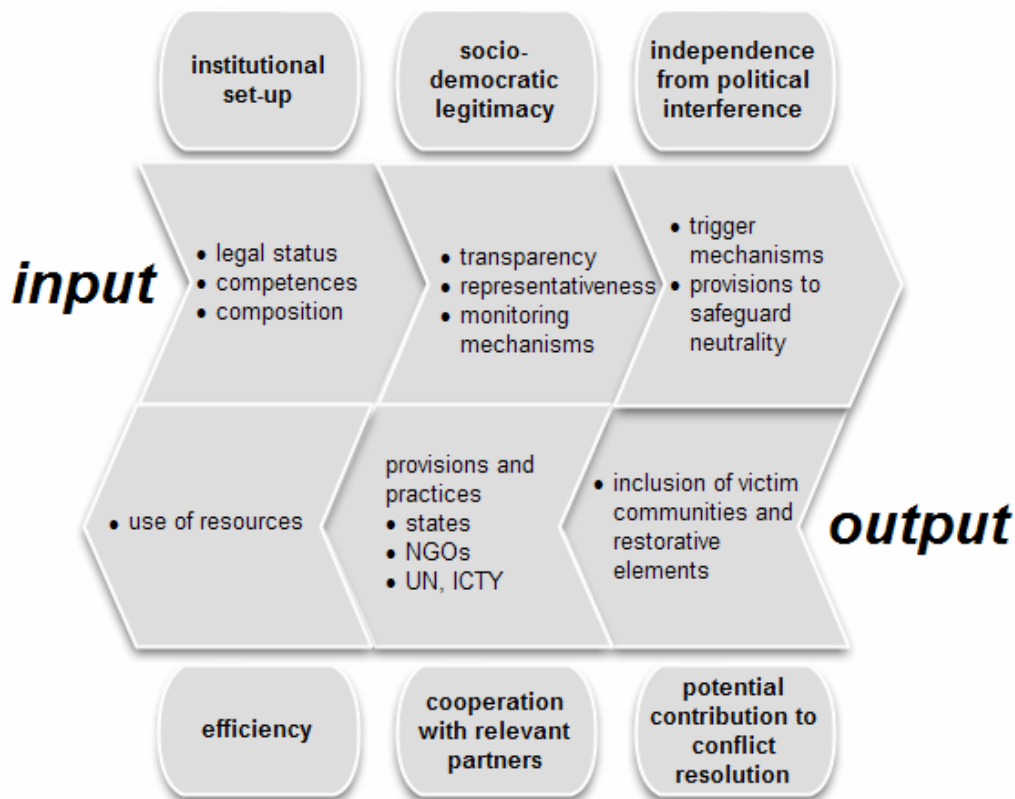
Figure 1 summarises the indicators for these six core elements to measure the effectiveness of the ICC.

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<sup>49</sup> See M. Dakolias, Court Performance around the World: A Comparative Perspective, *World Bank Technical Paper* no. 430, July 1999, Washington, D.C., World Bank, p. 5, [http://siteresources.worldbank.org/BRAZILINPOREXTN/Resources/3817166-1185895645304/4044168-1186404259243/14pub\\_br176.pdf](http://siteresources.worldbank.org/BRAZILINPOREXTN/Resources/3817166-1185895645304/4044168-1186404259243/14pub_br176.pdf).

<sup>50</sup> Art. 86-111 Rome Statute.

Figure 1: The effectiveness of the ICC



Source: author's own chart.

In addition to the goal-achievement analysis, the comparison with other actors is also a widespread tool to measure effectiveness.<sup>51</sup> This paper refers to the comparative method mainly in order to compensate for the lack of empirical data on cooperation and conflict resolution. It points to particularities of the ICC *vis-à-vis* the ICTY, set up in 1993 as the first UN *ad hoc* tribunal, whenever appropriate. The case of the ICTY seems particularly interesting because its jurisdiction *ratione temporis*<sup>52</sup> theoretically allows for a clash of competences with the ICC, which may deal with 'residual issues'<sup>53</sup> after the phasing out of the ICTY.<sup>54</sup>

Having designed and disclosed the yardstick, this paper now applies it to the EU's support (chapter 3) and the ICC itself (chapter 4).

<sup>51</sup> Jørgensen, *op.cit.*, p. 9.

<sup>52</sup> Art. 1, 8 ICTY Statute.

<sup>53</sup> ICTY, *Assessing the Legacy of the ICTY*, <http://www.icty.org/sid/10293>.

<sup>54</sup> A comparison with other courts, such as the ICTR, other international courts such as the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR), and national or hybrid tribunals, is excluded on purpose.

### 3. The EU's support for the ICC: mission accomplished?

This chapter applies the yardstick developed in chapter 2 to evaluate to what extent the EU's policy to broaden, strengthen and deepen the Rome Statute system is effective, identifying several conflicting objectives that constrain a more effective support.

#### 3.1 Broadening the Rome Statute system

Differentiating between internal and external aspects, this section examines the effectiveness of the EU's efforts to broaden the Rome Statute system by promoting universal ratification of the Rome Statute and the APIC.

In the run-up to the Rome Conference in July 1998, European institutions stood on the sidelines whereas civil society actors, often under the leadership of the Coalition for an International Criminal Court (CICC), could exercise significant influence on international decision-making.<sup>55</sup> Significant concessions, especially to the United Kingdom<sup>56</sup> and France,<sup>57</sup> were necessary to reach what slowly emerged as a European, and nearly global,<sup>58</sup> consensus.

Today, a uniform *internal* position allows EU member states to act more credibly as a collective entity.<sup>59</sup> After the Czech Republic ratified the Rome Statute on 21 July 2009,<sup>60</sup> all 27 EU member states are now states parties to the Rome Statute. EU-wide ratification allows the EU to combine the leverage of its member states in conformity with the motto *ex unitate vires*. The resolutions in support of the ICC, adopted annually by the United Nations General Assembly, and the Security

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<sup>55</sup> W. Pace & J. Schense, "The Role of Non-Governmental Organizations", in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, p. 111; and M. Glasius, "Does the Involvement of Global Civil Society Make International Decision-Making More Democratic? The Case of the International Criminal Court", *Journal of Civil Society*, vol. 4, no. 1, 2008, p. 45.

<sup>56</sup> Art. 13(b) and Art. 16 Rome Statute.

<sup>57</sup> Art. 124 Rome Statute; see Deitelhoff, *op.cit.*, p. 12; Groenleer & Rijks, *op.cit.*, p. 175. The 2010 Review Conference decided to retain this article in its current form, International Criminal Court, *Article 124 of the Rome Statute*, [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.4-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.4-ENG.pdf).

<sup>58</sup> The Rome Statute was adopted with a "landslide majority" of 120 votes in favour, 7 against and 21 abstentions, see P. Kirsch & D. Robinson, "Reaching Agreement at the Rome Conference", in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, p. 77.

<sup>59</sup> Groenleer & Rijks, *op.cit.*, p. 169.

<sup>60</sup> International Criminal Court, *ASP welcomes the Czech Republic as the 110th new State Party*, <http://www.icc-cpi.int/Menu/ASP/Press+Releases/Press+Releases+2009/PR457.htm>.

Council's deferral of the situation in Darfur to the ICC,<sup>61</sup> are positive examples of EU policy coordination among member states.<sup>62</sup>

However, concerns of state sovereignty continue to constrain the EU's internal policy to some extent. First, the Czech Republic and Malta have not yet ratified the APIC,<sup>63</sup> although its EU-wide ratification has been an official objective since 2003.<sup>64</sup> Additionally, the EU still lacks a unified position on the controversial issue of the crime of aggression<sup>65</sup> – even after the 2010 Review Conference. Similarly, France and the United Kingdom do not always seem to honour their obligation<sup>66</sup> to 'defend the positions and interests of the Union' in the Security Council: both countries have long supported the US in activating the deferral mechanism for personnel deployed in United Nations missions.<sup>67</sup> In this context, EU coordination has proved to be rather reactive than proactive. This weakens the EU's promotion of the ICC to the outside world.

The EU's *external* policy is more complex and controversial. In order to reveal a set of different competing objectives that constrain a more effective promotion of the ICC, the following section covers the most important forms of support, notably political declarations and dialogue, financial support and the use of ICC clauses.

#### *Political declarations and dialogue*

Political declarations and demarches are the most commonly used policy tool to encourage worldwide ratification of the Rome Statute and of the APIC. However, their concrete impact on the broadening of the Rome Statute system is questionable. One reason for this may be that they do not allow for the development of a genuine dialogue.

A vast number of meetings and summits institutionalise the EU's political dialogue with its partners. Virtually all agendas in fora of bi- and multilateral political

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<sup>61</sup> United Nations Security Council, *Resolution 1593 of 31 March 2005*, S/RES/1593 (2005), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/292/73/PDF/N0529273.pdf>.

<sup>62</sup> Council of the European Union, *The European Union and the International Criminal Court*, p. 15, [http://www.consilium.europa.eu/uedocs/cmsUpload/ICC\\_internet08.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/ICC_internet08.pdf).

<sup>63</sup> Interview with Rafael de Bustamante Tello, Council of the European Union, DG E IV United Nations and International Criminal Court, Brussels, 28 April 2010.

<sup>64</sup> Art. 3 CP 2003/444/CFSP.

<sup>65</sup> Interview with Rafael de Bustamante Tello, *op.cit.*

<sup>66</sup> Art. 34.2 Treaty on European Union.

<sup>67</sup> Art. 16 Rome Statute; see United Nations Security Council, *Resolution 1422 of 12 July 2002*, S/RES/1422 (2002), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/477/61/PDF/N0247761.pdf>; and United Nations Security Council, *Resolution 1487 of 12 June 2003*, S/RES/1487 (2003), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/394/51/PDF/N0339451.pdf>.

dialogue feature the promotion of the ICC, albeit as a second-rate topic.<sup>68</sup> Yet, the relevant passages in summit declarations are not legally binding, and they remain vague.<sup>69</sup> Although some observers attribute the ratifications of the Rome Statute by Chad<sup>70</sup> and Japan<sup>71</sup> to the EU's active promotion, it is not possible to establish a (mono-)causal relationship between the EU's support and ratification by third countries.<sup>72</sup> The complexity of today's conduct of international relations and the variety of actors and interests involved may constitute two major reasons. In particular, 'the added value of the EU as compared to single member states should not be over evaluated'.<sup>73</sup>

At any rate, the analysis of bilateral dialogues evinces the importance of good diplomatic relations with strategic partners. The EU's stated objective to achieve global ratification of the Rome Statute by raising the issue in negotiations with partners, 'whenever appropriate',<sup>74</sup> may easily be sacrificed on the altar of bilateral *realpolitik*, especially *vis-à-vis* great powers. The case of transatlantic relations illustrates this point. Ever since the US voted against the Rome Statute, the EU has first faced a US policy of open opposition under the *Clinton* and *Bush* administrations<sup>75</sup> and then an informal policy of careful rapprochement termed 'positive engagement' under the *Obama* administration, which, however, continues to refer to the opposition of the Senate to justify its wait-and-see attitude.<sup>76</sup> Both sides mainly repeat their own positions and 'agree to disagree'.<sup>77</sup> This policy may be 'realistic'.<sup>78</sup> However, as long as the inviolability of its good diplomatic relations with its strategic partners trumps its ICC policy, the EU will not oppose its strategic partners openly to broaden the Rome Statute system.

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<sup>68</sup> Council of the European Union, *The EU and the ICC*, *op.cit.*, pp. 10-11.

<sup>69</sup> See European Commission, *Joint Africa-EU Strategy*, paragraph 30, [http://ec.europa.eu/development/icenter/repository/EAS2007\\_joint\\_strategy\\_en.pdf](http://ec.europa.eu/development/icenter/repository/EAS2007_joint_strategy_en.pdf).

<sup>70</sup> S. Scheipers & D. Sicurelli, "Empowering Africa: Normative Power in EU-Africa Relations", *Journal of European Public Policy*, vol. 15, no. 4, 2008, p. 612.

<sup>71</sup> Groenleer & Rijks, *op.cit.*, p. 170.

<sup>72</sup> Interview with Rafael de Bustamante Tello, *op.cit.*

<sup>73</sup> Interview with interviewee C, senior official at the ICC, The Hague, 24 March 2010.

<sup>74</sup> Art. 2.1 CP 2003/444/CFSP.

<sup>75</sup> See, *inter alia*, the conclusion of more than 100 bilateral immunity agreements (BIAs, Art. 98 Rome Statute) with states parties (despite Art. 18 of the Vienna Convention on the Law of Treaties), the 2002 'withdrawal' of the US signature of the Rome Statute and the activation of the deferral mechanism (Art. 16 Rome Statute) for personnel deployed in UN missions (see fn. 67).

<sup>76</sup> Song, *op.cit.*; Interview with interviewee E, The Hague, 24 March 2010.

<sup>77</sup> Interview with Rafael de Bustamante Tello, *op.cit.*

<sup>78</sup> Interviews with interviewee A, senior official at the ICC; and interviewee C, *op.cit.*

### *Financial assistance*

Avoiding direct confrontation, the Commission furthers the broadening of the Rome Statute system in an indirect but effective manner. Since 1995, it has provided more than € 40 million under the European Instrument for Democracy and Human Rights (EIDHR) for campaigns promoting the broadening of the Rome Statute system.<sup>79</sup> Putting up with the rising influence of NGOs on the decision-making process, it ensures an effective form of grassroots support helping to implement the Action Plan.

### *ICC clauses*

Thanks to the economic strength of the European trading bloc, the Commission has considerable bargaining power in its negotiations with third countries. However, it generally refrains from imposing a policy of strict conditionality. Although the EU claims to 'pursue systematically the inclusion of an ICC clause in the negotiating mandates and agreements with third countries',<sup>80</sup> the Commission seems to prefer a case-by-case approach.

On the one hand, the Commission has successfully included ICC clauses in agreements with less influential countries, such as the 79 ACP countries: the Cotonou Agreement, last revised in 2010,<sup>81</sup> does include an ICC clause: 'The Parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instruments.'<sup>82</sup> This clause may be relatively weak: first, it only obliges the Parties to 'seek to take steps' in lieu of including an obligation to ratify and implement the Rome Statute, and the 'related documents' are not specified. Second, the ICC clause is not an 'essential element' of the agreement.<sup>83</sup> Therefore, a refusal to 'take steps' cannot justify the suspension of certain provisions of the Cotonou Agreement.<sup>84</sup> Third, the Commission has never envisaged applying aid conditionality in order to broaden the Rome Statute system.<sup>85</sup> Yet, this new generation of ICC clauses, inserted in agreements with less influential countries, exerts additional political pressure.

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<sup>79</sup> European Commission, *The International Criminal Court & the fight against impunity*, [http://ec.europa.eu/external\\_relations/human\\_rights/icc/index\\_en.htm](http://ec.europa.eu/external_relations/human_rights/icc/index_en.htm).

<sup>80</sup> Council of the European Union, *The EU and the ICC*, *op.cit.*, p. 13.

<sup>81</sup> European Commission, *The Cotonou Agreement*, [http://ec.europa.eu/development/geographical/cotonouintro\\_en.cfm](http://ec.europa.eu/development/geographical/cotonouintro_en.cfm).

<sup>82</sup> Art. 11.6 Cotonou Agreement.

<sup>83</sup> Art. 96 Cotonou Agreement.

<sup>84</sup> Art. 96.2(a) Cotonou Agreement.

<sup>85</sup> Interview with Rafael de Bustamante Tello, *op.cit.*

On the other hand, ICC clauses have not been included in agreements with the EU's strategic partners, such as the US, China or Russia. The differentiated treatment of certain states does not only limit the effectiveness of the EU's support for the ICC in the bilateral relations with these countries as diplomacy bears the palm, the EU is also being criticised for applying a double standard.<sup>86</sup> Therefore, European institutions, in order to promote the ICC effectively and credibly, have to legitimate this differentiated treatment, especially *vis-à-vis* less important countries.

This section has shown that the EU has made rapid strides to become a vocal promoter of the ICC worldwide after the entry into force of the Rome Statute. Although further convergence might prove helpful, the ratification of the Rome Statute by the 27<sup>th</sup> EU member state in 2009 has definitely overcome a major challenge to the credibility of the EU's external policy. Whereas the impact of political declarations remains limited, the EU's permanent dialogue with its partners has (at least partially) contributed to the broadening of the Rome Statute system. The case of transatlantic relations has illustrated to what extent diplomatic considerations constrain effectiveness. Whilst the EU's financial support for handpicked NGOs can be described as influential, the analysis of the use of ICC clauses has revealed the limits of the EU's differentiated approach to broaden the Rome Statute system.

### 3.2 Strengthening the Rome Statute system

The EU aims at strengthening the Rome Statute system by reinforcing its cooperation with the ICC. EU-ICC cooperation covers a wide spectrum of legal, political, financial and practical instruments.

Apart from tools that facilitate the EU-wide execution of arrest warrants,<sup>87</sup> the Council has enacted a number of legal instruments dealing explicitly with cross-national cooperation in the investigation and prosecution of mass atrocities. Council instruments of 2002<sup>88</sup> and 2003<sup>89</sup> set up the European Network of Contact Points and

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<sup>86</sup> R. Brody, *Playing it firm, fair and smart: The EU and the ICC's indictment of Bashir*, ISS Opinion, March 2009, p. 2, [http://www.iss.europa.eu/uploads/media/EU\\_ICC\\_Bashir.pdf](http://www.iss.europa.eu/uploads/media/EU_ICC_Bashir.pdf).

<sup>87</sup> Council of the European Union, *Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0001:0018:EN:PDF>.

<sup>88</sup> Council of the European Union, *Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:167:0001:0002:EN:PDF>.

<sup>89</sup> Council of the European Union, *Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:118:0012:0012:EN:PDF>.



attest to the EU's attempts to institutionalise regular communication channels to facilitate cooperation with the ICC. In practice, however, smaller member states sometimes lack the necessary resources to engage fully in the network.<sup>90</sup>

With regard to political instruments, official EU declarations on concrete decisions of the ICC or its Prosecutor are very numerous.<sup>91</sup> These declarations may sometimes be controversial: if phrased in ambiguous terms,<sup>92</sup> the EU's well-intentioned support for concrete decisions of the ICC may spark doubts on the independence of the ICC and thus be counter-productive.

The financial contributions of EU member states account for more than half of the total assessed contributions to the Court (that is, more than € 50 million per year).<sup>93</sup> In comparison, the EU's annual contribution to the Court's Internship and Visiting Professional's Programme, which amounts to € 500,000,<sup>94</sup> appears to be insignificant.

In 2006, the EU concluded a co-operation and assistance agreement with the ICC to allow for practical cooperation.<sup>95</sup> This agreement provides, *inter alia*, for the regular exchange of information. However, data protection concerns constrain a more effective form of cooperation between the EU and the ICC: the security arrangement concerning the exchange of classified information was finalised as late as 2008 and is rarely applied in practice due to its burdensome procedure.<sup>96</sup> Additionally, contrary to the ICC's hopes, the co-operation and assistance agreement does not provide for an EU-wide victim and witness protection programme. Up to present, only four member states have concluded witness protection and relocation agreements and only five have entered into enforcement agreements with the Court.<sup>97</sup> Additionally, Eurojust has only been associated loosely with the

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<sup>90</sup> Interview with Rafael de Bustamante Tello, *op.cit.*

<sup>91</sup> European Union, *International Criminal Court*, [http://www.europa-eu-un.org/articles/articleslist\\_t35\\_en.htm](http://www.europa-eu-un.org/articles/articleslist_t35_en.htm).

<sup>92</sup> See for the situation in Darfur Council of the European Union, *The EU and the ICC*, *op.cit.*, p. 24.

<sup>93</sup> *Ibid.*, p. 18.

<sup>94</sup> *Ibid.*, p. 17.

<sup>95</sup> International Criminal Court, *Agreement between the International Criminal Court and the European Union on cooperation and assistance*, [http://www.icc-cpi.int/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106_English.pdf).

<sup>96</sup> Interview with Rafael de Bustamante Tello, *op.cit.*

<sup>97</sup> *Ibid.* Austria, in 2005, and the United Kingdom, in 2007, had been the first states to sign enforcement agreements. Belgium, Denmark and Finland signed enforcement agreements during the Review Conference on 1 June 2010, see International Criminal Court, *Enforcement agreements*, <http://www.icc-cpi.int/NR/exeres/58DCFCB5-73E5-4A3E-8606-1426473DC289.htm>.

European Network of Contact Points.<sup>98</sup> Europol has not yet been included in the Network. Once again, disunity among member states prevents the EU from reinforcing its cooperation with the ICC.

This section has shown that the impact of financial and practical instruments to strengthen the Rome Statute system remains very limited due to limited funds, data protection concerns and the insistence of member states on national competences in this field. Political declarations on concrete decisions of the ICC may, if phrased in ambiguous terms, compromise the objective of judicial independence of the Court. On a positive note, the set-up of the European Network of Contact Point has successfully institutionalised EU-ICC cooperation to strengthen the Rome Statute system.

### 3.3 Deepening the Rome Statute system

The empowerment of national jurisdictions to deal with mass atrocities at the domestic level, thus deepening the Rome Statute system, concerns both member states and third countries.

As member states have a strong executive and judiciary to prosecute and punish war criminals, the only shortcoming remains the lack of implementation into domestic legislation of the crimes proscribed by the Rome Statute.<sup>99</sup>

The EU's official documents promise third countries technical and financial support.<sup>100</sup> In practice, the Commission organises lawyer training programmes and seminars and hosts workshops and conferences in order to diffuse expertise and empower local NGOs and national jurisdictions to deal with mass atrocities.<sup>101</sup> To this end, the Commission has also set up an EU list of experts.<sup>102</sup> Specialists in the field of international criminal justice may be seconded to third countries.<sup>103</sup> However, practice shows that this list is 'a bit dormant'.<sup>104</sup>

Additionally, external support remains often too limited to empower the countries concerned. In the Democratic Republic of the Congo, for example, a

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<sup>98</sup> Council of the European Union, *Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime*, Art. 10 and 25.2, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009D0426:EN:NOT>.

<sup>99</sup> Interview with Rafael de Bustamante Tello, *op.cit.*

<sup>100</sup> See CP 2001/443/CFSP, CP 2002/474/CFSP, CP 2003/444/CFSP, AP 2004.

<sup>101</sup> Scheipers & Sicurelli, *op.cit.*, p. 613.

<sup>102</sup> Council of the European Union, *The EU and the ICC*, *op.cit.*, p. 16.

<sup>103</sup> Interview with Rafael de Bustamante Tello, *op.cit.*

<sup>104</sup> *Ibid.*

fragile security situation threatens the organisation of fair local proceedings.<sup>105</sup> Only eight experts have been sent to the Democratic Republic of the Congo in the framework of the EU's security sector reform (SSR) mission, deployed in 2005.<sup>106</sup> In order to serve international justice, a more holistic, costly and dangerous engagement on the part of the EU and the international community in general – beyond the diffusion of expertise – would be necessary.

This section has shown that the deepening of the Rome Statute system is one of the most difficult tasks promoters of the ICC face. Given the numerous challenges, the EU's mission to broaden, strengthen and deepen the Rome Statute system is far from accomplished. It can gain in effectiveness if the particularities of the ICC are taken into account.

#### 4. The hydra-headed challenges to the ICC: mission impossible?

This chapter applies the yardstick developed in chapter 2 to assess to what extent the ICC succeeds in fighting impunity. It analyses input- and output-oriented elements.

##### 4.1 Input-oriented elements

The input-oriented core elements are the institutional set-up, socio-democratic legitimacy and independence from political interference.

###### *Institutional set-up*

This section highlights the Court's legal status, its competences and its composition to illustrate a dilemma that concerns the very foundations of the Court's architecture. Contrary to the ICTY, a temporary *ad hoc* tribunal established by and subsidiary to the Security Council,<sup>107</sup> the ICC, created outside the UN framework,<sup>108</sup> is a permanent<sup>109</sup> court with international legal capacity<sup>110</sup> and its own funds.<sup>111</sup> A

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<sup>105</sup> Song, *op.cit.*

<sup>106</sup> Council of the European Union, *EU advisory and assistance mission for security reform in the Democratic Republic of Congo*, <http://www.consilium.europa.eu/showPage.aspx?id=909&lang=En>.

<sup>107</sup> See Art. 13*bis*, 13*ter*, 16, 27, 34 ICTY Statute.

<sup>108</sup> See Art. 2 Rome Statute.

<sup>109</sup> Art. 1 Rome Statute.

<sup>110</sup> Art. 4 Rome Statute.

<sup>111</sup> Art. 113, 115 Rome Statute.

*priori*, these characteristics increase the independence of the Court, which is crucial for its acceptance (see section 3.1).

At the same time, the competences of the Court illustrate that it remains a 'product of concessions and trade-offs'<sup>112</sup>: whereas its competences *ratione temporis*<sup>113</sup> and *ratione personae*<sup>114</sup> are not very controversial, its competence *ratione loci* is based on the territoriality<sup>115</sup> and the active personality<sup>116</sup> principles and excludes the passive personality principle. Finally, its competence *ratione materiae*<sup>117</sup> is restricted by the opt-out clause on war crimes<sup>118</sup>. The dilemma to strengthen the Court while achieving the broadest possible support has accompanied the ICC since its beginning and affects attempts to reform the system: although the 2010 Review Conference succeeded in agreeing on a definition of the crime of aggression,<sup>119</sup> it will take at least<sup>120</sup> another seven years before the ICC can exercise its jurisdiction in this field. Thus, numerous concessions continue to weaken the overall effectiveness of the Court.

As to its composition, equitable geographical representation is a stated objective of the states parties.<sup>121</sup> This multi-national composition legitimates any international institution but cultural and language barriers as well as different legal backgrounds<sup>122</sup> inevitably reduce efficiency (see section 4.2).

This section has shown that, despite the numerous concessions necessary to increase its geographical reach, the ICC is the most advanced institutional player in international criminal justice. Still, even the best institutional set-up remains a dead letter if it lacks socio-democratic legitimacy.

### *Socio-democratic legitimacy*

In order to assess the socio-democratic legitimacy of the ICC, this section addresses the ratification rate of the Rome Statute and monitoring mechanisms.

The ratification rate is arguably the most important indicator for the Court's democratic legitimacy. Different criteria may be taken into account to approach

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<sup>112</sup> A. Cassese et al., "The Rome Statute: A Tentative Assessment", in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, p. 1913.

<sup>113</sup> Art. 11 Rome Statute.

<sup>114</sup> Art. 12 Rome Statute.

<sup>115</sup> Art. 12.2(a) Rome Statute.

<sup>116</sup> Art. 12.2(b) Rome Statute.

<sup>117</sup> Art. 5 Rome Statute.

<sup>118</sup> Art. 124 Rome Statute. The 2010 Review Conference decided not to delete this article.

<sup>119</sup> Art. 8bis Rome Statute.

<sup>120</sup> See the burdensome procedural provisions in Art. 15bis paragraphs 2 and 3 Rome Statute.

<sup>121</sup> Art. 36.8(a)(ii), 44.2 Rome Statute.

<sup>122</sup> Art. 36.8(a)(i) Rome Statute.

this term. A realist view on international relations would probably focus on the number of states represented and find that 112 out of 192 UN member states, that is 58.3 percent, have ratified the Rome Statute. Differentiating between single states, it could also point to the fact that three of the five permanent members of the Security Council have not ratified the Rome Statute (the US, Russia and China). It may also refer to the geographical distribution of states parties and establish that states from Latin America, Europe and sub-Saharan Africa are well represented, whereas Asia and Northern Africa are clearly underrepresented.<sup>123</sup>

In contrast, a liberal view on international relations would probably point to the world population indirectly represented by the states parties.<sup>124</sup> In September 2010, states parties accounted for roughly 2,071 million people.<sup>125</sup> This number equals about 30 percent of the estimated world population of 6,865 million<sup>126</sup> people. These percentage values are significantly lower than the number of 112 states parties might indicate and underline the underrepresentation of the biggest nations such as China and India.

A comparison with the ICTY, set up by the Security Council within the UN framework, confirms that, irrespective of the criteria used, the ICC is still far from being universal. Nevertheless, considering the slow ratification process of other international agreements, the ratification of the Rome Statute by 112 states in twelve years constitutes a major achievement. The ongoing ratification process, despite its geographical imbalances, increases the universality and the democratic legitimacy of the Court significantly.

The main monitoring organ of the Registry, the Office of the Prosecutor and the Chambers is the Assembly of States Parties (ASP)<sup>127</sup>. *Inter alia*, the ASP decides on the budget,<sup>128</sup> and elects<sup>129</sup> and removes<sup>130</sup> both judges and the Prosecutor. In the aftermath of the first Review Conference<sup>131</sup>, it adopts amendments<sup>132</sup> and thus exercises not only budgetary and organisational but also 'constitutional' control.

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<sup>123</sup> International Criminal Court, *The States Parties to the Rome Statute*, <http://www.icc-cpi.int/Menu/ASP/states+parties>.

<sup>124</sup> In contrast, NGOs represent the global *demos* only imperfectly, see Glasius, *op.cit.*, p. 43.

<sup>125</sup> Own calculation based on CIA, *World Factbook*, <https://www.cia.gov/library/publications/the-world-factbook>.

<sup>126</sup> United States Census Bureau, *World Population Projection*, <http://www.census.gov/ipc/www/popclockworld.html>.

<sup>127</sup> Art. 112.6 Rome Statute.

<sup>128</sup> Art. 112.2(d) Rome Statute.

<sup>129</sup> Art. 36.6, 42.4 Rome Statute.

<sup>130</sup> Art. 46.2 Rome Statute.

<sup>131</sup> Art. 123.1 Rome Statute.

<sup>132</sup> Art. 121.3 Rome Statute.

Additionally, an independent auditor annually checks the records, books and accounts of the Court.<sup>133</sup>

This section has demonstrated that the increasing ratification rate of the Rome Statute and regular control by the Assembly of States Parties contribute to the relatively good socio-democratic legitimacy of this young Court.

### *Independence from political interference*

This section looks at the independence of the Court, crucial for its recognition as being *super partes* and thus its effectiveness. It gives an overview of the provisions safeguarding the neutrality of the judges and the Prosecutor, examines the trigger mechanisms to open investigations and hints at the hierarchy between the ICC and national jurisdictions.

Legal provisions safeguard the personal independence of the eighteen judges<sup>134</sup> and of the Prosecutor.<sup>135</sup> The belief in complete judicial impartiality may be 'overly optimistic',<sup>136</sup> and the Prosecutor is hardly blind to the inevitable political consequences of his actions.<sup>137</sup> At present, however, there is no proof whatsoever of partiality on the part of neither the Prosecutor nor the judges.

The Rome Statute provides for three trigger mechanisms for the exercise of jurisdiction.<sup>138</sup> First, a state party may refer a situation to the Prosecutor.<sup>139</sup> This constellation reveals the impact of dynamic interpretations in public international law. The drafters of the Rome Statute conceived this mechanism for referrals of a situation in a third country and did not contemplate referrals of an internal situation.<sup>140</sup> However, the first three investigations in Uganda, the Democratic Republic of the Congo and the Central African Republic are based on self-referrals by the respective governments. Self-referrals generally signalise the willingness of the governments to cooperate, essential for the effective working of the Court. Yet, they also entail legal and political problems. A legal issue, which is still unresolved,<sup>141</sup> refers to the question of whether the Court may reject the referral on the ground that the

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<sup>133</sup> Art. 118 Rome Statute.

<sup>134</sup> Art. 36.9, 40.3, 41, 46, 48.2 Rome Statute.

<sup>135</sup> Art. 43.3-5, 46, 48 Rome Statute.

<sup>136</sup> M. Findlay, *Governing through Globalised Crime – Futures for International Criminal Justice*, Cullompton, Willan, 2008, p. 117.

<sup>137</sup> M. Arsanjani & M. Reisman, "The Law-in-Action of the International Criminal Court", *American Journal of International Law*, vol. 99, no. 2, 2005, p. 385.

<sup>138</sup> Art. 13 Rome Statute.

<sup>139</sup> Art. 13(a), 14 Rome Statute.

<sup>140</sup> Arsanjani & Reisman, *op.cit.*, p. 387.

<sup>141</sup> Song, *op.cit.*; see H. Satzger, *Internationales und Europäisches Strafrecht*, Baden-Baden Nomos, 2008, p. 219.

state is not 'unwilling or unable'<sup>142</sup> to carry out the investigation or prosecution or whether self-referrals automatically preclude such a test. The answer to this legal question is of particular political importance. If governments do not prevail in an ongoing conflict, they might use self-referrals to externalise their domestic problems.<sup>143</sup> In such a politicised environment, 'the failure of governments will simply become the failure of the ICC',<sup>144</sup> which itself cannot work effectively without the extradition of the individuals. In Uganda, for example, not a single arrest warrant has been respected.<sup>145</sup> The practice of self-referrals, not foreseen by the drafters of the Rome Statute, may therefore entrap the Court in intractable internal conflicts.

Second, the Security Council, if it so decides by 'an affirmative vote of nine members including the concurring votes of the permanent members',<sup>146</sup> may refer a situation to the Prosecutor<sup>147</sup> or also defer an investigation or prosecution for a period of twelve months.<sup>148</sup> This mechanism may be a mixed blessing for the ICC. On the one hand, the ICC needs the politico-legal support of the Security Council and the practical support of UN peacekeeping personnel in order to have its decisions enforced. On the other hand, a referral by the Security Council is a highly political decision. Referrals may be interpreted as a case of victors' justice, especially when the Security Council, with the (tacit) support of the three veto powers that are not states parties to the Rome Statute, refers the situation in another non-state party, for example Sudan<sup>149</sup>, to the Prosecutor. The past deferrals of the investigation or prosecution<sup>150</sup> were similarly controversial. This does not bode well for UN-ICC cooperation with regard to the crime of aggression, as states parties at the 2010 Review Conference strengthened the role of the Security Council.<sup>151</sup> Since the threat of interference remains a 'rightful concern',<sup>152</sup> the ICC faces the dilemma that the support by an actor it needs to enforce its decisions questions its independence.

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<sup>142</sup> Art. 17.1(a) Rome Statute.

<sup>143</sup> Arsanjani & Reisman, *op.cit.*, pp. 392, 394.

<sup>144</sup> *Ibid.*, p. 395.

<sup>145</sup> See International Criminal Court, *Uganda*, <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204>.

<sup>146</sup> Art. 27.3 United Nations Charter (UNC).

<sup>147</sup> Art. 13(b) Rome Statute.

<sup>148</sup> Art. 16 Rome Statute.

<sup>149</sup> See United Nations Security Council, *Resolution 1593 of 31 March 2005*, S/RES/1593 (2005), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/292/73/PDF/N0529273.pdf>.

<sup>150</sup> See United Nations Security Council, *Resolution 1422 of 12 July 2002*, S/RES/1422 (2002), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/477/61/PDF/N0247761.pdf>; and United Nations Security Council, *Resolution 1487 of 12 June 2003*, S/RES/1487 (2003), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/394/51/PDF/N0339451.pdf>.

<sup>151</sup> See Art. 15bis paragraphs 6-8 Rome Statute.

<sup>152</sup> Cassese et al., *Tentative Assessment*, *op.cit.*, p. 1907.

Third, the Prosecutor may open investigations *proprio motu*.<sup>153</sup> This provision, which constitutes an innovation in international law, was conceived as a non-political trigger mechanism to enhance the independence of the Court.<sup>154</sup> Its exercise is controlled by the pre-trial chamber,<sup>155</sup> which authorised the first *proprio motu* investigations on 31 March 2010<sup>156</sup>, demonstrating that the Court is willing to initiate investigations without the explicit referral by a state party or the Security Council.

With regard to the hierarchy between the ICC and national jurisdictions, the ICC is a tribunal of last resort.<sup>157</sup> According to the principle of complementarity<sup>158</sup>, it is the first responsibility of states to prosecute suspects. Nevertheless, the Court may determine whether a state party is 'unwilling or unable genuinely to carry out the investigation or prosecution'<sup>159</sup> and thus decides on whether it has jurisdiction with respect to a certain situation or not. This *Kompetenz-Kompetenz* increases the independence of the Court.

This section, completing the evaluation of input-related elements, has demonstrated that the Rome Statute provides for the necessary provisions on the neutrality of the personnel and the trigger mechanisms to safeguard the independence of the Court from political interference. However, self-referrals, as well as re- and deferrals by the Security Council, may contribute to the politicisation of the Court's work.

## 4.2 Output-oriented elements

This part deals with the three output-oriented elements: efficiency, cooperation with relevant partners and the potential contribution to conflict resolution.

### *Efficiency*

Efficiency refers to the use of resources, that is the costs and the time needed to resolve a case (see section 2.2). Applying these criteria to the ICC, this section

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<sup>153</sup> Art. 13(c), 15 Rome Statute.

<sup>154</sup> Cassese et al., *Tentative Assessment*, *op.cit.*, p. 1907.

<sup>155</sup> See Art. 15.4 Rome Statute.

<sup>156</sup> International Criminal Court, *ICC judges grant the Prosecutor's request*, <http://www.icc-cpi.int/NR/exeres/D81AA5AF-CD76-4B3C-A4FC-AA7819569B44.htm>.

<sup>157</sup> Satzger, *op.cit.*, p. 219.

<sup>158</sup> Art. 17 Rome Statute.

<sup>159</sup> Art. 17.1(a) Rome Statute.



investigates whether the Court is in fact a 'thriving institution [that] continues to gain inexorable momentum'.<sup>160</sup>

The budget of the ICC, which has increased from € 80.5 million in 2007 to € 104.6 million in 2010,<sup>161</sup> finances a 'large bureaucracy'.<sup>162</sup> Its internal organisation is burdensome and the use of numerous forms and multiple working languages protracts the duration of procedures to what an official calls a 'scandalous' period of time.<sup>163</sup> A comparison with the ICTY may put this claim into perspective: the ICTY, which has indicted 161 persons to date, sentenced six individuals in the first six years of operation.<sup>164</sup> The ICC has been up and running for seven years and has not concluded a single trial. The recent opening of investigations into 2007 post-election violence in Kenya may illustrate why there is 'some room for speeding up proceedings':<sup>165</sup> the Prosecutor requested to open investigations on 26 November 2009 but it was not until 31 March 2010 that his request was granted.<sup>166</sup> This means that it took the pre-trial chamber four months to decide on the mere opening of investigations. Stakes are high as the next elections in Kenya are scheduled for 2012. Administrative procedures have to be streamlined if the Court wants to win the trust of states parties reluctant to yield sovereignty.<sup>167</sup> The conclusion of the first trial could also encourage states parties to reconsider increasing their contributions to the Court.<sup>168</sup>

This section has shown that the current organisation of the Court limits its efficiency. Confronted with this situation, the relevant partners of the ICC may be less inclined to cooperate fully with the Court.

### *Co-operation*

Practitioners agree that ensuring good cooperation with all parts is the 'biggest challenge for the ICC'.<sup>169</sup> The reason for this is the 'indirect enforcement model'<sup>170</sup> that the ICC is based on. It lacks a constabulary and subpoena powers.

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<sup>160</sup> W. Schabas, *The enigma of the International Criminal Court's success*, 2006, [http://www.opendemocracy.net/globalization-institutions\\_government/icc\\_3278.jsp](http://www.opendemocracy.net/globalization-institutions_government/icc_3278.jsp).

<sup>161</sup> Coalition for the International Criminal Court, *Budget & Finance*, <http://www.iccnw.org/?mod=budgetbackground>.

<sup>162</sup> Interview with interviewee B, senior official at the ICC, The Hague, 24 March 2010.

<sup>163</sup> *Ibid.*

<sup>164</sup> Findlay, *op.cit.*, p. 121.

<sup>165</sup> Song, *op.cit.*

<sup>166</sup> International Criminal Court, *ICC judges grant the Prosecutor's request*, <http://www.icc-cpi.int/NR/exeres/D81AA5AF-CD76-4B3C-A4FC-AA7819569B44.htm>.

<sup>167</sup> Interview with interviewee B, *op.cit.*

<sup>168</sup> Interview with Rafael de Bustamante Tello, *op.cit.*

<sup>169</sup> Interview with interviewee A, *op.cit.*

<sup>170</sup> Satzger, *op.cit.*, p. 197.

Unlike the ICTY,<sup>171</sup> it does not have primacy over national courts. Therefore, cooperation with states, NGOs, the UN and the ICTY is vital.

Legal provisions on cooperation with *states* were influenced by state sovereignty concerns. In order to make universal ratification of the Rome Statute possible, its drafters made the ICC entirely dependent on the cooperation of states parties,<sup>172</sup> especially with regard to surrender requests<sup>173</sup> and the collection of evidence.<sup>174</sup> The obligation to surrender persons to the Court<sup>175</sup> is the most important concretisation of the general obligation to cooperate.<sup>176</sup> The Court has requested the surrender of thirteen individuals,<sup>177</sup> eight of whom are still at large.<sup>178</sup> In Uganda,<sup>179</sup> not a single of the five arrest warrants issued in 2005 has been respected and the situation in Sudan<sup>180</sup> is similarly difficult. As 'cooperation with states parties is not sufficient',<sup>181</sup> the Court faces serious challenges in establishing itself as a credible institution.

Cooperation with NGOs is problematic for both sides. The Court may receive valuable information from NGOs,<sup>182</sup> but it also has to defend impartiality at all costs (see section 4.1). Humanitarian NGOs underline how important their own neutrality is to maintain their work on the ground.<sup>183</sup> They see the expulsion of humanitarian aid workers after the issuance of an arrest warrant against al Bashir as a shot across the bow and warn against an 'intimate relationship'.<sup>184</sup> As both sides keep a watchful eye on their impartiality, cooperation with the ICC is less effective than the common interest in the fight against impunity might suggest.

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<sup>171</sup> Art. 9.2 ICTY Statute.

<sup>172</sup> Art. 86-111 Rome Statute.

<sup>173</sup> Art. 90.6, 98, 87.7 Rome Statute.

<sup>174</sup> Art. 93 Rome Statute.

<sup>175</sup> Art. 89 Rome Statute. According to A.-M. La Rosa, *Juridictions pénales internationales: La procédure et la preuve*, Paris, Presses Universitaires de France, 2003, p. 86, this is "le chaînon le plus fragile de la procédure pénale internationale".

<sup>176</sup> Art. 86 Rome Statute.

<sup>177</sup> The arrest warrant against Mr Lukwiya, who deceased in 2006, is unconsidered.

<sup>178</sup> See International Criminal Court, *All Cases*, <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Cases>.

<sup>179</sup> See International Criminal Court, *Uganda*, <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0204/Related+Cases/ICC+0204+0105/Uganda.htm>.

<sup>180</sup> International Criminal Court, *Darfur*, <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0205>.

<sup>181</sup> Interview with interviewee B, *op.cit.*

<sup>182</sup> The NGO *Witness*, for example, provided video footage used in the ICC trial against Mr Lubanga.

<sup>183</sup> MacArthur Foundation, *Humanitarian NGOs and the ICC*, Skylight Pictures, 23 March 2010.

<sup>184</sup> *Ibid.*

As regards the UN,<sup>185</sup> the relationship of the ICC with a particular subsidiary body of the Security Council, namely the ICTY, is surprisingly difficult. It is true that both institutions are very different: the permanent nature of the ICC and the complementarity principle of the Rome Statute are two main features that explain the singularity of the ICC with regard to the ICTY, to be phased out possibly in 2014.<sup>186</sup> However, the fact that the ICTY has seventeen years of experience in this area suggests that the ICC could learn a lot from its 'sister court'<sup>187</sup>. The dispute about witness proofing, that is the preparation of the witness for the trial testimony during a meeting with the counsel, is characteristic of tensions in the relationship between the ICTY and the ICC: at the ICTY, witness proofing had been practiced for a decade,<sup>188</sup> when the ICC dismissed this practice in a controversial decision.<sup>189</sup> Irrespective of whether this dismissal was legally justified or not, the controversy it provoked illustrates the need for more inter-institutional communication. An expert on this topic, warning that there is 'no need to reinvent the wheel', suggests that a digest of ICTY jurisprudence should inspire the ICC<sup>190</sup> and that the relationship between the ICC and the ICTY should be formalised further via one-year exchange programmes and the organisation of mini-conferences for the staff of both courts.<sup>191</sup> This could help to bring the 'stepsisters' closer to one another.

This section has shown that cooperation of the ICC with relevant partners, so vital for the effective working of the Court, is difficult in practice. Cooperation with states parties is not sufficient, concerns about impartiality on both sides hamper cooperation with NGOs and finally, the relationship with the ICTY is surprisingly strained.

### *Conflict resolution*

Whether or not the ICC fulfils its core function, that is puts an end to impunity and contributes to the prevention of the most heinous crimes,<sup>192</sup> is difficult to assess for one empirical and one theoretical reason.

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<sup>185</sup> Art. 5, 15, 18 of the *2004 Relationship Agreement between the International Criminal Court and the United Nations*, [http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf), provide for the exchange of information between the ICC and the UN.

<sup>186</sup> ICTY, *Completion Strategy*, <http://www.icty.org/sid/10016>.

<sup>187</sup> Song, *op.cit.*

<sup>188</sup> D. Taylor, *Witness Proofing in International Criminal Law*, International Society for the Reform of Criminal Law, 2008, p. 2, <http://www.isrcl.org/Papers/2008/Taylor.pdf>.

<sup>189</sup> *Ibid.*, p. 4.

<sup>190</sup> Interview with interviewee E, *op.cit.*

<sup>191</sup> *Ibid.*

<sup>192</sup> Preamble 5 Rome Statute.

First, as no trial has been concluded yet, the impact of the Court on the ground is still 'unclear'.<sup>193</sup> Lack of empirical research<sup>194</sup> and the dependence on exogenous variables such as the degree of military, political and economic commitment of the world community make it difficult to evaluate whether the permanent Court really exercises a 'huge preventive impact'<sup>195</sup> on leaders worldwide by stigmatising criminal conduct.

Second, academic debate<sup>196</sup> has concentrated on the discussion of 'peace vs. justice', especially in view of the difficult peace talks in Northern Uganda and of the expulsion of humanitarian aid workers from Darfur. Some argue that 'justice sustains peace'.<sup>197</sup> Others focus on food and security as the basic needs of the local population and warn that punishing violations may 'alienate actors who are also needed in building peace'.<sup>198</sup> 'Peace' and 'justice' remain blurry concepts and the catchword 'peace vs. justice' is an 'umbrella term for a debate with many different answers'<sup>199</sup> – a debate this paper cannot engage in to assess the contribution of the ICC to conflict resolution.

However, this paper can discuss the implications of this debate at a more concrete level and thus deal with the potential of the ICC to resolve conflicts. It first introduces the models of retributive and restorative justice, and it then assesses to what extent the ICC combines elements from both models. The last decades have witnessed the emergence of two types of politico-legal reactions to massive human rights violations: the retributive<sup>200</sup> and the restorative<sup>201</sup> justice model, as set out in Figure 2.

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<sup>193</sup> Interview with interviewee B, *op.cit.*

<sup>194</sup> See Arsanjani & Reisman, *op.cit.*, p. 403, Findlay, *op.cit.*, p. 121.

<sup>195</sup> L. Moreno-Ocampo, in *A Conversation with Luis Moreno-Ocampo of the ICC*, Harvard Kennedy School, Carr Centre for Human Rights Policy, 12 January 2010.

<sup>196</sup> See C. Albin, "Peace vs. Justice – and Beyond", in J. Bercovitch et al. (eds.), *The SAGE Handbook of Conflict Resolution*, Los Angeles/London, Sage, 2009, p. 580.

<sup>197</sup> Song, *op.cit.*

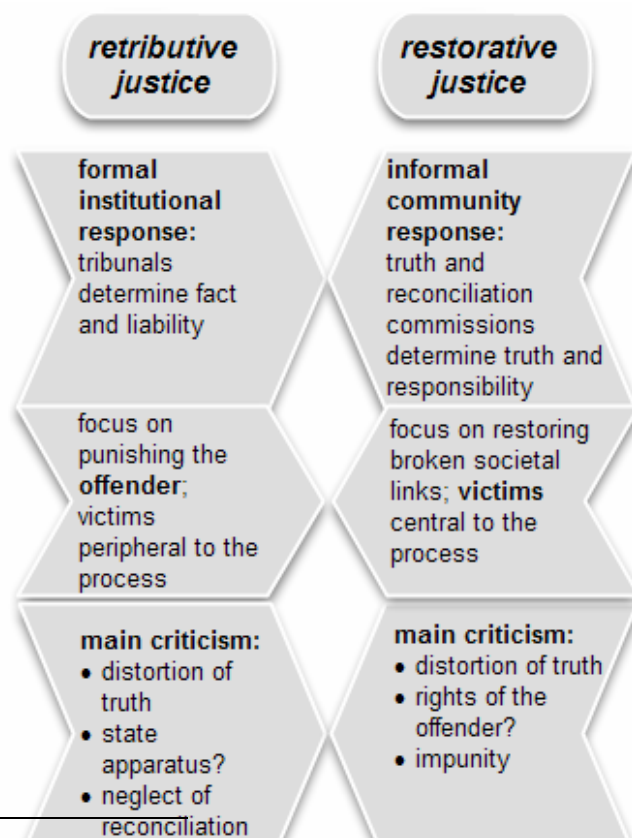
<sup>198</sup> Albin, *op.cit.*, p. 581.

<sup>199</sup> *Ibid.*, p. 580.

<sup>200</sup> Findlay, *op.cit.*, pp. 95, 98; La Rosa, *op.cit.*, p. 456. For criticism see S. Bartelt, "Die Zulässigkeit von Wahrheitskommissionen im Lichte des neuen Internationalen Strafgerichtshofs", *Archiv des Völkerrechts*, vol. 43, no. 2, 2005, p. 196; M. Findlay & R. Henham, *Beyond Punishment: Achieving International Criminal Justice*, Basingstoke, Palgrave Macmillan, 2010, pp. 121-122; M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Boston, Beacon Press, 1998, p. 25; S. Parmentier, M. Valiñas & E. Weitekamp, "How to repair the harm after violent conflict in Bosnia? Results of a population-based survey", *Netherlands Quarterly of Human Rights*, vol. 27, no. 1, 2009, p. 44.

The ICC itself, which may refrain from exercising its jurisdiction and allow for the set-up of national truth and reconciliation commissions granting amnesty,<sup>202</sup> combines elements of both models. The Rome Statute is influenced by the International Military Tribunals, the ICTY and the ICTR<sup>203</sup> and follows, in principle, the retributive model. However, whereas the victim was a 'passive object'<sup>204</sup> before the ICTY, three considerations make it a 'potential subject matter'<sup>205</sup> before the ICC.

Figure 2: Retributive and restorative justice model



<sup>201</sup> Bartelt, *op.cit.*, p. 188; J. Dugard, "Possible Conflicts of Jurisdictions with Truth Commissions", in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, p. 694; Findlay, *op.cit.*, p. 98; P. McCold & T. Wachtel, *In Pursuit of Paradigm: A Theory of Restorative Justice*, 2003, p. 1, [http://www.realjustice.org/uploads/article\\_pdfs/paradigm.pdf](http://www.realjustice.org/uploads/article_pdfs/paradigm.pdf); H. Steiner & P. Alston, *International Human Rights in Context – Law, Politics, Morals*, Oxford, Oxford University Press, 2000, 2<sup>nd</sup> edition, p. 1217. For criticism see Bartelt, *op.cit.*, p. 196; A. Corey & S. Joireman, "Retributive Justice: The Gacaca Courts in Rwanda", *African Affairs*, vol. 103, no. 410, 2004, p. 76; Findlay, *op.cit.*, p. 127.

<sup>202</sup> As "international law does not – yet – prohibit the granting of amnesty for international crimes" (Dugard, *op.cit.*, p. 698), the Prosecutor may use his discretionary power not to initiate an investigation "in the interests of justice", Art. 15, 51.1(c) Rome Statute, see Bartelt, *op.cit.*, p. 216. Other normative links to allow for considerations of political opportunity and to accept the granting of amnesty include Art. 16, 17.1(b), 20 Rome Statute.

<sup>203</sup> Cassese, "From Nuremberg to Rome", *op.cit.*, p. 3.

<sup>204</sup> C. Jorda & J. de Hemptinne, "The Status and Role of the Victim", in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, p. 1389.

<sup>205</sup> *Ibid.*, p. 1399.

Source: author's own chart.

First, the 'Victims and Witnesses Unit', which assists victims and witnesses that appear before the Court,<sup>206</sup> and the 'Outreach Unit', which implies local populations in interactive sessions and promotes the understanding of the ICC via the radio, short message services and word-of-mouth communication, seem to fulfil their respective tasks successfully.<sup>207</sup>

Second, the right of victims to participate in proceedings<sup>208</sup> is a major innovation in international criminal law. *Findlay* welcomes this development, claiming that international criminal justice must be 'legitimated through the interests of victim communities'.<sup>209</sup> In particular, *Findlay and Henham* invite judges to use their discretionary power<sup>210</sup> to actively include victims and witnesses 'according to their outcome expectations'<sup>211</sup> by giving an 'equal effect to lay and professional voices'.<sup>212</sup> In general, the greater use of the judges' discretionary power to focus on the inclusion of victims seems to be an adequate instrument to engage with restorative concerns. However, concerns about efficiency and the rights of the accused must be taken seriously. As victims become 'quasi a second prosecutor',<sup>213</sup> the inclusion of victim communities may protract court proceedings further. In fact, ICC officials do not seem to appreciate that the representation of 500 victims by two lawyers in the Katanga trial led to delays in the Court proceedings.<sup>214</sup> In addition, judges have to take the 'fragile equilibrium between the parties to the proceedings'<sup>215</sup> into account and strike a balance between the effectiveness and the fairness of the trial on the one side and legitimate concerns of victim communities on the other side. The difficult challenge the ICC faces is to harmonise the retributive and the restorative model in a workable way.

Third, the possibility to award reparations to victims<sup>216</sup> is another innovation in international criminal law.<sup>217</sup> This award may be made against a convicted person<sup>218</sup>

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<sup>206</sup> Art. 43.6 Rome Statute.

<sup>207</sup> International Criminal Court, *Outreach Report 2009*, pp. 1, 4, 20, 79; [http://www.icc-cpi.int/NR/rdonlyres/8A3D8107-5421-4238-AA64-D5AB32D33247/281271/OR\\_2009\\_ENG\\_web.pdf](http://www.icc-cpi.int/NR/rdonlyres/8A3D8107-5421-4238-AA64-D5AB32D33247/281271/OR_2009_ENG_web.pdf).

<sup>208</sup> Art. 68.3 Rome Statute.

<sup>209</sup> *Findlay, op.cit.*, p. 109.

<sup>210</sup> *Findlay & Henham, op.cit.*, p. 177.

<sup>211</sup> *Ibid.*, p. 176.

<sup>212</sup> *Ibid.*, p. 182.

<sup>213</sup> *Song, op.cit.*

<sup>214</sup> Interview with interviewees A & B, *op.cit.*

<sup>215</sup> *Jorda & de Hemptinne, op.cit.*, p. 1413.

<sup>216</sup> Art. 75 Rome Statute.

<sup>217</sup> *La Rosa, op.cit.*, p. 453.

<sup>218</sup> Art. 75.2 Rome Statute.

or through the Trust Fund,<sup>219</sup> which is to be financed mainly<sup>220</sup> by voluntary contributions. The Trust Fund should help victims 'to start a new life'.<sup>221</sup> Since it has already created 'expectations among the victims and their advocates',<sup>222</sup> a well-functioning reparations mechanism seems to be of major importance for the acceptance of the Court by local populations and thus for the contribution of the ICC to reconciliation and conflict resolution in general.

The procedural rules of the Rome Statute constitute a decisive advance for the inclusion of victims and thus for the potential of the ICC to resolve conflicts. Experts confirm that the ICC has learned the lessons of the ICTY, which was heavily criticised for neglecting elements of restorative justice.<sup>223</sup> The collection of empirical data on the impact of the ICC on the ground will tell whether the ICC will be a 'real force for peace and reconciliation' in the future.<sup>224</sup>

## 5. Conclusion

To what extent does the EU's support for the ICC qualify as a success story? Having elaborated a tailor-made yardstick to measure effectiveness, this paper showed that the EU's support for the broadening, strengthening and deepening of the Rome Statute system has become more coherent and more effective in the last decade. The EU shed the bystander status that it held at the Rome Conference and emerged as a vocal promoter of the ICC. The EU's internal policy now allows the EU to contribute to the broadening of the Rome Statute system although the differentiated treatment of strategic partners questions its credibility. Concerns about state sovereignty seriously limit the effectiveness of politico-legal, financial and practical instruments to strengthen the Rome Statute system. Lacking a more holistic approach to the deepening of the Rome Statute system, the EU's technical assistance remains suboptimal.

Although the ICC is a product of concessions and trade-offs to reach universality, its relatively advanced institutional set-up, its growing socio-democratic legitimacy and its relative independence from political interference (despite the practice of self-referrals and interventions by the Security Council) pave the way for a new powerful actor in the field of international criminal justice. However, the

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<sup>219</sup> Art. 75.2, 79 Rome Statute.

<sup>220</sup> Arsanjani & Reisman, *op.cit.*, p. 401.

<sup>221</sup> Song, *op.cit.*

<sup>222</sup> Arsanjani & Reisman, *op.cit.*, p. 402.

<sup>223</sup> Interview with interviewee D, senior official at the ICTY, The Hague, 24 March 2010.

<sup>224</sup> Jorda & de Hemptinne, *op.cit.*, p. 1416.

assessment that the Court still lacks efficiency does not bode well for its difficult cooperation with states, NGOs and the ICTY. Although it might still be too early to tell, elements of restorative justice, if implemented despite certain reluctance among practitioners, may enhance the potential of the ICC to resolve conflicts. The implementation of the results of the 2010 Review Conference will give direction to the future of the 'justice start-up' and will indicate whether the ICC can overcome the hydra-headed challenges it is confronted with.

The EU faces a tough balancing act when contributing to the ICC's fight against impunity. Based on the analysis in this paper, one may conclude that the EU should consider the following six policy recommendations to make its support for the ICC more effective.

- 1) In order to *broaden* the Rome Statute system further, the EU should ensure that all member states ratify the relevant agreements and penalise the crimes proscribed by the Rome Statute under domestic legislation. Furthermore, a common EU position on the crime of aggression would be helpful to activate the Court's jurisdiction, at least partially, by 2017. As to its external policy, the EU should take more steps to 'speak with one voice' at the ASP and reconsider its current use of ICC clauses. Maintaining the support for relevant NGOs, the EU might also consider intensifying its cooperation with regional powers such as Japan or Mexico.
- 2) When *strengthening* the Rome Statute system, the EU should envisage closer cooperation of the European Network of Contact Points with Europol, Eurojust and Common Security and Defence Policy missions.
- 3) In order to *deepen* the Rome Statute system, the EU should make use of its list of experts and prioritise technical assistance and capacity-building in its post-conflict security sector reform initiatives.
- 4) The EU, distinguishing between judicial independence and organisational aspects, should take a more '*critical position* towards the ICC',<sup>225</sup> openly encourage a closer cooperation between the ICC and the ICTY and emphasise the importance of bureaucratic efficiency.
- 5) New forms of *support* for the ICC could include contributions to research institutes to gather objective empirical data on the Court's impact on the ground and to the voluntary Trust Fund.
- 6) As the Stockholm Programme only contains very vague provisions on the ICC,<sup>226</sup> the EU should update its *strategic documents*, especially the 2003

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<sup>225</sup> Interview with interviewee B, *op.cit.*

<sup>226</sup> European Council, *Notice 2010/C 115/01 of 4 May 2010, The Stockholm Programme – an open and secure Europe serving and protecting citizens*, pp. 8, 17, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF>.



Common Position, taking note of the new challenges that have arisen in the eight years since the set-up of the Court.

Further empirical research on the ICC's impact on the ground and its contribution to the prevention of crimes is needed, especially in response to the conclusion of the first trial and in relation to the phasing out of the *ad hoc* tribunals. Additionally, analysing other (international) courts will help craft a uniform yardstick to assess and compare judicial effectiveness. Further research on the EU could concentrate on how the set-up of the European External Action Service will affect the EU's support for the ICC.

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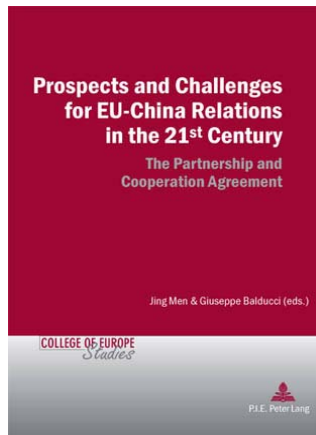
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