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By

Emilie Olsson

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Analyzing an international relationship

Sverker Jönsson

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Summary

EUs institutional and historical particularities create challenges for the organization when promoting international criminal law in general and ICC in particular. This has however not hindered EU from emerging as a staunch supporter of the ICC. To this end, the Presidency, the Council and the Commission have acted with one voice to promote ICC. EUs position towards ICC is formalized through the adoption of a Common Position and an Action Plan. The main focus of these instruments is external action to promote universal jurisdiction and implementation of the Rome Statute among third states as well as the integrity of the ICC. The Action Plan however contains measures to co ordinate internal EU activities. To this end, an EU Focal Point and National Focal points are created to gather and share information on crimes under the jurisdiction of the ICC, paired with requirements of closer cooperation between member states judicial- and immigration authorities. The limited focus on internal efforts is due to EUs limited competence to force its Member States to fulfill obligations under international treaties or to harmonize national criminal provisions. Several progressive steps could be taken to promote international criminal law within EU if the Member States gave EU that competence. With regard to external efforts, the EU has taken a wide variety of actions to implement the Common Position and Action Plan, using both first and third pillar-measures. One of the EUs most efficient means to promote compliance with international law has been to use it as an admission criterion when negotiating EU membership. The EU has also concluded an Agreement directly with the ICC, to manifest its support to the ICC. The substantive articles of the ICC-EU Agreement are uncontroversial, however the respectful tone towards the EU can be questioned both from a legal and political point of view. All together, the EU has taken the commitment to promote the ICC and the Rome Statute in its external actions impressively serious. Despite this, inconsistencies can be noted in EUs external behavior, implicating that the idealistic support to ICC sometimes has to make room for the political reality. Suggestions on how to limit these arbitrary aspects of the EU's commitments towards the ICC are presented in the last chapter.

Abbreviations

ACP	Africa Caribbean Pacific
ASP	Assembly of State Parties
ASPA	American Service members' Protection Act
BIA	Bilateral Immunity Agreement
CFSP	Common Foreign and Security Policy
CICC	Coalition for the International Criminal Court
COJUR	Council's Public International Law Working Group or "Comité Juridique"
COJUR-ICC Working party	International Criminal Court sub-area of the public international law working party
COPS	French acronym for PSC
EAW	European Arrest Warrant
European Communities	European Coal and Steel Community (ECSC), European Economic Community (EEC) and the European Atomic Energy Community (EAEC or EURATOM). The forerunner of the European Union.
EC	The European Community, one of the three pillars of the European Union created under the Maastricht Treaty.
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
EIDHR	European Initiative for Democracy and Human Rights
ENP	European Neighbourhood Policy
EPC	European Political Cooperation
EUSR	EU Special Representatives
GAERC	General Affairs and External Relations Council
ICC	International Criminal Court
ICRC	International Committee for the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
OTP	Office of the Prosecutor
PJC	Police and Judicial Co-operation in Criminal Matters
PSC	Political and Security Committee
QMV	Qualified Majority Voting
SG/HR	Secretary General of the Council/High Representative of the CFSP
SAA	Stabilisation and Association Agreement
SAP	Stabilisation and Association Process
TEC	Treaty establishing the European Community

TEU	Treaty on the European Union
TFEU	Treaty on the functioning of the European Union
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

1 Purpose and method

The purpose of this thesis is to map out and evaluate EUs policy towards the ICC. This requires a brief introduction to the historical and institutional framework of the European construction, which will be conducted in the first chapter. Subsequently, the thesis will examine relevant policy documents taken by the EU and their implementation in its internal and external policies. Material used consists of legal acts and other documents from EU as well as literature, comments and reports by NGO' s, think tanks and scholars. Conclusions and recommendations will be presented in the last chapter. The thesis will not investigate technical support supplied by the EU to third countries, but is limited to the political and economical measures taken.

2 The EU as a global actor

This chapter will examine how the EU has evolved into an important international voice, especially as the world's largest trade block, but with an ever increasing focus on foreign and security policy. It will also attempt to explain EU's special structure and see how this affects Europe's abilities to take external action. The chapter will pay special attention to the EU-ICC relationship.

2.1 A brief history of EU's external ambitions

The European Communities has since its formation in the 1950s maintained external relations in its own name. Initially, this consisted of economic relations with 'third countries', largely conducted through the Common Commercial Policy.¹ Third countries, with the exception of the Soviet Union and its satellites, also quickly acknowledged the European Commission's responsibility for commercial policy and opened diplomatic missions in Brussels. Except for multilateral trade negotiations, the European Communities own early external initiatives pointed in the direction of development, especially in former colonies.² Today, almost every country on earth has a diplomatic representation to the Community, and the Commission itself has delegations in about 125 countries and to five international organizations.³

Despite the European success on the global economical stage, the road to cooperation in the sphere of foreign and security policy has been uneven. When the first attempt of European integration in the area of high politics failed 1954⁴, it took until the early 1970s before the first signs of a new collective effort to establish a formal cooperation in the area of foreign and security policies appeared. This effort would last until the adaptation of the Single European Act in 1986. The basis of this endeavor was three reports presented by the Ministers of Foreign Affairs of the European Economic Community, in Luxembourg 1970, in Copenhagen 1973 and in London

¹ For instance K E Smith, "EU external relations" in M Cini (ed), *European Union Politics*, (OUP, New York 2003)

² Already the Treaty of Rome provided for a European Development Fund, although development was not formally recognized as a Community competence shared with the Member States until the Maastricht Treaty, see title XX of the ECT. For formal trade agreements, see for instance the Yaoundé Convention. See also D Dinan, *Ever Closer Union – An Introduction to European Integration*, (Palgrave 1994) 44 ff

³ K E Smith, "EU external relations" in M Cini (ed), *European Union Politics*, (OUP, New York 2003)

⁴ Following the French Parliaments rejection of the establishment of the European Defence Community.

1981.⁵ The reports constituted the foundation of the European Political Cooperation (EPC), the precursor of today's Common Foreign and Security Policy (CFSP).⁶ During this era, it was first acknowledged that security policies have implications in the economical sphere - and vice versa - meaning that the competences of the EC and cooperation in the field of foreign policy therefore are bound to overlap and interact.⁷ The tension between Community competences and fields of intergovernmental cooperation in foreign policy has ever since these days continued to preoccupy the European construction. Typically, the Member States tends to foster the contradictory ambition to operate collectively as an important global actor, yet desiring to retain national autonomy.⁸ Member States also tends to hold divergent priorities in their foreign policies. Dividing lines can be traced back to different historical ties with various third countries and smaller Member States tendency to embrace Community-efforts in contrast to larger Member States opting for intergovernmental cooperation.⁹

With the end of the Cold War, the Community was increasingly expected to emerge as an international actor with global responsibilities, including spreading peace and security to Eastern Europe.¹⁰ With the adoption of the Maastricht Treaty 1993 (TEU) some of these hopes were met by the creation of the European Union (EU) and the establishment of intergovernmental cooperation in all fields of foreign policy through its second pillar.¹¹

In retrospect, the EU does not have a consistent track-record as an international actor within the field of foreign and security policy. From the break-down of the former Yugoslavia to the war in Iraq, the EU has faced continuous problems of Member States failing to act or to speak with one voice in response to global crisis. At the same time, it is suggested that the growing number of EU actions around the world slowly but surely have made an impact on global perceptions of Europe and strengthened its

⁵ Davignon Report (Luxembourg, 27 October 1970); Second report on European political cooperation in foreign policy matters (Copenhagen, 23 July 1973); Report on European Political Cooperation (London, 13 October 1981).

⁶ It is argued that the EPC to a considerable extent simply formalized existing *ad hoc* arrangements. During this era, the EPC occasionally agreed on a common position, such as the Venice Declaration of June 1980 in which the Palestinians right to self-determination was recognized and a declaration that the Palestine Liberation Organisation (PLO) should be associated with peace negotiations was made by the European Council.

⁷ P Koutrakos, *EU International Relations Law*, (Hart Publishing 2006) 383 ff

⁸ See for instance K E Smith, "EU external relations" in M Cini (ed), *European Union Politics*, (OUP, New York 2003)

⁹ C Bretherton and J Vogler *The European Union as a Global actor* 2nd edition (Routledge 2006) p 162

¹⁰ See for instance K E Smith, "EU external relations" in M Cini (ed), *European Union Politics*, (OUP, New York 2003) and F Cameron, *An introduction to European Foreign Policy*, (Routledge 2007) 28.

¹¹ TEU Article 2, second indent and Article 11, see also D Phinnemore, "Towards European union" in M Cini (ed), *European Union Politics*, (OUP, New York 2003).

position as a global actor.¹² Examples of successful international efforts undoubtedly include the EUs support of the ratification of the Kyoto protocol and the Rome Statute as well as the work of the ICC.¹³ The motives behind EUs firm embracement of the ICC is argued to be based on a mixture of predominantly moral arguments, uncontroversial as most EU Member States feel they have nothing to fear from a strong ICC, but also EUs strategic priorities.¹⁴ Today, all but one of EUs Member States is State Parties of the ICC.¹⁵

Notably, when the floor is given to the EU itself to describe its international role and importance, a shift of its perception of its own significance can be noticed over recent years. In 1998 the Council simply described the year as marked by an ‘increase in CFSP activities of the European Union’.¹⁶ During 2008, however, the Council boldly declared that ‘The EU remained dynamically engaged in foreign and security policy, including through an active role in crisis management and conflict prevention, adding value, coherence and effectiveness to multilateral efforts to promote stability, security and peace in the world.’¹⁷

2.2 How can EU act? The question of Europe’s institutional challenges

The EU as established by the Maastricht Treaty and amended by the treaties of Amsterdam and Nice is complex and peculiar in its nature, often referred to as having a *sui generis*-character¹⁸ and commonly portrayed as a temple

¹² See for instance F Cameron, *An introduction to European Foreign Policy*, (Routledge 2007) 6 ff. C Bretherton and J Vogler *The European Union as a Global actor* 2nd edition (Routledge 2006) p 163

¹³ M L.P. Groenleer and L G. van Schaik, ‘United we stand? The European Union’s International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol’(2007) 45 JCMS 969; F Cameron *An introduction to European Foreign Policy* (Routledge 2007) 5

¹⁴ M L.P. Groenleer and L G. van Schaik, ‘United we stand? The European Union’s International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol’(2007) 45 JCMS 969, 989; A Antoniadis and O Bekou, ‘The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times’(2007) 7 Intl Crim L Rev 621, 624

¹⁵ The Czech Republic signed the Rome Statute in 1999. The Czech parliament ratified it in 2008, but the Czech President has yet to sign the bill into law. See <http://www.iccnw.org/?mod=region&idureg=10>;
<http://www.ceskenoviny.cz/news/zpravyczech-greens-calling-on-klaus-to-sign-icc-treaty/358346>.

¹⁶ Annual Report CFSP 1998 (adopted by the Council, by written procedure, on 16 April 1999), Doc no (7051/99)

¹⁷ Annual report from the Council to the European Parliament on the main aspects and basic choices of the CFSP 2007, DOI 10.2860/16913, ISSN: 1831-1016

¹⁸ E Denza, *The Intergovernmental Pillars of the European Union* (OUP, New York 2002)

of three pillars; the European Community (EC)¹⁹, the CFSP and the Police and Judicial Co-operation in Criminal Matters (PJC)²⁰. The EC possesses international legal personality and enjoys supremacy over national law in areas where the Member States have transferred power to the EC.²¹ The CFSP and PJC-pillars are intergovernmental in their nature and instruments adopted under them are only binding under international law.²² Since the jurisdiction of the European Court of Justice is excluded under the second and third pillar, no enforcement mechanism exists in order to ensure Member States compliance with decisions taken hereunder.²³ Most decisions taken under the second and third pillar requires unanimity among the Member States. It has often been assumed that EU's abilities as an international actor is related to the institutional set-up of the policy-making process. In other words, the more supranational the nature of cooperation, the higher degree of international actorness. Although it has recently been questioned if this link is as definite as earlier presumed, the assumed link is still used to promote the idea of institutional reform of EU foreign policy-making.²⁴

The EU-ICC relationship provides a good illustration of difficulties posed by the construction of the EU. EU's policy towards ICC is formally based on the Council's Common Position on the International Criminal Court.²⁵ The main instrument for implementing the cooperation obligation of the Rome Statute on behalf of the EU is the EU-ICC Agreement.²⁶ Both instruments have been adopted under CFSP, or the second pillar of the EU. However, measures relating to the implementation of most other Rome Statute obligations, of which the EU has committed itself through the Common Position, have been adopted under the third pillar of EU.²⁷ Finally, the promotion of international criminal law in third countries has taken place through actions within the first pillar, for instance by the insertion of ICC-

¹⁹ Comprising of the European Community, the European Coal and Steel Community and the European Atomic Energy Community.

²⁰ Earlier called Justice and Home Affairs (JHA).

²¹ Article 281 of the TEU and Case 6/64 *Costa v. ENEL* [1964] ECR 585 at 593.

²² E Denza, *The Intergovernmental Pillars of the European Union* (OUP, New York 2002) 2

²³ Article 46 TEU

²⁴ M L.P. Groenleer and L G. van Schaik, 'United we stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol' (2007) 45 *JCMS* 969, 970; see also for instance Convention 459/02 Working Group VII - "External Action"

²⁵ Council Common Position 2003/444/CFSP on the International Criminal Court, [2003] OJ L150/67 (hereinafter 'the Common Position'.)

²⁶ Council Decision of 10 April 2006 2006/313/CFSP concerning the conclusion of the Agreement between the International Criminal Court and the European Union on cooperation and assistance, [2006] OJ L115/49 (hereinafter 'the EU-ICC Agreement'.)

²⁷ Decision 2002/494/JHA, of 13 June 2002 (OJ L 167, p. 1), setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes; Framework Decision 2002/584/JHA, of 13 June 2002 (OJ L 190, p. 1), on the European arrest warrant and the surrender procedures between Member States; and Decision 2003/335/JHA, of 8 May 2003 (OJ L 118, p. 12), concerning the investigation and prosecution of genocide, crimes against humanity and war crimes.

clauses in international agreements concluded by the Community and by providing financial aid to NGOs fighting against impunity.²⁸

The following sub-chapters will examine how the European construction affects its ability to make take action in external relations and which tools it can use.

2.2.1 External competence, instruments and procedures within the first pillar

The main task of the EC concerns the common market, the economic and monetary union and implementation of common policies or activities to promote issues related to this. Examples of such issues include a high level of employment and of social protection, equality between men and women and sustainable and non-inflationary growth.²⁹ This does however not mean that the EC is completely separated from the CFSP and the PJC. Article 3 of the TEU proclaims that the all three pillars shall be served by a single institutional framework and that the EU shall ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. Article 6 of the TEU further asserts that all three pillars of the EU is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law and that the EU shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

With regard to external relations, two of the EU's most powerful external policy instruments are found under the first pillar, the capacity to enter into international agreements and the provision of offering financial and economic assistance.³⁰ The Community can offer three basic types of agreements to third countries; trade, cooperation and association, the two latter offering a deeper relationship with EU than merely trade. A cooperation agreement includes cooperation in economic and commercial matters, measures to liberalize trade and sets up frameworks allowing for regular political dialogue. The association agreements set up a closer, more institutionalized relationship with a third country or group of states. In addition to trade measures, they often include protocols specifying a package of EC aid and European Investment Bank loans. These types of agreements can even extend the customs union (as with Turkey) or the

²⁸ See for instance, the ICC-clause of the Revised Cotonou Agreement.

²⁹ Article 2 TEC

³⁰ Article 300 and Title XX of the TEC. Also K E Smith, "EU external relations" in M Cini (ed), *European Union Politics*, (OUP, New York 2003)

internal market (As the European Economic Area).³¹ Almost all countries in the world are linked to the EU through some kind of formal agreements.³²

The basic procedure for negotiating and concluding international agreements consists of the Council of foreign ministers, renamed into the General Affairs and External Relations Council (GAERC), authorizing the Commission to open negotiations with a third country or international organization. The Commission conducts the negotiations according to the Council's instructions and in consultation with a special committee appointed by the Council. Finally, the Council concludes the agreement. For trade agreements, the Council acts by qualified majority voting (QMV) and the European Parliament is not involved. For cooperation and development cooperation agreements, the Council acts with QMV, unless the agreement covers a field for which unanimity is required to adopt internal Community policies. It also consults the European Parliament, which assent is required for most such agreements, before the agreement is concluded. For association agreements, the Council decides by unanimity and the assent of the European Parliament is required. If any of the different agreements include areas under the exclusive competence of the Member States, such as dialogue on foreign policy matters, then it is required that all Member States ratify the agreement in order to conclude it.³³

There is a huge demand for entering into agreements with the European Community, the largest trading bloc in the world and one of the world's largest aid donors. The potential to enter into international agreements is also widely used by the EC.³⁴ It has been suggested that the Community increasingly has employed its instruments for political purposes, and arguably, the mere decision to conclude an agreement with third states is often political to its nature.³⁵ Furthermore, the character of the agreement tends to send political signals, where an association agreement signals a privileged partnership in contrast to a basic trade agreement. These kind of political considerations are not necessarily taken within the CFSP and therefore, the Community's actions can be politicized without CFSP input.

³¹ See for instance the Agreement establishing an association between the EEC and Turkey (Ankara, 12 September 1963 in Official Journal of the European Communities (OJEC). 24.12.1973, No C 113/2, pp. 2-8.); Agreement on the European Economic Area, in Official Journal of the European Communities (OJEC). 03.01.1994, No L1, pp. 3-36

³² K E Smith, "EU external relations" in M Cini (ed), *European Union Politics*, (OUP, New York 2003)

³³ TEC Article 300; See also p 231 Box 15.1 K E Smith, "EU external relations" in M Cini (ed), *European Union Politics*, (OUP, New York 2003).

³⁴ http://europa.eu/pol/dev/index_en.htm; see for instance K E Smith, "EU external relations" in M Cini (ed), *European Union Politics*, (OUP, New York 2003).

³⁵ For instance the Community's decision to conclude an interim association agreement with the Palestinian National Authority in 1997. See 97/430/EC, Council Decision of 2 June 1997 concerning the conclusion of the Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip. OJ L 187, 16.7.1997, p. 1-2.

The agreements themselves are also increasingly politicized and subject to conditionality,³⁶ meaning that third countries are required to meet political goals before concluding agreements with the Community. As an example, all community agreements now include a 'human rights clause'.³⁷ The Community can also impose economic and financial sanctions on third countries, entailing the suspension of an agreement. This requires a unanimous decision within the CSFP before the Community can decide on the legislative measures necessary. The Community has imposed sanctions on numerous occasions, often in conformity with the UN Security Council decisions.³⁸

Another powerful tool within the first pillar is the area of development cooperation, which the EC shares with the EU Member States.³⁹ In this regard, it can be noted that the EU is the world's largest aid donor.⁴⁰

2.2.2 External competence, instruments and procedures within the second pillar

Already the preamble of the TEU clarifies the Member States intention to implement a common foreign and security policy to promote peace, security and progress in Europe and in the world. Likewise, the European attachment to the principles of liberty, democracy, respect for human rights, fundamental freedoms and of the rule of law is promptly asserted.⁴¹

Today, the CFSP shall cover all areas of foreign and security policy, with the objective to:

- safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter;
- to strengthen the security of the Union in all ways;
- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders;
- to promote international cooperation; and

³⁶ All Cooperation and Association Agreements concluded since the entry into force of the TEU contains 'political conditionality' clauses. See for instance C Bretherton and J Vogler *The European Union as a Global actor* 2nd edition (Routledge 2006) p 167.

³⁷ See for instance *Human Rights and Democracy Clauses in the EU's International Agreements* DGExPo/B/PolDep/Study/2005/06 of the 29 September 2005.

³⁸ See chapter XX. See also

http://ec.europa.eu/external_relations/cfsp/sanctions/measures.htm; see also K E Smith, "EU external relations" in M Cini (ed), *European Union Politics* (OUP, New York 2003)

³⁹ Article 177 TEC

⁴⁰ More information available at http://europa.eu/pol/dev/index_en.htm

⁴¹ TEU recital 3 and 10

- to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.⁴²

Evidently, the EU competence under the CFSP is widely formulated, covering all areas of foreign and security policy, but limited by the objectives, since the EU only can intervene in pursuit of these.⁴³ In addition to these objectives shall also be added the common principles of the EU, as discussed above. With regard to the ICC, it has been argued that the TEU does not comprise values and objectives broad enough to fully and explicitly encompass the objectives of the Rome Statute.⁴⁴ In its actions, the EU has nevertheless assumed that the principles of the Rome Statute are fully in line with the principles of the Union.⁴⁵

In practice, the work within EUs second pillar is conducted in the following manner. The European Council sets the broad principles and guidelines of the CFSP as well as agrees on Common Strategies.⁴⁶ The GAERC takes decisions to implement them by agreeing Joint Actions and Common Positions.⁴⁷

The Joint Actions, relatively well used, can be applied in various situations when the Member States needs to act together to reach a specific object.⁴⁸ The Common Position is designed to align the Member States policies towards third countries or on specific issues.⁴⁹ The Common Strategies are less frequently used and normally lasts for four years with the ambition to ensure that the EU and its Member States, thus explicitly cross-pillar in its nature, adopts a consistent line in dealing with – so far – specific countries or regions. It is argued that Joint Actions have more substance and enjoy greater loyalty from the Member States than the Common Positions and the Common Strategies which are interpreted loosely by the Member States.⁵⁰ It has also been suggested that the Common Strategies are problematic as they provide for a long time focus, which is not necessarily helpful in rapidly changing situations.⁵¹ An analysis of the efficiency of the various

⁴² TEU Article 11 (1)

⁴³ Jacqu e *Droit institutionnel de l'Union Europ enne* 3rd edition (Dalloz 2004) p 169

⁴⁴ A Antoniadis and O Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times' (2007) 7 Intl Crim L Rev 621, 624

⁴⁵ See for instance Council Common Position 2001/443/CFSP on the International Criminal Court, [2001] OJ L155/19 recital 3; Council Common Position 2003/444/CFSP on the International Criminal Court, [2003] OJ L150/67 recital 4.

⁴⁶ Article 13 TEU

⁴⁷ TEU Article 14 and 15. See also K E Smith, "EU external relations" in M Cini (ed), *European Union Politics*, (OUP, New York 2003)

⁴⁸ Article 14 TEU. Although qualified majority voting is allowed when implementing Joint Actions Cameron (2007) believes that it is very unlikely to ever be used in what is considered a sensitive domain.

⁴⁹ Article 15 TEU

⁵⁰ F Cameron *An introduction to European Foreign Policy* (Routledge 2007) 29 ff

⁵¹ K E Smith, "EU external relations" in M Cini (ed), *European Union Politics* (OUP, New York 2003)

instruments used within the CFSP is however outside the scope of this thesis.

In addition to these internal means of action, The Amsterdam Treaty opened the possibility of negotiating and concluding international agreements directly between third countries or international organizations and the CFSP.⁵² An example of such an agreement is The Agreement between the ICC and the EU on cooperation and assistance which will be examined under chapter 4⁵³

If these actors and mechanisms weren't enough, there are many other important contributors to the work of the CFSP. The Council of the EU is supported by a Secretariat headed by the SG/HR. The Secretariat's main function is to prepare meetings of the Council in its many formations and its preparatory bodies, such as Coreper and Political and Security Committee (PSC, better known under its French acronym COPS).⁵⁴

Coreper comprises the Member States Ambassadors, i.e. the heads of the delegations or permanent representatives that each member state maintains in Brussels, and is responsible for preparing the work of the Council.⁵⁵ If Coreper is able to take a unanimous decision, the Council normally approves the proposal without discussion. It is argued that The Coreper rarely has time for detailed discussions on foreign and security policy matters and therefore tends to rely on the recommendations from the COPS.⁵⁶

The COPS was funded to monitor the international situation in the areas covered by the CFSP and contribute to the definition of policies by delivering opinions to the Council at the request of the Council or on its own initiative. It is also to monitor the implementation of agreed policies.⁵⁷ The COPS is claimed to be "the hub around which the CFSP resolves". It comprises ambassadors in Brussels and is active on a daily basis. It meets formally several times a week but there are informal discussions almost every day. In theory it reports to ministers via the more senior Coreper – with which there is some rivalry - but in reality they enjoy a large measure

⁵² TEU Article 24. However, this does not mean that the EU was officially given legal personality. The discussion concerning the implication of the Amsterdam Treaty and EU's *de facto* legal status remains an area of dispute, see for instance P Koutrakos, *EU International Relations Law* (Hart Publishing 2006) 407 f.

⁵³ Council Decision of 10 April 2006 concerning the conclusion of the Agreement between the International Criminal Court and the European Union on cooperation and assistance (2006/313/CFSP). Hereinafter "the ICC-EU Agreement"

⁵⁴ TEC Article 207; see also F Cameron *An introduction to European Foreign Policy* (Routledge 2007) 48.

⁵⁵ TEC article 207. Copreper is an acronym deriving from the French *Comité des représentants permanents*.

⁵⁶ F Cameron *An introduction to European Foreign Policy* (Routledge 2007) 48.

⁵⁷ TEU Article 25.

of autonomy.⁵⁸ The COPS, in their turn, relies on the work of European Correspondents and CFSP working groups.

There are over thirty specialized working groups of the CFSP that meet regularly in Brussels. One of these working groups is the special sub-area of the Working party on Public International Law (COJUR) devoted to the ICC. The ICC sub-area was created as ICC-related agenda items took too much of COJUR's time and required specific (legal) expertise. The ICC sub-area consists of senior representatives from foreign ministries (and sometimes ministries of justice) and convenes around four times a year to co-ordinate on matters relating to the ICC. Formally, the mandate of the sub-area is limited. It has no powers delegated from COJUR; it merely advises COJUR. The COJUR however usually adopts recommendations proposed by the sub-area, which are subsequently endorsed by the COPS without much discussion. When it comes to politically sensitive issues, the COPS determine the EU position.⁵⁹ It has been argued that representatives in the sub-area try to broaden legal issues to also include political matters, a trend that is said to be strengthened by the fact that not all representatives are legal experts; some are policy advisers.⁶⁰

The European Commission is fully associated in matters concerning the CFSP and can propose actions, together with the Member States.⁶¹ This does not mean that the European Commission possesses any formal authority. The actual influence of the Commission in matters concerning the CFSP in general and the ICC in particular, therefore, largely depends on how it manages to stretch its formal-legal mandate under the first pillar.⁶² It has been argued that in the case of the ICC, the European Commission stretched its competence by elaborating on the links with issues, such as development and trade, on which it does have a clear competence. This includes funding of non-governmental organizations that support the universal acceptance of the ICC within the EIDHR-framework and initiating a reference to the ICC in the revised Cotonou Agreement.⁶³ These issues will all be addressed in the following subchapters.

⁵⁸ F Cameron *An introduction to European Foreign Policy* (Routledge 2007) 45.

⁵⁹ M L.P. Groenleer and L G. van Schaik, 'United we stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol' (2007) 45 JCMS 969, 980.

⁶⁰ M L.P. Groenleer and L G. van Schaik, 'United we stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol' (2007) 45 JCMS 969, 981 f.

⁶¹ TEU article 18 (4) and 22.

⁶² *Cameron* (2007 p 40) argues that there is a constant struggle for power both within and between the Council and the Commission in the area of CFSP. The Commission has taken the Council to court over who had competence to implement a programme aimed at preventing the spread of small arms in West Africa, Case C-91/05 OJ C 171/2 5 July.2008.

⁶³ M L.P. Groenleer and L G. van Schaik, 'United we stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol' (2007) 45 JCMS 969, 980. For the Cotonou Agreement see http://ec.europa.eu/development/geographical/cotonouintro_en.cfm

Under the TEU, The European Parliament has little real power in questions related to the CFSP. Its influence is limited to the right to be consulted by the Presidency on the main aspects and the basic choices of the common foreign and security policy. The European Parliament shall also be kept regularly informed of the development of the foreign and security policy. Finally, the European Parliament may ask questions to the Council or make recommendations to it.⁶⁴ The European Parliament has however always been in favor of budget allocations for the ICC (and also supports increasing them year after year). Moreover, within the European Parliament a group of like-minded Members of the European Parliament consistently draws attention to the ICC resulting in a number of (activist) resolutions on the ICC and several parliamentary questions being submitted to the Council and the Commission.⁶⁵ It was also the EP who called for an Action Plan to follow up the Common Position.⁶⁶ Finally it can be reminded that the EP is the budgetary power of the EU, which can potentially be used to put pressure on other EU institutions.⁶⁷

With regard to external actions, it can be clarified that within the scope of CFSP, the EU is externally represented by a confusing mixture of one High Representative (SG/HR), the Presidency of the moment (rotating between different Member States every sixth month) and the Commission, their individual roles shifting depending on the circumstances.⁶⁸

2.2.3 External competence, instruments and procedures within the third pillar

EUs Member States were for many years reluctant to transfer competence relating to justice and home affairs to the EC, since this raised questions

⁶⁴ Article 21 TEU

⁶⁵ The “EP friends of the ICC” is an informal group of Members of the European Parliament belonging to different political groups and different nationalities who are committed to actively support the ICC. The group has been ensuring that MEPs take advantage of different opportunities (among others, EP thematic and geographic resolutions, EU-ACP Joint Parliamentary Assemblies, interparliamentary delegations to third countries) to promote the Court and the values enshrined in the Rome Statute. The Coalition and its members have also worked in a close alliance with the European Commission, in particular with the Directorates General for External Relations, Development and AidCo. From liaising with the Commissioners’ cabinets to working with thematic and geographic desk officers, NGOs have helped to ensure that the ICC is mainstreamed into different EC policies and in bilateral relations with third countries. See http://consilium.europa.eu/uedocs/cmsUpload/ICC_internet08.pdf; M L.P. Groenleer and L G. van Schaik, ‘United we stand? The European Union’s International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol’ (2007) 45 JCMS 969, 981

⁶⁶ European Parliament resolution on entry into force of the Statute of the International Criminal Court, C 293 E/88 Official Journal of the European Communities, 28.11.2002

⁶⁷ TEC Article 272

⁶⁸ TEU Article 18, 20, 24, and 26. See also for instance; F Cameron *An introduction to European Foreign Policy* (Routledge 2007) 15

both regarding national jurisdiction and how to handle the differences in legal systems.⁶⁹ These areas were also to a great extent already covered by functioning international instruments where both Member States and third countries effectively cooperated. It has therefore been argued that it has been especially complicated for the EU to shape its own legal framework in areas affected by the police and judicial cooperation, as well as asylum policies, since these areas, even when considered politically possible, are often already covered by other international treaties.⁷⁰ Despite this, the gradual reduction or abolishment of internal European border controls eventually resulted in the conclusion that tighter controls of external frontiers were necessary.⁷¹

The Maastricht treaty marked the creation of the third pillar of the EU, to replace previous European ad hoc arrangements in the area of Police and Judicial cooperation. The third pillar is, similarly to the CFSP, of supranational nature, with the Council as the highest organ in the development of new laws and policies. Initial differences between the second and third pillar structure is suggested to signify that the cooperation in Police and Judicial affairs was established on a more temporary or experimental basis.⁷² With the Amsterdam treaty, substantial changes were made in the third pillar and visa and asylum policy was moved into the competence of the EC under the first pillar.

Today, and without prejudices to the powers of the first pillar, the objective of the PJC is to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia. This shall be attained by preventing and combating crime, organized or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:

- closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol) (citation omitted),
- closer cooperation between judicial and other competent authorities of the Member States including cooperation through the European Judicial Cooperation Unit ('Eurojust') (citation omitted),

⁶⁹ E Denza, *The Intergovernmental Pillars of the European Union* (OUP, New York 2002) 63

⁷⁰ For instance the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, treaties on extradition and transfer of criminal proceedings, the Geneva Convention relating to the Status of Refugees. See E Denza, *The Intergovernmental Pillars of the European Union* (OUP, New York 2002) 68

⁷¹ "The Palma Declaration".

⁷² E Denza, *The Intergovernmental Pillars of the European Union* (OUP, New York 2002) 80

- approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e).⁷³

Clearly, the third pillar cooperation focuses on cross boarder crimes, which naturally has a clear EU dimension. In the fields of organised crime, terrorism and illicit drug trafficking, the Member States even commit themselves to the sensitive goal of progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties.⁷⁴

There are several measures available under the third pillar. When acting unanimously, on the initiative of any Member State or of the Commission, the Council may:

- a) adopt Common Positions defines which the approach of the Union to a particular matter;
- b) adopt Framework Decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions are binding upon the Member States as to the result to be achieved but leaves to the national authorities the choice of form and methods. They do not entail direct effect;
- c) adopt Decisions for any other purpose consistent with the objectives of this PJC, excluding any approximation of the laws and regulations of the Member States. These decisions are binding, but without any direct effect;
- d) establish Conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Member States shall begin the procedures applicable within a time limit to be set by the Council.

Essentially, the Common Positions, Framework Decisions and Decisions consistent with the objectives of PJC are adopted unanimously, where a Member States abstention to vote does not hinder the decision to be taken. On the other hand, measures necessary to implement the Decisions at the level of the Union and to establish Conventions which the Member States are recommended to adoption in accordance with their respective constitutional requirements can be decided using QMV.⁷⁵

The Common Position of the PJC has the same meaning as those of the CFSP – to define the EUs policy with regard to a particular issue.⁷⁶ The instrument of a Framework Decision is in many ways similar to the Directives under the first pillar of the EU. They serve to approach the national legislations of the Member States and oblige them to achieve a certain goal, at the same time leaving to the Member States to choose the

⁷³ See Article 29, 31(1)(e) and 31(2)(b) of the TEU

⁷⁴ Article 31 (e) TEU

⁷⁵ Article 34 TEU

⁷⁶ Jacqué *Droit institutionnel de l'Union Européenne* 3rd edition (Dalloz 2004) p 605

means.⁷⁷ The Framework Decision thus allows the EU to adopt uniform regulations in a specific area. This differs from the CFSP, where politics mostly is formulated as declarations and not as legally binding acts for the Member States.⁷⁸ The Decisions are excluded as means to approach national laws,⁷⁹ and are binding upon the Member States. Examples of decisions include the creation of a European Refugee Fund⁸⁰ and the establishment of a European Police College⁸¹. Before adopting Decisions and Framework Decisions, the Council consults the European Parliament. The Presidency and the Commission regularly informs the European Parliament of discussions in the areas covered by the CPJ. The European Parliament may ask questions of the Council or make recommendations. Each year, it shall hold a debate on the progress made in the areas referred to in this title.⁸² Precisely as under the CFSP,⁸³ the TEU provides for a loyalty clause under the PJC pillar when Member States acts in international fora, obliging them to defend the Common Positions adopted under the PJC.⁸⁴

The third pillar of the EU also provides for the possibility to enter into so called 'enhanced cooperation'. Enabling a few willing Member States to develop more rapidly than others who might be more reluctant.⁸⁵ Notably, this is how the Schengen area first was established.⁸⁶

Lately, the EU has acknowledged that the external possibilities and aspects of the PJC should be given more attention. The European Council in Feira, Portugal decided in June 2000 that the European Union's external priorities in the field of justice, freedom and security must be incorporated in the Union's overall external strategy. In November 2004, the European Council in Brussels adopted the Hague Programme on strengthening freedom, security and justice in the EU, where the development of a coherent external dimension of the third pillar is considered as a growing priority. This led to the adoption of a strategy covering all external aspects of the CJP.⁸⁷

2.3 The Lisbon Treaty

With the Irish referendum of the 2 October 2009, all EU Member States have approved of the Lisbon Treaty.⁸⁸ Among other things, the new treaty

⁷⁷ Jacqué *Droit institutionnel de l'Union Européenne* 3rd edition (Daloz 2004) p 605; Article 34(2)(b) TEU.

⁷⁸ Jacqué *Droit institutionnel de l'Union Européenne* 3rd edition (Daloz 2004) p 170.

⁷⁹ Article 34(2)(c) TEU.

⁸⁰ Initially named Council Decision 2000/596/EC OJ L 252, 6.10.2000, p. 12.

⁸¹ Initially named Council Decision 2000/820/JHA O J L 336 30.12.2000 p. 1.

⁸² Article 39 TEU.

⁸³ TEU Article 19.

⁸⁴ Article 37 TEU referring to Articles 18 and 19 TEU, applicable as appropriate to matters falling under this PJC.

⁸⁵ Article 40 TEU.

⁸⁶ <http://europa.eu/scadplus/leg/en/lvb/l33020.htm>

⁸⁷ COM (2005)491.

⁸⁸ As for the Czech Republic, the President formally has yet to ratify the Treaty.

will abolish the pillar structure of the current EU and extend QMV, especially within today's third pillar but also, to some extent, within the area of CFSP. The EU foreign policy (or CFSP) will however still primarily require unanimity by the Council and thus be an intergovernmental affair between the Member States. This means that although the Lisbon Treaty gives the EU legal personality, the EU would still only be able to conclude international agreements or join international organizations within the scope of the powers conferred on it by the Member States.⁸⁹

With regard to the institutional organization of the EU, the Lisbon Treaty contains two innovations a propos the Union's external action: the "permanent" President of the European Council appointed for a renewable term of two and a half years, and the new High Representative for Foreign Affairs and Security Policy and Vice-President of the Commission, who shall ensure the consistency of the Union's external action.⁹⁰

Under the Lisbon Treaty, in broad terms, provisions governing the "Community" elements of EU external action would be found in the Treaty on the Functioning of the European Union (TFEU), the renamed and amended TEC.⁹¹ Provisions governing the CFSP including the European Security and Defence Policy (ESDP) would continue to be found in the amended TEU. The splitting of EU external action provisions between two Treaties, and the broad division between "Community" elements in the TEC (or its successor) and intergovernmental ones in the TEU, would be the same as at present. As opposed to the TEC and TEU, detailed provisions governing international agreements and "enhanced cooperation" (including provisions relevant to the CFSP) will however be placed within the same treaty framework, namely the TFEU.⁹²

2.4 Concluding remarks

The EU faces several historical and institutional challenges when taking external action in general and when promoting the ICC in particular. Due to overlaps in external competence between the Member States, the Union and the Community, promotion of international criminal law has been done through all three pillars. All three pillars have different competences, decision making procedures and mechanisms. With regard to the decision

⁸⁹ Article 1 55 of the Lisbon Treaty

⁹⁰ The high representative will have a dual role: representing the Council on common foreign and security policy matters and also being Commissioner for external relations. Conducting both common foreign policy and common defence policy, he/she will chair the periodic meetings of member countries' foreign ministers. He/she will also represent the EU's common foreign and security policy internationally, assisted by a new European external action service, composed of officials from the Council, Commission and national diplomatic services.

⁹¹ Measures on humanitarian aid and on the provision of urgent macrofinancial assistance would become subject to qualified majority voting for the first time, see Article 2 167) and 168) of the Lisbon Treaty, inserting Articles 188I and 188J of the TFEU

⁹² <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmfaaff/120/120.pdf> p. 30 f

making procedures, they are all complicated and involve a multitude of actors. To a considerable degree, decisions under the second and third pillar require unanimity among all 27 of EU's Member States. The unclear external competence has in the case of ICC led the European Commission to stretch its competence by elaborating on the links with issues under the first pillar, such as development and trade, on which it does have a clear competence. Challenges can be found under the second pillar, where cooperation in the field of CFSP is not evident and can still be a sensitive issue among Member States and under the third pillar where it is particularly sensitive to harmonize Member States domestic criminal laws. These challenges shall be seen in the light of considerable expectations on Europe as a global player.

Despite these potential problems, EU has managed to speak with one voice in the field of international criminal law and is generally deemed successful in its role as a staunch international supporter of the Rome Statute and the ICC. One explanation might be that this commitment is uncontroversial among EU's Member States.

3 EU measures with an internal focus taken in support of International criminal law.

The following chapter will examine instruments taken by the EU to promote the ICC and how these have been implemented within the EU. EU instruments not directly linked to ICC, but potentially useful to strengthen international criminal law within the EU, will subsequently be examined. Finally the chapter will discuss future areas of cooperation. The chapter will not examine external action taken by the EU, as this will be done in chapter 4.

3.1 Formalizing EUs position – the adoption of a Common Position and an Action Plan.

The EU, through the Council and under the CFSP, first adopted a Common Position on the ICC in 2001, which was later revised in 2002 and 2003.⁹³ In 2002, the Council took note of a resolution approved by the European Parliament which called for the adoption of an action plan to follow up the Common Position. The Action Plan was finalized on 15 May 2002 and later revised in February 2004.⁹⁴ Notably, when these acts were adopted, all Member States of EU were State Parties to the ICC. Today, the Czech Republic has yet to ratify the Rome Statute.⁹⁵

3.1.1 The Common Position

Not surprisingly, the Common Position is formulated in general terms, as Action Plans or EU Guiding Principles are the tools intended to further specify the EUs action.⁹⁶ The objective of the Common Position is to support the effective functioning of the ICC and to advance universal support for it by promoting the widest possible participation in the Rome Statute.⁹⁷ To do so, the Common Position has a triple focus;

- the universal accession of the Rome statute;⁹⁸

⁹³ In accordance with Article 15 TEU; Council Common Position 2001/443/CFSP on the International Criminal Court, [2001] OJ L155/19; Council Common Position 2002/474/CFSP on the International Criminal Court, [2002] OJ L164/1 and Council Common Position 2003/444/CFSP on the International Criminal Court, [2003] OJ L150/67.

⁹⁴ Doc 5742/04, Action Plan to follow-up the Common Position on the International Criminal Court. Hereinafter ‘Action Plan’.

⁹⁵ The Czech Republic formally became an EU Member State 1 May 2004.

⁹⁶ See chapter xxx for a deeper analysis of these different instruments.

⁹⁷ Common Position Article 1(2).

⁹⁸ Common Position recital 7, Articles 2(1)(2) and (3).

- the implementation of the Rome Statute;⁹⁹ and
- the preservation of the integrity of the Rome Statute.¹⁰⁰

Measures to achieve universal accession and implementation of the Rome Statute includes raising the issue in negotiations or political dialogue with third states, promoting the values of the Rome Statute and sharing the experience of issues of implementation with third states. The Member States shall also contribute with other forms of support, such as technical aid or financial assistance to third states considering joining and implementing the Rome Statute. To this end, the EU and its Member States shall develop country-specific or region-specific strategies to coordinate their political and technical support.¹⁰¹

In order to safeguard the integrity of the Rome Statute, the EU and its Member States shall encourage States Parties to transfer promptly and in full their assessed contributions to the Court and make every effort towards the speedy signature and ratification, by Member States and others, of the Agreement on the Privileges and Immunities of the ICC. The integrity of the Rome Statute shall also be preserved by support to the development of training and assistance for judges, prosecutors, officials and counsel in work related to the Court.¹⁰² The Member States shall further draw third countries attention to the EU Guiding Principles regarding possible bilateral agreements relating to the conditions or surrender of persons to the ICC.¹⁰³ The Common Position opens for the Council to, when appropriate, coordinate measures by the EU and Member States to ensure the widest possible participation in and implementation of the Rome Statute and measures taken to support the independence of the Court.¹⁰⁴ Notably, the Common Position points out that the Commission intends to direct its action towards achieving the objectives and priorities of the Common Position, where appropriate by pertinent Community measures.¹⁰⁵ The Common Position contains few provisions obliging EUs Member States to take action at the domestic level. The Member States are instead expected to show a certain loyalty towards the ICC, as they are requested to cooperate to ensure the smooth functioning of the ICCs Assembly of State Parties (ASP), and to contribute to the finalization of the definition of the crime of aggression within the Special Working Group established by the ASP.¹⁰⁶

⁹⁹ Common Position recital 8, Articles 2(1)(2) and (3).

¹⁰⁰ Common Position recital 10, Articles 3 and 5(2).

¹⁰¹ Common Position Article 2.

¹⁰² See Article 3 of the Common Position.

¹⁰³ See recital 11 and article 5(2) of the Common Position. See chapter XX for an indepth analysis of the Guidelines.

¹⁰⁴ See Article 4 of the Common Position.

¹⁰⁵ See Article 6 of the Common Position.

¹⁰⁶ See Article 7 of the Common Position.

3.1.2 The Action Plan

The Action Plan to follow-up on the Common Position on the International Criminal Court is intended to provide concrete measures to implement the Common Position. The Action Plan is divided into three sections; co-ordination of EU activities, universality and integrity of the Rome Statute and the independence and effective functioning of the ICC. The Action Plan especially states that its focus lays on the initial period of the effective functioning of the ICC.¹⁰⁷

In order to coordinate the EUs efforts to implement the Common Position, the Action Plan invents an EU Focal Point as well as National Focal points in each Member State.¹⁰⁸ The purpose of the EU Focal Point is to ensure effective coordination and consistency of ICC-relevant information as well as adequately preparing programmes and activities for the EU in the implementation of the Common Position. The EU Focal Point will thus seek to identify synergies or risks of overlap.¹⁰⁹ Concretely, the EU Focal Point will establish contact with, for example, third countries, NGOs, the ICC and other international organizations to exchange relevant information.¹¹⁰ It will facilitate and update the communication within and of the EU, make information available, including information of relevant meetings and other events, coordinate the activities of the Member states through contacts with the national Focal Points and maintain a list of experts available for assistance. It will also facilitate the exchange of information and coordination within the Council and promote coherence of EU activities. It will provide updated assessments documents and reports. Likewise the EU Focal Point will prepare material, such as fact-sheets, ad hoc strategies and draft detailed projects for planned activities. It will further suggest concrete measures to be taken to the Presidency and identify opportunities for inclusion of the ICC on the draft list of issues to be discussed in negotiations and political dialogues.¹¹¹

The foreseen National Focal points will be established for external contacts and exchange of information and will be liaised with the EU Focal Point. National Focal Points should provide to the EU, to other Member States and to any relevant state or non-state actor, as appropriate, at their own initiative or upon request and in accordance with applicable law, any available

¹⁰⁷ Action Plan initial remarks 4th and 5th paragraph.

¹⁰⁸ The legal basis given for doing so is Articles 2-4 and 6 of the Common Position. In practice, the EU Focal Point for ICC issues was created by designating the official that was already dealing with ICC issues as the Focal Point. See Martin M L.P. Groenleer and L. G. van Schaik, 'United we stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol'(2007) 45 JCMS 969.

¹⁰⁹ Action Plan point A 2 and A 3 (i).

¹¹⁰ See for instance EU-ICC Agreement Article 4 where the parties agree on the establishment of appropriate regular contacts between the Court and the EU Focal Point.

¹¹¹ See Point B 3 of the Action Plan and Annex.

information that may be relevant in the implementation of the EU Common Position.¹¹²

Apart from this, existing EU bodies are targeted by the Action Plan. The COJUR-ICC Working party is encouraged to participate in the effective coordination of initiatives falling within their respective competence and concerning the ICC when meeting other Council Working Parties and to hold informal meetings with other relevant actors. Furthermore, the Presidency should meet periodically with the Commission and the EU Council Secretariat in order to co-ordinate informally and generate ideas to update and improve the EU support for the ICC. A meeting should be held at the beginning of each presidency. Before that meeting, Member States should be invited to present their views on the priorities for the following six months.¹¹³ The Commission should continue its practice of consulting with Member States and other relevant Parties, with conferences as an example, and the European Parliament will be kept regularly informed by the Presidency and the Commission of significant developments concerning the ICC where its views should be duly taken into account.¹¹⁴

In order to facilitate the coordination of activities, the EU Member States should co-ordinate their actions in all relevant multilateral forums, as appropriate and in accordance with established procedures. Member States are encouraged to have in their embassies in The Hague and in their missions in New York an expert dealing also with specific ICC matters. To promote efficiency and cost-effectiveness, Member States should endeavor to divide labour between them. Such a division of labour could relate to the relations with specific countries or organizations or to specific issues, and could concern contacts, analyses and other tasks.¹¹⁵

Apart from co-ordination of EU activities, the Action Plan also contains measures to protect the universality and integrity of the Rome Statute. To a large degree, measures proposed are similar to the ones found in the Common Position, although more precise. As the Common Position, the Action Plan has a clear focus on external efforts to “maximize ... [the] political will” of third countries to join the Rome Statute,¹¹⁶ including the use of political dialogue, statements in the UN and assistance to willing but unable third countries through expert assistance, financial support or access to data compiled by others. This work can also be conducted through the continued direct or indirect support of NGOs and expert assistance when drafting relevant legislation.¹¹⁷ A novelty is the decision to mainstream ICC in EUs external relations, by bringing up the ratification and implementation of the Rome Statute as a human rights issue in the negotiation of EU agreements with third countries, as well as within other

¹¹² Action Plan point A 3.

¹¹³ Action Plan point A 4.

¹¹⁴ Action Plan point A 6 and 7.

¹¹⁵ Action Plan point A 5.

¹¹⁶ Action Plan Section B 1 (ii) and B 3.

¹¹⁷ Action Plan Section B.

human rights and political dialogues. To this extent, the area of development co-operation is explicitly included, naming the framework of the Cotonou Convention as one example.¹¹⁸ The Action Plan also provides that the Member States, where appropriate, shall endeavour to put in place as soon as possible legislation necessary to implement the Rome Statute.¹¹⁹ Similarly the Member States are encouraged to sign the Agreement on Privileges and Immunities of the ICC and to ratify it without delay.¹²⁰

With regard to the independence and effective functioning of the ICC, the Action Plan provides for few innovations compared to the Common Position. The text includes statements of efforts to ensure that the ICC staff is highly qualified and elected in a proper and transparent way. In a sharper tone than the Common Position, it expresses that Member States *will* transfer promptly and in full their assessed contributions to the ICC, as well as encourage other states parties to do likewise.¹²¹ The EU and its Member States are also concerned about the ICC's image and will work together with other international actors, towards an effective 'management of expectations', by trying to ensure that the media and the general public understand the nature of the ICC and the time framework for the effective operation of the Court. Whenever appropriate the ICC sub-area Working Party will consult with the relevant Council working parties, in order to promote effective co-operation between national and European law enforcement and immigration authorities and the ICC.¹²² Finally, EU Member States should work towards an effective co-operation between the ICC and the UN, in particular by supporting the early conclusion of the Relationship Agreement between the ICC and the UN and its fullest implementation.¹²³

To conclude, the Action Plan specifies EU's commitment towards the ICC under the Common Position. Together with the Common Position, the Action Plan provides the framework for all direct EU action regarding the ICC and sets the foundation of the relations between the EU, the ICC and individual Member States.

3.2 Implementation of the Action Plan

After adopting the Common Position and the Action Plan, the EU has created other instruments to implement them in the individual Member States. These instruments will be examined in the following chapter.

3.2.1 The Network of contact points in respect of persons

¹¹⁸ Action Plan point B 3 (iii).

¹¹⁹ Action Plan Article/section! C(2)(viii).

¹²⁰ Action Plan Article/section! C(2)(x).

¹²¹ Section C 2 (iii), emphasis added.

¹²² Section C 2 (xi).

¹²³ Action Plan point C 2.

responsible for genocide, crimes against humanity and war crimes

Under the Action Plan, each Member State shall establish a national Focal Point for its external contacts and exchange of information concerning the implementation of the Common Position. In June 2002, The European Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes was established by a Council Decision.¹²⁴ This Decision partly implements the national Focal Points of the Action Plan, with the objective to facilitate the collection and exchange of information between national contact points.¹²⁵ In the preamble of this Decision, the Council recalls that all State Parties have a duty under the Rome Statute to exercise its criminal jurisdiction over those responsible for crimes within the ICC jurisdiction¹²⁶, emphasizes ICC's complementary nature¹²⁷ and affirms that the investigation and prosecution of, and exchange of information on, genocide, crimes against humanity and war crimes is to remain the responsibility of national authorities, except as affected by international law.¹²⁸ In relation to these introductory statements, it has been argued that the Council seems to construe the complementarity principle so that *all* national courts have the primary responsibility to investigate and prosecute international crimes, thus including the courts of bystander States.¹²⁹ After these general statements, the Council promptly states that the Member States are being confronted with persons who have been involved in crimes under the Rome Statute, attempting to seek refuge within the EU.¹³⁰ To ensure successful investigation and prosecution of crimes under the Rome Statute, the Council therefore points out that cooperation both between different authorities at the national level as well as international cooperation is essential.¹³¹ To this end, the Framework Decision requires each Member State to designate a contact point for the exchange of information concerning the investigation of genocide, crimes against humanity and war crimes such as those defined in Articles 6, 7 and 8 of the Rome Statute.¹³² The task of these contact points are to provide on request, in accordance with the relevant arrangements between Member States and applicable national law, any available information that may be relevant in the context of investigations into genocide, crimes against humanity and war crimes or to facilitate cooperation with the competent

¹²⁴ Council Decision (2002/494/JHA) of 13 June 2002.

¹²⁵ A Antoniadis and O Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times' (2007) 7 Intl Crim L Rev 621, 640.

¹²⁶ Council Decision (2002/494/JHA) of 13 June 2002 recital 2 and 3 of the preamble.

¹²⁷ Council Decision (2002/494/JHA) of 13 June 2002 recital 4 of the preamble.

¹²⁸ Council Decision (2002/494/JHA) of 13 June 2002 recital 6 of the preamble.

¹²⁹ C Ryngaert, Universal Jurisdiction in an ICC Era - A Role to Play for EU Member States with the Support of the European Union, p 70.

¹³⁰ Council Decision (2002/494/JHA) of 13 June 2002 recital 7 of the preamble.

¹³¹ Council Decision (2002/494/JHA) of 13 June 2002 recital 8 and 9 of the preamble.

¹³² Council Decision (2002/494/JHA) of 13 June 2002 Article 1(1) and (2)

national authorities. Within the limits of the applicable national law, contact points may also exchange information without a request to that effect.¹³³

Council Decision 2003/335/JHA on the investigation and prosecution of genocide, crimes against humanity and war crimes, requires that, at the initiative of the Presidency, the contact points shall meet at regular intervals with a view to exchange information about experiences, practices and methods. Representatives of international bodies, such as ICTY, ICTR and ICC may be invited to take part in these meetings.¹³⁴ To date, the network of contact points have had several meetings, where representatives from the ICC have participated.¹³⁵

Most scholars and NGOs agree that the work of the EU Network is positive and has provided results. The meetings between the contact points are argued to provide a unique possibility for prosecutors, judges and police officers to exchange experiences. Even though information sometimes is gathered *in absentia* by the contact points, it might be particularly helpful for other Member States wishing to initiate proceedings.¹³⁶ Notably, since the first meeting of the EU Network, in November 2004, a number of cases of serious international crimes have been successfully prosecuted in Europe.¹³⁷ Despite the overall positive experience of the work and coordination of the contact points, it has been argued that conclusions adopted by them are not automatically implemented by the Member States or by the EU institutions. It has also been suggested that the lack of periodic meetings between the contact points is problematic, were the initiative shall come from the Presidency of the moment. A proposed solution includes the creation of a small secretariat to contribute to the follow up of conclusions and ensure that meetings are held regularly, irrespective of the holder of the Presidency of the EU.¹³⁸

3.2.2 Council Decision 2003/335/JHA on the investigation and prosecution of genocide, crimes against humanity and

¹³³ Council Decision (2002/494/JHA) of 13 June 2002 Article 2(1) and (2). Compare with See Section A.3(ii) of the Action Plan.

¹³⁴ Council Decision 2003/335/2003 article 5(2).

¹³⁵ See 'The European Union and the International Criminal Court', European Communities, 2008.

¹³⁶ C Ryngaert, Universal Jurisdiction in an ICC Era - A Role to Play for EU Member States with the Support of the European Union, p 70.

¹³⁷ These include two Afghan military officers convicted in the Netherlands of war crimes committed in Afghanistan, an Argentine officer convicted by a Spanish court of crimes against humanity in Argentina, three Rwandan perpetrators convicted before Belgian courts for participating in the Rwandan genocide, an Afghan warlord convicted in the United Kingdom for crimes in Afghanistan, and one Mauritanian officer in France. A summary of cases and legislative developments from 2004 - 2007 can be found at FIDH & REDRESS, *EU Update on Serious International Crimes, June 2006, Vol I/III* available at <http://www.redress.org/publications/EU%20Report%20Vol%203%20July%202007.pdf>

¹³⁸ Redress, *Fostering a European approach to accountability for genocide, crimes against humanity, war crimes and torture, Extraterritorial Jurisdiction and the European Union*, Final Report, April 2007.

On May 8, 2003, the Council complemented its earlier decision by adopting a decision on the investigation and prosecution of genocide, crimes against humanity and war crimes.¹³⁹ This decision refers back both to the Common Position and the earlier Decision to set up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes.¹⁴⁰ Apart from initially repeating the statements from the decision to set up a European network of contact points¹⁴¹, the Council states that the EU Member States are being confronted *on a regular basis* with persons, who were involved in genocide, crimes against humanity and war crimes.¹⁴² (emphasis added) The preamble further states that competent authorities of the Member States shall ensure that when receiving information indicating that a person who has applied for resident permit is suspected for committing or participating in genocide, crimes against humanity or war crimes, the relevant acts *may* be investigated and where justified, prosecuted in accordance with national law.¹⁴³ (emphasis added) A novelty of the Directive is that it points at the importance of national law enforcement and immigration authorities cooperating to enable effective investigation and prosecution of crimes pointed out by the Decision by the *competent authorities that have jurisdiction at the national level*.¹⁴⁴ (emphasis added)

The objective of the decision is therefore to increase cooperation between national units in order to maximize the ability of law enforcement authorities in different Member States to cooperate effectively in investigating and prosecuting persons who have committed or participated in crimes under the Rome Statute.¹⁴⁵ To this end, Member States shall ensure that national law enforcement authorities and immigration authorities are able to exchange information, which may lead to prosecution in a Member State or in international criminal courts.¹⁴⁶ The competent authorities in different Member States are also requested to assist one another in these matters¹⁴⁷ and are obliged to coordinate ongoing efforts to investigate and prosecute persons suspected of committed or participating in the commission of genocide, crimes against humanity and war crimes.¹⁴⁸ As

¹³⁹ Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, O J L 118/12 (2003). The legal basis of this Decision is Articles 30, 31 and 34(2)(c) of the TEU (third pillar).

¹⁴⁰ Recital 11 and 12.

¹⁴¹ See Council Decision 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, O.J. L 167/1 (2002).

¹⁴² Council Decision 2003/335/2003 recital 6 and 2.

¹⁴³ Council Decision 2003/335/2003 recital 7.

¹⁴⁴ Council Decision 2003/335/2003 recital 8.

¹⁴⁵ Council Decision 2003/335/2003 Article 1.

¹⁴⁶ Council Decision 2003/335/2003 Article 2(1) and (2).

¹⁴⁷ Council Decision 2003/335/2003 Article 3(1), (2) and (3).

¹⁴⁸ Council Decision 2003/335/2003 article 5(1).

an additional tool, Member States are encouraged to create specialist units with the task of investigating and when appropriate, prosecute crimes under the jurisdiction of the ICC.¹⁴⁹

It has been argued that the importance of this Decision shall not be underestimated, since most prosecutions on the basis of the universality principle have been initiated against refugees found in the territory of a bystander State. Also, the link between IHL crimes and immigration is said to have the advantage of tapping into an established field of EU competence, setting in motion the Europol and Eurojust.¹⁵⁰

3.3 Other potentially useful instruments adopted by the EU

Although not especially intended to implement the Action Plan, other EU instrument might be potentially useful from an ICC point of view. The following subchapter will examine such acts.

3.3.1 Council conclusions of 30 September 2002 and the EU guiding principles

By its conclusion of 30 September 2002 on the International Criminal Court, the GAERC developed a set of none legally binding principles, to serve as guidelines for Member States when considering the necessity and scope of possible agreements or arrangements in response to proposals regarding the conditions to surrender persons to the ICC.¹⁵¹ These Guidelines will be examined under chapter 4.

3.3.2 European Union Guidelines on promoting compliance with international humanitarian law (IHL)

In December 2005, the European Union Guidelines on promoting compliance with international humanitarian law (IHL) were adopted by the Council under the second pillar of the EU.¹⁵² This means that they do not create any obligations for the Member States to enact legislation in conformity with them. However, the purpose of the guidelines are not

¹⁴⁹ Council Decision 2003/335/2003 article 4.

¹⁵⁰ C Ryngaert, *Universal Jurisdiction in an ICC Era - A Role to Play for EU Member States with the Support of the European Union*, p 72, also stating that there are no data available on the extent to which Member States effectively cooperate, through Eurojust, Europol or otherwise in the prosecution of IHL crimes.

¹⁵¹ 2450 Council session on External Relations, 30 September 2002, Brussels, 12134/02 (Presse 279).

¹⁵² European Union Guidelines 2005/C 327/04 of 23 December 2005 on promoting compliance with international humanitarian law (IHL) [2005] OJ C327/4

intended to bind the Member States but to serve as guidelines and set out operational tools for the EU and its institutions in their efforts to promote IHL.¹⁵³ The Guidelines aims at addressing compliance with IHL by third States and non-State actors operating within third States, assuming that the Guidelines are in line with EUs and its Member States' commitments vis-à-vis IHL.¹⁵⁴ The Guidelines are also explicitly complementary to Guidelines and other Common Positions already adopted within the EU in relation to matters such as human rights, torture and the protection of civilians.¹⁵⁵ Apart from briefly examine IHL, the Guidelines offer several means for the EU and its institutions and bodies to approach the question of IHL in their interactions with third parties. To this end, the Guidelines request all bodies of EU to monitor situations where IHL might be applicable in their relations with third States.¹⁵⁶ Representatives for the EU shall whenever relevant include an assessments of the IHL situations in their reports about a given state or conflict.¹⁵⁷ In addition, background papers for EU meetings should include, where appropriate, an analysis on the applicability of IHL. In a situation where an armed conflict might be at hand COJUR should be informed, along with other relevant bodies, and could be tasked to make suggestions of future EU action.¹⁵⁸ In a non-exhaustive list, EU's means of action are presented in the last section of the Guidelines, namely; Political dialogue, general public statements, demarches and/or political statements about specific conflicts, restrictive measures/sanctions, cooperation with other international bodies, crisis management operations, ensuring compliance with the concept of individual responsibility, training and restrictions when exporting arms.¹⁵⁹ Included in the political dialogue is the responsibility for EU to call upon third countries, also in peace time to adhere and fully implement the ICC statute.¹⁶⁰ In another clear reference to the ICC, the EU also suggest that the mandate of crisis-management operations could include collecting information which may be of use for the ICC, through the EU-ICC Agreement. Furthermore, with regard to individual responsibility, EUs support to the ICC is highlighted. Finally, both the Statutes of the ICTY and ICTR as well as the Rome Statute listed as principal legal instruments on IHL.¹⁶¹

In carrying out the Guidelines, cooperation with other international organizations including the International Committee of the Red Cross (ICRC) and the UN are repeatedly suggested.¹⁶²

¹⁵³ Section I (1)

¹⁵⁴ Section I (2)

¹⁵⁵ Section I (1)

¹⁵⁶ Section III (15)(a)

¹⁵⁷ Section III (15)(b)

¹⁵⁸ Section III (15)(c)

¹⁵⁹ Section III B

¹⁶⁰ Section III (16)(a)

¹⁶¹ Annex

¹⁶² Section III (15)(a) and (16)(e)

Clearly, the Guidelines does not go beyond the Common Position nor the Action Plan. It is however positive that the EU collects itself around a clear hands on procedure to handle situations where IHL might be applicable. Despite this, and from an ICC perspective, the Guidelines could have had a stronger focus on the aftermath of conflicts were the question of ICC's role could have been highlighted further. Notably, although military personnel from many EU states operate over the world – such as in Iraq – no measures are suggested to ensure their compliance with IHL.

3.3.3 The European Arrest Warrant

The Framework Decision on the European arrest warrant was adopted under the EUs third pillar in June 2002.¹⁶³ Recalling the Tampere European Council Conclusions¹⁶⁴ and the principles of subsidiarity and proportionality¹⁶⁵, it abolishes formal extradition procedures among Member States with respect to persons suspected of having committed serious criminal offences or who have been finally sentenced. Instead, the judicial authorities of each Member State must directly recognize and execute requests for arrest and surrender coming from another Member State.¹⁶⁶ In short, by nearly abolishing the traditional grounds for states to refuse to comply with a request for extradition¹⁶⁷, the European Arrest Warrant (EAW) gives the possibility to a Member State to ask another Member State to arrest and surrender one of its own nationals to be prosecuted in the first Member State. It also opens for the possibility to request the surrender of third states citizens for criminal prosecution or execution of a custodial sentence or detention order in the requesting Member State if the third state national is found in another Member State.

An EAW may be issued under two circumstances. First, for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.¹⁶⁸ Secondly, the Framework Decision contains a list of offences that, if they are punishable in the Member State issuing the EAW by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of the Framework Decision *and without verification of the double criminality* of the act, give rise to surrender

¹⁶³ Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, O J L 190/1 18 July 2002. Legal basis is Article 31(a) and (b) and Article 34(2)(b) TEU.

¹⁶⁴Recital 1 and 2 of the Framework Decision.

¹⁶⁵ Recital 7 of the Framework Decision.

¹⁶⁶ Framework decision Articles 1(1) and (2).

¹⁶⁷ The principles of double criminality for crimes falling within Article 2(2) but not 2(1), nationality, with exceptions in Articles 4(6) and 5(3) and to some extent speciality see Article 27.

¹⁶⁸ Framework Decision Article 2(1).

pursuant to an EAW.¹⁶⁹ The abolishment of double criminality thus only applies in the latter case and an EAW can be refused by the executing state referring to absence of double criminality in the first case.¹⁷⁰ Among the offences listed in the Framework Decision, *Crimes within the jurisdiction of the International Criminal Court* can be found.¹⁷¹

This regional uniform system of arrest and surrender of persons suspected of having committed crimes falling under ICC jurisdiction is unprecedented in the rest of the world.¹⁷² The effect of an EAW (especially for crimes under the Rome Statute) can however be limited, as Member States may refuse to execute an EAW, if the offence has been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.¹⁷³ This could potentially create problem if a Member State exercising universal jurisdiction for crimes under the Rome Statute issues an EAW for a third country national staying in a Member State who does not apply universal jurisdiction for such crimes.¹⁷⁴ Despite this and although the EAW only covers arrest and surrender between EU Member States, it has been suggested that recourse to the EAW may present several advantages for the prosecution of ICC crimes by EU Member States, by facilitating national prosecution in line with the principle of complementarity in the Rome Statute. The EAW is also argued to be potentially helpful if the ICC itself issues a request for surrender to an EU Member State, when the requested person already has sought refuge in another Member State.¹⁷⁵ In the event of two or more Member States issuing an EAW, or a conflict of a request of a third country and an EAW, it is for the competent authorities of the executing Member State to decide how to proceed. In this context, the Member States are duly reminded that the rules of the Framework Decision governing these occasions are without prejudices to Member States obligations under the Rome Statute.¹⁷⁶

The Framework Decision also addresses questions of domestic and international law immunities.¹⁷⁷ If immunity is granted by the *executing* Member State, the executing judicial authorities of that state shall request to

¹⁶⁹ Framework decision Articles 2(2), emphasis added.

¹⁷⁰ Article 2(4) and 4(1) of the Framework Decision. Other exceptions, such as protection from double jeopardy, can be found in Articles 3 and 4 of the Framework decision.

¹⁷¹ Article 2(2).

¹⁷² L Vierucci, *The European Arrest Warrant – An Additional Tool for Prosecuting ICC Crimes*, Journal of international Criminal Justice 2 (2004), 275. Vierucci also argues that the technical nature of the Framework Decision, conferring exclusively on the judicial authorities - without interference from the executive powers - the task of transmitting or executing the EAW, guarantees an efficient functioning of the Framework Decision.

¹⁷³ Article 4(7) of the Framework Decision.

¹⁷⁴ C Rynjaert, *Universal Jurisdiction in an ICC Era - A Role to Play for EU Member States with the Support of the European Union*, p 69.

¹⁷⁵ L Vierucci, *The European Arrest Warrant – An Additional Tool for Prosecuting ICC Crimes*, Journal of international Criminal Justice 2 (2004), 275, 277.

¹⁷⁶ Article 16(4) Framework Decision.

¹⁷⁷ Article 20 Framework Decision.

its own authorities that this immunity is waived. Until this is done, the judicial authorities of the executing Member State cannot fulfill the request in the EAW.¹⁷⁸ When the immunity is granted by another state or international organization, it is for the judicial authorities of the *issuing* Member States to request the waiver of immunity from the relevant entity.¹⁷⁹ Although this reflects the principle whereby official capacity protects a person from criminal responsibility and prosecution for official acts, and during their time in office, for acts carried out in private capacity, it can be noted that this principle today is limited for the State Parties of the Rome Statute which allows the ICC to exercise jurisdiction despite functional or personal immunity.¹⁸⁰ The provisions of immunity in the Framework Decision in relation to the obligations under the Rome Statute are however beyond the scope of this thesis.¹⁸¹

3.3.4 Framework Decisions on the execution of orders freezing property or evidence and mutual recognition to confiscation orders.

In 2003, the Council adopted a Framework Decision under the third pillar on the execution in the European Union of orders freezing property or evidence.¹⁸² The purpose of the Framework Decision is to establish rules under which a Member State shall recognize and execute in its territory a freezing order issued by the judicial authorities of another Member State in the framework of criminal proceedings.¹⁸³ Article 3 of the Framework Decision includes a list of offences, which is identical to the one relevant to the EAW, for which verification of double criminality of the act is not necessary, provided that the offence, as defined by the State issuing the freezing order to another Member State, are punishable in the issuing State of a maximum period of at least three years. This includes crimes falling within the jurisdiction of the ICC.¹⁸⁴ Property includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents and instruments evidencing title to or interest in such property, which the competent judicial authority in the issuing State consider is either the proceeds of an offence referred to in Article 3, or equivalent to either the full value or part of the value of such proceeds, or constitutes the instrumentalities or the objects of such an offence.¹⁸⁵ Evidence means objects, documents or data which could be produced as

¹⁷⁸ Article 20(1) and 17 Framework Decision

¹⁷⁹ Article 20(2) Framework Decision.

¹⁸⁰ Article 27 of the Rome Statute.

¹⁸¹ For an in depth discussion, see L Vierucci, *The European Arrest Warrant – An Additional Tool for Prosecuting ICC Crimes*, Journal of international Criminal Justice 2 (2004).

¹⁸² Council Framework Decision (JHA) 2003/577 of 22 July 2003 on the execution in the European Union of orders freezing property or evidence [2003] OJ L 196/ 45

¹⁸³ Article 1 of the Framework Decision

¹⁸⁴ Article 3 (2) of the Framework Decision

¹⁸⁵ Article 2 (d) of the Framework Decision

evidence in criminal proceedings concerning an offence referred to in Article 3.¹⁸⁶ It is argued that this would facilitate Member States in the execution of a request for the freezing of assets of a person indicted by the ICC under Article 93(1)(k) of the Rome Statute.¹⁸⁷

Worth noticing, three years later, the Framework Decision on the application of the principle of mutual recognition to confiscation orders was adopted, intended to supplement the Framework Decision on the recognition of orders freezing property and assets adopted on 22 July 2003.¹⁸⁸ This Framework Decision is intended to strengthen cooperation between the Member States by enabling judicial decisions to be executed immediately, containing a similar list of offences where exception is made from the principle of double criminality which also includes crimes falling under the jurisdiction of ICC's.¹⁸⁹ To clarify the content; confiscation order means, within the Framework Decision, a final penalty or measure imposed by a court following proceedings in relation to a criminal offence relating to the definitive deprivation of property.¹⁹⁰ Property shall in this context be understood as any property which is the proceeds of an offence or equivalent in value of such proceeds or constitutes the instrumentalities of such an offence. This means that any economic value derived from a criminal offence (as defined by the Framework decision and thus including offences encompassed by the Rome Statute) or any property used or intended to be used in any manner to commit an offence, can be confiscated under the Framework Decision.¹⁹¹ This effort to hamper any possible gain from crimes falling under the jurisdiction of the ICC must be seen as an important step to further limit the possibilities for those responsible as well as making such crimes less interesting for others.

3.4 Areas for future cooperation?

Suggestions of closer cooperation within the second and third pillar of EU can be considered highly controversial among the Member States. Keeping this in mind, the following subchapter will examine new ways for EU to support international criminal law.

¹⁸⁶ Article 2 (e) of the Framework Decision

¹⁸⁷ A Antoniadis and O Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times' (2007) 7 Intl Crim L Rev 621.

¹⁸⁸ Council Framework Decision (JHA) 2006/783 of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders [2006] OJ L 328/59

¹⁸⁹ Article 6 of the Framework Decision

¹⁹⁰ Article 2 (c) of the Framework Decision

¹⁹¹ Article 2 of the Framework Decision

3.4.1 Implementation of ICC crimes into domestic law of the EU Member States

It is not an obligation under the ICC regime to incorporate the ICC crimes into domestic law.¹⁹² Despite this scholars tend to agree that it is advisable for a State to do so, as well as to review other general principles of international criminal law to determine their compatibility with the ICC regime. Several EU Member States have adopted legislation in this respect. Whether the political will exists to adopt ICC implementing legislation on an EU level could be a matter of debate. The competence of the EU in relation to approximation of substantive criminal laws of the Member States is extremely limited, focusing mainly on organised crime, terrorism and illicit drug trafficking, which are classed as transnational, thus having an EU dimension.¹⁹³

A certain political will to pursue an implementation of the crimes under the Rome Statute at a European level could be found in the Action Plan, where Member States are encouraged to put in place, as soon as possible legislation necessary to implement the Rome Statute. They are also requested to exchange information on their progress in doing so.¹⁹⁴

3.4.2 Universal jurisdiction over crimes covered by the Rome Statute

It has been argued that the EU should not only continue its support to the ICC, but also encourage and assist its Member States to exercise universal jurisdiction for crimes against international humanitarian law.¹⁹⁵ This builds on the thesis that the Rome Statute could be interpreted so that any State, who claims universal jurisdiction over offences encompassed by it, could be asked by the ICC to prosecute these offences, as long as they are willing and able to do so.¹⁹⁶

Scholars have asked for a limited harmonization of domestic laws regulating IHL within EU, arguing that bystander states are not biased, nor do the EU states lack the necessary skills and expertise to investigate and prosecute

¹⁹² See Article 88 Rome Statute. For an in-depth analysis see A Antoniadis and O Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times' (2007) 7 Intl Crim L Rev 621, 631 ff.

¹⁹³ A Antoniadis and O Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times' (2007) 7 Intl Crim L Rev 621.

¹⁹⁴ Section C.2 (viii) of the Action Plan

¹⁹⁵ C Ryngaert, Universal Jurisdiction in an ICC Era - A Role to Play for EU Member States with the Support of the European Union.

¹⁹⁶ C Ryngaert, Universal Jurisdiction in an ICC Era - A Role to Play for EU Member States with the Support of the European Union, 50 f, noting that article 17(1)(a) of the Rome Statute merely says that a case shall be determined inadmissible by the ICC where [t]he case is being investigated or prosecuted *by a State which has jurisdiction over it*, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution (emphasis added).

IHL crimes.¹⁹⁷ Such harmonization is argued to enable more successful trials against the offenders, than is at present possible to carry out for the ICC alone. To this end, it is suggested that the roles of Europol and Eurojust should be strengthened, combined with the adoption of a Framework Decision spelling out common jurisdictional grounds for Member States combating IHL crimes.¹⁹⁸

When arguing around a Framework Decision implementing universal jurisdiction over Rome Statute crimes for EU Member States, it is however important to bear in mind that universal jurisdiction has been highly controversial in the international community. On the other hand, several EU Member States already have more or less rigid domestic provisions in force granting universal jurisdiction over certain crimes.¹⁹⁹ Although highly progressive, it is therefore not completely unthinkable that the Member States could agree on implementing universal jurisdiction over a limited list of the most heinous offences against IHL.

3.5 Concluding remarks

The Common Position has a clear focus on external action. Little attention is given the question of internal European efforts to strengthen international criminal law. Although one of the objectives of the Common Position is to achieve implementation of the Rome Statute, it does not contain any measures to achieve the full implementation of the provisions to cooperate with the ICC²⁰⁰ or to implement the substantive criminal law provisions of the Rome Statute within the EU. Consequently, it has been argued that the absence of any detailed measures to be taken at an EU level to implement the Rome Statute, is striking.²⁰¹ With regard to the integrity of the Rome Statute, the Common Position does not prohibit EU Member States from entering into bilateral agreement with a third State to circumvent the jurisdiction of the ICC, but asks them to, together with the EU, draw the attention of *third states* to EUs non-binding Guidelines. With regard to other obligations for the Member States under the Common Position, the principle of cooperation within international organizations is already enshrined in the TEU and some level of loyalty towards the ICC naturally steams from the very act of signing the Rome Statute. In sum, no controversial obligation arises for the Member States under the Common Position. Focus is instead placed on EUs institutions as actors when dealing with ICC matters.

¹⁹⁷ See C Ryngaert, Universal Jurisdiction in an ICC Era - A Role to Play for EU Member States with the Support of the European Union, p 76 f.

¹⁹⁸ See C Ryngaert, Universal Jurisdiction in an ICC Era - A Role to Play for EU Member States with the Support of the European Union, p 79 f.

¹⁹⁹ See for instance the German Völkerstrafgesetzbuch, the Spanish Judicial Power Organization Act and the French code de procédure pénale.

²⁰⁰ Article 88 of the Rome Statute.

²⁰¹ A Antoniadis and O Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times' (2007) 7 Intl Crim L Rev 621, 629.

The Action Plan devotes a greater deal to internal European efforts, by creating the EU focal point and the National Focal point. Their competence is however limited to gather and distribute of information and no obligation arises from the Action Plan for the Member States to actually use the information gathered to investigate or prosecute alleged offenders. Apart from the creation of Focal Points, few new obligations arise from the Action Plan as compared to the Common Position. Since not all EU Member States have ratified the Rome Statute, it can be noted that measures adopted by the EU to support the ICC can have awkward effects.

The narrow focus on internal efforts of the Common Position and Action Plan makes it evident that the EUs possibility to take action is limited by the competence given to it by its Member States under the second and third pillar. Consequently, EU does not force its Member States to ratify or implement the Rome Statute or to sign and ratify the Agreement on Privileges and Immunities of the ICC because it does not want to, but because it cannot.

The two Council Decisions creating a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes and on the investigation and prosecution of genocide, crimes against humanity and war crimes are clearly in line with the Action Plan, focusing on the gathering and sharing of information. Despite this limited aim, the construction of Focal Points has produced results. Interestingly, the general statements on international criminal law found in the preambles of the decisions are far more progressive than the articles.

Clearly, several progressive steps can still be taken by the Member States to further international criminal law also within the EU. If the EUs Member States would have been bolder, the Common Position and the Action Plan could have included the obligation for the Member States to implement the Rome Statute or to strengthen possibilities to investigate and prosecute alleged offenders at the national level by the EU itself, its Member States or European agencies such as Europol.

Notably, although the EUs Member States are reluctant to give up their national autonomy under the CFSP and the PJC, they have strongly committed themselves to use all means available to force third countries to accede and implement the Rome Statute.

4 External actions taken by the EU to promote compliance with international criminal law.

As discussed above, the substantive part of the Common Position and the Action Plan is devoted to external action. This chapter will examine how EU has used its institutions and mechanisms to fulfill the commitments undertaken through the Common Position and Action Plan.

4.1 The ICC-EU Agreement.

ICC membership is open only to states and the EU itself has not ratified the Rome Statute.²⁰² This does not prevent the ICC from asking international organizations for assistance, in the form of for example information and documents.²⁰³ Nevertheless, the ICC-EU Agreement is the first ever legally binding agreement of this kind between the ICC and a regional organization. When signing the ICC-EU Agreement it was also the first time the EU (and not just the EC) entered into an international agreement with another international organization, laying down a legal obligation for the EU to cooperate with the ICC.²⁰⁴ The Agreement thus binds the EU as a whole, and not its individual Member States.²⁰⁵

In the ICC-EU Agreement the obligation of cooperation and assistance is identified as a duty to cooperate closely and consult each other on matters of mutual interest, while fully respecting the respective provisions of the TEU and the Rome Statute. Through the Agreement, the parties consequently agree on the establishing of appropriate regular contacts between the ICC and the EU Focal Point for the ICC.²⁰⁶ Other forms of cooperation may

²⁰² The EC is a party to several international bodies such as the WTO and the FAO.

²⁰³ Article 87(6) Rome Statute: *The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.*

²⁰⁴ Agreement between the International Criminal Court and the European Union on cooperation and assistance L 115/50 Official Journal of the European Union 28.4.2006. Likewise, it was also the first agreement on cooperation and assistance that the ICC signed with a Regional Organization.

²⁰⁵ See the EU ICC Agreement recital 10 of the preamble and article 1 and 2. The legal basis of the Agreement is Article 24 of the TEU and Article 87(6) of the Rome Statute. The origin of the Agreement can be traced back to a request made by the Office of the Prosecutor (OTP) of the ICC to the EU regarding strategic information on issues of concern to the OTPs investigations, see A Antoniadis and O Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times' (2007) 7 Intl Crim L Rev 621, 634 referring to

http://ec.europa.eu/external_relations/human_rights/icc/index.htm

²⁰⁶ EU ICC-Agreement article 4.

consist of EU inviting the representatives of the ICC to attend its meetings and conferences²⁰⁷ and by the two institutions adopting initiatives to promote the values of the Rome Statute.²⁰⁸ With regard to the exchange of information, the EU and the Court shall, to the fullest extent possible and practicable, ensure the regular exchange of information and documents of mutual interest in accordance with the Rome Statute and the Rules of Procedure and Evidence.²⁰⁹ As the agreement is only binding between the EU and the ICC, the information requested under it only includes EU documents, including classified documents.²¹⁰ If the ICC needs a document that originates from a Member State, it shall request that directly from the individual State.²¹¹ The Agreement further contains provisions of security issues, classified information, testimony of EU staff, cooperation between the EU and the OTP, immunities, personnel and services as well as training of ICC staff.²¹²

Although the ICC-EU Agreement focuses on the sharing of information, the Rome Statute opens for other possibilities of assistance. For instance, the EU could have committed itself to implement an freezing of assets order under Article 93(1)(k) of the Rome Statute. The legal basis for adopting such an order remains a controversial matter under EU law,²¹³ but freezing of assets orders have been used by the EU in terrorist cases and when implementing the mandate of the ICTY, as will be discussed below.²¹⁴

Throughout the EU ICC-Agreement, respect for the TEU and EUs limitations there under, is expressively acknowledged. These declarations can be found under provisions regulating the obligation of cooperation and assistance,²¹⁵ exchange of information,²¹⁶ testimonies of EU staff,²¹⁷ cooperation between the EU and the OTP²¹⁸ and privileges and immunities²¹⁹. Special attention is also given the question of safety and

²⁰⁷ EU-ICC Agreement article 5.

²⁰⁸ EU-ICC Agreement article 6.

²⁰⁹ EU-ICC Agreement article 7(1).

²¹⁰ EU-ICC Agreement, Article 3(1), 7 and 9 as well as the Annex thereto.

²¹¹ EU-ICC Agreement, Article 3(1).

²¹² It is suggested that the Rome Statute's emphasis on assistance in the form of provision of information or documents from international organizations may be explained in that this would be the most common form of assistance such organizations would be able to provide the ICC with. As an example, the EU as an institution cannot directly provide certain services, such as prison facilities.

²¹³ A Antoniadis and O Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times' (2007) 7 Intl Crim L Rev 621, 636.

²¹⁴ In terrorist cases, the basis has been a Common Position (second pillar) followed by an EC regulation based on articles 60, 301 and 308 of the EC Treaty (first pillar), freezing of assets orders against Karadžić, *Mladić* and *Gotovina* was based on a Council Common Position without any subsequent first pillar measures. The choice of methods for adoption determine issues of judicial protection and respect for fundamental rights.

²¹⁵ EU-ICC Agreement article 4.

²¹⁶ EU-ICC Agreement article 7.

²¹⁷ EU-ICC Agreement article 10.

²¹⁸ EU-ICC Agreement article 11.

²¹⁹ EU-ICC Agreement article 12.

security of EU staff and security and proper conduct of an operation or activity of the EU, where the ICC can order, particularly at the request of EU, appropriate measures of protection.²²⁰

4.1.1 Concluding remarks

Undoubtedly, the ICC-EU Agreement sends an important political signal simply by being the first agreement of its kind. The Agreement is also important as it ensures continuity to the line of cooperation between the parties.²²¹ Clearly the agreement will facilitate sharing of information between the EU and the ICC by formalizing the procedure to do so. Keeping that in mind, it is clear that the provisions of the ICC-EU Agreement are generally uncontroversial. This could lead to the controversial conclusion that it is too deferential towards the EU. From a political point of view, where the ICC gains from clear support from the EU and the EU cannot risk internal criticism for abusing its external competences (albeit wanting to display itself as a serious international player with high moral standards) this is not surprising. From a legal perspective, however, it raises questions of potential conflicts between the TEU and the Rome Statute. In reality, the possibility of conflict between, for instance, the privileges and immunities of EU officials – forming part of primary EU law - and the provisions of the Rome Statute is at the same time convincingly argued to be unlikely due to the mutual good will between the organizations.²²² Also, albeit politically understandable, the consequences of ICC seemingly treating the EU unnecessarily favorable could be serious. Above all, it could raise questions if the integrity of the Rome Statute. This is a high price to pay for the good will gained by the two organizations signing an agreement on cooperation and assistance. Before taking this line of argument too far, it is however important to point out that the EU is not a State Party of the Rome Statute and might not, as an entity, be expected to live up to the same obligations as its individual Member States in their capacity of State Parties of the Rome Statute.

From an EU point of view, the decision to enter into a cooperation agreement with the ICC, primarily in order to provide the ICC with documents, is in fully line with the objective of the Common Position to support the effective functioning of the ICC²²³ and the Action Plan's declaration that the EU and its Member States should contribute to the effective functioning of the ICC.²²⁴

²²⁰ EU-ICC Agreement article 8.

²²¹ V Martin, *The two faces of impunity: The EU and the International Criminal Court*, FRIDE Comment 2007.

²²² A Antoniadis and O Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times' (2007) 7 Intl Crim L Rev 621, 635 f.

²²³ Article 1(2) of the Common Position

²²⁴ Section C.2 (ii) of the Action Plan

4.2 Political actions

According to the Common Position, the EU and its Member States shall make every effort to further the widest possible participation in the Rome Statute, by raising the issue of ratification, acceptance, approval or accession and implementation in negotiations and political dialogues with third States, groups of States or relevant regional organizations, whenever appropriate.²²⁵ To this end, the Action Plan states that the EU shall mainstream ICC in its external relations and that the ratification and implementation of the Rome Statute should be brought up as a human rights issue in the negotiation of EU agreements with third countries.²²⁶ The following chapter will examine how EU has used political actions to promote ICC in its external relations.

4.2.1 Using UN as a platform

Although the EU has 40 per cent of the seats as permanent members of the Security Council (UNSC) and 33 per cent of all members, it is argued that a lack of political will impairs the EU to effectively use its weight within the UN.²²⁷ With regard to the U. S. policy towards the ICC, the EU, including its members of the UNSC, has reacted with one voice within the UN. The EU-US debacle over ICC will be examined in detail below.

EU has also coordinated its positions in the General Assembly (UNGA) and in six main committees as well as in the ECOSOC. Increasingly, the EU votes together on UNGA resolutions.²²⁸ EU has also expressed its general support for the ICC within the UN through official statements by the EU Presidency.²²⁹ Since the Presentation of the First Report of the ICC to the UNGA on November 2005, the 27 EU Member States further co-sponsor the annual resolution in support of the ICC.²³⁰ Although none of these measures has a crucial political impact, they nevertheless send a political signal.

4.2.1.1 The referral of Darfur to the ICC

²²⁵ Article 2(1) of the Common Position

²²⁶ Action Plan Section B.3 (iii)

²²⁷ F Cameron *An introduction to European Foreign Policy* (Routledge 2007) 16.

²²⁸ F Cameron *An introduction to European Foreign Policy* (Routledge 2007) 16, also noting that since UNGA resolutions are not binding, the implications of this can be questioned.

²²⁹ EU Presidency Statement on the Establishment of the ICC, 14 October 2002; EU Presidency Statement on behalf of the EU at the 63rd UNGA: Report of the International Criminal Court, 30 October 2008. It can be noted that EU is the largest contributor to the UN budget.

²³⁰ http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/Plan_of_Action_-_EU_-_English_-_2007.pdf.

In March 2005 the UNSC for the first time decided to refer a situation, namely Darfur, to the ICC by adopting resolution 1593.²³¹ The resolution was initially tabled by France, and the EU played a vital role in the adoption of the text.²³² The U.S. abstained to vote, but conceded after it was guaranteed that US nationals would be exempted from the ICC's jurisdiction.²³³ The EU has continuously showed its support for the resolution and the Council has expressed that it 'stands ready to consider measures against individuals responsible for not-cooperating with the ICC, should the obligation under the UNSC Resolution 1593 on cooperation with the ICC continue to be disregarded'.²³⁴

4.2.2 Work within the ICC itself

In line with the TEU and the Action Plan, the EU member states coordinate their work in the ASP of the ICC.²³⁵ Today, a fourth of the ICC Member states consist of EU Member states, making them the largest block of States within the Court.²³⁶ During the Rome conference and on numerous occasions, the Member state holding the EU Presidency was taking the floor on behalf of all Member States to address the Conference and express the EUs position. Subsequently, this common voice has continued within the ASP.²³⁷ From an ICC perspective, this participation of an entity not being a State party in the plenary sessions of the ASP is unique. It is argued that unlike their work in the UN, the EU participation in the ICC has been a resounding success.²³⁸

4.2.3 The EU-US debacle over ICC- EUs Guiding principles

²³¹ S/RES/1593 (2005) Adopted by the Security Council at its 5158th meeting on 31 March 2005.

²³² http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/Plan_of_Action_-_EU_-_English_-_2007.pdf. (EC) 'The European Union and the International Criminal Court' (Booklet February 2008)

²³³ Other states abstaining were Algeria, Brazil and China. See Press Release SC/8351 of 31 March 2005.

²³⁴ Council Conclusions on Sudan adopted at the Councils' Luxembourg meeting, 16 and 17 June 2008. Despite this effort, the EU has been heavily criticized for lacking cohesiveness, possessing the necessary capabilities and institutions to take actual action on Sudanese ground, yet lacking political capability or will to effectively use them. In this respect, it is argued that the multitude of statements, joint actions and common positions and declarations on the situation in Darfur is to little avail for the Sudanese people concerned See for instance: A Toje, *The Consensus—Expectations Gap: Explaining Europe's Ineffective Foreign Policy, Security Dialogue*, (2008) 39. The question of armed intervention by the EU in humanitarian crises is however beyond the scope of this thesis.

²³⁵ TEU Art 19, Action Plan Section A 5(i). This includes the Czech Republic, which is not a State Party to the Rome Statute.

²³⁶ See <http://www.icc-cpi.int/Menus/ASP/states+parties/>.

²³⁷ A Antoniadis and O Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times' (2007) 7 *Intl Crim L Rev* 621, 654.

²³⁸ ²³⁸ A Antoniadis and O Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times' (2007) 7 *Intl Crim L Rev* 621, 653.

and beyond

The U.S. was one of only seven nations²³⁹ to vote against the Rome Statute in 1998.²⁴⁰ It did so out of concerns that the ICC could exercise its jurisdiction to conduct politically motivated investigations and prosecutions of U.S. military and political officials and personnel. Consequently, when the U.S. demand to maintain a Security Council veto on possible ICC-cases was not met, it chose to vote no.²⁴¹ Despite this, in an effort to maintain US influence in the drafting process and due to a deep-seated belief in the principles underlying the ICC, President Clinton signed the Rome Statute on December 31, 2000. On 6 May 2002, The Bush administration however effectively withdrew the U.S. signature on the treaty.²⁴² In an effort to limit the scope of the ICC, the U.S. created bilateral immunity agreements (BIA's), sometimes referred to as "Article 98"-agreements, seeking to ensure the non-surrender of US personnel²⁴³ to the ICC. The U.S. has used both political and economical pressure in its endeavor to conclude the BIAs.

After the US 'unsigned' of the Rome Statute in 2002, the EU reacted with disappointment in an official statement. The statement also reaffirmed EU's support to the ICC and expressed concerns that the U.S. decision might have undesirable consequences on multilateral treaty-making and generally on the rule of law in international relations as well as for the recent trend of individual accountability. The EU further restated its beliefs that the U.S. concerns were unfounded and expressed disappointment that the U.S. acted without having experienced the ICC's activities. The EU finally declared its hope that the US would continue to work together with friends and partners in developing effective and impartial international criminal justice, not closing the door to any kind of cooperation with the ICC. The declaration was aligned by the Central and Eastern European countries associated with the EU and the associated countries Cyprus and Malta and Norway.²⁴⁴

In September 2002, the GAERC adopted its conclusions on the ICC.²⁴⁵ Although the EU repeats the values of the Common Position, such as a general support for the ICC, most of the conclusions explicitly or subtly

²³⁹ The other six States were China, Iraq, Libya, Yemen, Qatar and Israel.

²⁴⁰ See Press Release L/ROM/22 of the 17th of July 1998 and <http://www.asil.org/insigh23.cfm>.

²⁴¹ See for instance <http://www.asil.org/insigh23.cfm> and <http://www.hrw.org/legacy/campaigns/icc/us.htm>

²⁴² http://www.iccnw.org/documents/CICCFUS_US_Opposition_to_ICC_11Dec06_final.pdf.

²⁴³ including both US nationals and foreign contractors working for the United States

²⁴⁴ Statement of the European Union on the position of the United States towards the International Criminal

Court, Brussels, 14 May 2002, 8864/02, Presse 141.

²⁴⁵ Council of the European Union, GAERC Conclusions with annexed thereto the EU Guiding Principles Concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conclusions to Surrender of Persons to the Court, Brussels, 30 September 2002. See Doc. 12134/02 (Presse 279).

address the U.S. position on the ICC. The GAERC proclaimed that the Rome Statute provides all necessary safeguards against the use of the Court for politically motivated purposes and recalled the common European and American values encompassing individual accountability, expressing hope that the U.S will continue to work together with its allies and partners in developing effective and impartial international criminal justice. To this end, the EU proposed a broader dialogue between the US and EU on all matters relating to the ICC, including future relations between the ICC and the U.S.

Furthermore, the Guiding principles took note of the proposals from the U.S to develop a set of bilateral and multilateral treaties with ICC State Parties regarding the conditions for surrender to the ICC. Annexed to the conclusions are a set of principles which are developed to serve as guidelines for Member States when considering proposals of BIA's from the U.S. The objective of the Guiding Principles is to observe the integrity of the Rome Statute and ensure respect for the obligations of States Parties under the Statute. The Guidelines states that entering into the proposed BIA's with the U.S would be inconsistent with the State Parties' obligations under the Rome Statute and possibly with other international agreements.²⁴⁶ Aware of the fact that some countries will have problems facing political and economical pressure from U.S. to enter into BIA's, the Guidelines also contains a number of clauses for this eventuality. To this end, states are suggested to include a guarantee in the BIA's ensuring that persons who have committed crimes falling under the jurisdiction of the ICC do not enjoy impunity. The provisions should guarantee appropriate investigation and – where sufficient evidence – prosecution by national jurisdictions. Furthermore, BIAs should only cover persons who are not nationals of an ICC State Party. With regard to State or diplomatic immunity under international law, BIAs should cover only persons present on the territory of a requested State because they have been sent by a sending State. Furthermore, surrender as referred to in Article 98 of the Rome Statute cannot be deemed to include transit as referred to in Article 89, paragraph 3 of the Rome Statute.²⁴⁷ The Guiding principles also suggest the insertion of a "Sunset clause" or a termination or revision clause in BIA's, limiting the period in which the arrangement is in force. Finally, the Guiding Principles reminds that the approval of any new agreement or of an amendment of any existing agreement would have to be given in accordance with the constitutional procedures of each individual state. The Guiding Principles are not legally binding, but even though the EU Member States are free to enter into BIAs with the US, none of them has done so.²⁴⁸

²⁴⁶ By maintaining that such agreements "may be inconsistent with other international agreements to which ICC State Parties are Parties" the Guiding Principles are argued to go a step further than the Rome Statute itself; A Antoniadis and O Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times'(2007) 7 Intl Crim L Rev 621, 651.

²⁴⁷ Referring to Article 98 paragraph 1 and 2 of the Rome Statute.

²⁴⁸ Romania signed an BIA on August 1, 2002 but has declared that it will not ratify unless a common stand is accepted by the US and the EU, see

Although intended to serve as Guidelines for EU member States, these are argued to constitute a foreign policy statement, considered an important policy indicator by many third countries, especially developing countries. The Guiding Principles are said to particularly influence acceding States, candidate States and associated States. In relation to the candidate States it has even been suggested that they also amounts to an accession condition, clarifying thereby that respect of the integrity of the ICC constitutes a fundamental element of the EUs foreign policy.²⁴⁹ This later suggestion will be examined bellow.

The Guiding principles have been both applauded and criticized. NGO's has called them too vague, lacking both definitions of impunity and measures to ensure that the U.S. is capable to investigate and prosecute crimes as defined by the Rome Statute. Critical voices have also reacted since the Guiding principle does not clearly prohibit states to enter into BIA's.²⁵⁰ Potential conflict can clearly arise if a State Party of the ICC is forced to hand over a person allegedly criminally responsible for acts punishable under the Rome Statute committed on its territory, to a third state who is unwilling or unable to investigate or prosecute these acts. In this case, the EU Guiding Principles are argued to encourage turning a blind eye to some of the most serious of crimes committed which would then go unpunished.²⁵¹ Positive comments include the insertion of a 'Sunset clause', as it encourages States which for various reasons are unable to resist entering into a BIA, to only sign a temporally agreement which might lead to a later decision not to prolong a BIA.²⁵² Some scholars suggest that the Guiding Principles provides a flexible approach to BIAs' proposed by the U.S.; although expressing the EUs strong rejection, the Guidelines maintains a pragmatic approach and offers a workable solution for States unable to resist US pressure.²⁵³

<http://www.iccnw.org/?mod=country&iduct=142>. The extradition treaty between the UK and the US that was agreed upon in 2004 has been said to grant immunity to US service members by prohibiting the handing over of US service members to the ICC when extradited to the UK, see M L.P. Groenleer and L G. van Schaik, 'United we stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol'(2007) 45 JCMS 969, 979.

²⁴⁹ See M L.P. Groenleer and L G. van Schaik, 'United we stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol'(2007) 45 JCMS 969, p 983 and A Antoniadis and O Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times'(2007) 7 Intl Crim L Rev 621, 651

²⁵⁰ See for instance

<http://www.iccnw.org/documents/HRWWorldEUPrincip21Oct2002.pdf>,

<http://www.iccnw.org/documents/AI.EUeffectiveSteps.pdf>.

²⁵¹ A Antoniadis and O Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times'(2007) 7 Intl Crim L Rev 621, 652.

²⁵² A Antoniadis and O Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times'(2007) 7 Intl Crim L Rev 621, 652.

²⁵³ A Antoniadis and O Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times'(2007) 7 Intl Crim L Rev 621, 652.

The EU has continued to publicly oppose the U.S policy towards the ICC. During 2002 the EU expressed its concerns regarding the American Servicemembers' Protection Act (ASPA), known as *the Hague Invasion Act*, through official Statements and by Council Conclusions.²⁵⁴ In 2004, The EU condemned the so called 'Nethercutt Amendment' that prohibits funds from the U.S. Economic Support Funds to all countries which have ratified the ICC treaty but have not signed a BIA with the US.²⁵⁵

In 2002 the EU also reacted in the UN against a heavily debated US-initiated Security Council resolution adopted under Chapter VII of the UN charter.²⁵⁶ The resolution requested that the ICC, for a twelve-month period starting 1 July 2002, would not commence or proceed with investigation or prosecution of any case, involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a UN established or authorized operation unless the Security Council so decided.²⁵⁷ In the UN, the U.S. was criticized for threatening to veto all future peacekeeping-operations, unless the resolution was adopted.²⁵⁸ The resolution was subsequently unanimously adopted.²⁵⁹ When the U.S proposed a renewal of the resolution in 2003,²⁶⁰ the EU once more protested.²⁶¹ This time, France, Germany and Syria abstained from voting, but the 12 other members of the UNSC voted in favor thus adopting the renewed resolution. The abstaining States argued that the ICC was not an impediment to peacekeeping, but a safeguard and that there was no justification to renew the resolution. France's representative said that last year he and other members had supported the one-year exemption, because of the danger of not extending a vital peacekeeping mission and because of the concerns of the United States. Those two elements now belonged to the past. Developments had since occurred that seemed to meet the concerns that had been expressed by the United States. It was also argued to be highly unlikely that a case would arise that would trigger the implications of resolution 1422. On behalf of the EU, Greece made similar remarks and affirmed EU's support of the ICC.²⁶² In June 2004, the US withdrew a draft

²⁵⁴ Council Conclusions on the International Criminal Court (ICC) and the draft US American Servicemembers' Protection Act. (ASPA)9717/02 of the 17th of June 2002 (Presse 178); Statement by Europe Minister Bertel Haarder regarding of the "American Service Members' Protection Act" 03/07/2002.

²⁵⁵ See, for instance, the declaration by the Dutch Presidency on behalf of the European Union on the Nethercutt amendment. Council of the European Union, Declaration by the Presidency on behalf of the European Union on the Nethercutt Amendment, Brussels, 15864/1/04 REV 1 (Presse 353), 10 December 2004.

²⁵⁶ S/RES/1422 (2002) Adopted by the Security Council at its 4572nd meeting, on 12 July 2002.

²⁵⁷ Declaration by the Presidency of the European Union on the UN Security Council's unanimous decision concerning Bosnia-Herzegovina/International Criminal Court, 13 July 2002.

²⁵⁸ http://www.iccnw.org/documents/FS-1422and1487Chronology_26March2008.pdf.

²⁵⁹ <http://www.un.org/News/Press/docs/2002/>.

²⁶⁰ S/RES/1487 Adopted by the Security Council at its 4772nd meeting, on 12 June 2003.

²⁶¹ EU Presidency Statement on the proposed renewal of the provisions of SCR 1422, 12 June 2003.

²⁶² See UN Press Release SC/7789 of the 12 June 2003.

resolution that would extend the previously granted immunity for an additional 12 months period, after several UNSC members had signaled that they could not accept the text, including France, Germany Romania and Spain, and would abstain on the vote.²⁶³

Interesting observations has been made regarding the EU-U.S. diverging policies towards the ICC. It has been suggested that the U.S. opposition to the ICC drove the EU Member States closer together, making them more willing to formulate Common Positions and undertake joint actions.²⁶⁴ On the other hand, researchers and NGO's points out that the EU does not treat the U.S. as other third countries in negotiations, and does not require the ratification and full implementation of the Rome Statute when negotiating bilateral agreements with the US, as it does with weaker counterparties.²⁶⁵

4.2.4 Admission restrictions - the example of Western Balkans

Any European State which respects the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law can apply for membership of the EU.²⁶⁶ To be accepted, a State must have the ability to take on the Community *acquis* and fulfill political and economical criteria, all together commonly known as the Copenhagen Criteria. The political criteria consist of stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.²⁶⁷ It has been argued that compliance with international criminal law and the ICC has developed into an admission criteria for candidate states of the EU.²⁶⁸ To examine this argument, this chapter will look into Serbia's road towards the EU.

Although the EU has a long history of presence in the former Yugoslavia, it failed to prevent or hinder the violent conflicts of the 1990's. Lately, interaction between EU and the new Western Balkan States has increased notably. Through the Commission Communication of 26 May 1999 on the Stabilisation and Association process (SAP) with Albania, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia and Serbia and Montenegro a new framework for the establishment of closer

²⁶³ http://www.iccnw.org/documents/FS-1422and1487Chronology_26March2008.pdf.

²⁶⁴ M.L.P. Groenleer and L.G. van Schaik, 'United we stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol' (2007) 45 *JCMS* 969, 983.

²⁶⁵ V. Martin, *The two faces of impunity: The EU and the International Criminal Court*, FRIDE Comment 2007; Amnesty International, *European Union - Amnesty International's recommendations on improving the effectiveness of international justice*, 31 August 2007, AI Index IOR 53/010/2007.

²⁶⁶ Article 6(1) and 49 TEU

²⁶⁷ Jacqu e *Droit institutionnel de l'Union Europ enne* 3rd edition (Dalloz 2004) p 104 f.

²⁶⁸ A. Antoniadis and O. Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times' (2007) 7 *Intl Crim L Rev* 621, 649 see footnote 181.

relations between the EU and Western Balkans was set up.²⁶⁹ Relations with the then Federal Republic of Yugoslavia (now Serbia) were further improved in 2000, with the victory of a wide coalition of Serbian democratic forces at the federal elections. After the EU-Western Balkan Summit in June 2003, the EU Member States and Albania, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Serbia and Montenegro jointly declared that the future of the Balkans is within the European Union²⁷⁰ and entered a new phase in their relations with the adoption of the Thessaloniki Agenda for the Western Balkans.²⁷¹ In a joint declaration, the EU and then Serbia and Montenegro in September 2003 expressed their resolution to reinforce and intensify their mutual relations in the political fields. Accordingly, the Parties agreed to establish a regular political dialogue, which would take into account Serbia and Montenegro's status as a potential candidate for European Union membership. One of the announced aims of the political dialogue was the fulfillment of obligations under international law, including full and unequivocal cooperation with the ICTY.²⁷² In 2005, the Commission announced that 'Serbia and Montenegro has recently made significant progress in meeting its international obligations concerning co-operation with the ICTY after a period where co-operation had been seriously deficient', and declared that 'Overall, the political criteria are sufficiently met at this stage for opening SAA (Stabilisation and Association Agreement) negotiations'.²⁷³ The same year negotiations between Serbia and the EU on entering into an SAA, creating a formal contractual relation between the EU and Serbia, officially opened. Full cooperation with the ICTY was expressively required before the SAA could be signed; likewise the Council annually confirmed that a key priority for Serbia in the European Partnership was to ensure full cooperation with the ICTY.²⁷⁴ In their annual progress reports of then Serbia and Montenegro, the Commission regularly pointed out that the State Union 'continued to have a positive attitude' towards the ICC. The Commission

²⁶⁹ Recommendation from the Commission to the Council to authorise the Commission to open negotiations with Serbia and Montenegro for a Stabilisation and Association Agreement /* SEC/2005/0926 final */.

²⁷⁰ EU-Western Balkans Summit – Declaration, Thessaloniki, 21 June 2003 10229/03 (Presse 163)

²⁷¹

²⁷² Joint Declaration on Political Dialogue between the European Union and Serbia and Montenegro (2003/C 240/01) OJ L 7.10.2003 C 240/1.

²⁷³ Communication from the Commission on the preparedness of Serbia and Montenegro to negotiate a Stabilisation and Association Agreement with the European Union, COM(2005) 476, Brussels 12.4.2005.

²⁷⁴ For example Council Decision 2008/213/EC on the principles, priorities and conditions contained in the European Partnership with Serbia including Kosovo as defined by United Nations Security Council Resolution 1244 of 10 June 1999 and repealing Decision 2006/56/EC 18 February 2008, Council Decision 2006/56/EC on the principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro including Kosovo as defined by the United Nations Security Council Resolution 1244 of 10 June 1999 and repealing Decision 2004/520/EC of 30 January 2006 and Council Decision 2004/520/EC on the principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro including Kosovo as defined by the United Nations Security Council Resolution 1244 of 10 June 1999 of 14 June 2004.

especially noted that Serbia and Montenegro consistently had refused to sign BIA's giving exemptions from ICC jurisdiction, and encouraged them to continue to do so.²⁷⁵ Notably, the remarks concerning Serbia's cooperation with the ICTY and its attitude towards the ICC were placed under the heading 'Political Criteria' in the Progress Reports.

The EU's weight and political influence on candidate countries can be evidenced by the actions taken by the then Chief Prosecutor for the ICTY, who during 2006 publicly urged the EU put pressure on Western Balkan States, explicitly mentioning Serbia as a State lacking political will to track down and extradite war criminals. In her statements, the Chief Prosecutor directly referred to the ICTY-cooperation as imposed by the EU in the context of SAA negotiations.²⁷⁶ Indeed, in 2006 and referring to the failure of Serbia to meet its commitments on cooperation with the ICTY, SAA negotiations were called off by the EU.²⁷⁷ In February 2007, following parliamentary elections in Serbia, the Council welcomed the Commission's readiness to resume negotiations on the SAA with a new government in Belgrade - provided that it took concrete and effective action for full cooperation with the ICTY. Following the Council's conclusions in June 2007 which welcomed the commitments and actions taken by the new government, the Commission resumed the SAA negotiations with Serbia.²⁷⁸ The move came after the ICTY chief prosecutor informed the UNSC that Belgrade was co-operating sufficiently with ICTY.²⁷⁹ The 29 April 2008, the EU-Serbia SAA Agreement was finally signed. Still, the actual implementation of the SAA was made conditional upon the full cooperation of Serbia with the ICTY.²⁸⁰ A few months later, the former Bosnian Serb

²⁷⁵ See for instance Serbia and Montenegro - 2005 Progress Report, COM(2005) 561.

²⁷⁶ ICTY Weekly Press Briefing 22 February at 2006 <http://www.icty.org/sid/3538>; Carla Del Ponte the 29 September 2006 at seminar entitled "Building a Culture of Accountability - Action Against Impunity in the External Relations of the European Union" organized by the Finnish EU Presidency and Amnesty International at <http://formin.finland.fi/Public/Print.aspx?contentid=81321&nodeid=15631&culture=en-US&contentlan=2>;

²⁷⁷ Commission staff working document - Serbia 2007 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2007-2008, COM(2007) 663.

²⁷⁸ Commission staff working document - Serbia 2007 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2007-2008, COM(2007) 663.

²⁷⁹ Commission staff working document - Serbia 2007 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2007-2008, COM(2007) 663; http://setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2007/11/08/feature-01

²⁸⁰ Article 2, 4 and 133 of the Stabilisation and Association Agreement between the European Communities and their Member States of the one part and the Republic of Serbia of the other part. See also Council of the European Union 8619/08 (Presse 105).

general Radovan Karadzic was arrested and extradited to the ICTY.²⁸¹ The rest of the Western Balkan States has faced similar challenges as candidate countries of the EU.²⁸²

From this brief overview, a few conclusions can be drawn. Compliance with international criminal law does not form part of the official political criteria to join the EU, known as the Copenhagen Criteria. In the case of Western Balkans, compliance with international criminal law has however been applied as an important political criterion for EU membership.

4.2.5 EU special representatives

At present, the EU has eleven Special Representatives (EUSR) in various regions of the world.²⁸³ The institution EUSR were established under Article 18 of the Amsterdam Treaty and are appointed by the Council through the legal act of a Joint Action. The EUSRs shall represent the EU in troubled regions and countries and play an active part in promoting the interests and the policies of the EU and is said to be the “voice” and a “face” of the EU and its policies on the ground’. The precise substance of a mandate depends on the political context of the deployment of a EUSR:²⁸⁴

Some of these EUSRs have a clear mandate related to the ICC, such as the EUSR for Sudan.²⁸⁵ The EU also maintains that the EUSR for the Great Lakes and Moldova plays an important role in cooperating and promoting the ICC in their respective regions.²⁸⁶

²⁸¹ See for instance Prosecutor Serge Brammertz Statement on the transfer of Radovan Karadzic, Press Release, the Hague 30 July 2008 at <http://secnet069.un.org/sid/9955>.

²⁸² See for instance The Stabilisation and Association Council between the European Union and Croatia (Brussels, 6 March 2007), welcoming Croatia’s support for the International Criminal Court and its commitment to preserving the integrity of the Rome Statute, particularly the fact that it had not signed a bilateral non-surrender agreement with the US at http://www.consilium.europa.eu/uedocs/cmsUpload/ICC_internet08.pdf

²⁸³ Afghanistan, the African Great Lakes Region, the African Union, Bosnia and Herzegovina, Central Asia, Kosovo, the former Yugoslav Republic of Macedonia, the Middle East, Moldova, the South Caucasus and Sudan. See <http://ue.eu.int/showPage.aspx?id=263&lang=EN>

²⁸⁴ EU Council Secretariat ‘EU Special Representatives (EUSRs) A voice and face of the EU in crucial areas’ (Factsheet June 2005) <http://www.consilium.europa.eu/uedocs/cmsUpload/EUSRs.pdf> Accessed 19 May 2009

²⁸⁵ Art 3 f) of Council Joint Action 2007/108/CFSP of 15 February 2007 extending the mandate of the European Union Special Representative for Sudan OJ L 46/63. The article reads: ‘with regard to human rights, including the rights of children and women, and the fight against impunity in Sudan, follow the situation and maintain regular contacts with the Sudanese authorities, the AU and the UN, in particular with the Office of the High Commissioner for Human Rights, the human rights observers active in the region and the Office of the Prosecutor of the International Criminal Court’.

²⁸⁶(EC) ‘The European Union and the International Criminal Court’ (Booklet February 2008) DOI 10.2860/38311 ISBN 978-92-824-2304-2
<http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/ICC_internet08.pdf>
Accessed 19 May 2009

4.3 EUs economical weight as carrot and cane

The EUs economic strength, including both resources and instruments, is found within the first pillar of the EU.²⁸⁷ The EU regularly uses its economical weight to further its international objectives, including positive actions such as financial assistance or trade concessions, or negative action involving economic sanctions or other restrictive measures.²⁸⁸ Traditionally, the Commission has shown a preference for positive engagement and use of incentives when interacting with third countries.²⁸⁹ Although economical power normally is located within the first pillar of EU, the Common Position, adopted under the second pillar, expressively notes that the Commission intends to direct its action towards achieving its objectives and priorities, where appropriate by pertinent Community measures.²⁹⁰ The following subchapters will look deeper into the various methods used by the EU to promote compliance with international criminal law through its economical resources.

4.3.1 Fundings

In furtherance of the EUs political aims, the European Initiative for Democracy and Human Rights (EIDHR) was established in 1994.²⁹¹ The Commission, through EIDHR, has provided over 20 million euro for projects aiming at supporting the ICC and international criminal justice. Significant funds have been used to promote the ratification of the Rome Statute, particularly by funding global NGO activity. The Commission has also supported the ICC through funding a ‘Clerkship and Visiting Professionals’ Program’ aiming to send legal practitioners from developing countries to the Court.²⁹² In addition, the EIDHR has been used to fund the work of ad hoc criminal tribunals, including the ICTY and the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the Khmer Rouge Special Chamber in Cambodia. The EU has

²⁸⁷ Notably, the CFSP budget is allocated within a sub section of EUs total budget named “EU as a global player”, where the individual budget posts for humanitarian aid, development cooperation and democracy and human rights all by far surpass the money allocated for second pillar action. See Annex XX

²⁸⁸ Information regarding sanctions or restrictive measures adopted under the CFSP can be found at http://ec.europa.eu/external_relations/cfsp/sanctions/index.htm

²⁸⁹ Decisions concerning impositions of sanctions or restrictive measures are however taken in the context of the CSFP, usually through a Common Position adopted by the GAERC. See C Bretherton and J Vogler *The European Union as a Global actor* 2nd edition (Routledge 2006) p 180.

²⁹⁰ Article 6 of the Common Position.

²⁹¹ Following the expiry of Council Regulations Nos 975/1999 (developing countries) and 976/1999 (other third countries), which served as the legal basis for the activities carried out under the EIDHR, this initiative was replaced by the financing instrument for the promotion of democracy and human rights worldwide from 1 January 2007, see <http://europa.eu/scadplus/leg/en/lvb/r10110.htm>.

²⁹² http://ec.europa.eu/external_relations/human_rights/icc/index.htm#funding.

also supported the strengthening of domestic judicial capacity in countries where the ICC has commenced investigations.²⁹³

It has been argued that the significant contribution of the EU to the ICC has caused certain mistrust in some sections of the international community.²⁹⁴ In this regard it is important to bear in mind that all but one of the cases referred to the ICC, has been done so by the affected states themselves.

4.3.2 Trade

EUs influence as the world largest trade block cannot be underestimated. The following chapter will examine how the EU, mainly through its first pillar, has used this advantage to promote international criminal law.

4.3.2.1 The revised Cotonou Agreement and the insertion of an ICC-clause

On 23 June 2000 a new Partnership Agreement between the EC and the African, Caribbean and Pacific (ACP) countries was signed in Cotonou, Benin,²⁹⁵ a partnership based on three pillars; development cooperation, economic and trade cooperation and a political dimension. The Cotonou Agreement shall be seen as the latest part of a cooperation process beginning several decades ago, first involving colonies of EEC member states and thereafter an ever-growing number of Third World countries. It has been argued that this cooperation framework, initially known under the terms Lomé I–IV (bis), probably became the most important development scheme world-wide, despite its selective nature as applied mostly to states which shared a common past as former colonies of EC countries.²⁹⁶

²⁹³ http://ec.europa.eu/external_relations/human_rights/icc/index.htm.

²⁹⁴ This questioning of the independence of the court is not helped by the fact that all of ICCs legal proceedings so far have begun in Africa. See V Martin, *The two faces of impunity: The EU and the International Criminal Court*, FRIDE Comment 2007.

²⁹⁵ Partnership Agreement between the members of the African, Caribbean and Pacific Group of

States of the one part, and the European Community and its Member States, of the other part, signed

in Cotonou on 23 June, O.J. L 317/3, 15.12.2000. The ACP currently consists of 79 States. More information at http://www.acpsec.org/en/acp_states.htm.

²⁹⁶ P Hilpold, *EU Development Cooperation at a Crossroads: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance*, *European Foreign Affairs Review* 7: 53–72, 2002. The European Development Fund (EDF) is the main instrument for providing Community assistance for development cooperation under the Cotonou Agreement. The EDF is funded by the EU Member State on the basis of specific contribution keys. Each EDF is concluded for a multi-annual period. The 10th EDF covers the period from 2008 to 2013 and has been allocated € 22.7 billion; it was established between the EU Member States by Internal Agreement. In comparison to the 9th EDF which covered the period 2000 to 2007, the initial amount available has increased by almost 65 % (the 9th EDF was initially allocated € 13.8 billion for 2000-2007). The cooperation with the ACP States funded from the EDF is complemented by development cooperation funded from the EC budget, through budgetary instruments - the Development Cooperation Instrument, the

The Cotonou Agreement was concluded for a twenty-year period from March 2000 to February 2020 and entered into force in April 2003. In June 2005 it was revised for the first time, with the revision entering into force on 1 July 2008.²⁹⁷ Upon the initiative of the Commission and faithful to the Common Position and Action Plan²⁹⁸, the EU and ACP countries agreed in February 2005 to include a commitment to the ICC in the revised Cotonou Agreement.²⁹⁹ This makes the Cotonou Agreement the first ever legally binding legal instrument including an ICC-related clause negotiated by the EU and third countries.³⁰⁰

Already in the preamble of the revised Cotonou Agreement the parties announce their commitment to the ICC by ‘reaffirming that the most serious crimes of concern to the international community must not go unpunished and that their effective prosecution must be ensured by taking measures at national level and by enhancing global collaboration’ and ‘considering that the establishment and effective functioning of the International Criminal Court constitute an important development for peace and international justice’.³⁰¹ A sixth subparagraph is also inserted under Article 11, which has the heading ‘Peace building policies, conflict prevention and resolution’ and is placed under Title II dedicated to ‘The Political Dimension’ of the cooperation. The new subparagraph reads as follows.

In promoting the strengthening of peace and international justice, the Parties reaffirm their determination to:

- share experience in the adoption of legal adjustments required to allow for the ratification and implementation of the Rome Statute of the International Criminal Court; and
- fight against international crime in accordance with international law, giving due regard to the Rome Statute.

The Parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instruments.³⁰²

The wording of the article opens for several interesting considerations. Notably, The Cotonou Agreement gives the issue of implementing the Rome Statute as much weight as the ratifying itself. The subparagraph further recognizes that experience sharing of the ratification and implementation of the Rome Statute can be highly important. It has

Instrument for Stability, the European Instrument for Democracy and Human Rights and the European Humanitarian Aid Instrument.

²⁹⁷ http://ec.europa.eu/development/geographical/cotonouintro_en.cfm.

²⁹⁸ Infoga referens från CP och AP.

²⁹⁹ http://ec.europa.eu/external_relations/human_rights/icc/index.htm.

³⁰⁰ http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/Plan_of_Action_-_EU_-_English_-_2007.pdf.

³⁰¹ Recital 10 and 9 of the preamble of the Revised Cotonou Agreement.

³⁰² Article 11(6) of the Revised Cotonou Agreement.

subsequently been argued that experience sharing of this kind truly can help some small or less developed countries when faced with making the necessary changes to implement the Statute. Furthermore, the insertion of this provision is argued to be important, as it acknowledges that challenging domestic legal adjustments might be necessary to join the ICC regime.³⁰³

Another interesting aspect of the clause is the wording “fight against international crime in accordance with international law”, which clearly has a broader scope than to simply ratify the Rome Statute or facilitate trials at the ICC. Neither international crime, nor which measures State Parties shall use to fight them is specified by the agreement. It has therefore been suggested that this provision strikingly makes the fight against international crime *in general* an obligation for the State Parties. If so, the Cotonou Agreement goes further than the Rome Statute which gives the States the discretion to join or not, and even when they do, does not oblige State Parties to initiate national investigations or prosecutions.³⁰⁴

Although the obligations under the revised Cotonou Agreement seem to be far-reaching and progressive, it is important to bear in mind that the obligation for the State Parties to ratify and implement the Rome Statute is without any time-limits or any details regarding how to proceed. The ICC clause has apart from this also been criticized for falling under ‘element of the political environment’ and not under ‘essential element’, which mitigates its efficacy as there is no possibility of suspending aid on the lack of compliance with the clause.³⁰⁵

By the Commission, the insertion of an ICC-clause in the Cotonou Agreement is described as ‘...an important reaffirmation of our joint commitment to the Court and will serve as an important precedent for the negotiation of agreements with other third countries.’³⁰⁶ This view is also confirmed by the EU Focal Point for the ICC which has described the clause as a ‘standard clause’ to be followed when negotiating other agreements.³⁰⁷

4.3.2.2 Insertion of ICC-clauses in other agreements

³⁰³ A Antoniadis and O Bekou, ‘The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times’ (2007) 7 Intl Crim L Rev 621, 647.

³⁰⁴ A Antoniadis and O Bekou, ‘The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times’ (2007) 7 Intl Crim L Rev 621, 647.

³⁰⁵ See Article 11 of the Revised Cotonou Agreement and A Antoniadis and O Bekou, ‘The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times’ (2007) 7 Intl Crim L Rev 621, 647.

³⁰⁶ Dr. Benita Ferrero-Waldner is the Commissioner for External Relations and European Neighbourhood Policy for the European Commission in a speech for Parliamentarians for Global Action, 14 April 2005.

³⁰⁷ http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/Plan_of_Action_-_EU_-_English_-_2007.pdf.

Within the framework for the European Neighbourhood Policy (ENP)³⁰⁸, ICC clauses have been inserted in the ENP Action Plans as political documents, thus not as part of the existing Partnership and Cooperation Agreements or Euro-Mediterranean Agreements.³⁰⁹ Within the ENP, the ICC clause has been inserted on a case-by-case basis with slightly different outcome. For instance, the ENP Action Plan with Israel, a non-ICC party, which has also signed a BIA with the U.S., requires Israel to promote cooperation on issues such as fight against impunity of authors of genocide, war crimes and any other crime against humanity. The ENP Action Plan with Tunisia has only a general clause for the respect of fundamental rights, despite Tunisia not having signed the Rome Statute.

Despite these differences there is a general formula regarding the ICC-clauses within the ENP Framework. Usually they contain the following obligations for third countries:

- to accede to the Rome Statute,
- to make the necessary legislative and constitutional amendments for its implementation; and
- to fight against international crime in accordance with international law, having due regard to preserving the integrity of the Rome Statute.

It has been argued that this ICC-clause in some ways appears to go further than the Cotonou-clause, as it contains a positive obligation for third States to actually proceed with the constitutional amendments necessary to enable implementation of the Rome Statute.³¹⁰

ICC clauses are also being negotiated in the Partnership and Cooperation Agreements (PCAs) with Indonesia, Thailand, Singapore, Brunei Darussalam, Malaysia, Vietnam and the Philippines and are included in the negotiations with South Africa for the Trade, Development and Cooperation Agreement. The negotiating mandates for Iraq, China, Russia, Ukraine the Andean Community and Central America include an ICC clause.³¹¹

4.3.3 Sanctions

As indicated above, the EU applies restrictive measures in pursuit of the specific CFSP objectives set out in the TEU.³¹² The Council is willing to

³⁰⁸ Including Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Occupied Palestinian Territory, Syria, Tunisia and Ukraine. See http://ec.europa.eu/world/enp/partners/index_en.htm for more information.

³⁰⁹ A Antoniadis and O Bekou, 'The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times' (2007) 7 Intl Crim L Rev 621, 648

³¹⁰ http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/Plan_of_Action_-_EU_-_English_-_2007.pdf

³¹¹ http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/Plan_of_Action_-_EU_-_English_-_2007.pdf and http://www.consilium.europa.eu/uedocs/cmsUpload/ICC_internet08.pdf

³¹² Restrictive measures are not confined to economic sanctions but also including diplomatic sanctions and admission restrictions. When applying restrictive measures, the Council first adopts a Common Position under Article 15 of the TEU, which requires

use sanctions both when they form part of UN obligations³¹³, but also as an autonomous EU effort to fight terrorism, proliferation of weapons of mass destruction and as a restrictive measure to uphold respect for human rights, democracy, the rule of law and good governance. The EU measures expressively include arms embargoes, visa bans and freezing of funds. However, this is not an exhaustive list of methods.³¹⁴

Today, the EU maintains sanctions towards Sudan and the Democratic Republic of Congo, whose nationals have been indicted by the ICC.³¹⁵ However, the EU has yet to impose sanctions especially referring to the ICC. With regard to other international tribunals, EU has imposed targeted freezing of assets belonging to Radovan Karadžić, Ratko Mladić and Ante Gotovina, explained as a part of the EU's overall effort to prevent any assistance provided to them and to bring them to the ICTY.³¹⁶ Restrictive measures have also been targeted towards natural persons who are engaged in activities which help persons at large continue to evade justice for crimes for which the ICTY has indicted them or are otherwise acting in a manner which could obstruct the ICTY's effective implementation of its mandate.³¹⁷

4.4 Concluding remarks

The EU has used a wide variety of means, including financial and technical assistance, political statements to promote international criminal law in general and ICC in particular outside its borders. These actions have been

unanimity. The measures foreseen in that Common Position are either implemented at EC or at national level. Measures such as arms embargoes or restrictions on admission are implemented directly by the Member States. Other measures interrupting or reducing, in part or completely, economic relations with a third country, including measures freezing funds and economic resources, are implemented by means of an EC Regulation, adopted by the Council on a proposal from the Commission and based on the provisions of the TEC. Such a Regulation only requires QMV. Regulations are binding and directly applicable throughout the EC and are subject to judicial review by the ECJ and Court of First Instance of the EC.

³¹³ When the EU implements UN Security Council Resolutions, it adheres to the terms of those Resolutions but it may also decide to apply further restrictive measures.

³¹⁴ See Paragraph 1-6 in the Annex of Council document 10198/1/04, Brussels, 7 June 2004, Basic Principles on the Use of Restrictive Measures (Sanctions).

³¹⁵ See for instance Common Position 2005/411/CFSP OJ L 139, 2.6.2005, p. 25 concerning restrictive measures against Sudan and repealing Common Position 2004/31/CFSP and Council Common Position 2008/369/CFSP OJ L 127, 15.5.2008, p. 84 concerning restrictive measures against the Democratic Republic of the Congo and repealing Common Position 2005/440/CFSP.

³¹⁶ Council Common Position 2004/694/CFSP OJ L 315, 14.10.2004, p. 52 on further measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), Council Regulation (EC) No 1763/2004 OJ L 315, 14.10.2004, p. 14 imposing certain restrictive measures in support of effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY).

³¹⁷ Council Common Position 2004/293/CFSP OJ L 94, 31.3.2004, p. 65 renewing measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY).

taken using means under both the first and the second pillar. In their external actions, The Presidency, the Council and the Commission have acted with one voice to promote ICC. All together, the EU has been keen to show that it is taken the commitment to promote the ICC and the Rome Statute seriously.

There are some inconsistencies in EUs external behavior. Although EU repeatedly and publicly has expressed disappointment with the U.S policy towards the ICC, EU has also shown lacking abilities to live up to the principles of the Common Position and Action Plan when under strong pressure from the U.S. This is evidenced by inability of EU Member States party of the UNSC to vote against two U.S. initiated UNSC resolutions limiting the jurisdiction of the ICC. The EU has also been accused of treating U.S different from other third states when negotiating bilateral agreements, abstaining from putting real pressure on the U.S to ratify and implement the Rome Statute. With regard to the insertion of ICC-clauses in agreements with ENP countries, these clauses have been formulated on a case-by-case basis, with some clauses entirely lacking reference to ICC or the Rome Statute. Another problem with the ICC-clauses inserted in agreements with third countries is their imprecise wording, lacking timeframes and clear definitions of obligations contained in them.

Notably, the strong approach used by the EU when treating compliance with international criminal law as a political admission criterion for EU membership in regard to the Western Balkan States has produced requested results. This more severe approach to compliance with international criminal law might also be useful outside the scope of membership negotiations.

5 Conclusions and recommendations

The EU has clearly gone to great lengths in its support for the ICC. Although the main efforts lies within its external actions, some significant achievements has taken place within the union, such as the creation of a network of contact points as well in respect of persons responsible for genocide, crimes against humanity and war crimes. Even though EU has refrained from any progressive use of its competences when adopting internal measures, the small steps taken to promote international criminal law within its Member States has been somewhat successful. There are however still problematic features in EUs policy towards the ICC. To simplify, one can say that EUs external actions are ambitious but inconsistent, with multiple actors and different standards in different international agreements as well as different expectations of different third states. If turning towards EU's internal actions, they can clearly be more daring.

Some problems highlighted in the EU-ICC relationship relates to larger questions of the organizations respective nature. This includes the character of the complementarity principle within the ICC-regime and EU's shifting competences under its different pillars. The main key to solving these problems lies within the organizations themselves. It is suggested that these institutional issues needs to be addressed, as they could otherwise lead to problematic inconsistencies and uncertainty for the ICC and the EU both as separate entities but also when cooperating. Putting these considerations aside, as being outside the scope of this thesis, some concrete measures can still be suggested within the existing framework.

With regard to its internal actions, several steps could be taken by the EU and its Member States to develop their support of the Rome Statute. Even though controversial, it is suggested that the EU should consider a limited harmonization of domestic criminal law provisions with regard to the crimes under the jurisdiction of ICC. This could include progressive jurisdictional options to facilitate the investigation and prosecution of such crimes in the national judicial systems of each Member States as well as the common abolishment of certain types of immunities. If necessary, this could initially take the form as an enhanced cooperation of some progressive Member States, in the same manner as the Schengen-system was launched.

Since the EU has no power to force its Member States to join the Rome Statute, and since compliance with international criminal law clearly has been used as a political admission criterion by the EU in negotiations with potential candidate countries, it is suggested that ratification of the Rome Statute should be lifted to a formal criteria for membership in the EU. This would serve as a powerful political signal but also prevent future situations were some Member States are not part of

the Rome Statute, thus possibly making it more difficult for the EU to speak with one voice in the promotion international criminal law.

With regard to EUs external actions, a greater consistency in the European policies towards different third states regarding the ICC would be helpful to achieve uniformity and avoid exceptions being negotiated by strong third states. It is therefore suggested that The EU should adopt a single ICC-clause to be used in all relevant international agreements negotiated by the EU.

Finally, this thesis stresses that it is imperative that the EU ensure that its support to the ICC and the Rome Statute is carried out in such a manner that it cannot give rise to any questions regarding the integrity of the ICC.

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