Briefing
May 2017

European Parliament

International Criminal Court at 15
International justice and the crisis of multilateralism

SUMMARY

The establishment of the International Criminal Court (ICC) on 1 July 2002 was heralded at the time as a major breakthrough for ending impunity for most serious crimes of international concern, namely genocide, crimes against humanity and war crimes. Fifteen years later, the record of the Court is mixed and criticism from both supporters and opponents has abounded. The challenges and the criticism it is currently facing are typical of many other multilateral institutions today.

The Court has conducted investigations and trials on some of the world's most brutal conflicts, but it has faced criticism that it was politicised and biased against the African continent. The atrocities committed by groups such as ISIL/Da'esh have unveiled the ICC's limitations, since it is unable to investigate in Syria and Iraq, which are not parties to the Rome Statute, without UN Security Council authorisation. As a multilateral institution with universal ambitions, the Court is also limited in its effectiveness by the refusal of major powers such as the US, China and Russia to join it. Lack of cooperation by some states parties has also severely constrained its effectiveness.

Yet the Court has had positive effects on the capacity of some states to deal themselves with crimes under their jurisdiction. The Court has taken its role seriously, not shying away from indicting persons of the highest rank, such as heads of state, and proving that it is committed to the principle of universal responsibility. Shortcomings in the prosecutorial investigations, for example in relation to witness interference and protection, have been addressed in a transparent and firm way.

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Background: the issue of multilateralism

The post-1945 world has been characterised by a wide array of global and regional institutions, established to manage economic, political, and security relations. With the end of the Cold War, several of these institutions extended into the 'more fully global multilateral system of governance' which exists to this day. The most basic definition of multilateralism is 'three or more actors engaging in voluntary and (essentially) institutionalised international cooperation governed by norms and principles, with rules that apply (by and large) equally to all states'. The term global governance has become increasingly popular to describe 'the complex of multilateral institutions established to manage global relations'.

When 120 states signed the Rome Statute in 1998, there was much hope that the International Criminal Court (ICC) to be created under it would represent the core of a universal criminal justice system to which gradually all states would commit. Almost twenty years later, the ICC, with slightly over 120 members now, has established a reputation as a strong institution. It has conducted investigations and trials in most difficult situations, has indicted two heads of state and has made efforts to improve its working methods. However, it has also faced multiple criticisms and attacks from various quarters. Everything the Court has done has withstood the intense scrutiny of its supporters and opponents alike. A coalition of 2 500 NGOs committed to the cause of international justice has continuously monitored the activity of the Court.

The Court embodies a special, newer type of multilateralism - one that is geared towards promoting international accountability for serious crimes. The crimes within its remit are to be universally proscribed and punished and therefore it is expected that in the long run all states will join it. Its decisions are binding on its states parties and the individuals concerned. However, the ICC's limited jurisdiction – covering only genocide, war crimes, and crimes against humanity – make it less representative of other forms of multilateral cooperation with wider arrays of competences.

The challenges the Court is facing are common to multilateral institutions. Firstly, **major powers such as the USA, China and Russia have refused to join it**. Great powers are usually reluctant to submit to multilateral institutions, because they are afraid this would tie their hands over time, limiting their scope for action. Secondly, some of the states parties and other stakeholders have voiced their frustration about what they perceive to be a **political bias of the ICC** in the choice of situations/cases for its investigations. African critics reproach the Court for being permanently biased against African states, calling it 'a European Court for Africa'. This complaint that the rules to be applied in an impartial way are bent by the more powerful actors in order to promote their interests is common to many multilateral institutions. Thirdly, for the same reason mentioned above, **some of its states parties have threatened to withdraw** and the African Union has even encouraged its members to do so. Multilateralism in general is seriously threatened when states start issuing signals that they may not abide by the rules any more.[1] Fourthly, **the ICC, like any other multilateral organisation, relies on member states to enforce its decisions** (arrest warrants, cooperation on investigation) and when this does not happen its capacity is seriously undermined. Fifthly, **the ICC is a bureaucratic institution that uses significant resources** with outcomes that some consider disappointing (€1.3 billion has been spent on the ICC for very few convictions) – another criticism that is frequently heard about international institutions.

Debates on the 'crisis of multilateralism' are not new. Criticisms regarding the functioning of multilateral institutions have abounded, particularly since the turn of the 21st century and the rapid changes it has brought – including in the global balance of economic power, in geopolitics and in technology. The crisis of multilateralism has many faces: fewer multilateral treaties are being signed and ratified; some of the existing treaties are poorly implemented, and states are increasingly rejecting the oversight of treaty obligations and monitoring of compliance by multilateral organisations. Some of the causes of this situation are increased polarisation and fragmentation in world politics and a lack of effectiveness, transparency, representativeness and democratic accountability of many multilateral organisations. The phenomenon has also been attributed to the growing intensity and complexity of economic and security interdependence; the rise of new actors in the international arena and the changing position of the USA in the global system. Consensus has become hard to reach within existing multilateral structures. Concerns about the future of multilateralism have been reinforced by early indications that the Trump administration will decrease – financially and normatively – US support for multilateral arrangements in areas such as trade, climate, security and aid.

Role of the Court

History

The Rome Statute of the International Criminal Court was initially signed in July 1998 by 120 of the 127 states that took part in the negotiations. It entered into force four years later on 1 July 2002, after ratification by the required number of states (60), leading to the formal establishment of the ICC. It is the first permanent international criminal tribunal. Today, 124 countries are states parties to the Rome Statute. The ICC is based in The Hague.

The ICC was preceded by ad hoc tribunals that addressed war crimes and other related crimes. Such tribunals were temporary and their investigations were limited in space and time. They raised questions regarding their legitimacy, since they were created through ad hoc decisions taken either by winners in war or by the Security Council. After the Nuremberg and Tokyo tribunals were established in the aftermath of the Second World War to prosecute high-ranking officials for war crimes and other atrocities, several decades passed without any similar institution being created. In the 1990s, two international ad hoc tribunals were established to deal with atrocities committed during civil wars: the International Criminal Tribunal for the former Yugoslavia (ICTY), (1993), and the International Criminal Tribunal for Rwanda (ICTR), (1994). They were the first to be established by decisions of the United Nations (UN) Security Council on the basis of the UN Charter. Other tribunals having a similar jurisdiction have been hybrid in nature, being established jointly by national governments and the United Nations: the Special Panels and Serious Crimes Unit in East-Timor (2000), the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, and Regulation 64 Panels in the Courts of Kosovo. The effectiveness of these hybrid courts has varied: for example, two of them (the East Timor Tribunal and the Kosovo Tribunal) have been severely affected by a lack of capacity and resources. The former was also prevented from fulfilling its tasks by lack of cooperation from Indonesia (most indicted persons were Indonesian nationals).

Structure of the Court

The main ICC bodies are its three chambers (the Pre-Trial, Trial and Appeals Divisions) and the Office of the Prosecutor. The Assembly of States Parties is the management oversight and legislative body and is composed of representatives of the states that have ratified the Rome Statute. The 18 judges are elected by the Assembly of States Parties on the basis of their qualifications, impartiality and integrity, and serve nine-year, non-renewable terms. They have to

be citizens of states parties and are nominated for election by their states. The Office of the Prosecutor is responsible for examining situations under the jurisdiction of the Court and carrying out investigations and prosecutions against the individuals responsible. The current Prosecutor is Fatou Bensouda from The Gambia. The Prosecutor and Deputy Prosecutor are elected by the assembly for a non-renewable mandate of nine years.

Types of crime under ICC jurisdiction

Unlike previous international tribunals, the ICC is a permanent tribunal and its jurisdiction, although not universal, is wider reaching in space and time. The ICC exercises jurisdiction over three types of crime: genocide, crimes against humanity and war crimes. The limitation to these crimes was justified by the fact that these have been enshrined in international law for a long time – via the Geneva Conventions and the UN Convention on the Prevention and Punishment of Genocide – and are therefore universally recognised as crimes of a very serious nature.

The Rome Statute takes over the definition of genocide from the UN Genocide Convention, which includes a range of crimes committed with the intention to destroy 'in whole or in part, a national, ethnical, racial or religious group'. The crimes against humanity class covers the most wide-ranging list of crimes, including for the first time sexual and gender-based crimes committed against civil population. The respective acts have to be committed as 'part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. As far as war crimes are concerned, the jurisdiction of the Court distinguishes four categories: grave breaches of the Geneva Conventions; other serious violations of the laws and customs applicable in international conflicts; serious violations of common Article 3 of the Geneva Conventions in conflicts not of an international character; and serious violations of the laws and customs applicable in armed conflicts not of an international character. Situations of internal disturbance and tension, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, are not covered by the relevant articles concerning war crimes.

The crime of aggression is potentially also within the remit of the Court. The initial text of the Rome Statute stated that 'the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.' Article 15 was modified in 2010 with effect in 2013, potentially extending the Court's jurisdiction to the crime of aggression. Current Article 15bis states that 'the Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of states parties as is required for the adoption of an amendment to the Statute.' There is however an important reservation since states can make a declaration opting out of this provision. A further demand has been to include the crime of international terrorism under the jurisdiction of the Court.

Applicability of the Court's jurisdiction

The Court can conduct trials only on crimes committed on the territory or by nationals of states parties, unless the UN Security Council empowers it to investigate situations beyond these criteria. The competence of the Court is also limited by the principle of **complementarity**: the ICC is competent to conduct investigations only when states are unable or unwilling to prosecute the crimes themselves. There are three ways an investigation can be launched. States parties to the Rome Statute can refer the situation to the Court themselves, if they consider that they do not have the capacity to conduct

appropriate investigations. Secondly, after having completed a preliminary investigation, the ICC prosecutor can launch an investigation into crimes committed on the territory or by nationals of countries that have ratified the Statute if he has the assent of the pre-trial chamber. The third way is referral of a situation in a state that is not party to the ICC by the UN Security Council. A very important aspect of the Court is that its jurisdiction applies to all persons. Heads of state and government are not exempt from the jurisdiction of the Court, according to Article 27. Immunities attached to the official capacity of a person, whether under national or international law, do not bar the Court from exercising its jurisdiction over that person.

Until now, of the situations under investigation, five have been investigated at the request of states parties (in the Democratic Republic of the Congo (DRC), Uganda, Central African Republic (CAR) twice, and Mali); two at the request of the UNSC (in Darfur – Sudan and Libya); and three at the initiative of the Prosecutor (*propriu motu*) with the assent of the pre-trial chamber (in Kenya, Côte d'Ivoire and Georgia).

There have thus far been 23 cases brought before the Court, some of them involving more than one suspect. 29 arrest warrants have been issued by the Court, leading to the detention of eight persons, while 13 persons remain at large; another three have died and consequently the charges against them were dropped. The ICC has issued six verdicts, some involving several persons: nine individuals have been found guilty and one has been acquitted.

Main challenges faced by the Court

The main objective of the Court, according to the preamble to the Rome Statute, is to end impunity for the perpetrators of the 'most serious crimes of concern to the international community as a whole'. This is tightly interlinked with the objective of preventing crimes, which is mentioned in the preamble as well.

Given the relatively short time the Court has been active, it is difficult to assess the degree to which these two objectives have been achieved. The ICC has not been able to hold accountable those responsible for the horrific crimes committed in Syria and Iraq. Neither of these two countries is party to the Rome Statute, and the UN Security Council has so far failed to refer the situation there to the Court (in the case of Syria because of a veto by China and Russia, while on Iraq there has been no vote). Concerning Iraq, the Prosecutor is conducting preliminary investigation on possible war crimes committed by UK military personnel. ISIL/Da'esh perpetrators are however out of the reach of the Court. This paradoxical situation reflects the incapacity of the Court to really focus on the most serious crimes of its jurisdiction, as well as the asymmetric treatment of citizens of different states that is made possible by the status of the Court. The Court could only prosecute **ISIL/Da'esh leaders guilty of war crimes if they were nationals of states parties**. However, according to evidence gathered by the prosecutor, those in the highest chain of command, who would fall under the jurisdiction of the Court[2] taken into account the gravity criterion, are not citizens of states parties.

Many states remain outside the jurisdiction of the Court

The USA and other major powers such as China and Russia are not states parties, and oppose the Court on various grounds. While it had initially signed the Rome Statute, the USA did not ratify it and subsequently 'unsigned' it under the President George W. Bush administration. The USA has signed over 100 'bilateral immunity agreements' with third countries to ensure that its citizens cannot be extradited to the Court by these states.

This is legally possible under the Rome Statute. Article 98 of the Rome Statute grants an exemption concerning the surrender of indicted persons to the jurisdiction of the Court to those states that have bilateral agreements prohibiting this. In response, the European Union (EU) drafted guiding principles on bilateral non-surrender agreements for its Member States in order to preserve the integrity of the Rome Statute. According to these, entering into US agreements as drafted at the time would have been inconsistent with the ICC Statute.

Russia, which also initially signed the Rome Statute, announced at the end of 2016 that it was withdrawing its signature.

Non-party states nevertheless have the possibility to cooperate with the Court. The USA made use of this under the Obama administration, delivering one suspect to the Court. The US attitude therefore remains fundamentally ambiguous. While it refuses to accept the Court's jurisdiction, the USA has sent numerous signals in the past that it considers the Court useful and worthy of support.

Criticism of political bias and selective investigations

The accusations of political bias often point to the Prosecutor's selectivity. The Office of the Prosecutor is an independent organ of the Court and is supposed to select situations for investigation independently and impartially. According to Article 15 of the Rome Statute, the Court can receive information, called 'communications', from individuals and organisations regarding crimes under its jurisdiction. The Prosecutor must review 'the seriousness of the information received'. Most of these communications are usually dismissed as being manifestly outside the jurisdiction of the Court. If the Prosecutor decides that a situation requires an investigation, she needs the backing of the pre-trial chamber. The role of the Prosecutor is thus crucial, but not unlimited, in determining whether a situation is admissible to the Court.

The Court is supposed to embody the principle of global and impartial justice for crimes under its jurisdiction, but the criteria for selecting the situations and cases that deserve its attention have been left quite vague and general in the Rome Statute. The negotiating states had diverging views on the role of the Prosecutor and the Court, some preferring a broad and independent mandate, while others were in favour of a more limited role. The result was 'ambiguous statutory language'.

In order to determine the admissibility of an investigation, the Office of the Prosecutor must do a series of checks, namely determine whether there is **sufficient evidence** of crimes of **sufficient gravity** under the Court's jurisdiction, whether there are **proceedings by national courts** respecting due justice principles (the principle of complementarity), and whether opening an investigation would serve the **interests of justice and of the victims**. The ICC is an international judicial authority able to interpret its own statute. According to Article 17(1)(d) of the Rome Statute, a case is inadmissible if it 'is not of sufficient gravity to justify further action by the Court'.[3] According to the jurisprudence of the Court, the Prosecutor does not have any discretion when deciding which situations are sufficiently grave, being instead constrained by 'exacting legal requirements'.[4] Its only discretion is in determining whether an investigation is not in the 'interest of justice'. Concerning the gravity aspect, paragraph 2 of Regulation 29 of the Office of the Prosecutor, adopted in 2009, provides some indications for assessing the gravity of a situation, namely: 'In order to assess the gravity of the crimes allegedly committed in the situation the Office shall consider various factors including their scale, nature, manner of commission, and impact.' The interests of justice, on the other hand, are defined as

including 'the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime' (Article 53(2)(c) of the Rome Statute).

Moreover, the decision of the prosecutor is subject to judicial oversight: the pre-trial chamber has to approve the launching of an investigation and if the Prosecutor considers a referral by a state or the UN Security Council to be inadmissible, the requesting state or the Security Council can ask the pre-trial chamber to review this decision. Sometimes a divergence between the Prosecutor and chamber can be persistent, such as in the investigation on the vessels of the Comoros. This case refers to the Israeli raid on 31 May 2010 on the humanitarian aid flotilla bound for the Gaza Strip. The Prosecutor received a communication asking for an investigation into the alleged crimes committed within the Court's jurisdiction. While the Prosecutor decided the investigation was inadmissible, the pre-trial chamber asked her to reconsider her decision, a position upheld by the appeals chamber.

When assessing whether the complementarity principle is fulfilled, the Prosecutor or Court must assess whether due process principles have been upheld by national courts. More specifically, to fulfil the principle, in the country concerned, persons concerned should not be shielded from criminal responsibility; there should have been no unjustified delay; and the proceedings should have been conducted independently and impartially.

All these elements that the Court and its Prosecutor must take into account in order to establish the admissibility of an investigation create an important margin of discretion that has been used by critics to underpin their conviction that the Court has acted in a biased manner. Various accusations of political bias[5] have been made concerning decisions taken by prosecutors and endorsed by the Court for launching investigations:

- Links between the former prosecutor and the US administration raised doubts as to his independence.
- Several cases have allegedly been selectively picked up by the Court at the instigation of powerful member states. Although most African cases have been referred by national governments, there was sometimes said to have been external pressure on them.
- The investigations have almost always focused on one side of a conflict: rebel militias (Uganda, CRA, DRC) or government forces (Sudan, Côte d'Ivoire); whereas according to critics, there was sufficient evidence that both sides had been involved in crimes falling under the jurisdiction of the Court. Where the investigations have covered both sides, as in the case concerning Kenya for example, exactly three persons from each side were investigated, raising suspicions that the Court tried on purpose to preserve the balance for political reasons.[6]
- The persons put under investigation were generally not among those in the highest command position. This accusation concerns investigations into crimes committed in the DRC in particular. The accused have been militia chiefs, while the ultimate responsibility may have resided with those in power in the country and neighbouring states. In defence of the Court, it can be mentioned that it did begin investigations against three heads of state (Sudan's president, Kenya's president and Libya's president).

  There are also objective limitations to holding those of the highest rank accountable. The crime of aggression is not yet under the jurisdiction of the Court,

but still pending a decision by the Assembly, in accordance with an amendment already adopted. This has created a rather paradoxical situation, since soldiers can be prosecuted for crimes under the jurisdiction of the Court, but the heads of state who started a war without UN Security Council authorisation and thus have the ultimate responsibility, cannot.[7]

- Politically more influential states are believed to have been able to thwart investigations against them.
- Somewhat paradoxically, the Court's reliance on funding from the EU and other Western donors has been interpreted as exposing its vulnerability to political pressure from them, although no evidence in this sense has been produced.[8] EU Member States' funding to the ICC remains crucial for its functioning and existence.

In general, there is not much evidence to substantiate these criticisms of bias. It all remains a matter of speculation and comes down in the end to putting together the desired puzzle from disparate pieces of information. The outcome of more systematic research[9] is that referrals by states parties and the UN Security Council are more likely to result in 'one-sided prosecutions that reflect the preferences of those who refer the situation, and result in dangerous impunity gaps' while investigations initiated by the ICC prosecutor are more likely to result in impartial prosecutions.

By contrast, some voices defend the politicisation of the Court as something that is both inevitable and desirable. One author[10] points out that an international criminal court such as the ICC should inevitably take into account the political ramifications and consequences of its prosecutorial decisions; otherwise it risks undermining itself. The indictment of the presidents of Sudan and Kenya provide the best illustration of the Court's dilemmas and difficulties in this respect. According to the same author, if the Court decides to declare admissible[11] the investigation into possible war crimes committed by US troops in Afghanistan (which is a state party to the Rome Statute), this could risk antagonising the new US administration and backfire against the Court.

African bias

The accusations of political bias have converged into a general accusation that the Court is biased against Africa. Recently three African countries (Burundi, The Gambia and South Africa) have announced their intention to withdraw from the Court. A state party can withdraw one year after it makes an announcement to the Court in this sense.

Burundi has announced its decision to withdraw from the Court. Since the country is marred by numerous human rights violations and its government is considered to play a role in these, this decision does not come as a surprise and it could be even seen as an indirect endorsement of the Court's effectiveness.

The Gambia had formally announced its decision to withdraw from the Court in October 2016, under former president Jammeh, but the new president has cancelled this declaration. The decision to withdraw was justified by the fact that the Court was pursuing 'the persecution of Africans, and especially their leaders'. Such accusations were all the more surprising since the Court's Prosecutor is a former justice minister in The Gambia.

South Africa's government also announced its intention to leave the court, but had to backtrack after its High Court declared this decision 'unconstitutional and invalid' on the grounds that it required the approval of the Parliament. A bill has been tabled in the

Parliament to repeal the relevant legislative text and pave the way for withdrawal. South Africa was one of the staunchest supporters of the Court at its beginning. The crisis began after South Africa's government allowed Sudan's president – indicted by the ICC, but participating in an African Union summit in South Africa – to leave the country. The official reason invoked for the withdrawal is that ICC membership is incompatible with South Africa's role in the peaceful resolution of conflicts on the African continent, which requires immunity to be provided for other states' officials. Proceedings are under way at the ICC to determine whether South Africa failed in its duties to the Court when it refused to arrest al-Bashir.

Other potential exiters include Namibia, Kenya and Uganda: Namibia's cabinet has voted to withdraw; Kenya's parliament has voted twice to withdraw; and Ugandan ministers have suggested that the country could exit.

By contrast, a significant number of African states as well as civil society organisations from the continent have expressed their strong support for the Court. Among them: Burkina Faso, DRC, Cote d'Ivoire, Ghana, Nigeria, Tanzania and Tunisia. Some countries such as Kenya, Lesotho and South Africa, have expressed a wish for a reform of the Court.

The African Union has sided in the past with those rejecting the Court. At its summit in January 2017, it adopted a recommendation calling for a collective withdrawal of African nations from the ICC. This recommendation is not binding and several African countries have opposed it. In 2009, after the ICC issued the arrest warrant against Sudan's President Al Bashir, the African Union forbade its member states from cooperating with the Court in respect of this case and threatened those that did cooperate with sanctions.

The strategy favoured by the African Union and a number of African states is to set up their own regional penal institution to try crimes of ICC jurisdiction. To this end, the existing African Court on Human and Peoples' Rights, which has interim status, will be transformed into the African Court of Justice and Human Rights, dealing also with the trial of individuals who have committed transnational crimes (genocide, crimes against humanity, corruption, money laundering, human and drug trafficking, piracy). Heads of state and government and other senior officials will be excluded from its jurisdiction as long as they are in power. The amendments extending the jurisdiction of the future Court to crimes within ICC remit were adopted in 2014 by the African Union, but no country has yet ratified the corresponding Protocol, while only nine have signed so far.

Witness interference

Witness interference has represented a major problem for the Court in many of its trials and it has had consequences for both the perception of political bias and the Court's effectiveness. Witness interference severely constrains the fair dispensation of justice.

Several trials have been marred by instances of witness interference. In the first trial (Lubanga case), all former child soldiers but one invited by the prosecution to testify against the indicted proved to be unreliable (according to trial judgment of the trial chamber itself), having been influenced or manipulated. ICC judges[12] have admitted that witness interference may have been committed in almost all cases tried. The termination of the case against Kenya's president and vice-president owing to insufficient evidence was due in part to witness interference, according to some sources.[13] Instances of witness interference include: murder at least in one case, intimidation, bribery, coaching,[14] and disclosing and publicising the identities of protected witnesses. Moreover, witness interference has been well coordinated and systematic, involving broad networks of

perpetrators. In response to this, the Court has taken measures to protect witnesses, by hiding their identity during proceedings, by relocating them to a different country and also by prosecuting those responsible for witness interference in accordance with Article 30 of the Rome Statute. The main responsibility however falls upon states to investigate and prosecute witness interference.

Cooperation from member states

As for any multilateral international organisation, cooperation from member states is crucial. Since the ICC does not have its own police force, it relies wholly on member states to arrest suspects, and it needs their cooperation to conduct investigations. Many of the Court's investigations refer to places with a very precarious security situation, which impacts negatively on the work of the Prosecutor.

The non-implementation of arrests pending against Sudan's president in Chad, Kenya, South Africa (in the latter country, the national High Court issued a judgement that he should have been arrested) has showcased the limits of state cooperation and the problems it poses for the Court to fulfil its mandate. However, this type of situation may represent the exception more than the rule. African states, which have received the highest number of formal requests for cooperation by the Court, have in the majority of cases, complied.

According to research, in a two-sided conflict, victors are more likely to cooperate with the ICC if they can ensure that the Court tries their opponents first. When pressure mounts on those in power, they tend to reduce their cooperation (e.g. Côte d'Ivoire).

The Court's effectiveness

The number of convictions made by the Court – three final to date – is very low given the financial resources it has used (€1.3 billion in 13 years). The ICC's expenses are however comparable to those of other similar tribunals, such as the ICTY or the ICTR, both of which had a budget of over €90 million per year. The ICC budget has risen, from €53 million in 2004 to €140 million in 2016 because of an increased workload. As a result, 11 states, including some EU Member States (Canada, Colombia, Ecuador, France, Germany, Italy, Japan, Poland, Spain, the UK and Venezuela) have proposed restricting the court's funding. However, this may not be the right course of action since the limited resources available to the Court are considered one of the main obstacles preventing it from enforcing the Rome Statute on a larger scale.

The Court's effectiveness should not however be assessed solely only on the basis of the number of convictions. The Office of the Prosecutor receives a high number of 'communications', of which only a small number are declared admissible for a preliminary investigation. The investigations conducted often require extensive efforts, since they are carried out under the most difficult conditions.

More importantly, the ICC is supposed to intervene only when national jurisdictions fail to dispense justice on crimes of ICC jurisdiction. The mere existence of the ICC has been an encouragement for countries to strengthen their judicial systems, also in order to avoid investigations by the ICC. This has come to be known as 'positive complementarity' or 'proactive complementarity'. Following the difficulties the Court has faced in prosecuting heads of state, there has been a shift towards this 'positive complementarity', underpinned by the understanding that the Court could do better its task of ending impunity by encouraging states to prosecute perpetrators themselves. This reorientation was epitomised in the declaration of the former prosecutor: 'this Court is

designed to have almost no cases. This Court is helping countries to really take seriously their own obligations'. Setting consistent standards for national jurisdictions remains a task to be accomplished. The ICC has been criticised for not having a 'consistent and clear vision of its relations with domestic jurisdictions'.

European Union support for the Court

The EU is a staunch supporter of the Rome Statute and the ICC, and the biggest contributor to the Court's budget. EU policy is based on a 2011 Council Decision and action plan on its implementation. The EU recognises the importance of the complementarity principle, prioritising accountability and justice at the national level, which presupposes that the justice system of each State functions effectively and independently.

The EU has expressly supported those features of the Court that ensure that it can achieve its objectives. It has namely expressed support for the objective of attaining universal acceptance for the Court. According to the 2011 action plan, the EU's primary objective is to maximise 'political will for the ratification, accession and implementation of the Statute in order to achieve the desired universality', using means such as political dialogue, demarches, clauses in agreements, letters from the High Representative or other bilateral means, statements, including at the UN and other multilateral bodies, and support for dissemination of the ICC principles and rules. In order to attain this objective, the EU has included an ICC clause in several of its cooperation agreements with partner countries, for example the association agreements with Eastern Partnership countries (Georgia, Moldova and Ukraine) and the Cotonou Agreement ('The Parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instrument', Article 11(7) of the revised Cotonou Agreement). The EU has been providing assistance for countries that encounter difficulties in ratifying, accessing and implementing the Rome Statute, including expert assistance, financial support or access to relevant information.

Another important objective is the preservation of the integrity of the Rome Statute; this means its core principles should be kept intact throughout any review process, in order to avoid diluting and undermining the primary aims of the Court.

Position of the European Parliament

The European Parliament has expressed its support for the ICC in numerous resolutions: it has expressed support for the principle of universality of the Rome Statute and the inclusion of the crime of aggression under the jurisdiction of the Court. It has requested that all parties provide the ICC with diplomatic, financial and logistical support. It has called on the Iraqi government to ratify the Rome Statute in order to enable the Court to prosecute crimes perpetrated by ISIL/Da'esh.

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Endnotes

1 C. Bouchard and J. Peterson, Conceptualising multilateralism. Can we all just get along?, January 2011.

2 The ICC jurisdiction is different from the so-called universal jurisdiction, which existed for example between 1993 and 2003 in Belgium, where it was adopted in reaction to the Rwandan genocide. This universal jurisdiction afforded the right to anyone to submit a war crime for prosecution in Belgian courts, irrespective of whether it was committed on Belgian territory, and whether a Belgian national was involved as either perpetrator or victim.

3 For a detailed analysis of the Court's jurisprudence in this respect, see M. Ochi, Gravity threshold before the International Criminal Court: An overview of the Court's practice, ICD Brief 19, January 2016.

4 M. M. de Guzman, What is the Gravity threshold for an ICC investigation? Lessons from the pre-trial chamber Decision in the Comoros situation, August 2015.

5 This article (A. Tiemessen, The International Criminal Court and the politics of prosecutions, May 2014) attempts to expose some patterns of political bias, while recognising that 'Most critical analysis and accusations from scholars and human rights advocates (…) remain vague about how and why political agency is exercised with international judicial interventions, or have failed to identify the pattern of politicised prosecution across the ICC's cases'.

6 See S. Maupas, Le Joker des puissants, Éditions Don Quichotte.

7 This is the case with British soldiers who fought in Iraq and could be investigated for war crimes, while the former Prime Minister, Tony Blair, who led the country to war against Iraq, cannot be investigated.

8 According to an EP study drafted by an external contractor: 'While little – if any – evidence has been adduced to establish a causative relationship between the source of ICC funding and the Court's activities and decisions, the mere suspicion (however substantiated) can itself be of damage both to the Court's credibility and that of the EU'.

9 A. Tiemessen, op. cit., note 5.

10 See D. M. Crane, Fatal Attraction — The International Criminal Court and politics, November 2016 where the author, former Chief Prosecutor of the Special Court for Sierra Leone defends the stance that any prosecution plan should be 'deliberative, careful, balanced' taking in its political, diplomatic, cultural, practical and legal ramifications.

11 The situation is under preliminary investigation.

12 'Almost all cases in the confirmation of charges and trial phases have been or are confronted with incidents of obstruction of justice – in particular witness tampering', in Office of the prosecutor, Strategic plan 2016 - 2018, July 2015.

13 For a detailed analysis, see Briefing paper: Witness interference in cases before the ICC, Open Society Foundations, November 2016.

14 Witness coaching involves giving advice to witnesses to provide false testimony, often in conjunction with promising bribes or other types of financial reward.

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