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ADVANCING THE ICC'S COMPLEMENTARITY PRINCIPLE

HOW CAN THE EU IMPROVE ITS SUPPORT FOR
THE ICC'S COMPLEMENTARITY PRINCIPLE?

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Executive Summary

This research aims to examine how the EU and its Member States can advance its support for the ICC's complementarity principle. The principle of complementarity is one of the ICC's core principles and its paramount importance is acknowledged by the EU. Subsequently, the ICC is a court of last resort and complementarity ensures that it is utilized for that purpose. It therefore justifies the importance of complementarity in regard to the EU's support for the ICC. The main research question is: *How can the EU improve its support for the ICC's complementarity principle?* To answer the main research question, five research objectives are formulated, that are addressed in the different chapters of the research respectively. The Literature Review is used to present a clear overview of the existing academic literature in line with the research question, it also defines key terms in light of various experts and scholars. Which points out that advancing the support for complementarity requires the participation of all concerned actors. Essential actors and tools within the international justice system ensure that the support for the ICC is adequately implemented and reinforced. The EU and its tools play a critical role in promoting support for the ICC and its complementarity principle.

The Findings chapter applies a combination of extensive desk research to present a rounded list of EU efforts and qualitative interviews to obtain insight into the topic from experts with varying backgrounds and perspectives on the EU and its policy on international criminal justice, complementarity and the EU and the ICC dynamics or relations. The most pertinent findings from the Literature Review and Findings chapter are analysed in the Analysis Chapter to provide an additional dimension to the largely descriptive research and leads towards a comprehensive answer to the main research question. It is concluded, that over the years, the EU and its Member States have been the firmest advocates of the Rome Statute and conjointly of the ICC and its complementarity principle. Nonetheless, the current research suggests several courses of action for advancing the EU's support for the complementarity principle.

The first recommendation point is the national implementation of core crimes. Implementing core crimes in national legislations enables States to fulfil their fundamental responsibility to investigate and prosecute core crimes. As second recommendation point, this research identifies the pivotal importance of political will and national capacity in ensuring the adequate functioning of complementarity. The third recommendation point is an evaluation and update of the Complementarity Toolkit, which was published in 2013. The fourth recommendation point is the OTP's completion strategy. The study identifies the importance of the OTP's completion strategy and the lack of support from the international community. Lastly, the current research highlights the importance of the EUMS financial support to the ICC.

List of Abbreviations

AFET	European Parliament's Committee on Foreign Affairs
ASP	Assembly of State Parties
BKA	The Bundeskriminalamt
CEPOL	European Union Agency for Law Enforcement Training
CFSP	Common Foreign and Security Policy
CONJUR-ICC	Working Party on Public International Law for the ICC
CSOs	Civil society organisations
EC	European Commission
EEAS	European Union External Action Service
EIDHR	European Instrument for Democracy and Human Rights
EJTN	European Judicial Training Network
EU	European Union
EUMS	European Union Member States
FDLR	Democratic Forces for the liberation of Rwanda
FTFs	Foreign terrorist fighters
GENVAL	General Matters Including Evaluation
HRW	Human Rights Watch
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ISIS	Islamic State of Iraq and Syria
MEPs	Members of the European Parliament
MS	Member States
NGOs	Non-Governmental Organisations
OTP	Office of the Prosecutor
RS	Rome Statute of the International Criminal Court
TFEU	Treaty on the Functioning of the European Union
VStGB	Völkerstrafgesetzbuch
ZBKV	Zentralstelle für die Bekämpfung von Kriegsverbrechen /Code of Crimes against International Law

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1.Introduction

The European Union and its Member States acknowledge that they have been the firmest advocates of the Rome Statute of the International Criminal Court (Rome Statute , Statute or RM) and the International Criminal Court (ICC) in the last two decades (European Parliament, 2014, p. 11). The ICC is a permanent international court created to investigate, prosecute and try perpetrators of the crimes of genocide, crimes against humanity, war crimes and the crime of aggression (core crimes or core international crimes) (Rome Statute of the International Criminal Court, 1998). The ICC was created through the Rome Statute in 1998, however it began sittings on 1 July 2002 when the Rome Statute went into force (Rome Statute of the International Criminal Court, 1998). With the RS, the ICC's complementarity principle was established through Article 17. The principle of complementarity implies that the ICC is "complementary to national criminal jurisdiction"(Preamble of the Rome Statute, 1998). This means that a case is only admissible before the ICC if a State is unwilling or unable to genuinely execute the investigation or prosecution of the core crimes. The ICC is therefore a court of last instance and does not replace national States. National States still have the main responsibility to investigate and prosecute these core crimes (Preamble of the Rome Statute, 1998). Furthermore, the ICC is not capable of handling all cases of the core crimes. Therefore, without strengthening domestic investigations and prosecution of these horrendous core crimes, there would be an increased risk for impunity to triumph (European Commision, 2013, p. 2).

Currently this system is at a critical turning point. According to Eurojust there were 2943 open or ongoing cases regarding the core crimes within the EU Member States (EUMS) in 2018, "which is the highest number documented since the creation of the Genocide Network" (Eurojust , 2019). As explained by Eurojust "the Genocide Network was established in 2002 and reinforced in 2003 by the Council of the European Union to enable close cooperation between national authorities when investigating and prosecuting core international crimes. It is also known as the European Network for investigation and prosecution of genocide, crimes against humanity and war crimes" (Eurojust, 2020). In that same year the ICC had ten cases under preliminary investigation and eleven situations under investigation (International Criminal Court , 2018). Currently the ICC has eight cases under preliminary investigation and thirteen situations under investigation (International Criminal Court, 2020).

The Rome Statute states that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" (Preamble of the Rome Statute, 1998). Additionally, it emphasizes that "effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation" (Preamble of the Rome Statute, 1998). In 2013, the

European Commission and the European Union External Action Service (EEAS) released the Joint Staff Working Document on Advancing the Principle of Complementarity, which is also known as the Complementarity Toolkit, for the purpose of offering effective guidelines to EU officials and Member States (MS) concerning the efforts that can be made to strengthen and ensure that national legal systems are able to investigate and prosecute core crimes (European Commission & European External Action Service, 2013, p. 2). The document offers an outline of all the different activities and measures which can be taken to promote cooperation between national justice systems and the ICC, while respecting the integrity of the Rome Statute (European Commission & European External Action Service, 2013, p. 2). The document states that "the EU will carry out work to establish a complementarity toolkit which will describe how the application of the principle of complementarity can be strengthened" (European Commission & European External Action Service, 2013, p. 4).

In addition, the 2014 study which was requested by the European Parliament's Subcommittee on Human Rights, identified areas where the EU could improve its support for the ICC (European Parliament, 2014). Furthermore, it emphasised that States are required to carry out their primary duty to investigate and prosecute international crimes at national level in order to diminish the Courts burden as the court of last instance (European Parliament - Directorate-General for External Policies of the , 2014, p. 67). The document stresses the importance of advancing the principle of complementarity within EUMS because when States have the competence to investigate and prosecute core crimes domestically, this reduces the ICC's workload (European Parliament - Directorate-General for External Policies of the , 2014, p. 67).

To date, no additional documents, updates or evaluations to the Joint Staff Document have been provided by the European Union or the EEAS. Moreover, the EU has not published any significant documents in relation to the ICC's complementarity principle since the Joint Staff Document in 2013. Notwithstanding, the EU has committed itself to the ICC's complementarity through various official documents including the Joint Staff Document and the 2014 study which was requested by the European Parliament's Subcommittee on Human Rights. Putting the principle of complementarity to practice requires the investigation and prosecution of core international crimes at national level (European Commission, 2013, p. 8). Without national investigations and proceedings the principle of complementarity would abstain from functioning adequately.

Thus, this research aims to analyse how the EU and its Member States can advance its support to the ICC's complementarity principle. It is necessary to examine how the EU is and should support the ICC in the prosecution of these severe international core crimes.

Therefore, it is essential to examine these developments and analyse how the EU should make improvements to advance its support for the ICC's complementarity principle.

1.1. Research Structure

Taking all the above-mentioned considerations into account, led to formulating the central question that will be at the heart of this research: **How can the EU improve its support for the ICC's complementarity principle?**

This research aims to critically assess the EU's performance to date in supporting the ICC's complementarity principle through its policies and actions. More accurately, the research aims to fulfil five main objectives:

1. Establish a theoretical framework for discussing the ICC's complementarity principle
2. Analyse the relationship between the ICC and the EU including its Member States
3. Present an overview of EU-efforts to support the ICC's complementarity principle
4. Analyse EU-efforts to support the complementarity principle in light of its Complementarity Toolkit, policies, papers and actions
5. Provide recommendations for future EU's support for the ICC's complementarity principle.

The above outlined objectives are reflected in the structure of the research paper and are addressed throughout the various chapters. Firstly, the literature review addresses the first research objective by looking into all applicable primary and secondary papers from the EU, the ICC and other international and regional institutions as well as reports by non-governmental organisations (NGOs), academic articles and theories applicable to the topic. Furthermore, it lays out the relevant terminology, provides academics' viewpoints regarding the ICC and the ICC's complementarity principle. After the foundation has been laid, in-depth qualitative research regarding the relationship between the ICC and the EU and its Member States will be conducted. The third objective is addressed by providing a comprehensive overview of EU-efforts to support the ICC's complementarity principle, substantiated by semi-structured expert interviews capturing the varying stakeholder views in regard to the EU's support for the ICC's complementarity principle which will be conducted in the [Findings](#) chapter. Finally, in the [Analysis](#) chapter all previously gathered information will be used to analyse the findings and deliver well-founded recommendations regarding further EU-support for the ICC's complementarity principle, thereby elaborating on the fourth and fifth research objectives.

2. Methodology

The main research method of this research is qualitative desk research. This involves all relevant primary and secondary documents from the EU, the ICC as well as reports by non-governmental organisations (NGOs) and academic articles. This research takes an inductive approach which starts with observations and collecting all relevant data on the EU's support for the ICC's complementarity principle. The researcher then looks for patterns in the collected data and develops a theory that could explain those patterns. Streefkerk points out that "the main difference between inductive and deductive reasoning is that inductive reasoning aims at developing a theory while deductive reasoning aims at testing an existing theory" (Streefkerk, 2019). This research aims to analyse how the EU could advance its support for the ICC's complementarity principle, therefore inductive research is more suitable in comparison to deductive research.

2.1. Research Methods

Every research method falls into a certain category, primary research or secondary research. Shannon McCrocklin explains that "primary research is information gathered through self-conducted research methods, while secondary research is information gathered from previously conducted studies" (McCrocklin, 2018). She adds on to state that "the goal of primary research is to answer specific questions that directly refers to the research at hand" (McCrocklin, 2018). This research utilises secondary research because it provides basic knowledge to the relevant information that has already been accumulated by other researchers in the past. Contrary to primary research which supplements the information that a researcher is unable to collect through secondary research (McCrocklin, 2018).

As defined by Ranjit Kumar "a study is classified as qualitative if the purpose of the study is primarily to describe a situation, phenomenon, problem or event; if the information is gathered through the use of variables measured on nominal or ordinal scales (qualitative measurement scales); and if the analysis is done to establish the variation in the situation, phenomenon or problem without quantifying it" (Kumar, 2011, p. 32). Contrary to qualitative research, quantitative research gathers and reviews non-numerical data such as video, text or audio (Bhandari, 2020). In addition, this research is both descriptive and explanatory in character, Kumar notes that "descriptive research attempts to describe systematically a situation, problem, phenomenon, service or programme, or provides information or describes attitudes towards an issue" (Kumar, 2011, p. 30). The researcher aims to provide an overview of the EU's efforts in support of the complementarity principle and how it could be advanced, therefore using a descriptive and explanatory approach is most appropriate. Moreover, explanatory research will

be applied to clarify why and how there is a relationship between the EU, the ICC and the principle of complementarity (Kumar, 2011, p. 31).

2.2. Qualitative Semi-Structured Interviews

In addition, qualitative primary research in the form of interviews is conducted. The interviews supplement the desk research and provide an expert input. Ranjit Kumar defines an interview as “a verbal interchange, often face to face, though the telephone may be used, in which an interviewer tries to elicit information, beliefs or opinions from another person’. Any person-to-person interaction, either face to face or otherwise, between two or more individuals with a specific purpose in mind is called an interview” (Kumar, 2011, p. 137). Interviews are needed to get an expert opinion on this topic. In depth interviews are a great method of collecting information because of its low cost and it enables finding expert information in most academic and professional fields (Kumar, 2011, p. 124). A semi-structured interview structure will be utilized to conduct the interviews. This provides the benefits of both structured and unstructured interviews. It provides freedom in terms of the content and structure of the interview. It also leaves room for discussions and the possibility to spontaneously formulate questions and bring up issues based on what takes place during the interview (Kumar, 2011, p. 126/137). Moreover, semi-structured interviews are useful for collecting in-depth information because the interviewer is able to get in-depth information by probing (Kumar, 2011, p. 142). Probing questions cannot be planned because it is impossible to know which issues will be raised. The researcher uses probing and open-ended questions to get more information than the provided research questions.

The interviews in this research are conducted via Zoom or Skype and are transcribed afterwards, so the information is accurately analysed. The Skype call recording are available in the chat for 30 days after the call, the recording can be downloaded and saved locally at any time during the 30 days (Skype Support, 2020). Zoom recordings are downloaded directly and stored locally on the computer of the researcher (Zoom Help Center, 2020). The Skype recordings can be accessed by the researcher and interviewee up to 30 days after the recording is made, the Zoom recordings on the other hand can only be accessed by the researcher. The researcher uses the coding method and categorized the provided answers. This means that the researcher links keywords to answers received to the interview questions (Streefkerk, 2020). The researcher is able to find connections and patterns between the answers of the interviewees based on the keywords.

This research covers three different areas of expertise: the EU and its policy on international criminal justice, the principle of complementarity and the EU and the ICC dynamics or relations. It is necessary to interview experts on these different areas to enrich the information collected

through desk research. Potential interviewees are selected and contacted based on their expertise.

1. **Elizabeth(Liz) Evenson:** serves as the associate director of the International Justice Program at the Human Rights Watch. The focal point of her research and advocacy is the ICC which includes observing the ICC's development (Human Rights Watch, 2020).
2. **Interviewee 2:** Interviewee 2 wishes to stay anonymous and is a parliamentary research administrator at the European Parliament.
3. **Matevz Pezdirc:** Head of the Genocide Network Secretariat (GNS) at Eurojust.

2.3. Research Ethics

Furthermore, each interviewee will be provided an informed consent form, which needs to be signed. Kumar expressed that "informed consent implies that the subjects are made adequately aware of the type of information requested from them, why the information is being sought, what purpose it will be put to, how they are expected to participate in the study, and how it will directly or indirectly affect them. Moreover, it is important that the consent is also voluntary and without pressure of any kind" (Kumar, 2011, p. 208). This informed consent form also provides the interviewee the option to remain anonymous. It is crucial that the interviewees are provided this option, as certain types of information are considered delicate and private. Consequently, it might impose an issue regarding the invasion of privacy (Kumar, 2011, p. 221). In case an interviewee decides to remain anonymous, they will not be referred to by name in this research and the information collected from all the interviews will be stored in a manner that complies to the relevant Dutch and EU privacy laws. As stated by Zina O'Leary in her book on conducting research "the power to produce knowledge requires responsibility for integrity in its production" (O'Leary, 2017, p. 50). That applies to this research as well, as the researcher bears the responsibility to ensure the ethical conduct of the research. This concerns norms and acceptable behaviour in regard to the researched topic and the involved parties. Lastly, the researcher is required to fill out the dedicated ethics form ([See Annex 1](#)) in order to demonstrate awareness of the potential impact of the research for the individuals who participate in this research by providing privileged information. The researcher aims to be transparent to the interviewees in the description of this research.

2.4. Research Limitations

Research limitations are “considered all influences that the researcher cannot control” (Dudovskiy, 2018). Dudovskiy explains that this includes all weaknesses, circumstances or effects that cannot be controlled by the researcher. Hence, limitations place restrictions the methodology and conclusions of the research (Dudovskiy, 2018). There are several limitations present in the scope of this research.

2.4.1 Limitations due to the Covid-19 pandemic

The first limitation of this research is the ongoing Covid-19 pandemic. This pandemic has a major impact all aspects of today's society, including all academic and research activities. Companies, libraries, universities and colleges are temporary closing and going virtual. Which may create a few problems and limitations for this research. Kumar defines problems as “difficulties relating to logistical details, whereas limitations designate structural problems relating to methodological aspects of the study” (Kumar, 2011, p. 214).

The Dutch government has setup guidelines to prevent no additional spreading of the virus. People are advised to practice social distancing and are required to keep 1.5 meters distance whenever possible. Currently, the government is planning to relax the current restrictions, however if new circumstances worsen, any decision to relax measures could be reversed (Rijksoverheid, 2020). As explained by Jeff Zacks, PhD of Washington University in St. Louis and chair of APA's Board of Scientific Affairs, “the research that will be affected first are studies that involve bringing groups of people together in close proximity, but this is going to slow everybody down for 2020” (Clay, 2020). This means, that it is reasonable to assume that all interviews will be conducted via videocall, e-mail, or phone and not in person. Due to the current social distancing measures advised by the Dutch government, personal interviews would not be a fitting option. Therefore, the interviews would preferably be conducted via (video) phone, skype or e-mail depending on the interviewee's preference. Video interviews are more suitable for the researcher because it leaves room for probing, which is quite limited with e-mail interviews.

2.4.2 Limitations In regard to Official EU and ICC website

Another limitation found in the research is in regard to the EU's official websites. It is important to note that the online documents provided by the EU in regard to the principle of complementarity may be considered outdated and limited. Only a limited number of official documents are provided by the EU in regard to the complementarity principle. The two main

documents on this topic are *The Joint Staff Working Document on Advancing the Principle of Complementarity* and the document on *Mainstreaming Support for the ICC in the EU's Policies* (European Commission, 2013) (European Parliament - Directorate-General for External Policies of the , 2014) . These documents may be considered to be outdated because they were published in 2013 and 2014. To date, no additional documents or updates to the Joint Staff Document have been provided by the EU. Moreover, the EU has not published any significant documents in relation to the ICC's complementarity principle since 2014. Making the official EU data outdated and limited. Thus, forming a hypothesis on the basis of these documents forms a solid limitation for this research.

3. Literature Review

As previously mentioned, the Literature Review is used to present a clear overview of the existing academic literature in line with the central research question, this chapter also defines key terms and aspects in light of various experts and scholars. Therefore, firstly, Article 17 of the Rome Statute will be explored, by taking a deeper look into the various provisions established in the Article such as the “unwilling”, “unable” and “genuine”. Secondly, the concept of positive complementarity will be extensively examined. In addition, Article 18,19 and 20 of the Statute will be touched upon. Furthermore, the terminology will be explained by giving definitions of the most vital terms and concepts in regard to complementarity. Lastly, the chapter will touch upon the paramount importance of national implementation of core crimes when it comes to fighting impunity. Thus, this chapter aims to provide a basis of information regarding the rest of the research.

3.1. Framework of Article 17 of the Rome Statute

When discussing complementarity, it is essential to thoroughly delve into Article 17(1) of the Rome Statute. Complementarity as previously discussed is not specifically outlined in the Statute, but Article 17 establishes the essential admissibility test that establishes the principle of complementarity (Art. 17(1) Rome Statute, 1998). The admissibility test identifies if a State is willing and able to genuinely investigate and prosecute cases that are chosen or reviewed for selection by the Court (Art. 17(1) Rome Statute, 1998). Article 17 (1) of the Statute will be extensively analysed later in the [Analysis](#) chapter of this research.

According to the criteria, a case will be admissible if there is an absence of national action (Art. 17(1) Rome Statute, 1998). If that is the case, it becomes unnecessary for the ICC to prove if a State is unable or unwilling to investigate or prosecute the alleged crimes. Thus, the absence of action from the State makes the case admissible to the court (International Criminal Court, 2019, pp. 4,27). Notwithstanding, if a State has proven to be unwilling or unable to investigating or prosecuting a case, the case might still be admissible before the ICC (Art. 17(1) Rome Statute, 1998). Most importantly, it is necessary that a State is genuine while doing so. Therefore, States have to take the proper measures to ensure that the case is adequately investigated and prosecuted, otherwise a case could still be admissible before the ICC (Agirre, et al., 2003, p. 8). Rightly so, Megan Fairlie and Joseph Powderly argued that “Article 17 of the Rome Statute, which presents the principle of complementarity, has not adequately addressed, inter alia, the standard

of proof, a key issue for the Court to determine whether a State is “unwilling” or “unable” to carry out an investigation or prosecution” (Fairlie & Powderly, 2011, pp. 642-645). For this reason, the following section moves on to comprehensively analyse the admissibility test and it extensively describes the concepts of “unwillingness” , “ inability” and “genuine”.

Unwillingness is technically hard to expose, because it is prone to involve interferences and circumstantial evidence. In addition to that, proving unwillingness is politically sensitive when it comes to accusations against the national authorities (Agirre, et al., 2003, p. 14). In some cases, the national authorities and regimes utilize complex conspiracies and plots to mask their involvements and to coverup crimes. Resulting in the need of tools to analyse and validate information to cope with these tactics. Harman van der Wilt points out that the standards of the European Court of Human Rights (ECHR) on adjective responsibilities could be utilized by the ICC. The ICC could use that as an anchor point for the evaluation of the eligibility of a case in the light of its complementarity (Wilt, 2011, p. 706). In addition, he argues that complementarity has not yet been adequately evaluated and academically debated from various perspectives (Wilt, 2011, p. 685).

Furthermore, Article 17(3) sets out two specific factors to review in regard to determining a State's inability. The first factor is that there is a “collapse” or “unavailability” of the national judicial system. The second factor is to assess if the State is able to apprehend the accused or to obtain evidence and testimonies, or whether the State is unable to carry out proceedings (Art. 17 (3) Rome Statute , 1998). Notwithstanding, the examination of unwillingness should not rely on the results of the investigations of proceedings (Agirre, et al., 2003, p. 14). On the surface, it may be alluring to imply that no rational court could acquit the accused based on the available evidence. However, utilizing the outcome of the proceeding to test unwillingness could create complications and is presumably not in line with the Rome Statute. As explained in the informal expert paper, *The Principle of Complementarity in Practice*, “this would undermine the accused's right to be presumed innocent at trial once before the ICC. Therefore, the admissibility assessment should be based on procedural and institutional factors, not the substantive outcome” (Agirre, et al., 2003, p. 14). Nevertheless, it is vital that the EU utilizes diplomatic actions such as diverse political and human rights dialogues and procedures to maintain pressure on States to investigate and prosecute core crimes. Moreover, the EU could include various ICC clauses in agreements with third countries in order to promote the fight against impunity (Council of the European Union & High Representative of the European Union for Foreign Affairs Security Policy, 2013, p. 11).

However, the admissibility test supported by Article 17 can be justifiably criticized because it distinguishes the States inaction from unwillingness or inability. Nidal Nabil Jurdi argues that this is done “ in a way that can create tensions with the duty of every State to prosecute international crimes and the role of the ICC as the Court of “last resort”” (Jurdi, 2009, pp. 28-56). Konforta and Vajda explained that “States can temporarily abstain from prosecuting core crimes for various reasons that go beyond “inability” or “unwillingness”, such as various political, financial, logistical, local, or even external reasons” (Konforta & Vajda, 2013, p. 14). Moreover, States can choose to purposely handoff cases to the ICC, which would counter the objective of the complementarity regime (Konforta & Vajda, 2013, p. 31). Notably, States also have the possibility of self-referrals. Accordingly, States could opt to relieve themselves from the pressure and responsibility to investigate and prosecute core crimes (Arsanjani, 2005).

3.2.1 Article 18,19 and 20 of the Statute

The previous section discussed Article 17 of the Rome Statute, which deals with the most important aspects of admissibility. The following section moves on to discuss Article 18 , 19 and 20 of the Statute which discusses other crucial aspects of admissibility.

Article 18 narrates “the preliminary rulings regarding admissibility” (Paul F Seils, 2011, p. 29). Consequently, Article 18 can be utilized to ask the OTP to postpone or hold off an investigation after it has been opened (Art. 18 Rome Statute, 1998). In doing so, the State has to demonstrate that it is already investigating the matters related to the prosecutor’s particular situation. The OTP must notify the concerning State that may have jurisdiction, once it has opened an investigation. While notifying the State, the OTP should include information about the acts that may form the crimes under investigation. States are able to request more information regarding these acts from the OTP (Art. 18 Rome Statute, 1998). Usually at this phase, the OTP will not yet have a comprehensive perception of the cases it may bring. However, the OTP should be able to provide sufficient information , so that the State has a comprehensive indication of the relevant incidents (Paul F Seils, 2011, p. 29). Thus, giving the State a good indication of the kinds of incidents it should be concerned with (Seils, 2016, p. 30). After receiving the OTP’s notification, the State has one month to notify the Court of its national proceedings (Art 8(2) Rome Statute , 1998). The prosecutor must then postpone the investigations or ask for the Pre-Trial Chamber’s permission to allow the investigation. If the OTP chooses to defer, it can re-examine the State proceedings after six months and if needed this could be done earlier (Art. 8(3) Rome Statute , 1998). Nevertheless, the State can also appeal the Pre-Trial Chamber’s decision to permit the

investigation (Art. 8(4), 1998). There are currently no rulings by the Court in which a State under investigation has invoked Article 18 of the RS (Taylor, 2016).

Moving on to another noteworthy Article of the Statute in terms of admissibility. Contrary to Article 18 of the Statute that allows a State to hinder the Court from exercising its jurisdiction over a potential case that has not yet been opened. Article 19 of the Statute allows a State to challenge the admissibility after the case has been opened and has started before the Court (Art. 19 Rome Statute, 1998). The main distinction from Article 18, is that Article 18 does not obligate the State to prove that it is examining the same case as the OTP (Art. 18 Rome Statute, 1998). However, Article 19 obligates a State or an accused to prove that the same specific case is being handled or has been handled at national level (Art. 19 Rome Statute, 1998). Subsequently, States have the time from the opening of the ICC's preliminary examination until the OTP's notification that an investigation has been initiated, to prosecute core crimes at national level. If the State does not evoke Article 18 of the Statute for a deferral within one month of the OTP's notification, then it misses its first opportunity to challenge the admissibility. Its next opportunity would be after the OTP has finished its investigation, then the State has another opportunity to challenge the admissibility under the consideration that the same case is being handled or has already been handled (Seils, 2016, pp. 30-34). Noteworthy is that the concept of the "same case" has multiple interpretations within the ICC. According to Article 17(1)(a) of the Statute, the ICC's Pre-Trial Chamber has found the same case to be qualified by two components: "the same person and the same conduct" (ICC, 2019, p. 3). Whereas the Appeals Chamber has interpreted it as "the investigation or prosecution must "substantially" cover the same conduct" as the ICC (ICC, 2019, p. 3). As explained by the ICC's Pre-Trial Chamber "the question of what constitutes substantially the same conduct as alleged in the proceedings before the Court will vary according to the concrete facts and circumstances of the case and requires, therefore, a case-by-case analysis" (ICC, 2019, p. 3).

The Rome Statute also includes, among others, the principle of "ne bis in idem", which is established in Article 20 of the Rome Statute, which is also included in many national, European and international legal instruments (Art. 20 Rome Statute, 1998). Ne bis in idem is the "prohibition of double jeopardy", to ensure that no one is prosecuted for the same crime at national level and in an international jurisdiction like at the ICC (Art. 20 Rome Statute, 1998). Article 20 of the Statute is crucial for complementarity because once a person is genuinely tried by another court in regard to the core crimes set out in Articles 6,7 and 8 of the Statute, the case becomes inadmissible before the ICC. Since the ICC was created, there has been frequent campaigns and efforts to promote national implementation of the definitions of the core crimes

(Seils, 2016, p. 35). There are compelling reasons why this might be advantageous for the principle of complementarity. It would be beneficial for States to have a general context of definitions. Additionally, it would simplify the process of applying jurisprudence from various States and it might advance the assessment of the various ongoing investigations in regard to the core crimes (Seils, 2016, p. 35). The national implementation of the core crimes is extensively discussed later on in this research in [Chapter 6](#). Consequently, Article 20 of the Rome Statute is not about assessing if national jurisdictions are investigating or prosecuting a person in regard to the core crimes. Most importantly is that the national proceedings relate to the core crimes committed by the specific individuals the ICC is considering (Seils, 2016, p. 35).

3.3. "Genuine" proceedings

After touching upon the admissibility test and the concepts of inability and unwilling, the research moves on to examine the concept of genuine proceeding. It is pivotal that States and the ICC comprehend the concept of "genuine" proceedings. When looking at it from the perspective of a State, only genuine national proceedings will inhibit the ICC's intervention. States are compelled to perform at or above this threshold of "genuine" (Stigen, 2009, pp. 215-216). From the perspective of the Court, it can only overturn national proceedings when they are not genuine. Stigen explains that "the term represents a requirement to the States' exercise of jurisdiction and a limit to the ICC's exercise of jurisdiction" (Stigen, 2009, pp. 700-701). Most importantly, the concept of "genuine" proceedings describes the manner in which the proceedings must be carried out and it puts the main focus on the proceedings and not on its outcome. Furthermore, it is essential for States to be ensured that national proceeding cannot be found "non-genuine" on the account of insufficient funds and resources. Agirre et al. highlighted that "the issue must be whether the proceedings are so inadequate that they cannot be considered "genuine" proceedings" (Agirre, et al., 2003, p. 8). As explained by the Human Rights Watch "in assessing complementarity, it is important to recall that the genuineness of national proceedings refers to the ability and willingness of national authorities to investigate potential cases that might otherwise be heard before the ICC, rather than a general assessment of the legal system" (Human Rights Watch, 2020). On the contrary, the ICC's Pre-Trial Chamber has concluded that a State's national system and proceedings must be examined in order to assess its ability to carry out genuine investigations and proceedings (ICC, 2019, p. 5).

3.4. The ICC's Principle of Complementarity

Now that it is clear under which circumstances a case is inadmissible before the ICC, the research moves on to discuss the main concept of the ICC's complementarity principle, which is at the centre of this study. The ICC only deals with minimal cases, the first Article of the Statute established that the ICC will be complementary to domestic jurisdictions (Art 1 Rome Statute , 1998). Complementarity means that States bear the principal duty to investigate and prosecute the core crimes and the ICC should be viewed as an underlying safeguard (European Commission, 2013, pp. 2,3). Michael A. Newton critically points out the effect of the relationship between the Court and national jurisdiction on complementarity. He argues that this 'competitive vs. cooperative' relationship may jeopardise the entire judicial process because national States do not always comply with the Rome Statute which compels them to join forces with the court in terms of investigating and prosecuting core crimes (Newton, 2011, p. 304). Meanwhile, the Court is still obligated to consult those States for assistance, information and carrying out arrest warrants. Newton argues that "partnership based on mutual respect between the Court and domestic judicial mechanisms would effectively combat the culture of impunity, the principal objective of the Court" (Newton, 2011, p. 306). The principle of complementarity depends on the primary responsibility of national jurisdiction to prosecute and investigate core crimes, because States have the prime access to the required evidence and witnesses to adequately carry out the investigations and proceedings (Agirre, et al., 2003, p. 3). Notwithstanding, the ICC is a single institution and is therefore limited in the number of prosecutions it can feasibly conduct. Certainly, prosecutions by the ICC are still crucial and vital as national criminal institutions have periodically proven unable or unwilling to investigate, prosecute and bring to trial perpetrators of core crimes. The ICC's goal is not to contend with States for jurisdiction, its purpose is to guarantee that violations of core crimes do not go unpunished (Agirre, et al., 2003, p. 3).

Putting the primary responsibility of investigating and prosecuting core crimes in the hands of States strengthens the principle of complementarity by creating a sense of accountability (ICC-OTP, 2006, p. 4). In an ideal situation the ICC would not have to deal with any cases because States are conforming to their primary responsibility. However, in reality many states lack the capacity and recourses to conform to their primary responsibility. As explained by the European Parliament " the size of the investigations and volume of evidence can be overwhelming for even the most well-resourced justice systems. But quite aside from the legal and factual complexity of international criminal investigations are the practical elements – war torn countries or regions may lack the basic physical infrastructure necessary for a functioning justice system – courtrooms, detention centres and prisons" (European Parliament, 2014, p. 15). Nonetheless, in the suitable

circumstances , it is essential to stimulate national authorities to step up to their primary responsibility of investigating and prosecuting core crimes.

Consequently, complementarity serves as an instrument to encourage and promote States to conform to their principal duty of investigating and prosecuting core crimes. Only when States are unable or unwilling to genuinely carry out their responsibilities, will the ICC intervene to carry out the proceedings. Agirre et al. affirmed that the ICC's "proceedings provide independent and impartial justice, demonstrate the determination of the international community to repress international crimes, and demonstrate the real prospect of ICC action, thus encouraging prosecution by States in the future" (Agirre, et al., 2003, p. 3). Nonetheless, the principle of complementarity is still seen as an unclear and abstract concept, despite it being one of the cornerstones of the ICC and it being vital for the ICC. Which leaves it exposed to different interpretations and contributes to the issue of its abstractness (Hilmi M. Zawati, 2016, p. 227).

4. Framework of the EU-ICC Dynamic

This research focuses on the EU's support for the ICC's complementarity principle; accordingly this chapter analyses the framework between the EU and the ICC. In addition key actors in field of complementarity are mapped out. Furthermore, a thorough overview of the EU's efforts to support complementarity is provided. The EU and its MS shared commitments that formed the core of the European fight against impunity. These commitments included the strengthening of institutions of international criminal justice, fighting impunity, honouring human rights, integration of rule of law and safeguarding and reinforcing international justice (Article 2&3 Consolidated Version of the Treaty on European Union (hereafter, TEU), 2010). Consequently, this chapter extensively reviews the most important EU-ICC framework over the past two decades.

4.1. Rome Conference

The EU and its MS have been the firmest devotees of the Rome Statute and conjointly of the ICC (European Parliament - Directorate-General for External Policies of the , 2014, p. 9). The European Parliament and the EUMS started voicing their support for the ICC during the negotiations of the Rome Statute in 1995. The EU was convinced that the establishment of an international criminal court would improve and ensure the international justice system (European Parliament, 1995). In addition to its political support, the EU also provided economic assistance. During the negotiations of the RS, the Dutch chairman of the Preparatory Committee commenced the establishment of a UN Trust Fund to sponsor the participation of developing countries. At the urging of the General Assembly of the United Nations, the UN Secretary-General founded the Trust Funds. These had been utilized before, however they had never been utilized for conferences concerning public international law (A/C.6/51/SR.27 , 1996). The only contributors of the Trust Funds were Belgium, Denmark, Finland, the Netherlands, Sweden, the UK, the European Commission, Canada, and Norway. The Funds managed to sponsor 52 developing States to participate in the Rome Conference (Lee, 1999) (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court , 1998). As stated by Huikuri “the almost exclusive European participation to the Trust Fund indicates that the EU was more interested than other countries in bringing as many small countries as possible into the conference” (Huikuri, 2019, p. 139).

4.2. Common Positions and Action Plans

The European Parliament called on its MS to adopt a common position on the ICC prior to the Rome conference however this was never realized, due to the fact the UK and France did not support the extensive authority of the ICC as most other European countries did (European Parliament, 1996) (European Parliament, 1997). Despite the lack of a formal common position, the EUMS managed to reach an agreement on the draft features of the Rome Statute. They agreed that the ICC should be a permanent and autonomous institution and they highlighted the principle of complementarity, the clear definitions of the core crimes, partnership with the ICC, and the gravity of the rights of the accused (Huikuri, 2019, pp. 134-137). Furthermore, it was pivotal to ensure the widest ratification of the Rome Statute from the start (Huikuri, 2019, p. 140). Subsequently, the EU declared its commitment to the fight against impunity through the Common Position 2001/443/CFSP, which setup the fundamental blueprint that manages the EU-ICC relations (Council Common Position 2001/443/CFSP of 11.06.2001 on the International Criminal Court (hereafter 'Council Common Position 2001/443/CFSP'), 2001 , p. 19). The 2001 Common Position centralized on the universal ratification of the Rome Statute by third States in addition to offering assistance in the implementation of the Statute into national legislation.

4.2.1. 2003 Common position

In 2003, the European Council amended the EU's Common Position on the ICC, which had expanded into a more extensive policy framework for the EU and its MS. In between the 2001 and 2003 Common position, the Rome Statute went into force on 1 July 2002 (Rome Statute of the International Criminal Court, 1998). The 2003 Common Position also emphasized universal ratification of the Statue (mostly among third party States) and the implementation of the Rome Statute by MS. It incorporated measures to promote the integrity of the Rome Statute and called for protection of the new delicate international justice system to ensure international accountability from actions that could compromise its reason for existing (Council Common Position 2003/444/CFSP, 2003, p. 67). Furthermore, it expressed the willingness of all EUMS to support the ICC and to cooperate to advance its efficiency (Human Rights Watch , 2003). Most importantly, the EU's Common Foreign and Security Policy employs the Common Positions as a legally binding instrument (Council of the European Union, 2019).

Common positions are supported by Action Plans, the first Action Plan was adopted in 2002, which called upon the European Parliament to adopt a practical plan of action to ensure the promotion of the ratification of the Statute by many States as possible (European Parliament

resolution of 28.02.2002 on entry into force of the Statute of the International Criminal Court, 2002, p. para.5). In 2004, an amended Action Plan was approved which was based on the enhanced provisions of the 2003 Common Position. The 2004 Action Plan emphasized the effective functioning of the ICC since the Rome Statute went into effect. Furthermore, it focused on three major issues: the coordination of EU activities, universality and integrity of the Rome Statute and the autonomy and efficient performance of the ICC (Council of the European Union, 2004, p. 1). This shaped the primary foundation for the EU's involvement with ICC related affairs and emphasized support for the ICC in establishing and safeguarding its jurisdiction within the international justice system.

4.2.2. Kampala Review Conference

In 2010 the first Review Conference of the RS was held in Kampala, Uganda, (Kampala Review Conference). State Parties to the Statute had the possibility to participate in an assessment exercise which reflected on the achievements and challenges the Court faced in the first years of its functioning (Wenaweser, 2010). By that time the ICC was established and operating for a few years, which modified the ICC and EU's attention to making the Court effective rather than the establishment of the ICC within the international order. The Kampala Review Conference centred around four themes, all which were relevant to the ICC's work. The four themes were complementarity, victims and impacted groups, synergy and peace and justice (Wenaweser, 2010). These four priorities emphasized the duty of the ICC as a crucial actor in the international justice system (López-Palop, 2010). Ultimately, the most crucial development of the Kampala Review Conference was the adoption of the amendments on the crime of aggression. This enabled the ICC to exercise its jurisdiction over the crime of aggression (Lasso, 2019, p. 1).

4.2.3. The 2011 Council Decision

In 2011, the European Council adopted Decision 2011/168/CFSP (the 2011 Decision) enforcing the commitments made in Kampala. It was accompanied by the Action Plan adopted to carry out the 2011 Decision (the 2011 Action Plan) (Council of the European Union, 2011). These documents formed the EU's framework for engaging with the ICC. In essence the 2011 Decision shared comparable objectives as the previous Common Positions which were adopted by the Council. The 2011 Decisions explicitly defined five objectives on how the EU and its MS should pursue its goal to promote universal support for the Rome Statute through its activities (Article 1(2) Council Decision 2011/168/CFSP, 2011). The first objective was universality, which meant "promoting the widest possible participation in the Rome Statute" (Article 1(2) Council Decision 2011/168/CFSP, 2011). The second objective was preserving the integrity of the Statute. The

third objective was “supporting the independence of the ICC and its effective and efficient functioning” (Article 1(2) Council Decision 2011/168/CFSP, 2011). The fourth objective was supporting cooperation with the ICC and the final objective was supporting the implementation of the principle of complementarity (Article 1(2) Council Decision 2011/168/CFSP, 2011).

The 2011 Decision established a fundamental development through Article 8. It committed the EU to “ensure that there is consistency and cohesiveness between all its instruments and all its policies” concerning the core crimes (Article 8 Council Decision 2011/168/CFSP, 2011). Essentially, Article 8 of the 2011 Decision committed the EU to ensuring that such consistency and cohesiveness existed in its external actions as in its internal measures. Meaning that the EU should be consistent in its actions and policies in regard to its MS and third States. The 2011 Action Plan instructs the EU to utilize several methods 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” to optimise the political will and the implementation of the Statute (Council of the European Union, 2011, pp. 7-8). To accomplish this goal, the EU included an ICC clause in several of its agreements with third States (European Parliament Research Service / Ionel Zamfir, 2018, p. 11). For example, the EU included the ICC clause in the association agreements with Georgia, Moldova and Ukraine and the Cotonou Agreement. This ICC clause commits States to “take steps towards ratifying and implementing the Rome Statute and related instruments” (Article 11 (7) of the Cotonou Agreement and multiannual financial framework 2014–20, 2005). Furthermore, the EU has been supplying States with financial support and resources to ratify and implement the Statute (European Parliament Research Service / Ionel Zamfir, 2018, pp. 10-11). The EU acknowledges the paramount importance of the complementarity principle because it prioritizes the accountability and justice at national level (Council of the European Union & The High Representative of the Union for Foreign Affairs and Security Policy, 2013, p. 3). Consequently, complementarity ensures that national justice systems function efficiently and independently in prosecuting core crimes (European Parliament Research Service / Ionel Zamfir, 2018, p. 11).

Besides the 2011 Decision, the EU and its MS approved various projects that were developed to support MS to carry out its responsibilities within the Statute. Council Decision 2002/494/JHA was one of those decisions which resulted into the establishment of the Genocide Network, which is a network of national engagement point for the exchange of data and resources in regard to the investigation and prosecution of the core crimes (Article 1 Council Decision 2002/494/JHA, 2002). An in-depth assessment of key actors in the field of complementarity, including the Genocide Network, is provided in the following section.

4.3.Key Actors

Advancing the support for the ICC's complementarity principle requires the participation of all concerned actors. Essential actors and tools within the international justice system ensure that support for the ICC is adequately implemented and reinforced. EU delegations and tools play a critical role in promoting support for complementarity. The following chapter identifies these significant actors and tools and analyses its crucial role in advancing complementarity.

4.3.1 The Council of the European Union

The first actor is the Council of the European Union, which plays an essential role in drafting the EU's policies in respect of the ICC and its complementarity principle (Council of the European Union & High Representative of the European Union for Foreign Affairs Security Policy, 2013, p. 19). Furthermore, the Council of the European Union develops policies and statements in support for the ICC and its complementarity principle which reflects the EU's commitment to the ICC (Council of the European Union & High Representative of the European Union for Foreign Affairs Security Policy, 2013, p. 19). These statements are a primary instrument which the EU can utilize to stimulate third States and organizations to unite in their commitment to the ICC and its mandate (Council of the European Union & High Representative of the European Union for Foreign Affairs Security Policy, 2013, p. 19). The Council contains two main structures that are responsible for drafting the EU's policy on ICC-related issues. One of those main structures is the Working Party on Public International Law for the ICC (COJURE- ICC), which is a subgroup within the CONJUR working group in charge of drafting a general EU strategy in regard to international criminal law from the standpoint of the Council in the context of the Common Foreign and Security Policy (CFSP) (European Parliament, 2014, p. 19). It was established in May 2002, which is same year the Court went into force, after an excessive increase of workload issues related to the ICC and international criminal law. The COJUR working group is responsible for drafting and composing the Common Positions and their joined Action Plans. The 2011 Action plan determined that the CONJUR-ICC must meet at least four to five times a year, on top of the meeting in preparation for the annual ICC Assembly of States Parties (European Parliament, 2014, p. 19). The CONJUR-ICC formulates approaches towards the ICC and issues related to MS. In addition to coordinating projects with other Council working groups to ensure support for the ICC and its complementarity principle across all relevant policy activity (European Parliament, 2014, p. 19). Hence, the subgroup CONJUR-ICC is a prime actor in drafting the EU's policy in regard to the ICC and ICC related issues. As previously mentioned, the Council has two main structures that are accountable for drafting the EU's policy on ICC related issues.

4.3.2. Genocide Network

The second subgroup within the Council is the Working Party on General Matters Including Evaluation (GENVAL), which is a Council Working Party responsible for tackling and assessing the EU operations regarding international criminal law and judicial cooperation (European Parliament, 2014, p. 20). Consequently, GENVAL's drafting of Council Decision 2002/494/JHA resulted in the creation of the Genocide Network (Network) (2002/494/JHA: 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, 2002). According to Eurojust "the Network provides a platform for practitioners to exchange operational information and share experience and best practice through biannual meetings" (Eurojust, 2020). Making it a remarkable forum in which EU national authorities, State Parties to the Rome Statute, European Union delegations, United Nations and civil society cooperate in the fight against impunity. Alongside their principal activities, the Network provides specialized trainings and workshops in cooperation with partners such as the European Judicial Training Network (EJTN) and the European Union Agency for Law Enforcement Training (CEPOL) in addition to investing adequate resources in national investigations and prosecutions (Eurojust, 2020). European MS are represented in the Genocide Network through national contact points which provide support and cooperate to investigators and prosecutors at national level (Eurojust, 2020).

4.3.3. European Commission

Additionally, the European Commission plays an important role in regard to the ICC's complementarity principle. The role of the European Commission is the "financing of relevant programmes under the EU budget along the lines of the Decisions and Action Plans" (Council of the European Union, 2011, p. 6). The EU does not only provide direct financial aid to the ICC, in addition it provides financial support to NGOs and civil society organisations (CSOs) engaging in the promotion and support of the ICC, or CSOs and NGOs that work on building national capacity (European Parliament, 2014, p. 21). Thus, the Commission is vital for providing financial and technical support to the ICC and its complementarity principle.

The EIDHR

The Commission is able to support the ICC through various financial instruments, this research discusses the two noteworthy for the ICC and its complementarity principle. The first financial

instrument is the European Instrument for Democracy and Human Rights (EIDHR) which replaced the European Initiative for Democracy and Human Rights in 2007 (European Parliament and the Council, 2006, p. 1). The EIDHR is the fundamental financial tool utilized by the EU to contribute to the international justice system, strengthening of “democracy, the rule of law and the respect for human rights and fundamental freedoms” within its internal and external policies and relations (European Parliament - Directorate-General for External Policies of the , 2014, p. 22). Additionally, the EU has provided more than 40 million euros to the ICC since its establishment through direct support and indirectly through CSOs and NGOs under its thematic instrument for democracy and human rights (Council of the European Union - Working Party on Public International Law (COJUR), 2020, p. 28). The total EIDHR 2018-2020 package is over 4.1 million euros (European Commission, 2020). Out of this total package, three million euros was invested into supporting the ICC and another 3.7 million euros went towards the capacity development of national human rights institutions (European Instrument for Democracy and Human Rights (EIDHR), 2020, p. 7). In line with the principle of complementarity, the EU is providing comprehensive support to the justice systems of various countries under investigation or under preliminary examination by the ICC, including Afghanistan, Myanmar/Burma, Georgia, Côte d'Ivoire, Kenya, Guinea, Mali and Uganda (Council of the European Union - Working Party on Public International Law (COJUR), 2020, p. 28).

Instrument for Stability

The second financial instrument is the Instrument for Stability within the EIDHR. Contrary to the EIDHR, the Instrument for Stability offers more flexibility as it is also able to quickly act upon progressing issues (European Parliament and the Council , 2006, p. 1). Article 3 (1) of the Regulation (EC) No 1717/2006 of the European Parliament and of the Council of 15.11.2006 establishing an Instrument for Stability states that “the Union can provide technical and financial assistance in response to a situation of urgency, crisis, or emerging crisis, a situation posing a threat to democracy, law and order, the protection of human rights and fundamental freedoms, or the security and safety of individuals, or a situation threatening to escalate into armed conflict or to severely destabilise the third country or countries concerned” (Article 3(1) Regulation (EC) No 1717/2006., 2006). Technical and financial assistance within the scope of Regulation (EC) No 1717/2006 includes assistance for the development of State institutions active in the field of international law and capacity building for national law enforcement and judicial authorities (Article 4(1)(a), Regulation (EC) No 1717/2006, 2006). This includes support for efforts that advance “conflict resolution, mediation and dialogue, and support for international criminal tribunals and ad hoc national tribunals” (Article 3(2), Regulation (EC) No 1717/2006, 2006).

Thus, the Instrument for Stability is an essential and flexible instrument utilized by the EU to provide firm support and assistance to advance the ICC's performance and mandate.

4.4. Current Framework

It is imperative to assess the EU's current framework on complementarity as well. The European External Action Service (EEAS) emphasized the advantage of the EU's capacity to engage with national governments, regional and international organizations through political dialogue. Which can provide a "favourable political framework" for any matters concerning the development and implementation a peace agreement, where the EU can directly support the mediation and dialogue process (European External Action Service, 2017, p. 6). In 2020, the EU pledged to maintain its support for the ICC, in its *COJUR Report on the EU guidelines on Promoting Compliance with International Humanitarian Law* and aims to improve the consistence between its various policies and actions in promoting and ensuring respect for international humanitarian law (Council of the European Union - General Secretariat, 2020, p. 5). During the past two decades, the EU has continued to actively promote international criminal justice including the ICC and its complementarity principle through its policy decisions and operational activities. Additionally, the EU has supported the ICC financially and in the work with regional and international actors.

Currently, the EU is actively assisting the transitional justice process in Colombia by building capacity. In doing so, the EU has contributed 4.5 million euros in assisting the Colombian Prosecutor General's Office and the Truth Commission. In addition, it contributed 3.5 million euros to the new Missing Persons Unit (Council of the European Union - Working Party on Public International Law (COJUR), 2020, p. 28). Additionally, in Guinea the EU has been supporting victim participation in the trial concerning the stadium massacre of 28 September 2009. The national investigation began in February 2010 and it was terminated in late 2017 (Amnesty International, 2019). The investigations advanced slowly as a result of the political, financial and logistical obstacles (Human Rights Watch, 2020). Previously, the Guinean government and the EU, France and the United States committed to assist with the trial, which till this day has not started yet (U.S. Embassy in Guinea, Embassy of France in Guinea & the EU, 2019). The trial was scheduled to start in June 2020, but due to new challenges caused by the Covid-19 pandemic, nothing has progressed. Most recently, the EU has been assisting Iraq with strengthening its capacity to document the crimes committed by the Islamic State in Da'esh. Furthermore, the EU has been supporting actions aimed at laying the grounds for reconciliation (Council of the European Union - Working Party on Public International Law (COJUR), 2020, pp. 24-30). The reader can find an extensive list of the recent EU projects in support of complementarity and international law

[Annex 7.](#)

Ultimately, this chapter has clearly demonstrated how the EU and its MS have been and still are the firmest advocates of the ICC. However it should be noted that there were some moments when the ICC's relationship with some MS strained. Nonetheless, the EU and its MS maintained its support to advance the RS and its mandate. This chapter determined how the EU-ICC framework has progressed over the past two decades and by laying down the basic framework through which the EU provides support to the ICC and its complementarity principle. It evidently highlights what activities the EU undertook to ensure the intended effect of objective five since adopting the 2011 Decision. Concluding that the EU-ICC framework has and still is favourable and encouraging since the establishment of the Court. Additionally, his research acknowledges the vital importance of CSOs and NGOs in advancing the complementarity principle and notes that there are various actors such as the Human Rights Watch, Amnesty International, the Coalition for the International Criminal Court and the Open Society Justice Initiative. Nevertheless, this research highlights the EU and its MS's support for the complementarity principle. Hence, CSOs and NGOS are not comprehensively discussed.

5. National Implementation of the Core Crimes

When discussing complementarity, it is crucial to delve into the implementation of the core crimes into national legislation. Accordingly, States are required to integrate elements and provisions of core crimes into their national legal systems in for the adequate functioning of the complementarity system. Therefore, the following section discusses a number of approaches regarding the national implementation of core crimes. In addition, it explores the challenges of national implementation. Lastly, the reader can find an example of how EUMS such as Germany are taking an active role in the implementing and prosecuting core crimes at national level.

5.1.Challenges

National implementation does not come without challenges. Firstly, the implementation of core crimes is an uncommon and complex process for the majority of national law makers (Case Matrix Network ('CMN'), 2017, p. 13). Furthermore, national implementation is time-consuming because of the complexity of examining the compatibility of national provisions with international standards (Case Matrix Network ('CMN'), 2017, p. 13). In addition, the process of formulating and enacting legislation on international criminal law and procedures is often prolonged due to its complexity. States often lack the expert knowledge and resources which are required for this process (Case Matrix Network ('CMN'), 2017, p. 13). The implementation of core crimes is still an uncommon and difficult process for the majority of national legislative authorities. The rapport by CMN on *Implementing the Rome Statute of the International Criminal Court* points out that "such States often have access to a limited number of qualified drafters, lack funding and have an institutional infrastructure destroyed or impaired as a consequence of armed conflict. Moreover, ICC implementation may not be prioritised over legislation regulating more pressing domestic issues"(Case Matrix Network ('CMN'), 2017, p. 13). In addition to the lack of political will, frequently Sates face challenges in the process of national implementation due to the type of legal system it follows. CMN explains that this could cause possible conflicts with "constitutional guarantees and the pre-existing national legislation of statutes of limitations and immunities" (Case Matrix Network ('CMN'), 2017, p. 13). As previously mentioned, the type of legal system can bring challenges to the national implementation of the core crimes. In the following section the reader can find an elaborate explanation of the importance of the legal systems in regard to national implementation.

5.2. Dualist and Monist Systems

The type of legal system a State follows is crucial for the national implementation of core crimes. States with monist legal systems, “where the domestic and international legal systems are viewed as a single”, have an integrated system with immediate effect (Case Matrix Network (‘CMN’), 2017, p. 13). Therefore, the directly enforceable provisions of international agreements ratified by a State with a monist legal system would directly be applicable in national law and it would exceed any contradicting domestic provisions (Bekou & Shah, 2006, pp. 499-503). On the contrary, States with dualist legal systems, “which view the international and domestic legal systems as separate bodies”, require certain integrating legislation to enable the application of an international treaty at national level (Case Matrix Network (‘CMN’), 2017, pp. 13-14). In practice, States are neither entirely monist nor entirely dualist, therefore enacting legislation would be preferable and required in most States (Case Matrix Network (‘CMN’), 2017, p. 13).

The majority of EUMS have been taking their responsibility to investigate and prosecute core crimes at national level. Over the years, national States have made an effort to investigate and prosecute core international crimes (Eurojust, 2020). Most recently, national prosecutors within the EUMS are increasingly building up charges on core crimes such as war crimes and genocide against returning foreign terrorist fighters (FTFs) and members of ISIS (Eurojust, 2020). Eurojust’s report on *Cumulative prosecution of foreign terrorist fighters for core international crimes and terrorism-related offences* established that over 20 cases have been investigated, went to trial or are still ongoing. In some of these cases, national judges found the perpetrators guilty of committing crimes against humanity and war crimes (Eurojust, 2020). The following section discusses the opportunities for investigating and prosecuting core crimes at national level. This section also presents the reader with existing jurisprudence and progressing practices by national authorities.

EU Member States are actively improving their national capacity by setting up war crimes units. France, Germany and the Netherlands have the most longstanding and forceful war crimes unit (Eurojust, 2020). Noteworthy is that the specialized war crimes unit in the Netherlands goes back for over two decades. Human Rights Watch points out that the Netherlands has developed an exceptional and powerful model which could be utilized by other MS that are considering to setup a similar war crimes unit (Human Rights Watch, 2014). An essential advantage of a specialized war crimes unit is its extensive knowledge and experience. Over the years, war crimes units have acquired significant knowledge and expertise that enables them to investigate and prosecute core crimes with increased efficiency and effectiveness. Furthermore, the quality of investigations and

proceedings have improved and while the duration of the investigations have decreased (Human Rights Watch, 2020).

5.3. National War Crimes Units

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5.3.1 Germany

Germany's specialized unit, Central Unit for the Fight against War Crimes and further Offences pursuant to the Code of Crimes against International Law (ZBKV), is an expert national unit which prosecutes international crimes (Völkerstrafgesetzbuch (VStGB), 2002). In line with its international commitments, Germany created the independent Code of Crimes against International Law (VStGB) in 2002 to uphold its commitments under the Rome Statute with the purpose of making international crimes punishable at national level (Völkerstrafgesetzbuch (VStGB), 2002). This code defines genocide, crimes against humanity and war crimes as punishable under the German national criminal code.

The ZBKV gathers and reviews information of international crimes, afterwards it hands over the information on these crimes to the Federal Prosecutor General for legal evaluation. The Federal Prosecutor General can then proceed to initiate an investigation and proceedings (The

Bundeskriminalamt (BKA), 2020). Between 2015 and 2017 they received over 4000 tips of potential war crimes and crimes against humanity committed by perpetrators who reside in Germany (Duerr, 2019). Most of these tips concerned crimes committed in Syria (Duerr, 2019). The ZBKV carries out the required investigations nationally and internationally. Its focal point is the perpetrators of core crimes who are also German nationals or who seek to use Germany as a “safe haven” to evade prosecution (The Bundeskriminalamt (BKA), 2020). The ZBKV cooperates closely with international partners such as Interpol, War Crimes Units of other countries, criminal justice courts such as the ICC and the ICTR. Additionally, the ZBKV is active at national level where it works together with the national security authorities such as state and federal police (The Bundeskriminalamt (BKA), 2020).

5.3 Conclusion

As outlined in the previous chapters, the academic writing on the ICC's complementarity principle and related topics is diverse and comprehensive. The principle of complementarity is an exceptional, original, far-reaching and multidisciplinary concept. It is based on theoretical analysis and practical experiences, conducted by outstanding scholars, research centres, international criminal lawyers, judges, investigators, prosecutors, NGOs, CSOs and actors in the international criminal judicial system. Consequently, complementarity serves as an instrument to encourage and promote states to conform to their primary duty of investigating and prosecuting core crimes. Only when states are unable or unwilling to genuinely carry out their responsibilities, will the ICC intervene to carry out the proceedings. Nonetheless, the principle of complementarity is still seen as an unclear and abstract concept, despite it being one of the cornerstones of the ICC and it being vital for the ICC. Which leaves it exposed to different interpretations and contributes to the issue of its abstractness (Hilmi M. Zawati, 2016, p. 227).

The available literature is written by the EU, EU-affiliated organizations, NGOs, CSOs, the ICC and various academic and non-academic authors. The Literature Review provided a solid basis for further research such as the ICC's continues difficulties with its decisions regarding the concepts and principals set out in Article 17 of the RS. Certainly, the EU and its MS are crucial global actors in regard to complementarity. Nonetheless, there is a lack of overview regarding the measures the EU has taken to ensure the consistency of the support for the ICC, it needs to be applied across both the internal and external dimensions. Consequently, previous research has not sufficiently analysed what is required to pervade, facilitate and ensure an adequate advancement of the EU's support for the complementarity principle. Furthermore, the current literature does not provide an extensive overview of how complementarity and the national implementation of core crimes

works in practice. The following Findings chapter proceeds to provide the reader with a summary of the primary research findings organised by the research objective.

6. Findings

Having provided the reader with a clear overview of the existing academic literature in line with the central research question, this chapter provides a summary of the primary research findings organised by the research objectives. In this section the reader can find an overview of the EU and the EUMS position in regard to the complementarity. This section also provides the reader with an extensive analysis of the Complementarity Toolkit and how it is applied by EUMS. Lastly, the reader can find in which ways the EU can provide additional support to the ICC's complementarity principle. This research makes a distinction between the internal and external support for complementarity. Internal support refers to what the EU does to support the complementarity principle in relation to EUMS. In contrast to external support which refers to what the EU does to support the complementarity principle in relation to third party States. The literature review and the qualitative desk research that accompanies it, lays the basis for expert interviews. Experts in the field of EU policies and actions on complementarity, the ICC and the fights against impunity are consulted to provide supplementary information to the research. The reader should also note that this chapter solely provides the description of the results, abstaining from interpretation, which can be found in the Analysis chapter.

6.1. Internal Support

The majority of the interviewees view the principle of complementarity as a critical aspect of the EU's support to the ICC (Interviewee 2, 2020, Personal Communication, 00:00:24) (Evenson, 2020, Personal Communication, 00:01:26). Evenson argues that complementarity should and is critical in many aspects and the EU has certainly given it attention through essential political commitments and policies. However, the question is how to translate that political commitment into more effective and practical results (Evenson, 2020, Personal Communication, 00:01:26). Strikingly, Pezdirc argues that complementarity is not necessarily a critical aspect of the EU's support, he argues that EU supports the ICC because it is a permanent court and the principle of complementarity deals more with the obligations of States (Pezdirc, 2020, Personal Communication, 00:00:24). Pezdirc links the EU's support for the ICC to the political and financial support because the EU's support for the ICC is not devoted to national prosecutions. Even if the principle of complementarity would not exist, the EU would still support the ICC because it is permanent (Pezdirc, 2020, Personal Communication, 00:01:21).

Nonetheless, the interviewees all agree that the EU has adequately supported the ICC's complementarity principle through its actions and policies over the past two decades (Pezdirc, 2020, Personal Communication, 00:04:28/ 00:08:32) (Evenson, 2020, Personal Communication, 00:02:48) (Interviewee 2, 2020, Personal Communication, 00:00:42). Interviewee 2 maintains that the EU is a top supporter of the ICC, however there should also be a balance of support from EUMS and ICC State Parties in addition to new ways of funding (Interviewee 2, 2020, Personal Communication, 00:11:54). Nonetheless, the European Parliament supports the improvements and the strengthening of the fight against impunity and continues to be a firm supporter of the ICC (Interviewee 2, 2020, Personal Communication, 00:17:52). Currently complementarity is becoming more relevant for the EU and its MS now that more perpetrators are residing on European soil (Interviewee 2, 2020, Personal Communication, 00:21:16).

All EUMS have ratified the Rome Statute and most importantly the majority of the EUMS have implemented the required legislation which authorizes them to investigate and prosecute core crimes (National Implementing Legislation Database, 2020). Notwithstanding, only ratifying the Rome Statute is not enough. The definitions of the core international crimes need to be implemented into national legislation. The principle of complementarity is dysfunctional without the implementation of the core crimes into national legislation. Not having the appropriate national legislation to prosecute core crimes limits States from taking their primary responsibility to investigate and prosecute these core crimes (Pezdirc, 2020, Personal Communication, 00:12:04). Thus, counteracting the principle of complementarity. Implementing the core crimes would be a way through which the EU could support and encourage its MS to ensure the comprehensively implementation of the Rome Statute. Complementarity works in EUMS such as Belgium, Sweden, Finland and The Netherlands because they have implemented the international crimes in their national legislation and therefore have ground to prosecute core crimes and build capacity (Pezdirc, 2020, Personal Communication, 00:12:04).

On the other hand, complementarity does not work in some EU countries where they either do not have the appropriate national legislation to prosecute core crimes or they do not have a specialised or dedicated staff, trained to apply particularities of these core crimes when investigating and prosecuting (Pezdirc, 2020, Personal Communication, 00:12:04). Looking at the efficiency of the principle of complementarity within EU, it is noteworthy that complementarity works in the majority of the EU countries (Pezdirc, 2020, Personal Communication, 00:12:04). Interviewee 2 points out that often there is a lack of political will and capacity, there is always a political aspect to national proceedings of core crimes. Close cooperation and monitoring by the international community is therefore required (Interviewee 2, 2020, Personal

Communication,00:06:58). Evenson remarks that complementarity is not working in certain ways because too many cases are still coming to the ICC. The international community should compel national authorities to carry out their responsibility to investigate and prosecute core crimes because the ICC is a court of last resort (Evenson, 2020, Personal Communication, 00:19:16). However, the ICC has far too many situations to investigate and prosecute without sufficient resources. Evenson does state that she is not clear how this could be resolved, nonetheless it is clear to her that it would require case law, political will, and a much stronger and robust strategy in terms of national proceedings. She points out that if States really want these proceedings to happen, then they will (Evenson, 2020, Personal Communication, 00:19:16).

Evenson stresses that even though the ICC is criticized for examining complementarity on a case-to-case basis, "it is difficult to imagine a different way to do it, that does not create huge openings for the system to be really manipulated and for governments to make promises that they will prosecute and never follow through on them" (Evenson, 2020, Personal Communication, 00:19:16). As explained by Evenson "on one hand referring cases to the ICC could be problematic. But in a way, it is the least problematic way, if it is done genuinely because that means that there is a genuine impulse for accountability. Nonetheless, the concern remains that complementarity could be manipulated by States as a way to make false commitments or actions that do not translate into fair and sufficient investigations or proceedings"(Evenson, 2020, Personal Communication, 00:19:16). Notwithstanding, in her experience the manipulation of complementarity is often due to political commitment rather than the lack of support or technical assistance (Evenson, 2020, Personal Communication, 00:19:16). Also, currently none of the investigations or cases before the ICC had a realistic prospect that national authorities would act upon the committed crimes (Evenson, 2020, Personal Communication, 00:17:08).

Remarkably responses among the interviewees seem to differ when asked whether the ICC is fairly criticised for being inconsistent and lacking to provide national jurisdictions with a clear vision and guidelines in regard to jurisprudence on complementarity. Evenson argues that some of the criticism is fair and she hears this criticism often in the context of preliminary examinations and the same case test (Evenson, 2020, Personal Communication, 00:21:56). She stated the Al-Senussi case as an example, in her expert opinion the fair trial issues were overlooked in various ways even though there was compliance to national proceedings, there were still too many alarming problems with that case(Evenson, 2020, Personal Communication, 00:21:56). The Appeals Chamber of the ICC unanimously declared the case against Abdullah Al-Senussi inadmissible before the ICC (International Criminal Court , 2014). The Appeals Chamber concluded that there were no findings that indicate that "Libya is not unwilling or unable to genuinely prosecute Mr Al-Senussi, or in the exercise of its discretion in the conduct of the

proceedings and in the evaluation of the evidence" (International Criminal Court , 2014). Furthermore, Interviewee 2 maintains that the guidelines should come from the international conventions, there are international standards in place that provides States with sufficient guidelines (Interviewee 2, 2020, Personal Communication,00:09:05).

Evenson disagrees with the criticism of the ICC being inconsistent or lacking, in her view this criticism often comes from States with a hidden agenda. States despise being under preliminary investigation, yet in some cases they may not be willing to take full responsibility to ensure adequate national proceedings (Evenson, 2020, Personal Communication, 00:21:56). Evenson does acknowledge that the Office of the Prosecutor is relatively clear in its assessment of situations (Evenson, 2020, Personal Communication, 00:24:08). Pezdirc explains that the ICC is not fairly criticized because the guidelines provided by the ICC are clear (Pezdirc, 2020, Personal Communication, 00:19:04). Usually it is States that are unwilling or unable, who unfairly criticise the ICC, otherwise States who are genuinely concerned and involved would rather build national capacity (Pezdirc, 2020, Personal Communication, 00:21:23). Pezdirc contends that inability is only an argument of States who are unwilling, he provides Senegal as an example (Pezdirc, 2020, Personal Communication, 00:21:43). According to Pezdirc, Senegal did not have the capacity to prosecute the committed core crimes, however they were able to quickly build up capacity with assistance and funding from the EU and ICC. Ultimately, it is always the question of genuine willingness, if States want to investigate and prosecute core crimes, they will do so and the ICC will support them in that (Pezdirc, 2020, Personal Communication, 00:21:43).

Overall the interviewees agree that the principle of complementarity works in practice as it is laid down in the Rome Statute (Evenson, 2020, Personal Communication, 00:17:08). On the other hand, prosecuting war crimes as an ordinary crime does not capture the gravity of the conducts and it does not resonate with the experience of victims or the scale of victimization (Evenson, 2020, Personal Communication, 00:25:49). Evenson noted that prosecuting core crimes as ordinary crimes would have consequences for the penalties and the possible reparations process. The lack of a reparations process at national level would result in less accountability, if there is a reparation process indirect perpetrators of core crimes could also be held responsible by being required to step down from a certain position (Evenson, 2020, Personal Communication, 00:25:49).

6.2. *The Complementarity Toolkit*

After discussing the EU's internal support for complementarity, the following section proceeds to provide the reader with an extensive analysis of the Complementarity Toolkit (Toolkit). The reader can find comprehensive expert recommendations, based on the interviews, to how the Toolkit can be improved or revised to ensure adequate support for Complementarity. In addition, the reader can find an overview of other vital external mechanisms in support of the ICC's complementarity principle.

The Toolkit was designed to provide political, legal and developmental guidance to third countries in regard to the implementation and reinforcement of the principle of complementarity. The Toolkit could be utilized by the EU officials, delegations and MS to assist third countries with building capacity to fully exercise criminal jurisdictions over perpetrators of core crimes (Council of the European Union & High Representative of the European Union for Foreign Affairs Security Policy, 2013, p. 2). The Toolkit addressed the political, legal and developmental dimensions of the principle of complementarity and can be seen as a useful mechanism to assist the process of mainstreaming the implementation of the principle across all relevant EU policies and activities (Council of the European Union & High Representative of the European Union for Foreign Affairs Security Policy, 2013). The Toolkit is a comprehensive document that identified the importance of ensuring accountability for core international crimes. It positions this urge of accountability as a focal point of the EU's foreign policy and provides an elaborate guide for developing effective programs to advance the principle of complementarity (Council of the European Union & High Representative of the European Union for Foreign Affairs Security Policy, 2013, pp. 2-3). The core provision of the Toolkit is that "actions implementing and supporting the principle of complementarity should take into account the legal framework and decision making, investigations and prosecutions, judges, court management and management of detention and prison facilities, the rights of victims and witness protection, outreach, and the defence counsel and legal profession" (Council of the European Union & High Representative of the European Union for Foreign Affairs Security Policy, 2013, p. 27). Additionally, resources should be directed to projects that strengthens the capacity to carry out fair and efficient investigations and proceedings. Adequate resources require a proper mix of various financial instruments and aid arrangements (European Commission & European External Action Service, 2013, pp. 26-27).

The Complementarity Toolkit has been observed as a positive development amongst all interviewees (Pezdirc, 2020, Personal Communication,00:07:17) (Evenson, 2020, Personal Communication,00:14:19) (Interviewee 2, 2020,Personal Communication,00:03:24). Evenson argues that it was an essential development for that time. It was a Toolkit that described what the

EU was doing in terms of complementarity (Evenson, 2020, Personal Communication, 00:09:03). In her opinion, the Toolkit should have focussed more on what could be done by providing a roadmap for states which also specifies the details of various funding lines. On the other hand, she also points out that in the last five years, there has not been that much capacity to follow up with the Toolkit as a policy matter (Evenson, 2020, Personal Communication, 00:09:03). Evenson suggested the idea that EUMS could develop their own individual Toolkit with case studies and best practices. These individual Toolkits would be a great assesment to how the Toolkit works in practice based on the different national legal systems (Evenson, 2020, Personal Communication, 00:14:19).

Nonetheless, all interviewees do agree that the Toolkit is due for an update or possible evaluation. Interviewee 2 and Liz Evenson suggested that the Toolkit should be evaluated first) (Evenson, 2020, Personal Communication, 00:14:19) (Interviewee 2, 2020, Personal Communication, 00:03:24). This evaluation must include how the Toolkit has been utilized by EUMS in the past years. It is important to analyse to what extent the Toolkit has been implemented including the best practices which can be implemented in the update of the Toolkit. Updating the Toolkit also provides the EEAS and European Commission with the opportunity to share their current standpoint on complementarity. Above all, an evaluation and update of the Toolkit is crucial to measure its effectiveness (Interviewee 2, 2020, Personal Communication, 00:03:24) (Evenson, 2020, Personal Communication, 00:14:19). Pezdirc noted that in the view of policy makers, the Toolkit would still be decent and would not necessarily require an update. However, for practitioners, an update which includes best practices and case descriptions would be essential (Pezdirc, 2020, Personal Communication, 00:07:17).

6.3. Additional Support

When asked about how the EU could improve its support for the ICC's complementarity principle, the interviewees all agreed that the EU should progress its support in terms of capacity building (Interviewee 2, 2020, Personal Communication, 00:14:10) (Pezdirc, 2020, Personal Communication, 00:25:18). The EU has put a lot of focus on building capacity in third countries, more could be done to build capacity within the EUMS because there are still too many MS who do not have specialised or dedicated staff, trained to apply particularities of these core crimes when investigating and prosecuting (Pezdirc, 2020, Personal Communication, 00:25:18). In terms of external support, Pezdirc voiced the issue of State Parties to the Rome Statute who have questionable rule of law (Pezdirc, 2020, Personal Communication, 00:25:18). Additionally, Interviewee 2 voiced the importance of possibly looking into innovative financing even from the

private sector and new resources of funding. She also points out the UN's investigation mechanism which could be utilized for national proceedings as well (Interviewee 2, 2020, Personal Communication, 00:14:10).

Furthermore, Evenson expressed concern for the lack of support for the ICC's completion strategy, which is a strategy that is still under development by the Office of the Prosecutor (Evenson, 2020, Personal Communication, 00:30:57). The OTP's completion strategy is intended to determine the most useful experience and lessons during the process of wrapping up activities in a situation country (Secretariat of the Assembly of States Parties, 2019, pp. 4-9). As previously mentioned, the completion strategy is still under development. On 4 April 2019, the Secretariat of the Assembly of States Parties held a seminar with stakeholders on the development of the completion strategy. During this seminar ambassador Predescu pointed out that the completion strategy "could provide guidance on how a situation country can be assisted in carrying on national proceedings when the Court completes its activities" (Secretariat of the Assembly of States Parties, 2019, p. 1). Later on, Mr. Abtahi added on that States face several issues after the OTP finalizes its judicial activities in a situation country such as "residual functions, enforcement of sentences, acquitted persons, revision of sentences, protection of witnesses, and implementation of reparation orders" (Secretariat of the Assembly of States Parties, 2019, p. 3). Therefore, a completion strategy could be utilized to provide States with the much needed guidelines and support to ensure that they are able to proceed with the situation. Essentially, the main challenge for the ICC is how to "successfully transfer responsibility to national authorities that are willing and able to handle the situations" (Secretariat of the Assembly of States Parties, 2019, p. 9). However, the realisation of a completion strategy first requires the political trigger to explore the strategy. After that, political and institutional agreement are required to support the plan in addition to the laws to incorporate the elements of the completion while ensuring the original mandate is upheld. Lastly, it potentially requires the creation of new organizations (Secretariat of the Assembly of States Parties, 2019, pp. 1-2).

Remarkably, the interviewees also agree that even though the EU is at the forefront when it comes to supporting the ICC, more could have been done. When it comes to the investigations in Georgia, Evenson argues that the EU could have supported the national proceedings, she thinks that there was a period in time where the EU could have prioritized more support. However, she is unable to provide concrete examples (Evenson, 2020, Personal Communication, 00:10:51). Nonetheless, Evenson expresses that the national proceedings in Georgia could have been more present in the EU's political dialogues by addressing the importance of accountability (Evenson, 2020, Personal Communication, 00:11:33). According to Evenson, the national proceeding in Georgia where

overtaken by the fact that the ICC opened its own investigation (Evenson, 2020, Personal Communication, 00:10:51). In addition, it is uncertain whether the national proceedings would proceed now that the ICC has opened its on investigations (Evenson, 2020, Personal Communication, 00:11:33).

As perfectly worded by Evenson “complementarity is the risk and the power of a court of last resort , it keeps the responsibility where it should be but is a risk of then you've got a system which is too weak to confront very entrenched interests” (Evenson, 2020, Personal Communication, 00:28:12). Evenson encourages the ICC to setup a variation of a referral mechanism, with which it could refer cases back to national jurisdictions (Evenson, 2020, Personal Communication, 00:28:12). Hence, throughout the years the EU has been active in supporting the ICC and its complementarity principle. The following Analysis chapter aims to discuss and analyse these results in order to sufficiently answer the research question.

7. Analysis

This chapter seeks to analyse the findings presented by comprehensively discussing them in the light of the conducted research from the Literature Review and Findings. The analysis delves into the meaning, importance and relevance of the findings. The reader can find an interpretation and evaluation of the findings in line with its relation to the literature review and research question and objectives.

The first objective of this research aims to establish a theoretical framework for discussing the ICC's complementarity principle. The introduction and literature review provided the basis of the research, which stresses and identifies the paramount importance of the ICC's complementarity principle in the fight against impunity. Making the principle of complementarity a vital aspect of the EU's support to the ICC. In accordance with the present results, this research, with support of the interviewees, has demonstrated the importance of the EU's support to the ICC's complementarity principle (Interviewee 2, 2020, Personal Communication, 00:00:24) (Evenson, 2020, Personal Communication, 00:01:26). Pezdirc observed that even if the principle of complementarity would not exist, the EU would still support the ICC because it is a permanent international court (Pezdirc, 2020, Personal Communication, 00:01:21). Nonetheless, it does not imply that complementarity is not a key principle of the ICC, hence why it deserves acknowledgement from the EU in its support for the ICC. Comprehensively, the research suggests that it is highly unlikely that States manipulate the principle of complementarity to avoid their primary responsibility to investigate and prosecute core crimes. The misuse of complementarity is often caused by the lack of political commitment rather than the lack of support or technical assistance (Evenson, 2020, Personal Communication, 00:19:16).

Consequently, Article 17(1) of the Rome Statute deals with three different scenarios of inadmissibility. This analysis delves into the three different scenarios of admissibility and takes the two-step process into account (Paul F Seils, 2011, pp. 38-40). The first scenario is where the domestic judicial authorities are currently dealing with the same case as the ICC, the second scenario is where the domestic judicial authorities have investigated the same case and decided not to prosecute and the third scenario is where the same case has been prosecuted domestically (Art. 17(1) Rome Statute, 1998). Thus, Article 17 deals with challenges of inadmissibility with a two-step process and aims to determine whether the same case has already been dealt with domestically. Understanding this two-step process is crucial to assess whether the case is admissible before the ICC. It is noteworthy that the two-step process asks varying questions according to which of the three scenarios of Article 17(1)(a)-(c) is applicable (Seils, 2016, p. 38).

Scenario 1: The same case is being investigated by the domestic judicial authorities (Art.17(1)(A) Rome Statute, 1998) (Paul F Seils, 2011, p. 38)

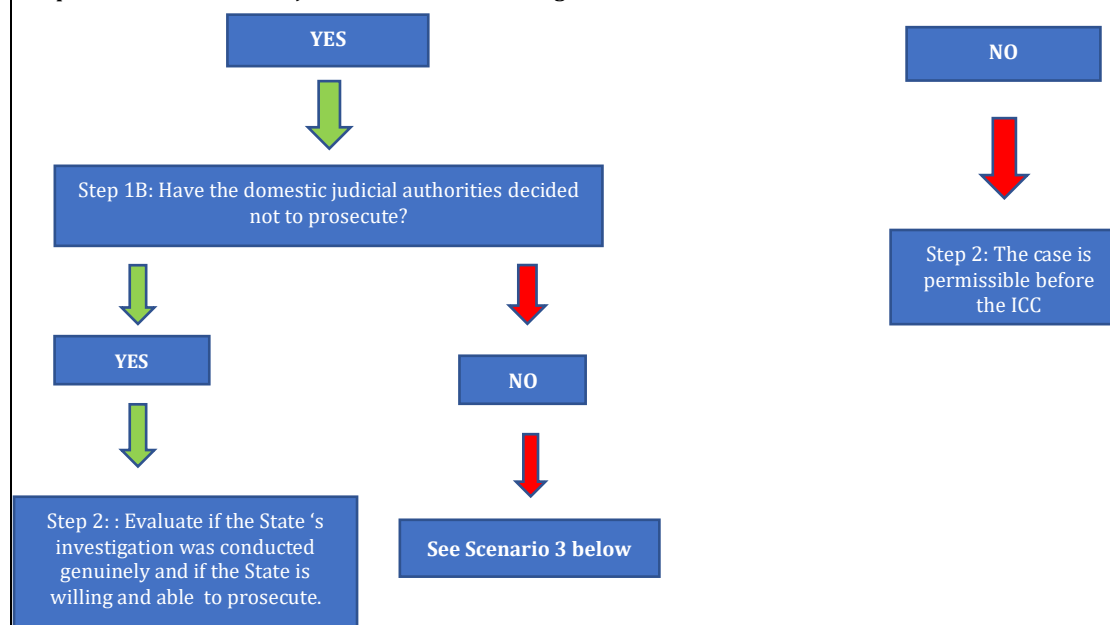
Step 1: Are the domestic judicial authorities investigating the same case as the ICC?



In regard to Article 17(1)(a) the first step of the two-step process is to assess whether the same case is being investigated by the domestic judicial authorities (Art.17(1)(A) Rome Statute , 1998). Only then would it be relevant to determine if the State is willing and able to execute genuine proceedings. If the State is considered to be willing and able then the case is inadmissible before the ICC. However, if the State is considered to be unwilling or unable then the case is admissible before the ICC (Art.17(1)(A) Rome Statute , 1998).

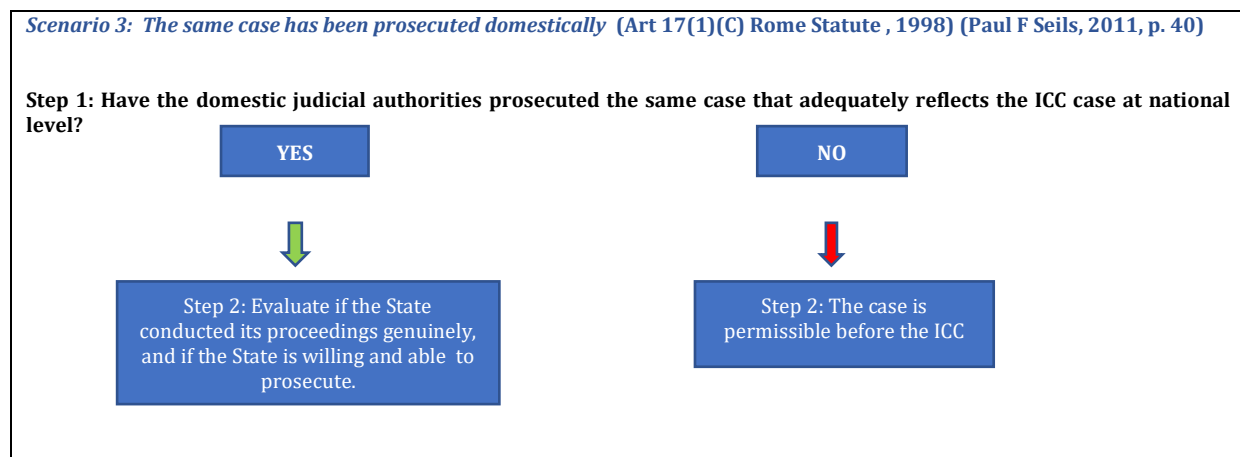
Scenario 2 : The same case has been investigated by the domestic judicial authorities and they have decided not to prosecute (Art 17(1)(B) Rome Statute , 1998) (Paul F Seils, 2011, p. 39)

Step 1A: Have the domestic judicial authorities investigated the same case as the ICC?



Article 17(1) (B) of the Rome Statute deals with the second scenario, this is when the same case has been investigated by the domestic judicial authorities and they have decided not to prosecute (Art 17(1)(B) Rome Statute , 1998). The first step of the two- step process in regard to Article

17(1)(B) is to determine if the same case has been investigated domestically and if they decided not to prosecute the case. Only if the answer to both parts of the question is yes, then it would be relevant to examine if the State's decision not to proceed is a result of the State's unwillingness or inability. Nonetheless, the case would still be admissible before the ICC in the case that the response to any parts of the question is "no" (Art 17(1)(B) Rome Statute , 1998) (Paul F Seils, 2011, p. 40).



Subsequently, Article 17(1)(C) of the Rome Statute deals with the situation where the same case has been prosecuted domestically (Art 17(1)(C) Rome Statute , 1998). Once it has been determined by the ICC that the same case has been prosecuted, the only question that remains is whether the proceedings were adequate, impartial, independent and genuine. Hence that in this scenario it is rarely required to examine the States' inability. Therefore, in this scenario, the case would only be admissible before the ICC if the proceedings are considered to be a show trial or if it cannot be determined that the proceedings were performed fairly and independently (Paul F Seils, 2011, p. 40).

In conclusion, prosecuting core crimes at national level comes with challenges and limitations for States. Financial resources are usually limited, and the investigations can be difficult and expensive (Paul F Seils, 2011, p. 49). Additionally, national proceedings can cause political tensions, especially when it involves (former) government or military leaders, which can result in demonstrations, riots, and even a crisis of stability (Paul F Seils, 2011, p. 49). Thus, the stakes for States acting with integrity are often extremely high and States do not want to take the financial burden and the previously mentioned risks, only for the ICC to proceed with its case because the national case is not comparable to the ICC's case. Such a decision would come off as a waste of a State's money and resources which would be discouraging for States to step up to their primary responsibility to investigate and prosecute core crimes (Paul F Seils, 2011, p. 49). Hence, it may

undermine the ICC's complementarity principle. Therefore, this analysis stresses how important it is for States to clearly know what is expected from them in regard to investigating and prosecuting the same case as the ICC.

7.1. Framework of the EU ICC Dynamic

The second objective of this research seeks to analyse the relationship between the ICC and the EU and its MS. The results clearly demonstrate how the EU and its MS have been and still are the firmest supporters of the ICC and its complementarity principle (Carrasco & Álvarez, 2015). Moreover, the MS conjointly are the largest contributor to the ICC's budget (European Parliament Research Service / Ionel Zamfir, 2018, p. 10). Due to the increased workload over time, the entire ICC budget has increased from 53 million euros in 2004 to 149 million euros in 2020 (ICC - ASP, 2019). Consequently, eleven State Parties including EUMS such as France, Germany, Italy, Poland and Spain proposed to restrict the ICC's funding (Evenson & O'Donohue, 2016). The provided reasoning was the Courts inefficiencies and the global financial crisis. Nonetheless, the current study found that this might not be an appropriate course of action, because the ICC already has limited resources (Cluskey, 2017). Which is one of the Courts main challenges, restricting it from implementing the Statute on a wider scale (European Parliament Research Service / Ionel Zamfir, 2018, p. 6). Therefore, this research acknowledges the critical importance of the EU's financial support for the ICC because it contributes to essential projects, to CSOs and NGOs that enhance complementarity (ICC-ASP, 2018). In 2020, the EU pledged to maintain its support for the ICC in its COJUR report and it aims to improve the consistence between its various policies and actions in promoting and ensuring respects for international law (Council of the European Union - General Secretariat, 2020, p. 5). These results corroborate the findings of a great deal of the EU's previous commitment to improve the consistency between its internal and external support for international law, including its support for the ICC. The results identify the EU including its MS, the ICC, State Parties, CSOs and NGOs as the key actors in regard to complementarity. The Parliament has provided and still provides great political momentum for the EU's support for the ICC (Council of the EU, 2020).

The third objective of this research seeks to present an overview of EU-efforts in support of complementarity. Over the years the EU has setup subgroups within the Council of the European Union and the European Parliament in support of the ICC, incidentally also in support of its complementarity principle. These subgroups such as the Genocide Network and the CONJURE-ICC are utilized by the EU to provide technical and financial support to the ICC. The research demonstrates the EU's commitment to the ICC and its complementarity principle since the

reinforcement of the ICC and demonstrates a correlation between the reinforcement of the ICC and the establishment of the Councils CONJUR-ICC and Genocide Network subgroups. The Council's COJURE-ICC subgroup was established at the same time the Rome Statute went into force (Council of the European Union & High Representative of the European Union for Foreign Affairs Security Policy, 2013, p. 19). This shows the EU's commitment and devotion to the ICC since its establishment.

Moreover, this research identifies the Genocide Network as a crucial actor in the EU's support for complementarity. The Network meets every half year, and it offers a stage for experts to share knowledge, experiences and best practices (Eurojust, 2020). Making it a remarkable forum in which EU national authorities, State Parties, EU delegations, United Nations, CSOs and NGOs cooperate in the fight against impunity. Provided that it is utilized to its capacity, it can reinforce the performance and effectiveness of the actions taken by EUMS to guarantee that the European Union is not utilized as a sanctuary for perpetrators of core crimes (European Parliament - Directorate-General for External Policies of the , 2014, pp. 18-20)

7.2. Internal Support

The fourth objective of this research seeks to analyse the EU's efforts to support the complementarity principle in light of its policies, papers and actions. This research makes a distinction between the EU's internal and external support for the ICC's complementarity principle. The results indicate that the EU has been actively supporting the complementarity principle. Above all, the interviewees seem to substantiate that the EU has adequately supported the complementarity principle through its actions and policies over the past two decades (Pezdir, 2020, Personal Communication,00:04:28/ 00:08:32) (Evenson, 2020, Personal Communication,00:05:15) (Interviewee 2, 2020, Personal Communication,00:00:42). Additionally, the European Parliament supports the improvements and the strengthening of the fight against impunity and continues to be a firm advocate of the ICC (Interviewee 2, 2020, Personal Communication,00:17:52).

European Member States have progressively stepped up to their responsibility to prosecute core crimes at national level. [Chart 1](#) in [Annex 6](#) reveals that the EUMS have increased their efforts in prosecuting core crimes at national level. This result may be explained by the fact that currently complementarity is becoming more relevant for the EU and its MS now that perpetrators are residing on European soil (Interviewee 2, 2020, Personal Communication,00:21:16). Most striking

in [Chart 1](#) is the high rate of pending or ongoing cases in comparison to the resolved cases. The number of ongoing cases seem to remain high each year and less than half of the cases get resolved. Nonetheless, it is encouraging to see that EUMS are taking on so many cases concerning core crimes and that almost half of the cases are getting resolved. The high number of ongoing cases can be explained by the complexity of investigating and prosecuting core crimes. In addition, most MS do not have the capacity or expertise to tackle the workload. These results are in line with those of the previous report conducted by Eurojust (Eurojust, 2019). Therefore it is essential to promote coordination between national and regional authorities and international organisation, CSOs and NGOs. Particularly when it comes to sharing practical knowledge, jurisprudence, standpoints and best practices (Genocide Network Secretariat, 2020, pp. 25-26). Furthermore, national authorities can be supported by the ICC, the EU's Genocide Network, the EU and other State Parties in the process of investigating and prosecuting core crimes.

7.2.1. National Implementation of Core Crimes

This analysis supports the hypothesis that the principle of complementarity would be dysfunctional without the implementation of provisions of the core crimes into national legislation (Pezdir, 2020, Personal Communication, 00:12:04). Thus, making EUMS crucial actors in ensuring the adequate functioning of complementarity. Consequently, implementing the core crimes would be a way through which the EU could support and encourage its MS to ensure the comprehensive implementation of the Rome Statute. Therefore, the following section proceeds to analyse to what extent EUMS have implemented provision of the core crimes in their national legislation and what possible impacts this has in regard to complementarity.

[Chart 2](#) in [Annex 6](#) contains an overview of all EUMS including the type of legal system they predominantly follow. In addition, it shows which core crimes have at least one or more national provision that covers that crime or if there are no existing national laws or provisions that deals with the core crimes. Most prominent in [Chart 2](#) is the dominance of a predominantly monist legal system. A majority of 15 States follows a predominantly monist legal system opposed to a minority of 11 States that follow a predominantly dualist system. Conversely, Malta follows a mixed dualism/monism after shifting from a predominantly monist legal system (Aquilina, 2012, pp. 217-249). In States with monist legal systems, enforceable provisions of international agreements become directly enforceable and apply directly in national law after the State ratifies the international agreements (Case Matrix Network ('CMN'), 2017, p. 13). Thus, exceeding any conflicting domestic provisions. On the contrary, States with dualist legal system often require

certain national implementation to enable the application of an international treaty at national level (Case Matrix Network ('CMN'), 2017, pp. 13-14).

Theoretically, States with monist legal system are not required to implement the core crimes as they become directly enforceable and apply directly in national law after the State ratifies the Rome Statute (Kooijmans, 1994, p. 83). Remarkably, there are a lot of monist States, such as Bulgaria, Estonia, Germany, Latvia, Lithuania, the Netherlands, Spain and Slovakia, that have chosen to still implement provisions of the core crimes. A possible explanation for this might be that States want to be as clear as possible. Furthermore, explicitly implementing the provisions of the core crimes in national legislation minimizes the probability that the ICC might intervene because of an incorrect implementation of the core crimes (Bekou & Shah, 2006, p. 509). On the other hand, monist States such as Austria, Cyprus, Czech Republic, France and Luxembourg have chosen not to implement provisions of core crimes in their national legislation. It is most likely that these results are due to them having a monist legal system. They have all ratified the Rome Statute, consequently making it directly enforceable. Thus, the core crimes apply directly in their national law.

The results show that there are dualist States, such as Belgium, Finland, Greece, Hungary, Ireland, Portugal, Romania and Slovenia, who have properly implemented the provisions of the core crimes into their national legislation. The main issue in dualist systems is that even after implementing the international agreements in national law, it can later be rescinded by a new national law (Kooijmans, 1994, p. 84). The newest national law replaces the earlier one. Thus, States would be willingly or unwilling violating or undermining international agreements (Kooijmans, 1994, p. 84). Consequently, a dualist system calls for an ongoing examination of all future national laws to ensure that it does not conflict with the existing international agreements. Hence why this would be required in the cases of Belgium, Finland, Greece, Hungary, Ireland, Portugal, Romania and Slovenia to ensure that they do not violate or undermine the Rome Statute (National Implementing Legislation Database, 2020) (Ciongaru, p. 7) (Ojanen & Salminen, 2019, pp. 359-404) (Contiades, Papacharalambous, & Papastyliano, 2019, pp. 641-683) (Csatlós, 2014, p. 127) (Irish Department of Foreign Affairs, 2020) (Tay, 1999) (Tanchev, 2015, p. 3) (Bardutzky, 2019, pp. 687-744).

National implementation of core crimes is most crucial in States with a predominantly dualist legal system. Dualist systems require that the international agreements are interpreted into the national law and that the conflicting national laws are amended or removed to ensure that it matches the international agreements (Kooijmans, 1994, p. 83). Most surprisingly is that Italy,

Sweden and Denmark, who all follow dualist legal systems, have not adequately implemented the core crimes (Kolb, 2014) (Bondesson, 2015, p. 3) (Sloss, 2011, p. 3). Italy does not have any national provisions or legislation that cover crimes against humanity, war crimes and genocide. However, Italy has ratified the Rome Statute and has national provisions in regard to the crime of aggression (National Implementing Legislation Database, 2020). Furthermore, Sweden has not yet passed any legislation on the core crimes (Cooperation and Judicial Assistance Database, 2021). Currently, only genocide is punishable under the Swedish criminal code. However, Sweden is in the process of changing its national legislation (National Implementing Legislation Database, 2020). Denmark's national legislation only covers genocide and lacks national provisions on crimes against humanity, war crimes and the crime of aggression (National Implementing Legislation Database, 2020). Notwithstanding, it is necessary that States implement the core crimes into their national legislation to ensure that they are lawfully authorized to investigate and prosecute core crimes domestically.

One unanticipated finding is that too many EUMS such as Austria, Belgium, Cyprus, Czech Republic, Denmark, France, Greece, Hungary, Ireland, Luxembourg, the Netherlands, Portugal, Romania, Spain and Sweden, have not implemented provisions in regard to the crime of aggression (National Implementing Legislation Database, 2020). Austria, Cyprus, France, Luxembourg, the Netherlands and Spain follow monist legal systems, therefore national implemented is not required if they have ratified the Kampala Amendment (Sloss, 2011, pp. 6-7) (Himoni, 2016) (Sloss, 2011, pp. 6-7) (Gerkrath, 2019, pp. 221-267) (Tanchev, 2015, p. 3). However, France has not yet ratified the Kampala Amendments, thus making France incompetent to investigate and prosecute the crime of aggression within its national jurisdiction (Principality of Liechtenstein & the Global Institute for the Prevention of Aggression, 2019). On the other hand, Hungary, which follows a predominantly dualist legal system, already had national provisions criminalizing the crime of aggression before the Kampala Review Conference (Principality of Liechtenstein & the Global Institute for the Prevention of Aggression, 2019) (Csatlós, 2014, p. 127). Furthermore, Greece, Romania and Denmark are strongly active in ensuring that the Kampala Amendments are ratified (Principality of Liechtenstein & the Global Institute for the Prevention of Aggression, 2019). Lastly, Sweden has several criminal code bills under development at parliamentary level which include provisions on the crime of aggression (Principality of Liechtenstein & the Global Institute for the Prevention of Aggression, 2019).

Thus, the type of legal system a State follows plays a crucial role in the national implementation of core crimes. Further work is required to examine the exact consequences of the various legal systems on the principle of complementarity. These results imply that monist legal systems may

be preferable for complementarity, because international agreements become directly applicable after ratification. However, dualist legal systems require that the international agreements are interpreted into the national law and that the conflicting national laws are amended or removed to ensure that it matches the international agreements. Therefore, States with dualist legal systems are compelled to engage more actively in implementing international agreements. While States with monist legal system can merely ratify the international agreement without a significant engagement with the provisions at national level.

Consequently, this analysis supports the theory that Complementarity works in practice as it is laid down in the Rome Statute (Evenson, 2020, Personal Communication, 00:19:16). In concrete terms, complementarity works in the majority of the EU countries (Pezdirc, 2020, Personal Communication, 00:12:04). It should be noted that political will and capacity are also required to ensure the adequate function of complementarity (Interviewee 2, 2020, Personal Communication, 00:06:58) (Evenson, 2020, Personal Communication, 00:19:16). Nonetheless, it could be argued that complementarity is not working in certain ways, or that it is underutilized because the ICC still has a significant amount of situations to investigate and prosecute without the sufficient resources (Evenson, 2020, Personal Communication, 00:19:16).

Contrary to expectations, this research strongly disagrees with the general criticism of the ICC being inconsistent and lacking to provide national jurisdictions with a clear vision and guidelines in regard to jurisprudence on complementarity (Mcintyre, 2020) (Akanke, 2019) (Jurdi, 2016). Overall, the interviewees seem to reflect the same standpoint (Evenson, 2020, Personal Communication, 00:21:56) (Pezdirc, 2020, Personal Communication, 00:19:04) (Interviewee 2, 2020, Personal Communication, 00:09:05). The ICC's guidelines are fairly straightforward, even in the event that the guidelines are not clear, States always have the international law they can resort to. States who argue that the ICC is inconsistent and lacking in its guidelines usually lack the political will to carry out investigations and prosecutions of core crimes (Evenson, 2020, Personal Communication, 00:21:56). Even in the event of a State being unable to carry out these proceedings, with a genuine political will States would be able to build capacity to do so, much like the situation in Senegal (Pezdirc, 2020, Personal Communication, 00:21:43).

7.3. External Support

The findings suggest that the EU could improve its support for the ICC's complementarity principle, the interviewees all agreed that the EU should advance in terms of capacity building (Interviewee 2, 2020, Personal Communication, 00:14:10) (Pezdirc, 2020, Personal

Communication, 00:25:18). The EU has put a lot of focus on building capacity in third countries, more could be done to build capacity within the EUMS. Because there are still too many MS who do not have specialised or dedicated staff, trained to apply particularities of these core crimes when investigating and prosecuting (Pezdir, 2020, Personal Communication, 00:25:18). The study shows that several European countries including EUMS such as the Netherlands, Belgium, Norway, Denmark, the UK and Switzerland have established specialised war crimes units, which consists out of national law enforcements and prosecutors, who are specialized and committed to handling core crimes (Human Rights Watch, 2016). Furthermore, this study supports evidence from previous observations made by Human Rights Watch, that these specialized units have gained valuable knowledge and expertise that increases their effectiveness (Human Rights Watch, 2014). However, it should be noted that some war crimes units such as France, Germany, Sweden and Switzerland had insufficient staffing and budget which weakened their ability to investigate and prosecute core crimes (Human Rights Watch, 2016). Member States with war crimes units need adequate resources for them to function efficiently. Additionally, MS without war crimes units should consider setting up such units because this research has shown the complexity of investigating and prosecuting core crimes. Therefore setting up special war crimes unit within MS would be preferable, so all States have the expertise and valuable knowledge to do so. Nonetheless, the research also acknowledges the fact this would not be feasible for all MS to create its own war crimes unit. However, States with or without war crimes units can always utilize the EU's Genocide Network and Europol to cooperate with other States (Human Rights Watch, 2016).

7.3.1. The Complementarity Toolkit

The fourth objective of this research aims to assess the EU's efforts to support complementarity in light of its Complementarity Toolkit (Council of the European Union & High Representative of the European Union for Foreign Affairs Security Policy, 2013). This research acknowledges the vital importance of the Toolkit in the EU's external and internal support for the complementarity principle. The interviewees mirrored the importance of the Toolkit and agree upon the fact that the Toolkit is due for an evaluation or update (Pezdir, 2020, Personal Communication, 00:07:19) (Evenson, 2020, Personal Communication, 00:14:19) (Interviewee 2, 2020, Personal Communication, 00:03:24). This evaluation or update of the Toolkit must include how the Toolkit has been utilized by EUMS in addition to analysing the effectiveness and best practices. In addition, States, the ICC and all relevant stakeholders need to be consulted for feedback and input. Updating the Toolkit also provides the EEAS and European Commission with the opportunity to

share their current standpoint on complementarity. Above all, an evaluation and update of the Toolkit is crucial to measure its effectiveness (Interviewee 2, 2020, Personal Communication, 00:03:24) (Evenson, 2020, Personal Communication, 00:14:04). Furthermore, an updated Toolkit could clarify several issues related to complementarity such as the fact that States do not have to label the crimes the same as the ICC crime label when prosecuting at national level. Nonetheless, the results observed that prosecuting core crimes as ordinary crimes could have consequences for the penalties and the possible reparations process (Evenson, 2020, Personal Communication, 00:25:49). The Complementarity Toolkit should be seen as a living document, that should develop and adapt with the EU and its political environment. Thus, the study stresses the vital importance of an update or evaluation of the Toolkit.

Lastly, this analysis stresses the importance of a comparable provision or Toolkit specially tailored for EUMS (Evenson, 2020, Personal Communication, 00:14:19). This research therefore partly supports the theory of Evenson that EUMS should develop their own Toolkit with case studies and best practices. The findings indicate that EUMS have different national legislation and different legal systems therefore creating their own Toolkit would ensure that the principle of complementarity is adequately applied in line with the national legislation. However, the results acknowledge that this might not be feasible. Therefore, a joint EU toolkit would be preferable. This is an important issue for future research. In future research, it is suggested to take States such as the Netherlands, France and Germany as a reference point due to their active participation in investigating and prosecuting core crimes.

The next chapter, Conclusions and Recommendations, summarises the main findings of the research and provides recommendations based on the discussed information. Additionally, possible next steps for further research are mentioned.

8. Conclusions and Recommendations

This research aims to identify how the EU and its MS can advance its support for the ICC's complementarity principle. Ultimately, the research seeks to answer the main research question; **How can the EU improve its support for the ICC's complementarity principle?** This section concerns the final elements of the research based on a quantitative and qualitative analysis of the importance of the EU's support for complementarity. The research has shown that the ICC is a court of last resort and complementarity ensures that it is utilized for that purpose. This makes the principle of complementarity one of the Court's core principles. It therefore justifies the importance of complementarity in regard to the EU's support for the ICC. Consequently, the relevance of the principle of complementarity is clearly supported by the current findings. These results add to the rapidly expanding field of international criminal law and the fight against impunity. The fifth objective of this research seeks to provide recommendations for future EU support for the ICC's complementarity principle. These findings suggest several courses of action for advancing the EU's support for complementarity.

This research has found that generally complementarity works in theory as it is laid down in the Rome Statute. The findings of this research suggest that complementarity works in the majority of the EUMS. The research has also shown that national implementation of the core crimes is required in order for complementarity to work adequately. Therefore, the first recommendation point for advancing the EU's support for complementarity is the national implementation of core crimes. Implementing core crimes in national legislations enables States to fulfil their primary responsibility to investigate and prosecute core crimes. Overall, the majority of the EUMS have national provisions of the core crimes in their national legislation. However, Sweden and Denmark, who all follow dualist legal systems, have not adequately implemented the core crimes. Italy does not have any national provisions or legislation that cover crimes against humanity, war crimes and genocide. Furthermore, Sweden has not yet passed legislation on the core crimes and France has not yet ratified the Kampala Amendments, making France incompetent to investigate and prosecute the crime of aggression within its national jurisdiction. Currently, only genocide is punishable under the Swedish criminal code. In addition, Denmark's national legislation only covers genocide and lacks national provisions on crimes against humanity, war crimes and the crime of aggression. Consequently, explicitly implementing the provisions of the core crimes in national legislation minimizes the probability that the ICC might intervene based on an incorrect description of the core crimes.

Nonetheless, the results of this study imply that the type of legal system a State follows plays a vital role in the national implementation of the core crimes. In States with monist legal systems, enforceable provisions of international agreements become directly enforceable and apply directly in national law after the State ratifies the international agreements. Accordingly, exceeding any conflicting domestic provisions. On the contrary, States with a dualist legal system often require certain national implementation to enable the application of an international treaty at national level. Thus, the results of this study indicate that a dualist system requires an ongoing examination of all future national laws to prevent any conflicts with the existing international agreements. Most importantly, the research determines that this would be required in the case of Belgium, Finland, Greece, Hungary, Ireland, Portugal, Romania and Slovenia in order to ensure that they do not willingly or unwillingly violate or undermine the Rome Statute. Despite that, the results of this research support the idea of national implementation of the core crimes by all EUMS because in practice it streamlines the definitions and jurisprudence on the core crimes in all EUMS. Therefore enacting legislation would be preferable and required in most States. Notwithstanding, this study has raised important questioning about the impact of national monist or dualist legal systems on the effectiveness of complementarity. It was not possible to assess the impact of national legal systems on the effectiveness of complementarity. Therefore, it is unknown if States with monist or dualist legal systems are more preferable in regard to the effectiveness of complementarity. This is an intriguing issue which could be usefully explored in further research.

As second recommendation point, this research identifies the vital importance of political will and national capacity in ensuring the adequate functioning of complementarity. The results suggest that States who lack national capacity can always build up their capacity with the assistance of the ICC, the EU and other stakeholders. The study implies that it is States that lack the willingness, who utilize the lack of capacity as reasoning for not carrying out their fundamental duty to investigate and prosecute core crimes. Taken together, these results imply that the EU has been actively assisting States with building up the national capacity to investigate and prosecute core crimes. However the EU's focus has been on third States. The research has shown that the EU should prioritize capacity building within MS. Considering that there are still too many MS who they do not have specialised or dedicated staff trained to tackle the workload of investigating and prosecuting core crimes.

States can have the required national legislation to investigate and prosecute core crimes, but without political will it is more likely that the proceeding would come to a standstill. This is where the EU could play a fundamental role, by creating political momentum through diverse political

and human rights dialogues and procedures and by pushing for national proceedings in certain situations. In addition, it is essential for the EU to keep utilizing various ICC clauses in EU agreements with third States. These ICC clauses could be utilized to create incentives or sanctions for States that want to evade their primary responsibility to investigate and prosecute core crimes by pushing for national proceedings in certain situations. Thus, the principle of complementarity is not only based on having appropriate legislation, but it requires broader cooperation, capacity and political willingness to fight impunity.

The third recommendation point for advancing the EU's support for the ICC's complementarity principle is an evaluation and update of the Complementarity Toolkit, which was published in 2013. The current research highlights the vital importance of the Toolkit in the EU's external and internal support for complementarity. The study considers the Toolkit to be a living document, that should develop and adapt with the EU and its political environment. Thus, stressing the importance of an update and evaluation of the Toolkit. This evaluation and update of the Toolkit must include how the Toolkit has been utilized by EUMS in addition to analysing the effectiveness and best practices. In addition, States, the ICC and all relevant stakeholders need to be consulted for feedback and input. It has been over eight years since the Toolkit was first published and in this timeframe the EU, including its MS, and the ICC have undergone several developments. One major development is the increasing number of EUMS who are investigating and prosecuting core crimes at national level. This research therefore partly supports the theory of Evenson that EUMS should develop their own Toolkit with case studies and best practices. The findings indicate that EUMS have different national legislation and different legal systems, therefore creating their own Toolkit would ensure that the principle of complementarity is adequately applied in lines with the national legislation. However, the study acknowledges that this is not feasible. Therefore, a joint EU toolkit would be preferable. This is an important issue for future research. In future research, it is suggested to take States such as the Netherlands, France and Germany as a reference point due to their war crimes units that actively participate in investigating and prosecuting core crimes. Furthermore, Member States with war crimes units require adequate resources to ensure that it functions effectively. Additionally, MS without war crimes units should consider setting up such units because this research has shown the complexity of investigating and prosecuting core crimes. Therefore setting up special war crimes unit within MS would be preferable, so all States have the expertise and valuable knowledge to do so. Nonetheless, the study acknowledges that this is not feasible for all MS to create its own war crimes unit. However, States with or without war crimes units can always utilize the EU's Genocide Network, the ICC, Europol and other vital stakeholders to cooperate with other States.

The fourth recommendation point is the development of the OTP's completion strategy. Subsequently, the OTP's completion strategy is still in the works, however these findings provide the following insights for future research; the study identifies the severity of the completion strategy and the lack of support from the international community. In addition, it still lacks the political trigger to explore the strategy. A reasonable approach to tackle this issue would be for the EU to create political momentum and encourage other States to support and get involved into the completion strategy. Furthermore, the EU and its MS could play a vital role in ensuring that the appropriate laws are implemented to incorporate the elements of the strategy. Ultimately, the EU and its MS could financially contribute to the creation of the potentially required new organizations that reinforce the strategy. This would be a fruitful area for further work.

Lastly, the current research highlights the importance of the EUMS financial support to the ICC. Due to its increased workload, the entire ICC budget has increased from 53 million euros in 2004 to 149 million euros in 2020. The EUMS conjointly are the largest contributors to the ICC's budget, therefore this study empathizes the pivotal importance of the financial support for the ICC. The current study found that EUMS should continue to provide financial support to the ICC . Furthermore, EUMS should not limit the funding because the ICC's resources are already very limited. Which is one of the Courts main challenges , restricting it from implementing the Statute on a wider scale. Consequently, the EUMS's financial support for the ICC advances complementarity as it contributes to NGOs, CSOs and the development of initiatives, projects and programs. Furthermore, the study also raises an issue of interest regarding the nature and extent of the EU's external support to the complementarity principle through victim and witness support. The present research raises the possibility that national immigrations officials and national law enforcement authorities should be utilized to obtain valuable witness testimonies and informing victims to their rights to participate in possible proceedings. In particular when processing the asylum seekers from Syria, Iraq and other Middle Eastern Countries. Further research is required to assess the long-term effects of utilizing this method to gather vital information and testimonies.

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Annex 1: Student Ethics Form



European Studies Student Ethics Form

Your name: Shelly Simwaba

Supervisor: Isabel Düsterhöft

Instructions:

Before completing this form you should read the APA Ethics Code (<http://www.apa.org/ethics/code/index.aspx>). If you are planning research with human subjects, you should also look at the sample consent form available in the Final Project and Dissertation Guide.

a. Read section 2 that your supervisor will have to sign. Make sure that you cover all these issues in section 1. b. Complete section 1 and, if you are using human subjects, section 2, of this form, and sign it.

c. Ask your project supervisor to read these sections (and the draft consent form if you have one) and ask him/her to sign the form.

d. Always append this signed form as an appendix to your dissertation. This is a knock-out criterium; if not included the Final Project/Dissertation is awarded an NVD.

Section 1. Project Outline (to be completed by student)

(i) Title of Project: How can the EU improve its support for the ICC's complementarity principle?

(ii) Aims of project: This research aims to critically assesses the EU's performance to date in supporting the ICC's complementarity principle through its policies and actions. The research aims to fulfil five main objectives; establish a theoretical framework for discussing the ICC's complementarity principle, analyse the relationship between the ICC and the EU including its member states, present an overview of EU-efforts to support the ICC's complementarity principle, analyse EU-efforts to support the complementarity principle in light of its Complementarity Toolkit, policies, papers and actions and provide recommendations for future EU's support for the ICC's complementarity principle.

(iii) Will you involve other people in your project – e.g. via formal or informal interviews, group discussions, questionnaires, internet surveys etc. (Note: if you are using data that has already been collected by another researcher – e.g. recordings or transcripts of conversations given to you by your supervisor, you should answer 'NO' to this question.):

YES

If yes: you should complete the section 2 of this form.

If no: you should now sign the statement below and return the form to your supervisor. You have completed this form.

This project is not designed to include research with human subjects. I understand that I do not have ethical clearance to interview people (formally or informally) about the topic of my research, to carry out internet research (e.g. on chat rooms or discussion boards) or in any other way to use people as subjects in my research.

Student's Signature _____ **Date:** 20 November 2020

Section 2 Complete this section only if you answered YES to question (iii) above.

(i) What will the participants have to do? (v. brief outline of procedure)

Take part in a semi-structured interview. Questions are provided beforehand in addition to the informed consent form alerting subjects of their rights. The interview questions are provided beforehand to offer the interviewees the chance to review the questions and assess if they are comfortable answering them. The interviews will be recorded and transcribed afterwards, so the information can be accurately analysed

(ii) What sort of people will the participants be and how will they be recruited?

Subjects are recruited under the basis of experience and knowledge in the applicable fields of the EU and its policies, the International Criminal Court and its complementarity principle. Interviews will be gained through email request. Interviews are conducted via video or audio call such as Zoom or Skype.

(iii) What sort of stimuli or materials will your participants be exposed to? Tick the appropriate boxes and then state what they are in the space below

☐ Questionnaires ☐ Pictures ☒ Sounds ☒ Words ☐ Other

(iv) Consent: Informed consent must be obtained for all participants before they take part in your project. By means of an informed consent form you should state what participants will be doing, drawing attention to anything they could conceivably object to subsequently. You should also state how they can withdraw from the study at any time and the measures you are taking to ensure the confidentiality of data. A standard informed consent form is available in the Dissertation Manual. Appendix the Informed Consent Form to your Final Project/Dissertation as well.

(vi) What procedures will you follow in order to guarantee the confidentiality of participants' data?

Personal data (name, addresses etc.) should not be stored in such a way that they can be associated with the participant's data. The informed consent form further notifies the interviewees of their rights in terms of confidentiality. The Skype call recordings are available in the chat for 30 days after the call, the recording can be downloaded and saved locally at any time during the 30 days. Zoom recordings are downloaded directly and stored locally on the computer of the researcher. The Skype recordings can be accessed by the researcher and

interviewee up to 30 days after the recording is made, the Zoom recordings on the other hand can only be accessed by the researcher and are stored locally on the computer.

Student's signature:

Date: 20 November 2020



Supervisor's signature:



Date: 9 December 2020

(if satisfied with the proposed procedures)

Annex 2: Consent Form Interview – Elizabeth Evenson



Informed Consent Form

Informed Consent Form

1) Research Project Title: How can the EU improve its support for the ICC's complementarity principle?

2) Project Description (1 paragraph)

It is necessary to examine how the EU and its member states is, and should support the ICC in the prosecution of the severe core international crimes. The Joint Staff Working Document on Advancing the Principle of Complementarity was published by the European Commission in conjunction with the EEAS on 31 January 2013. To date, no additional documents or updates to the joint staff document have been provided by the European Union. Moreover, the EU has not published any significant documents in relation to the ICC's complementarity principle since the Joint Staff Document in 2013. Which may imply that the European Union and its member states have not made any adjustments or improvements to their commitment to the ICC's complementarity principle in the last seven years. Therefore, it is essential to examine the developments in the past seven years and evaluate how the EU should make improvements to support the ICC's complementarity principle. Furthermore, the EU has committed itself to the ICC's complementarity through various official documents including the Joint Staff Document and the 2014 study requested by the European Parliament's Subcommittee on Human Rights. It is crucial to analyse if and how the EU and its member states have adhered to their commitment to the ICC's complementarity principle.

If you agree to take part in this study please read the following statement and sign this form.

I am 16 years of age or older.

I can confirm that I have read and understood the description and aims of this research. The researcher has answered all the questions that I had to my satisfaction.

I agree to the audio recording of my interview with the researcher.

I understand that the researcher offers me the following guarantees:

All information will be treated in the strictest confidence. My name will not be used in the study unless I give permission for it.

Recordings will be accessible only by the researcher. Unless otherwise agreed, anonymity will be ensured at all times. Pseudonyms will be used in the transcriptions.

I can ask for the recording to be stopped at any time and anything to be deleted from it.

I consent to take part in the research on the basis of the guarantees outlined above.

Name: Elizabeth Evenson

Signature: Elizabeth Evenson

Date: 29 September 2020

Annex 3: Consent Form Interviewee 2

04/11/20, 12:43

THE HAGUE
UNIVERSITY OF
APPLIED SCIENCES

Informed Consent Form
Informed Consent Form

1) Research Project Title: : How can the EU Improve its support for the ICC's complementarity principle?

2) Project Description (1 paragraph)

It is necessary to examine how the EU and its member states is, and should support the ICC in the prosecution of the severe core international crimes. The Joint Staff Working Document on Advancing the Principle of Complementarity was published by the European Commission in conjunction with the EEAS on 31 January 2013. To date, no additional documents or updates to the joint staff document have been provided by the European Union. Moreover, the EU has not published any significant documents in relation to the ICC's complementarity principle since the Joint Staff Document in 2013. Which may imply that the European Union and its member states have not made any adjustments or improvements to their commitment to the ICC's complementarity principle in the last seven years. Therefore, it is essential to examine the developments in the past seven years and evaluate how the EU should make improvements to support the ICC's complementarity principle. Furthermore, the EU has committed itself to the ICC's complementarity through various official documents including the Joint Staff Document and the 2014 study requested by the European Parliament's Subcommittee on Human Rights. It is crucial to analyse if and how the EU and its member states have adhered to their commitment to the ICC's complementarity principle.

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I can confirm that I have read and understood the description and aims of this research. The researcher has answered all the questions that I had to my satisfaction.

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Recordings will be accessible only by the researcher. Unless otherwise agreed, anonymity will be ensured at all times. Pseudonyms will be used in the transcriptions.

I can ask for the recording to be stopped at any time and anything to be deleted from it.

I consent to take part in the research on the basis of the guarantees outlined above.

Name: Nanka Lerda

Signature: [Handwritten Signature]

Date: 2/11/2020

Pagina 1 di 1

https://viewer/web/viewer.html?file=https://s.ui-portal.com/2Ftoken%2FafPwmqko9tVyVwAMyGae#pagemode=thumbs

Annex 4: Consent Form M. Pezdirc

HAGUE
UNIVERSITY OF
APPLIED SCIENCES

Informed Consent Form
Informed Consent Form

1) Research Project Title: : How can the EU improve its support for the ICC's complementarity

2) Project Description (1 paragraph)

It is necessary to examine how the EU and its member states is, and should support the ICC in the prosecution of the severe core international crimes. The Joint Staff Working Document on Advancing the Principle of Complementarity was published by the European Commission in conjunction with the EEAS on 31 January 2013. To date, no additional documents or updates to the joint staff document have been provided by the European Union. Moreover, the EU has not published any significant documents in relation to the ICC's complementarity principle since the Joint Staff Document in 2013. Which may imply that the European Union and its member states have not made any adjustments or improvements to their commitment to the ICC's complementarity principle in the last seven years. Therefore, it is essential to examine the developments in the past seven years and evaluate how the EU should make improvements to support the ICC's complementarity principle. Furthermore, the EU has committed itself to the ICC's complementarity through various official documents including the Joint Staff Document and the 2014 study requested by the European Parliament's Subcommittee on Human Rights. It is crucial to analyse if and how the EU and its member states have adhered to their commitment to the ICC's complementarity principle.

If you agree to take part in this study please read the following statement and sign this form.

I am 16 years of age or older.

I can confirm that I have read and understood the description and aims of this research. The researcher has answered all the questions that I had to my satisfaction.

I agree to the audio recording of my interview with the researcher.

I understand that the researcher offers me the following guarantees:


All information will be treated in the strictest confidence. My name will not be used in the study unless I give permission for it.

Recordings will be accessible only by the researcher. Unless otherwise agreed, anonymity will be ensured at all times. Pseudonyms will be used in the transcriptions.

I can ask for the recording to be stopped at any time and anything to be deleted from it.

I consent to take part in the research on the basis of the guarantees outlined above.

Name: Matevž Pezdirc

Signature: 

Date: 14 Dec 2020

Annex 5 : Interview Transcripts

Annex 5.1 : Personal Interview 1

Interview Liz Evenson – Human Rights Watch

21 August 2020 – 00:37:26 Min

Speaker 1: Researcher

Speaker 2: Elizabeth Evenson

Speaker 1 [00:00:00]: great. So, uh, as I said in the email, that does get recorded for my thesis. If they're any part you want me to leave out, you can always just tell me so I can note that down. I have the questions here in front of me. So, you may see me looking down. But that's because I have the questions right here so if there's anything, just let me know. Yeah?

Speaker 2 [00:00:24]: Yeah. And I want to let you know I did look at the informed consent form, and it's absolutely fine by me. I just don't have any way to to print and sign it and send it to you. I can see if I can kind of paste my signature in, you know, as the image and then and then send it back to you. But I just I don't have printing right now.

Speaker 1 [00:00:48]: Okay. That shouldn't be a problem if you could also sign it digitally. That would be fine as well.

Speaker 2 [00:00:54]: Okay, great.

Speaker 1 [00:00:57]: Oh, as I said, I would really like to thank you for making some time for me to ask you this question for my dissertation. Auuhm And, And I don't want to take too much of your time, so just dive into it, and we'll just see how it goes.

Speaker 2 [00:01:10]: Okay, sounds good.

Speaker 1 [00:01:12]: Okay. Well, I have nine questions in total. The first question is, do you view the principle of complementarity as a critical aspect of the EU's support for the ICC?

Speaker 2 [00:01:25]: Ah,

Speaker 2 [00:01:26]: It should be. I guess, is the answer. Um, it should be and in some respective has been. I think you already know from your research that it forms part of EU's action plan on the ICC. On that they've also developed a toolkit to assist in figuring out what kind of programming is, you know, potentially helpful to support national prosecution. So, yes, I mean, I think it has been certainly given attention, and, um, and they've been important policy commitments and even a potentially important programmatic tool developed. Um, and I think the question is how to translate that into, you know, more effective, more effective practical. Ah, Results.

Speaker 1 [00:02:23]: Exactly. Okay, Thank you. Um, let's see we are going to move on to the next questions. Over the years, and we look from the establishment of the ICC until now, has the EU adequately supported the ICC's complementarity principle like through its policies or its actions? Ah,

Speaker 2 [00:02:48]: yeah, I think I mean, I think that's where um, I also should say, Like, I don't know that I have enough knowledge to be able to, give a full answer to that. I think I can just be too kind of what we've observed. But you really would have to look kind of on a on a country-by-country basis. And there might be quite a lot that's happening that, you know, I'm just not aware of in terms of EU support on complementarity. I think it would also be helpful to know, if what you mean by complementarity. Do you mean specifically in countries where the ICC is investigating, um, specifically in countries where the ICC has preliminary examinations, or do you mean in general support to national prosecutions of of international crimes?

Speaker 1 [00:03:34]: It's more in general. So just ensuring that the ICC has the tools and also the support they need from the EU and its member States to prosecute international crimes and even investigate international crimes as well.

Speaker 2 [00:03:48]: Okay, their support to the ICC? Not support a complementarity. Think I misunderstood the question.

Speaker 1 [00:03:53]: Well, it is, I don't think you misunderstood the question. It is support for the ICC, but my thesis really specifies it on the complementarity principle because they yeah, the EU supports the ICC in several different ways. And I specified it. Ah, on the complementarity principle itself. So, what they've done in terms of their policies in, terms of their actions or plans they have made to make sure that they ensure that the complementarity principle is effective. And that it is also supported by the other member States of the EU as well.

Speaker 2 [00:04:34]: Okay, so again there, um, in your thesis, how are you framing the complementarity principle? Is that ah, just affect to countries where the ICC is already active? Um, Or is it is it? Are you using the term complementarity too mean? General support for national prosecutions?

Speaker 1 [00:05:01]: In this there it would be in countries where the ICC is already active. So, State Parties who have already signed to the Rome statute, Um, and work closely with the ICC as well.

Speaker 2 [00:05:15]: Okay. Um Okay, so I think they're again. It's a bit hard to section you're talking about, you know, 20 different countries and I don't have no specific knowledge of all of the 20 different countries. What I can say is that, um, you know, they're a couple of different ways in which country could be supportive to the ICC on complementarity. One way is through the ICC's Assembly of State Parties. So, this isn't specific to the EU. This is actually not about regional organ editions at all about individual Member States. Okay, um, there's a long, long, ongoing discussion about complementarity within the Assembly of States Parties, um, and that the Assembly of State Parties has the secretariat, and that Secretariat is mandated to broker a system between governments that are seeking support for national capacity and governments that have experts or assistant or rule of law funding. And that hasn't been used as much as it should be. Um, it's something which kind of set up almost 10 years ago now and has really never had the resource is put behind it. To turn it into something I think that would be more effective. And alongside of this there has been an ongoing discussion for many years about how if I-56 parties were to invest in a domestic capacity in places where the ICC has investigation. It would actually allow the ICC cape to complete its work more efficiently. So, for example, if you have the ICC's investigations in Congo, um, if you had a strong national witness protection program, it would be possible at some point, maybe, maybe not all witnesses. But at some point, you know, that would both be helpful, to prosecutions in Congolese national courts. And that would be helpful for the city to be able to transfer some of its responsibilities

Speaker 2 [00:07:24]: for caring for its own witnesses. You know, 10 15 years down the line if they still need protection, like official support, etcetera. And again there. You know, States have really been very reluctant. To engage in these kinds of depressions. They really discouraged the ICC from seeing itself as having a role on complementarity. You know, often they will say that the ICC is found a development agency, we don't you know, we wanted to focus on its core work, so I would just say in general, there's not been a strong enough of support and dialogue around what does it really take for the complementarity principle be implemented in practice? Um, and actually, over the last few years, the dialogue has been much more about admissibility as a component. So, it's been much more about the legal. What of complementarity mean from a legal perspective? When should the ICC act? When should it not act, as opposed to the positive notion of complementarity? It's really gone kind of a bit out of out of favor among ICC State Parties. So that's the overall picture. And we've been that, um I'm struggling a little bit too know if I could really evaluate the EU so not European member States but the EU's positioning. What we've seen is that the tool kit was developed. Um, but it never seemed to receive the attention that we thought it should.

Speaker 2 [00:09:02]: uuhmmm

Speaker 2 [00:09:03]: So, it was, you know, probably shared with delegations, but well, I don't think we felt that enough was done to make sure that they would see it as a useful tool and understand how to use it. And I think also there was a sense that it maybe wasn't that, you know, I think perspective from EU that it wasn't particularly revolutionary. You know, it was a toolkit, that kind of already said what they were doing. But I think we didn't really share that view and to us there was a utility in maybe opening some eyes after what could be done, Um, and giving kind of, ah, roadmap. And even I think the toolkit could have gone further to really have it details about particular funding lines and really, you know, really, like, if this is relevant in your discussion with national partners here is really the kinds of things you could access on what-On-what time level timeline. So, I took It was really important initiative. Um, but at least you know, five years ago, which is the last time I was really following this very closely. It wasn't being It wasn't really being promoted. As much of it, it could have been. And then in the last five years, we haven't had that much capacity to follow it as a policy matter. But I think it's been I'm not sure that there is still kind of a lot of ownership over that toolkit or a lot of you know kind of, maybe it maybe again, because there was ambivalence after whether it was itself. You know, saying anything new or different. When and when it comes to specific country situations that's really like beyond my knowledge because of the way we divided our work. I have colleagues there working on particular country situations. On the country's situation that I work on

Speaker 2 [00:10:51]: hasn't been very relevant. So, I worked on Kenya and I worked on Georgia and I work on Ukraine and ah again there, I feel like in Georgia and Ukraine, there probably would be more scope, um, for the EU to support national prosecution. But, um, you know, in in many ways in Georgia it got a bit overtaken by the fact that the ICC opened its own investigations. I think there was kind of a time period where the EU could have prioritized more support, but I don't know kind of concrete way to be able to say oh they could on this or you could have done that, you know.

Speaker 1 [00:11:32]: Yeah.

Speaker 2 [00:11:33]: You know in terms of programming. I think it could have been more of a part of their political dialogue, the importance of accountability. But once the ICC stepped in, I think there's been a good deal of uncertainty as to whether national prosecutions are going forward or not going forward. Are they waiting to see what the ICC does? Again, I don't really know whether the EU could be playing a more a different or more constructive role. So that's a little bit more like, um, big picture on policy development rather than on you know what? You would what would probably be more help with your thesis but knowing,

Speaker 2 [00:12:09]: like, okay, in this situation, you know, for double in Guineas, the EU was a positive actor. I just don't have the knowledge missile.

Speaker 1 [00:12:19]: No, but this is this is useful as well for me. So, I also know where to look at based on the points you mentioned. So, it also gives me an indication of ways to look at it. So, it should be useful as well. The next question you already touched upon it. It was. Are you aware about the EU's Complementarity Toolkit? You have mentioned, yes, you're aware about it. And have you also utilized it in your field of work? Is it something you use often or is it something like yes, we are aware about it, but we don't really utilize it as much?

Speaker 2 [00:12:54]: Well, in our work, it would be more What? What? What what we would be doing, would be calling on the EU to use the Toolkit. In that sense, it does still form, you know, kind of part of what we do. Ah, in the sense of you know, my colleagues who are working, for example in Guinea a national prosecution using it as a reference point with interlocutors. To say what, this policy instrument, probably not quite the right term, but this this Toolkit could be a very helpful resource. You're so Yeah, it is still futures in what we, how we talk and as a you know, a reference point.

Speaker 1 [00:13:33]: Reference point of course. Thank you. Well, the next question is, Well you're you're aware that the complementarity toolkit was published in 2013 currently we are in 2020. So, a lot of years have passed, and it has not yet been updated or revised in the past years. Do you feel like it is due for an update? Or do you feel like it's still, it's still current for for the for the current circumstances where are in right now.

Speaker 2 [00:14:04]: um, I haven't looked at it in a while, so it's hard for me to answer that question. Um, I think that I think an update would be useful only, if only to give it come back to come back to the topic,

Speaker 1 [00:14:19]: Yes.

Speaker 2 [00:14:19]: You know, come back to the topic and consider again. Maybe. I think at some level, you know, in 2010 in that period, you know, 2000, 2009, 2010, 2011, 2012. There are a lot of policy discussions going on about complementarity. So, what could the EU do? What could other development actors do? There was the idea that individual EUMS could develop their own Toolkit. So, you know, for example, Well, at the time, you know, when the UK was part of the EU, like, could the UK develop its own version of the complementarity, Toolkit? could the Danish aid develop its own version of the complementarity Toolkit? And although I, I don't know that any of that happened, and I think that that would have been useful to kind of keep the policy formulation going, but at some level, you have to say OK, how is it being used in practice? So, I think what would be really interesting would be an assessment of the Toolkit. I don't know if it's this much update, but in an assessment of when was it used? And what are some of the, you know, examples in case studies of how it was used? Um and you know, if it hasn't turned out to be useful, why not? You know, So I don't know that some. I imagine the building blocks are still very similar in terms of what it takes to support national prosecution. But an evaluation of it as a tool, I think, could be useful

Speaker 1 [00:15:45]: Yes, it could be useful. Thank you. Ah, the next questions; In your expert opinion, does the complementarity principal currently work in laws in practice. So, the way it has been laid down the law in the Statute, the Rome Statute. Does it work the same way in practice or?

Speaker 2 [00:16:13]: Ah. So, what do you What do you mean by that? Or what? You mean in terms of you know, what case is that the ICC has taken on? Or like, viewed from what perspective?

Speaker 1 [00:16:27]: Yeah, viewed from the perspective of the ICC. Uhhhh, well it is, um, a principle that laid down that the ICC is complementary to national States. And do you feel like it works that way in practice? Because there are some cases where it has been alleged that some States have used the complementarity principal to get out of prosecuting crimes and just letting the ICC take care of it instead of them taking their responsibility the prosecuting the crimes themselves.

Speaker 2 [00:17:08]: Yeah. I mean, it's a really, really good question and a complicated one. It's pretty hard to identify. You know, I think that here right now, it's pretty hard to identify any case up before the ICC right now where there was a realistic prospect that the national authorities would act. Um ah, I don't know, you know, and and what do you mean by realistic? You know that that's what I'm struggling with us because it's like, Well, you know, I could have imagined that, um when Uganda referred, they tried to only refer the Lord's Resistance Army to the ICC. And that was then clarified that it was the situation in Northern Uganda? Now, they said that they did that because they had no ability to arrest. Um Ah, the the LRA leadership. Um well ah, but they probably had the capacity to prosecute their own government soldiers. You know, there's some some cases, some court martial cases digging way back in my in my mind right now, so probably being wildly inaccurate. Take this as more of, like a typology kind of examples like. So yes, in some sense, they probably did, you know, refer situation. But they at least had some capacity to do something about, particularly when it came to, their own service members. But that said, um, it's hard to say that that means that the complementarity principle isn't working. I mean, I think it's difficult you have to judge it. I feel anyway, you have to judge it kind of at a particular moment in time, and that is really the approach the court has again. And it's like a lot of criticism. I mean, that case law has really been like at this particular moment are the national authorities dealing with the you know, the case before us.

Speaker 1 [00:19:16]: Yeah,

Speaker 2 [00:19:16]: And I know that you know subject to a lot of criticism, but it's difficult to kind of imagine a different way to do it. That doesn't create huge openings for the system to be really manipulated and for governments to make promises that they will prosecute and never follow through on them. So, it's sort of interesting that, you know, on the one hand you think referring to the ICC. It's problematic, but in a way, the less problematic. If it's done genuinely because then that means that there's like a genuine impulse for accountability. I think the concern I often have about complementarity of the opposite that it's manipulate it could be manipulated by governments to kind of make, you know, going promises of action that don't don't translate into anything. And that, sometimes could be because its governments aren't receiving the kind of support that they need interest of technical assistance. But much more often in our experience, it's about a political commitment too independent and that is, you know, really challenging to come by and. So, I guess I would say ultimately that yes, I think so much more can and should be done by the international community to compel national authorities to carry out their responsibilities because the ICC is really only meant to be a court of last resort, and we can see that it has far too many situations to deal with and the resources are not available. And it's not. It's not working, and in some ways, it isn't working. You know, in some ways, complementarity isn't working because too many cases, I think, are coming to the ICC. But it's not clear to me how to solve.

And it's not going to need about a result of kind of how the case law has been treated as opposed to the kind of political realities on the ground and States means to understand that there has to be much stronger, robust strategy around national around national prosecution. If you really want them, if you really want them to happen.

Speaker 1 [00:21:21]: Exactly. Oh, you already touched upon the subject as well because the next questions were like the ICC is uhhmmm. Do you think that the ICC is fairly criticized for being inconsistent and lacking to provide national jurisdictions with a clear vision and guidelines in regard to the jurisprudence complementarity? You did say it is now case-based and you feel that that's the right way to go. Um, But do you think that it's fairly criticized, or do you think that it's not?

Speaker 2 [00:21:56]: I think some of the criticism is fair. So, for example, when I look at the Al-Senussi case, um, I think you know that's been criticized because the fair trial issues were really overlooked in many ways. And there was deference to a national process. But you know where where there were really some alarming problems with that process. I think, I think some of the criticism is fair. Um, I hear this criticism a lot in the context of preliminary examination. I know that there is also criticism about the same conduct tests in, you know, but I feel like right now I hear it more. But governments that are under preliminary examination or the situation's under preliminary examination. They don't understand what the ICC is looking at? Ah, what do they have to do, to prevent the ICC from opening an investigation? And I have to say I'm not sure that I agree with that criticism. I mean, I believe that there can always be more, you know, more clarity. Um, and I know that the prosecutor, as part of a part of their strategic, um, plan planning commitment, is working on a paper that would help describe, you know, its approach to complementarity. So, I think that's useful. But I feel like that the criticism comes often time with, um, an agenda. Ahh, which is, you know, governments don't like to be under preliminary examination, but they may not be willing to do what they need to do to bring about national accountability and so it gets translated into this. Well, it's unfair. It's been open for so long and has reputational consequences for us. We don't know what to do, and I think there may be some elements about that are legitimate and ways in which the preliminary examination process could be extradited or clarified.

Speaker 2 [00:23:58]: But is it really about the handling of the complementarity issues? I feel like the office of the prosecutor. You could say that they should take a different approach,

Speaker 1 [00:24:08]: Yes.

Speaker 2 [00:24:08]: But I actually feel that they've been relatively clear in what they say about what they're doing. You know, they're not affecting the entire judicial institution. There looking at potential cases, and they're looking at whether they're genuine proceedings with respect to those potential cases. So, it seems pretty clear to me whether there's a better approach for different approach before there could be more transparency. And they're doing that assessment probably, you know, probably. But I don't know that it's for lack of trying to claim what they're doing. I just don't think that there's maybe it's agreement among States parties about what they should be doing. I'm not sure if it is about the transparency or the communication might see that there's not a lot of you know, that there are some States. I think you really ought to be a very different approach to complementarity that it really focuses not so much on unwillingness, but more on inability.

Speaker 1 [00:25:06]: Yes.

Speaker 2 [00:25:06]: But t what was meant. Um, and, uh, so I think there may be some policy disagreement, but get translated into, oh we need more consistency, or we need more transparency. I Yeah,

Speaker 1 [00:25:24]: uh, thank you. Um, let's see. Double prosecution over ordinary crime, for example, murder on a national level fulfill yeah, the same case requirements as opposing to an international crime, like war crimes, or genocide. Ahh what, what is your opinion on that?

Speaker 2 [00:25:49]: That's a good one. I don't know that, Um, I don't know that we have a view on that. I mean, I think that there's some real, ah, will deficiencies with prosecuting what should be a crime against humanity. Ah, in particular. But also, war time as ordinary crime, it doesn't necessarily really capture the conduct. It doesn't necessarily resonate with experience of victims. It doesn't necessarily capture the scale of the victimization. It may that may have consequences for penalties. U um, if there's a reparations process that may have confidence that you have the national level for for reparations processes and often times you don't quite have the same most of my liability to be able to charge, you know, if it's not the direct perpetrator, if it's somebody you know at a remove who has ordered the crime or, you know, has command responsibility for the crimes, sometimes the most liability are not able to be applied in a domestic system towards ordinary crimes. You have conspiracy. You have, you have some ability to do that. But man, and responsibility in particular, I actually should know the answer said, but I don't know whether that applies to ordinary crimes. There will be, you know, war crimes. No, you know, in a military system. So, um, I think there has to be some practicality. Uh, you know, I think there has to be something, you know, some understanding that accountability is often a really imperfect process.

Speaker 1 [00:27:35]: Yes.

Speaker 2 [00:27:36]: We to, you know, closure. You know, it could be imperfect. We don't want to make the perfect the enemy of the good that there could be some real, like, real weaknesses of prosecuting these crimes, just using the ordinary definition.

Speaker 1 [00:27:51]: Okay, thank you. Uh, let's see. So, you did touch upon this as well? Is it likely for States to abuse the complementarity principle? You did already touch upon that. So, I think it is. Is there anything more you would like to add on that?

Speaker 2 [00:28:12]: No, I I talk. Think so, I mean, I just think that that's the risk of a court of last resort. The power, it's the power of it, you know, it keeps the responsibility where it should be, but it is a risk of then you've got a system which has too weak to confront very entrenched interest on. But also, you know, that if you look at the ad hoc tribunals that ended up having kind of a referral mechanism, cases back, um, it'd be interesting to think about the ICC needing to have something like us because it would, you know, I don't know. It wouldn't be a referral. Or would it be some greater capacity to assess what's going on at the national level to really some kind of? Because right now, I think it's like, Well, the ICC is a court of last resort. So, there's a huge amount of discrepancies to what the national parties can do.

Speaker 1 [00:29:05]: Yeah.

Speaker 2 [00:29:05]: You knew and big discouragement. But it shouldn't look at it. It's not a human rights court like it's not there to judge national systems, and I think that's really important for the kind of buy into the system. And the ownership of the system and it should be owned by national governments have seemed to be part of their system. And it should be be as material at all possible, but it means that you don't have the court like set up, you know, with in a way, the capacity to really look at national proceeding and to really understand them and to really understand, you know what the problems are, especially when you're talking about. Of course, you know, between investigations and preliminary investigations, looking to 20 20 very different situations. So, at some level I feel that it's, you know, has the potential. It's what makes the Rome Statute such an amazing instrument and a real engine, you know, for both the rule of law and for local ownership of these processes. But I'm not sure that there's been enough investment is getting it to work, you know, in the way that it could work.

Speaker 1 [00:30:15]: The final questions is, Do you have any additional ways you feel that the EU could support the ICC and its complementarity principle? You have mentioned a few during this interview. But it there something you say, this is really important that they should apply.

Speaker 2 [00:30:34]: So, I think it would be here a really good time for the EU to talk about supporting the ICC's completion strategies. So, the Office of the Prosecutor is developing something called a completion strategy with which would be, you know, how do you how do you wind down your work in a situation under investigation.

Speaker 1 [00:30:57]: Yes.

Speaker 2 [00:30:57]: We, you know, we think that this is actually something that should be done from the very beginning. That there should be like a clear vision, not just from the Office of the Prosecutor, but across the court. You know, this is the legacy the ICC would seek to achieve. And then, you know, one of the benchmarks to get there? And some of the benchmarks would be its own investigations and prosecutions and other benchmarks would be, you know, equipping uh helping to be part of a process that would support national authorities to carry out their responsibilities. Uhm and and other benchmarks. So, what do you do with your archives? What do you do with some of the functions that need to be continued after after investigations and prosecutions are over? So, we have probably, like a little bit more of its expansive concept of what completion strategies mean, because for us, they would actually, like, set the agenda. Not just about how you leave, but actually how you do your work all along because all along you should be thinking about the legacy of the Court. Nonetheless, though the OTP is looking at completion now as a specific idea and concept, and however you think about completion, it has to involve complementarity. Um, because they're, you know, Okay, doesn't have to, because the ICC permanent court so it could continue to do everything it does, you know, cater for archives, cater for witnesses. You know, all the things that have been part of the completion strategies of ad hoc tribunals. It could do that, but I think it would lose the real opportunity to, um, again you know like something like archives those should be based in the country and be accessible to, you know, future generations. So, I think that this is where, um

Speaker 2 [00:32:42]: it would provide a new way of, ah, thinking about complementarity and a new a new use for the Complementarity Toolkit or other programming. If the EU would maybe look more specifically at, how can it support the completion strategies that the, OTP and the court is also planning to do based on the OTP's completion strategy. So., I think I would be really, and I would recommend that did not be done at a policy general policy level, but take particular countries you know, take particular countries. And that could be either one where the ICC is just starting its work. Because, as I said, I think some of it takes a lot of time. So, it's like never too soon to talk about what needs to be done to support, um, everything from civil society to journalism, too. ehe investigators and the prosecutors themselves. Like all the things that it takes to have kind of credible national proceedings that are observed and have meaning for victims and have participation of victims in whatever ways are allowed under the domestic system. So, they could focus, the EU could pick a situation country that's just been opened. Or they could look at some of the situations uh, potentially the ICC's work coming to a close because they're even if we think they should still do more cases. You know, it's probably unlikely that they will do a lot more cases in some of these situations that have now been opened for 15 16 years. So, that would be, um, a way to get more specific. A way to get more concrete. Um, and to be more supportive, I think that they are doing a lot. So, I would say, like on the Special Criminal Court in Central African Republic again have another colleague who works on that. So, I don't know the details, but I'm

Speaker 2 [00:34:30]: I'm sure that the EU have been, you know, an actor. I'm not suggesting that they haven't done. You know, it's really more like I just I don't know, uh, but I think the way that they could get more interesting specific It would be supporting the ICC. But it would also be supporting national prosecutions to look at that intersection between completion and complementarity.

Speaker 1 [00:34:55]: I am just writing this down. That was actually the final question. So, I think we went through it really quickly, but I'm so happy with the information you provided me. So, it just gives me a few points that I could really focus on and do further research on for my thesis as well. So really like to thank you so much for that. Um, let's see. Yeah, so we have with us all the questions, and I think all we need is just that informed consent form, huh? But that shouldn't be an issue. You

can just a sight it digitally and an e mail back to me on once. Yeah, I'm done. If you'd like, I could send you a copy of my thesis for you to just read through.

Speaker 2 [00:35:44]: Yeah, I would love to, that would be great. Yeah.

Speaker 1 [00:35:47]: Yeah. Do you have any other questions for me? Um, anything you'd like to know.

Speaker 2 [00:35:53]: No. No, I think it's a great topic. Um, I had, um, an intern a few years ago. Studied in the same program on she really loved it. Think your school's doing a great job. So, it was a pleasure. Thanks for the interest in the topic.

Speaker 1 [00:36:09]: It is a really interesting topic. It is really intense. I must say, it is really intense, and you say differs per State. But it is nice to just know about what's going on and how it can be improved because, yeah, the case at the ICC are the most severe cases that are on the earth. So, it is just nice to have the knowledge about it.

Speaker 2 [00:36:34]: Yeah. Yeah, and it's really a hot topic. Complementarity. It's become hot again. There's a lot of discussions going on in the Hague among State Parties. So, you kind of picked a good moment to look at it

Speaker 1 [00:36:49]: Exactly. Because if you also look at the resources, like it was hype around 2010, 2011 and then it died down all those years. And then now, the past two years, I started being a hot topic again. So, you can also see the resources that are available on this topic as well.

Speaker 2 [00:37:08]: Yeah. Yeah, for sure for sure. Good luck with everything. And I would love to read your thesis when you're when you're finished with it.

Speaker 1 [00:37:16]: Thank you so much for for sitting down with me.

Speaker 2 [00:37:20]: It was a pleasure.

Speaker 1 [00:37:22]: Thank you. Have a nice day.

Speaker 2 [00:37:24]: You too. Bye bye have a nice weekend.

Speaker 1 [00:37:26]: Bye.

Annex 5.2 : Personal interview 2

Interview 2 – Parliamentary Research Administrator

13 October 2020 – 00:28:30 Min

Speaker 1: Interviewee 2 European Parliament
Directorate-General for External Policies of the Union
Speaker 2: Researcher

Speaker 2 [00:00:01]: So, the recording is starting right now, and I just think it's good to dive into the questions.

Speaker 1 [00:00:07]: Yes.

Speaker 2 [00:00:08]: So, the first question is do you view the principle of complementarity as a critical aspect of the EU's support of the ICC?

Speaker 1 [00:00:23]: um, you mean what is critical in the sense, whether it's important for the ICC?

Speaker 2 [00:00:28]: Yes.

Speaker 1 [00:00:28]: Yeah, yeah, absolutely. I mean, it's one of the key principles of the whole set up, I would say on the fight against impunity and of the ICC statute. And I think this is also recognized in the EU's approach.

Speaker 2 [00:00:42]: And do you feel that over the years, the EU has also adequately supported the complementarity principle? Or do you think they could have done more with their policies or with their actions?

Speaker 1 [00:00:55]: Um, I mean, there's always something which for which you could have done more. But I think really on the fight on, generally on the support of the ICC. And I mean the EU is really in the forefront. And, I would also say that its support for transitional justice mechanisms and other just I mean justice aspects in third countries. The EU is also I mean, I think one of the supporters. However, I think overall, when you look at the EU's Development Corporation, which is one of the key mechanisms to help justice systems in the countries develop, it's not the most important focus sector in the EU aid. So, certainly that could be done more in terms of the priorities. But on the other hand, there are so many priorities. I mean, there is energy, there's food so and justice is also a super complicated sector to support. So yes, that could be done more. But still, I think in comparison that you said in the key actor for the ICC.

Speaker 2 [00:02:08]: Um So are you aware about the EU's Complementarity Toolkit?

Speaker 1 [00:02:14]: Yes.

Speaker 2 [00:02:15]: And is that something maybe you've worked on or something you use in your field of work? Or not?

Speaker 1 [00:02:23]: Not really, because it's not. I mean I mean working in the parliament, and it's not I mean, it's not part of the off the daily work. I think that those in Parliament who work on impunity issues, they're aware of the importance of the complementary principle. I mean, parliament has adopted a specific resolution on genocide, war crimes and crimes against humanity. I think it was maybe 2018 and there was a strong focus on complementarity. But it's not something for the daily work of the Parliament.

Speaker 2 [00:03:03]: Okay, thank you. So, the complementarity Toolkit it was published in 2013 and we're now in 2020. Do you feel that the complementarity toolkit it is due for an update? Or maybe it must be revised or evaluated in some kind of way?

Speaker 1 [00:03:24]: I can't say whether it needs an updating. I have to say, um, about the evaluation. Yes. I mean, as you know, we have just published a study on impunity, and that's one of the recommendations of the expert that indeed it would be important to look at how to what extent and has been implemented. So, I think a review of where we stand on complementarity notes on the wider approach to impunity for international crimes, I think would be useful. But then, you know we have limited resources and the human rights sector and there is so many competing priorities. I mean, it's just a matter of.

Speaker 2 [00:04:11]: thank you. The next question is in your expert opinion does the complementarity principle currently work in law as in practice. So, the way it had been laid down in the Statute. Is that the way that it has also been working in practice as well?

Speaker 1 [00:04:31]: That I cannot answer because for this I mean, I would need to look at the concrete. umh concrete country situations and compare and the ongoing investigations. And then I couldn't give a, uh, really well based answer to that.

Speaker 2 [00:04:52]: Okay. Okay, that's fine. Um, the next question is; does the prosecution of an ordinary crime, for example, murder in opposed to, ah, persecution of the international crime, like war crimes satisfy the same case requirements? So, do you feel if the perpetrator is, um, prosecuted for murder at national level, that it fulfills ah, the same requirements for the same case?

Speaker 1 [00:05:25]: You mean, whether it should require the same like conditions off...?

Speaker 2 [00:05:32]: Yes. So, like national national States can choose to prosecute war crimes as murder, for example at national level. Do you think that ah, that resonates with the severity cases of work crimes? Or do you feel like war crimes just needs to be prosecuted as war crimes or national level as well and can't be ah, used as a murder, for example?

Speaker 1 [00:05:56]: ahhh, I'm not. I have to say I'm not a lawyer. I don't know of any discussions about that, but I would say my my immediate reaction would be that there should be a specific ahh specific provisions in the criminal court before for, for, for an international crime.

Speaker 2 [00:06:20]: Okay, those provisions that could be used by national authorities?

Speaker 1 [00:06:27]: Yeah. Similar to the to the standards also which, which I applied by the ICC and basing it on on on international best practice.

Speaker 2 [00:06:38]: Yes. And is there may be a particular EU country where you feel that they're really ah ahh. like in the forefront of ah prosecuting national crime, I mean international crimes on a national level was? Or is there no contrary you are aware of?

Speaker 1 [00:06:58]: Well, I think they're several. I mean, um I mean, first of all, I think in many countries where you have grave human rights violations which which which, which, which fulfil the conditions off international crimes. Unfortunately, often there is either a lack of political will or a lack of capacity. So, I mean, that's why we need the ICC? But I think there is more and more I mean attempts with specialized accords and transitional justice mechanisms. And I think like in the study, when on which lining the cases that we had selected there, I think for some, Colombia is an interesting case where where there is an effort to to try to find an approach at at the domestic level with support of the ICC. And another case which I think is more complicated but also a bit more, let's say innovative is in the Centre African Republic. Um but I think it's because of these difficulties of there's always a political.... political aspect to these prosecutions at national level. So, it is good that there is a close cooperation with and close monitoring by the international community and the ICC. But these are two examples, I think they're interesting attempts, developing to to deal with the with the past.

Speaker 2 [00:08:28]: Okay. And do you think that the ICC is fairly criticized for being inconsistent ahh and lacking to provide national jurisdictions with a clear vision and guidelines in regard to jurisprudence on complementarity? Because currently they look at cases on case-to-case basis, so they're not really clear guidelines for nationals to ahhh yeah, to look at. So, to make sure that the ICC is are not do step in, they don't have guidelines to prevent intervention from the ICC?

Speaker 1 [00:09:05]: Um, well, I think about the whole discussion about the ICC being inconsistent. I think there's also it's not always, really well represented the way ummm the way that the cases have been, I mean that there are many cases in Africa. There was this criticism that there were too many cases in Africa. And now I think there is more many investigations also ongoing, which which are not in Africa. When it comes to the criteria for for persecuting at the national level. Um, I cannot answer that question whether that I mean, whether the ICC should be more, I mean, should provide the guidance. I think the guidance should come from from the international conventions that we have, which on are for example, on genocide. I mean, there's not one on crimes against humanity, but I mean we have international standards which which which should be sufficient for countries to see whether they have to prosecute or not. I don't know whether this is umm....

Speaker 2 [00:10:18]: That is fine, thank you. ummm And do you feel it's likely for States and maybe EUMS, for example, for them to misuse the principle of complementarity? So, instead of them taking accountability of ahhh prosecuting international crimes, them rather being reluctant and saying, well, we're just going to leave it up to the ICC to handle these cases.

Speaker 1 [00:10:48]: Um, I mean, so far, what I would say it's rather the opposite. I mean, I would rather see that there are many problems with corporation with the ICC, rather than, you know, over over referring to the ICC. Because you don't want to do it home. I mean, in theory, that could be that risk. But honestly, at the moment, I'm not quite. I don't really see many examples that would support this.

Speaker 2 [00:11:19]: Okay, And do you feel that the ICC is burdened with too many cases because over the years they have not aahhhhh they have a lot of open investigations that have not really proceeded to the next step. And some criticism is because the workload of the ICC is just too much and national States are not really relieving the ICC from from that workload, eh? So, do you feel like national States or even the EU should do more to make sure that the ICC remains a court of last resort?

Speaker 1 [00:11:54]: Yeah, I mean, I think in terms of workload I mean, if you feel I mean just not I mean the sheer number of cases off international crimes. Unfortunately, I mean already I mean this It's impossible, to to tooooo.... deal with all that. So, there is a certain a certain selection and then the proceedings take, they take very long. Which is, of course, a problem in many respects. So, yes, that would certainly be. We're trying to provide it with more resources. Again. As I said in the beginning, I think the EU was really a top supporter of the ICC. And of course, I mean, they should should keep that up, and there's always maybe a possibility for doing more. But on the other hand, I mean, there should be also a balance support from other from other Member States of U.N. Member States, or, I mean, ICC State Parties. So, or maybe new ways of, one should think of new ways of financing. But this one has to, would have to be innovative and then really finalize off course agreement. So, it's not, I don't know. See, I don't know, say needs a solution. But of course, more resource would probably be more important to make sure it can can do its work.

Speaker 2 [00:13:10]: Yes. Um and you do you feel that there are additional ways that the EU could support the ICC's complementarity principle. I've heard of I've read where some scholars are suggesting some kind of victim support, for example, for victims of these international crimes offering in some kind of refuge,

Speaker 1 [00:13:31]: Sorry... some kind of what?

Speaker 2 [00:13:34]: Aaah some kind of asylum because usually, like were crimes of war crimes or genocide, victims can't go back to their aaaahmmm to them to their homes, to her place after, after testifying for the ICC. Uhhmm, there are some suggestions being made of offering... Of the EU supporting in this victim support while the trial is... uhhh while the trial is still going on.

Speaker 1 [00:14:10]: Yes. Yeah, I think this is of course an area where the EU could step in and support. And then there's also I know there are suggestions also for finding new solutions for remedy for for victims. uhhh and this is also an area maybe where the EU could.... could.... that could come in. There is some, it's called, what is it called... like impact investing model. So, where you would bring in innovative financing even from the private sector, maybe into into funds and then to find you new financial resources for remedy payments. Um, otherwise, I think and an interesting development at the moment where the EU has been very much behind, are these new investigative mechanisms set up by the U.N. So, which are which. so, to say, they do the first part of the work for investigation. I mean in the sense of the investigations, which can then be used by domestic court once they are already and willing to prosecute and to uhhmm. So, I think this is an innovative mechanism and maybe this can be extended because at the moment it's case. But I mean, this country, we have this for three countries situations. I mean the specific situation. Maybe this could be, um, extended. Um and yeah, I think the EU is very. where the EU's very good at is also at supporting, I mean civil society and human rights defenders and activists who fight for accountability efforts at national level. So, I think this is a tool which, where the EU was good at. And I think they're already doing that, so if you're having a country which should set up its its domestic system to prosecute international crimes, and you need also mean forces which push for that. And it was so overcome that resistance is, so the EU is in the support off civil society which.... which supports the fight against impunity and national level there? I think it can. It can use its tools even, maybe in a more targeted manner. But again, also there we have many competing issues, we have environmental crimes. We have I mean, Gender Issues. We have torture, we have stability. So, it's one among many.

Speaker 2 [00:17:10]: Exactly. And do you feel that it is even feasible for EU to even do more than they're doing right now? Like, is it something we could expect from the ICC? I mean from the EU to provide even more support because they're almost one of the largest financial supporters of the ICC. They do also more with their MS as well. So, is it feasible to even expect more support from the EU on this topic? Or as you said, there's a lot going on besides international justice, Of course, or is it something that just has to develop in the coming years?

Speaker 1 [00:17:52]: Um, I think that, um, with that financing tools the EU can... can probably do more. Also, in its diplomatic relations and can even push more by putting the impunity issue on the on the on the agenda. Um, on the other, internationally we see that, I mean, the ICC suffers from pressure as other international organizations in the area. And... So, whatever the EU does in the field of human rights or international justice is becoming more difficult. Even the EU, if it does more and puts more efforts at the same time, the conditions that more, more, more difficult if we see now, is that U. S position and the number off situations rather being on the on the increase where you should normally interfere with with international justice. So, um, I think yes, I think the EU will work on it and trying to flow the improve and strengthening the approach. The parliament is very much behind that and continues to be a very strong support of the ICC. But at the moment, at the same time, the hurdles become become more problematic. And then there is of course with this kind of division, international division, where it comes a bit too can become a bit problematic is that you're not necessarily find consensus EU level on some questions regarding international justice. I mean because yeah, because also the internal split in the EU. So, I think, yes, they would try to do more, and at the same time, it would become more difficult for different reasons. But this is more political, I mean, more geopolitical argument and, you know, But this is an in which the whole, um, EU policy is developing and in which which shapes its success.

Speaker 2 [00:20:07]: Yes. And is there a specific ah, tool or resolution? What you were you feel that I t's ah, it's something that really needs to be looked more into regards in fighting... in regard to fight against impunity? So, 1 or two resolutions or tools where you would say, like this is something that deserves more more attention, actually than it's getting right now?

Speaker 1 [00:20:36]: I mean, when you say resolution, you don't mean parliamentary resolution. You mean what do you mean by a resolution?

Speaker 2 [00:20:45]: Well... that could be Ah, that could be, um how do you say that? That that could be Ah, yeah, exactly. So that there could be one of the objectives of the EU Or it could be, ah, one of the documentations released by the EU as well.

Speaker 1 [00:21:16]: uhhmm, I think where... The parliament has been very much behind in in recent years and where I also think that more can be done also by the EU and within the EU is the whole issue off universal jurisdiction. Now, this is of course also complicated. I mean legally and politically complicated area. But the way we see where the ICC reaches its limits and were well, domestic courts can't can't, can't or don't want to do their work. I mean, this is an avenue which I mean, it's becoming more and more relevant now with perpetrators being on European soil. But not all the MS are doing, I think what they could do. And, if this is like, like an idea which I mean, maybe which could could be further developed and maybe also other. I mean, not only that you other countries could also contribute through universal jurisdiction. So, we limit... I mean we extend further the avenues which can be pursued to... to... to ensure accountability because we have these these other limitations. So, I think this is something we're each State which is willing to help, can maybe contribute. So, this I think something where more work could be done.

Speaker 2 [00:22:37]: Yes. And well what do you think that MS could contribute even more to the fight against impunity?

Speaker 1 [00:22:45]: Yeah, for example, first of all, the EUMS, they all have their own bilateral diplomacy. So, and I'm not sure whether all of them put the same focus on ICC and accountability as issues as the EU does. I doubt it. ahhh then as I said universal jurisdiction. Yeah, as you know, maybe know, there's this Genocide Network in the EU, which tries to, you know, exchange, best practices and ideas and these war crimes unit with some countries have with specialized experts, which can ensure that if you have international crime perpetrators on your soil and you can really then victims and then you can't really start an investigation properly and with the necessary capacities and resources. And I think this kind of good practice could be a, ... it could be extended, in other MS. And as far as I know also, the legislation is not the same in all MS. I am coming from Germany. So, which is quite as I understand one of the few countries which is quite still quite, I mean, um, which makes it rather easy. Or it is possible to to... apply universal jurisdiction under certain conditions. And it's also happening and so I think other MS could maybe, I mean, they should exchange best practices and see, But what what legislative? What legislation is is helping this kind off, uh, processes and injustice. On the one hand, it just universal jurisdiction on the other end. Through this genocide network, there is close exchange with the ICC because sometimes you're in kind the same kind of situation. So, maybe the same kind of expertise and.... facts and evidence which can be shared. So, I think there's working at different levels on the same country situation to something which would be probably the future or continue to be reality.

Speaker 2 [00:24:54]: Oh, that was actually the final question on. So, we have gone going all the questions. I don't know if there's anything more you would like to to say on this topic or aah are something you feel that's important? Uh, what could be maybe important for for my research for the topic.?

Speaker 1 [00:25:16]: No, but the only thing that I had already mentioned I think if you are interested in the EU policy as I understand it, I don't know whether you're looking at it more from a legal point or from the political science point of view? Then I would really advise, not also had to look at also look at the Parliament's position on this matter. So, as I mentioned, there has been a specific resolution dealing only with international crimes and to see what Parliament recommends in the area of complementarity and what it demands from from the other institutions. Because the parliament, of course we're not.... Parliament in the end also has a strong say on how the budget is spent. So much money would go to... to what extent you have this kind of issues in in the different support and aid programs. And so, so I think it would be interesting to look at this resolution may be and to see Parliament stands and what and what direction it pushes. I think it's from 2017. If you don't find that, you can send me an email. But if you if you search it online you could find it.

Speaker 2 [00:26:19]: Thank you very much, I will have a look online and contact you if I am unable to find it. If you are interested, I could e-mail you a copy of my final research paper.

Speaker 1 [00:26:19]: Yes. That would be nice.

Speaker 2 [00:26:19]: Again, Thank you very much for your time. Have a nice day.

Speaker 1 [00:26:19]: Same to you, have a nice day. Bye.

Speaker 2 [00:26:19]: Bye.

Annex 5.3 : Personal Interview 3

Interview Mr. Matevz Pezdirc - Head of *Genocide Network Secretariat*

19 October 2020 – 00:28:25Min

Speaker 1: Researcher

Speaker 2: Mr. Matevz Pezdirc

Speaker 1 [00:00:00]: The first question is do you view the principle of complementarity as a critical aspect of the EU's support to the ICC?

Speaker 2 [00:00:14]: Yes and no, in a way. But, um um, I think more, more maybe, you know, because

Speaker 1 [00:00:23]: uhuhmm

Speaker 2 [00:00:24]: The EU is supporting the ICC because it's a permanent the court and the principal complementarity deals more with this show of how, what's the obligation of States? So I wouldn't say this is a critical aspect.

Speaker 1 [00:00:43]: Okay, so you don't think ah by making it as a priority in ensuring that States prosecute core international crimes at national level doesn't relief the ICC from ah from their workload?

Speaker 2 [00:01:02]: It does. But that's in any way their own, I think, we are having a bit of a different understanding of this. The way I see the principal complimentary is, yeah States should do their own obligation of their own homework and prosecute these cases whenever they are in a position to do so.

Speaker 1 [00:01:20]: Yes.

Speaker 2 [00:01:21]: But that's not, that's different than the EU support for the ICC. Which is, in my understanding is not devoted to the prosecution's, it's basically devoted to the to the political support and financial support. So that's why I'm not making this linkage, that this is a critical aspect. It is a very important one, but it's not a critical one. I think that even if there would be no principle of complementarity foreseen, The EU would still support the ICC because it's permanent. It's ah, long term judicial tribunal, basically, court, to deal with the most horrendous crimes. And I think that, um, if we follow your argument, that State, because the EU is supporting... the EU is supporting, um, ICC because States need to prosecute. It's basically contradicting itself.

Speaker 1 [00:02:25]: Exactly. Yes. No, I understand. That's really good input. Actually, you're the first one to see that from that perspective.

Speaker 2 [00:02:34]: How many other interviews you had?

Speaker 1 [00:02:36]: Three.

Speaker 2 [00:02:37]: With whom?

Speaker 1 [00:02:40]: Ah, well I had an interview with someone from the European Parliament. Um, and I had an interview with someone from the Human Rights Watch.

Speaker 2 [00:02:50]: Which one from Human Rights Watch?

Speaker 1 [00:02:52]: Uhm Liz Evenson. I don't not if you know her.

Speaker 2 [00:02:54]: Yeah, yeah.

Speaker 1 [00:02:56]: Yes, I had an interview with her.

Speaker 2 [00:02:58]: That's why I'm asking because this world off international justice is pretty tiny, so on. And so I'm the third one or am I the fourth one?

Speaker 1 [00:03:08]: Yeah, you are the third one.

Speaker 2 [00:03:10]: Good.

Speaker 1 [00:03:12]: Uhhh so the next question is; over the years, do you feel that the EU has adequately supported the ICC's complementarity principle through its policies and actions?

Speaker 2 [00:03:27]: Now, you're asking you know, a practitioner there so we could always say that the EU and then again, this is an issue. Like, who do understand as in EU? Uhhh the Commission, the Parliament. Ah, the Council? So, that's a bit of how how do we understand who EU is? Um, this is the external action service? So, EU is many things, even the States are EU huh?

Speaker 2 [00:03:56]: Yes.

Speaker 2 [00:03:56]: So that's maybe what I need clarification from you prior to answering.

Speaker 1 [00:04:03]: Ah, well, I think it is good to make ah, um a division between national States, because as you said MS could also be seen as EU. But I'm specifying it more on the ah EU level. So the Commission, the Parliament, and even, um, institutions as Eurojust for example.

Speaker 2 [00:04:28]: I mean, here I would make a distinction. What we're referring to support for the ICC complementarity principal. I'm usually making the distinction, were EU support to accountability on internal and external dimensions. So, internal is what we usually describe as justice and home affairs area. Um, and the external is basically support to third countries. So in a way, yes, there has been. And basically, you have, you can read, um, on these issues huh. And there is a recent European Parliament paper on accountability mechanisms written by Olympia Beaucoup. Have you seen that one?

Speaker 1 [00:05:14]: Yes, I've seen that one.

Speaker 2 [00:05:16]: Okay, then you have one also that was drafted by her. But it was probably 10 years ago. That one was also very nice, exactly in these issues on complementarity principle. And I think majority of those ah, still remain. Um, then you have yeah, those two are kind of quite quite essential. And then, um, now whether that's adequately, it could be better. But it wasn't the way it was, I think quite a lot of effort done. And recent also defending the ICC in the recent issues with with US. So I would say adequate so yeah.

Speaker 1 [00:06:07]: Okay okay, thank you. And are you also aware about the EU's Complementarity Toolkit ?

Speaker 2 [00:06:14]: This is not EU this is a European external actions service. That's what I was saying. Just a general remark, try to work very concise and detailed to this these questions he,

Speaker 1 [00:06:31]: Yes, I will.

Speaker 2 [00:06:34]: We actually have a lot of interns in our Genocide Network and I always try to use the opportunity also to explain.... Yes, I'm aware. Absolutely. Yeah. There. Yes.

Speaker 1 [00:06:58]: Yes. Okay. And as you an aware maybe that the Complementarity Toolkit was published in 2013, ah and we're now in 2020. And do you feel that the Toolkit is due for an update or maybe an evaluation?

Speaker 2 [00:07:17]: It depends who's the the addresses, is that policy makers than that's still ok. Um, if it's ah, um if you want more to touch upon practitioners and definitely needs a blade. I think in any way such a such a kind of a Toolkit should to be, yeah, since it's seven years ah, it should be updated and more compared more Ah, case descriptions, case example. So that, um, States can understand better. What's ah, what's requested.

Speaker 1 [00:07:52]: What is requested.. of course, of course, And.. and in your opinion, do you feel that the complementarity principle works coherently has it is in practice?

Speaker 2 [00:08:05]: Now, I need to to ask you, in which countries? for which countries do you see this?

Speaker 1 [00:08:13]: So, I might think this specifies on the EUMS.

Speaker 2 [00:08:17]: Okay, because the Toolkit is not meant for EU Member States?

Speaker 1 [00:08:26]: Yes, it's meant for third countries. Yes..

Speaker 2 [00:08:32]: Yeah, that's ah in a way, when I was previously on question two replying ah whether EU is adequately supporting the ICC. I made the distinction between internal dimension and external because external is what you do in support third States and what EU does in relation to national jurisdictions. In relation to national jurisdiction. So now if you're interested in MS yes the EU has done quite a lot and that's what we are, we have also foreseen or acknowledged in our strategy. I don't know if you read that paper Genocide Network strategy. It's available on our website. So, um, I think it has done quite a number of actions. But of course more could be done. You still have two Member States that have not implemented the Rome statute crimes, are you aware of that?

Speaker 1 [00:09:30]: Yes, I am aware of that.

Speaker 2 [00:09:32]: Which two are those?

Speaker 1 [00:09:34]: Ah, let me see, I have it in my graph. I am just going to open it. Um..

Speaker 2 [00:10:04]: Now, I'm giving hard questions for you

Speaker 1 [00:10:07]: I did have.. I did check it. Let me see. Well, do you mean by ah, like have ratified the ICC statutes or, ummm?

Speaker 2 [00:10:25]: No I mean implementing the crimes,

Speaker 1 [00:10:29]: Implementing the crimes. Okay, Well,

Speaker 2 [00:10:31]: That means transposing definitions from the Rome statute International legislation. That's also the idea of the principle of complimentary. You need to have these crimes in your own national legislation.

Speaker 1 [00:10:46]: Well, according to my research, there are few countries that haven't implemented the crime of aggression yet.

Speaker 2 [00:10:52]: We'll forget the crime of aggression, that would take quite some years.

Speaker 1 [00:10:56]: Some years. Okay. Ah. And also, there are some countries someone ratified the Kampala Amendments, and that is I have

Speaker 2 [00:11:04]: It's still I'm undaunted. That's still That's like, you know, that's faculty. We're talking about primary school of primary homework. It means for transposing a 98th Rome statute definitions of war crimes, crimes against humanity and crime of Genocide in your own national legislation.

Speaker 1 [00:11:25]: Ah, let me see. Well, I have here that the Bulgaria who still doesn't have the crime of crimes against humanity. I know that's correct.

Speaker 2 [00:11:37]: I think they have it with, but anyhow. It's basically Italy and Denmark that are the ones that

Speaker 1 [00:11:43]: Oh,

Speaker 2 [00:11:45]: um, so that refers to your question. Whether it works, whether it works, whether it works coherently in law as in practice. Yes and no.

Speaker 1 [00:12:03]: Yes and no...

Speaker 2 [00:12:04]: Basically, um, in a way, it's it it it does. Because so the ICC is concept of the principle of complementarity that the States are obliged. And this goes beyond the EU that the States are obliged to do their own work. If there have suspects, works in countries like Germany, Netherlands, France, ah Belgium, Sweden, Finland. But it doesn't work in some countries where the either don't have appropriate legislation or they don't have, um or they don't have specialised stuff. Who would understand what these crimes are? Therefore not having their ear and eyes open to investigate and prosecute them. So would actually say for this question, if you want to elaborate on that check the ICC website on the implementing legislation and they will see which countries have implemented Rome Statute and which one haven't. And then you will get an answer whether that works or not. For the EU, you could say it works in in 80% off countries because they have implemented or maybe even 90. But you should also maybe look broadly of all State Parties because it's not enough just to ratify the Rome Statute. That just gives you a political kind of agreement with the concept with principles. But operationally doesn't allow you to do much.

Speaker 1 [00:13:34]: Yes. So, it also needs to be implemented to the national...

Speaker 2 [00:13:37]: Exactly.

Speaker 1 [00:13:37]: Ah, thank you. So the next question is, um, that does the prosecution off ordinary crime such murder and opposed to an international crime such as war crimes satisfy the same case requirement? I know there was ah, a paper published in May 2020, were a lot of EUMS like Germany, the Netherlands, Hungary, France, Sweden and Finland, who are prosecuting ah, um ISIS members or fighters in their national in the national courts. Ah. Do you feel that they should be a distinction within persecution some crimes as, ah, terrorism acts or rather, as one of the international core crimes?

Speaker 2 [00:14:34]: Yeah. Well, since I wrote that paper, you know my position. No. So, basically, I'm advocating that States should prosecute whenever possible, both. Because, like, let's put slavery as an example. So you have ah, Yazidi family to the work of slaves in your household. Now, how would you prosecute under counterterrorism legislation? It would be extremely difficult because you're not endangering any organisation or State. You could hypothetically argue, you're spreading Ah, um um, terror among civilian population. But not all because you're just targeting a specific group.

Speaker 1 [00:15:28]: Yes.

Speaker 2 [00:15:29]: So, basically, you can't do much under terrorism legislation for that kind of factual description. But it's a clear case either slavery is a war crime, crime against humanity or a genocide.

Speaker 1 [00:15:42]: Yes, as it also said in the reports. Some States are able to prosecute that both and some States are not able to prosecute it as both.

Speaker 2 [00:15:51]: Thinking it's not the issue off being able. It's the issue off understanding that you can do that if you have it in your legislation. The majority could do it.

Speaker 1 [00:16:08]: Thank you.

Speaker 2 [00:16:08]: And I think what your questions seeks, in more you might not be completely correct because, um, ne bis in idem relates to the factual circumstances, you can't prosecute twice for the same act. But here you're actually deciding that you'll prosecute. Ah specific act for a murder or you decided you would prosecute for war crime. So, I don't feel that this is that an issue of ne bis in idem. It's just how you define. But of course, if you prosecute a specific act for murder, then you cannot prosecute for war crimes. It's not the issue whether that satisfied the requirements with same came ne bis in idem. It's it's not really on. I think you're you either. Concepts are not

Speaker 1 [00:16:58]: Aligning..

Speaker 2 [00:16:59]: Yes aligning..

Speaker 1 [00:17:03]: Thank you for that remark. Um, the next question is do you think that the the ICC is fairly criticised for being inconsistent or lacking to provide national jurisdiction with the clear vision and guidelines? Especially when it comes to jurisprudence on ah, complementarity.

Speaker 2 [00:17:29]: Why would they be consistent and lacking clear vision and guidelines on this issue?

Speaker 1 [00:17:36]: ahhh there are some criticisms that say, because the ICC looks at cases on a case-to-case basis, so they don't really have clear guidelines that national States can ah.. can consult to make sure that they fulfilled their requirements of investigating or prosecuting a case.

Speaker 2 [00:17:58]: I don't really follow that argument. So I'm sorry, I don't really.. If you if you basically guide me. Which are those arguments and which situations they refer to?

Speaker 1 [00:18:15]: So ah, for example, you have States that are trying to, ah prosecute or investigate national crimes, aah international court crimes I mean. Um, and some of them feel like they don't have the guidelines or clear jurisprudence they could use to ensure that the ICC still does not have to intervene. Ah, in the prosecution or investigation of the international core crimes.

Speaker 2 [00:18:49]: Mmmmmmm.

Speaker 1 [00:18:50]: So, they just have some guidelines or points they can uhhh consult and see like let's check these boxes to make sure we're doing the right things so the ICC....

Speaker 2 [00:19:04]: But you can't put this all these issues in the boxes. Then that's the idea that you put it, you say, have this shame trials that you put, um, certain off your suspects into a national procedure. I'm looking already on you on your next question. Number eight. You put him in your own national kind of criminal procedure, but you don't prosecute them seriously. You prosecute them for I know ah, corruption, maladministration and not for war crimes, for example. And then you say? Well, no, we're doing what we can, or you prosecute them, even for war crimes. But you are not serious about that because you know they'll be acquitted at the end. So and then that's the issue off, unable or unwilling. So I think that they are quite clear guidelines on that, whether you're unable or unwilling. But the States probably don't want to agree with that. Well, then that then they would use this argument like we don't have clear guidance, but it's it's quite clear. I mean, from perspective of the ICC I think it's already in the Statute. Inability, unwillingness. Then, of course, you can break down that, you had that in Libya and Gadhafi case. So, um, that's an interesting example of your question. I, um so ...

Speaker 1 [00:20:34]: So in your...

Speaker 2 [00:20:35]: I think you had there an opinion. Where the ICC said, why that kind of trials that Libya was was conducting, um is not is not aligning with Ah, it's not fulfilling the criteria, for it's basically fulfilling criteria off inability and unwillingness in a way. So, to put it the other way around you.

Speaker 1 [00:21:07]: So, if I understand you correctly, you feel that the guidelines are clear and usually just it's usually that States that are..... are unable or unwilling, who feel like they don't have clear guidelines?

Speaker 2 [00:21:23]: Exactly, exactly. Otherwise States who are genuinely interested, and it's like what you see now in Gambia, um, Gambia made a change in regime some some years ago. I don't know if you're aware of that situation.

Speaker 1 [00:21:42]: No.....

Speaker 2 [00:21:43]: But, um, they had a dictatorship and widespread torture. So, not war crimes but crimes against humanity. They're basically change than they have the uprising and the coupe basically of... and a new government, which is much more democratic and oriented. And they're basically... the new government is trying to prosecute former regime, and they're doing that with willingness. And and and the issue is, I think, here is willingness ability is an issue off support. You had that basically, um, in Senegal, hum with the special African chambers for the trial of Hissène Habré. And Senegal didn't have ability at that moment, but they build up ability fairly quickly with assistance also of the EU by financing that, um and also by expertise. So ability in my view is only argument off those who are unwilling. If you have willingness you will be, you might not have ability at the same moment, but you can build ability in one or two years to put ah, or three years to put ah, good court in order. So at the end of the the day, it's always the question of willingness, but the genuine willingness. If you want to do it, you will do it, and also ICC will support you in that. If you want to, you know, or protect your own nationals or kind of pretend you're doing something, well then that will not fly.

Speaker 1 [00:23:30]: That will not work exactly. Thank you. That's a good...that's a really good inside actually. You, um you already talked about the next question, question eight. If it's likely for States to abuse the principle of complementarity. So I don't know if you want to add anything onto that.

Speaker 2 [00:23:52]: No. I think.. I think it was quite clear that.

Speaker 1 [00:23:55]: Yeah. Okay ahhhh, well we're on the final question and.... in what additional ways ah, can the EU support the ICC's complementarity principle? You already made a distinction between internal and external. So, I will just specify it too internal.

Speaker 2 [00:24:19]: Yeah, in terms of internal, they could do more in terms of capacity building. Because EUMS also require, um, capacity to proceed with this case is because not many of them have experiences with these case with these cases, but with impractical or in the light off migration and in light off the proximity of Syria and and die ASHA um, component. Ah. And then we come back to these community's prosecution off foreign terrorist fighters. Um, many MS are not a fully equipped or do not have capacity to really proceed these cases. Uuhm and then that's an issue where I think more could be done in terms of capacity building trainings, um, and so on and awareness raising as well.

Speaker 1 [00:25:18]: So, trainings, workshops and awareness raising.

Speaker 2 [00:25:22]: Yeah, that's in in one word that's capacity. I mean, you know, you do have prosecutors, you do have offices. You do have staff there, but it's just basically the component of training, awareness, knowledge. And when we look into external, then you have an issue that in many States you who are State Parties to the ICC, you have a questionable rule of law. Um, um, situation you might not have appropriate courts capacity, sufficient number of prosecutors, and then also knowledge and all of that. So that's maybe even broader more support them on that.

Speaker 1 [00:26:06]: From the external point of view.

Speaker 2 [00:26:09]: Yeah, for supporting third country yeah. And that's in a way, what EU and ICC are doing both.

Speaker 1 [00:26:19]: Yes. Well, that was the final question. Um, I don't know if you have anything more you'd like to add.

Speaker 2 [00:26:25]: Just the question is whether you plan to use any, um, quotes? or you plan just to in your in your thesis to elaborate with who you had interviews with and then basically a general text without specific references to persons?

Speaker 1 [00:26:45]: Um, it is maybe a combination of both, depending. First, I will just be given overview comparing your, um, your opinions on this topic and your input. And then I could maybe quote ah, quote you in my thesis as well.

Speaker 2 [00:27:04]: Okay, then. If you plan to quote me, then I would appreciate if you can actually send me those quotes in advance for notification and information.

Speaker 1 [00:27:16]: Okay, So? So I could just send it to your personal e mail or email oh ahh..

Speaker 2 [00:27:22]: You can send it me on my personal e-mail, that fine.

Speaker 1 [00:27:25]: Okay, so I will do that. Send the quotes. Yes, that's that shouldn't be a problem. It will probably just be one or two quotes, but I will be sure to send them before I put them into my thesis.

Speaker 2 [00:27:42]: Okay, that's fine.

Speaker 1 [00:27:45]: Well, once again, I would really like to thank you for taking the time to answer my interview question and also for being really critical on my questions, because it's also gives me ah, few points for me to improve aahhh... for my thesis. So, that's a good thing for me.

Speaker 2 [00:28:06]: Yeah, you are welcome.

Speaker 1 [00:28:10]: Well, thank you. And ah, you hear from me about the quotes.

Speaker 2 [00:28:14]: Yeah. Good luck with your thesis and you're drafting of that.

Speaker 1 [00:28:19]: Thank you very much.

Speaker 2 [00:28:20]: Okay, bye bye. Take care, bye

Speaker 1 [00:28:23]: Bye.

Annex 6 : Analysis Charts

Chart 1 : National Prosecution EU Member States

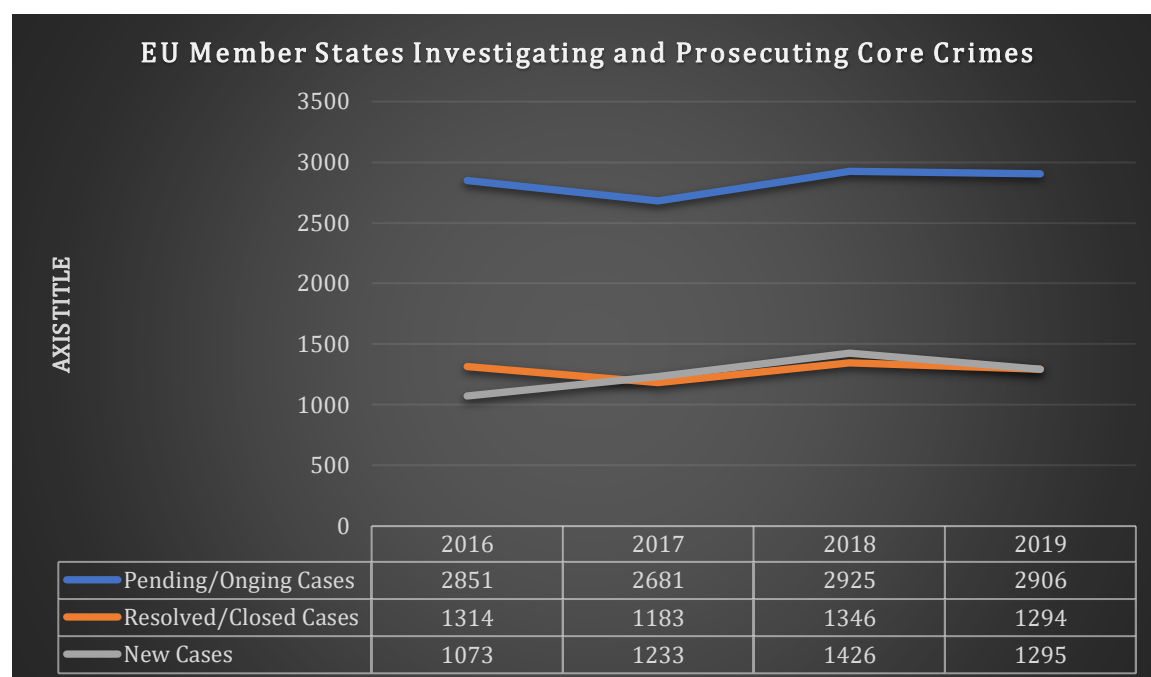
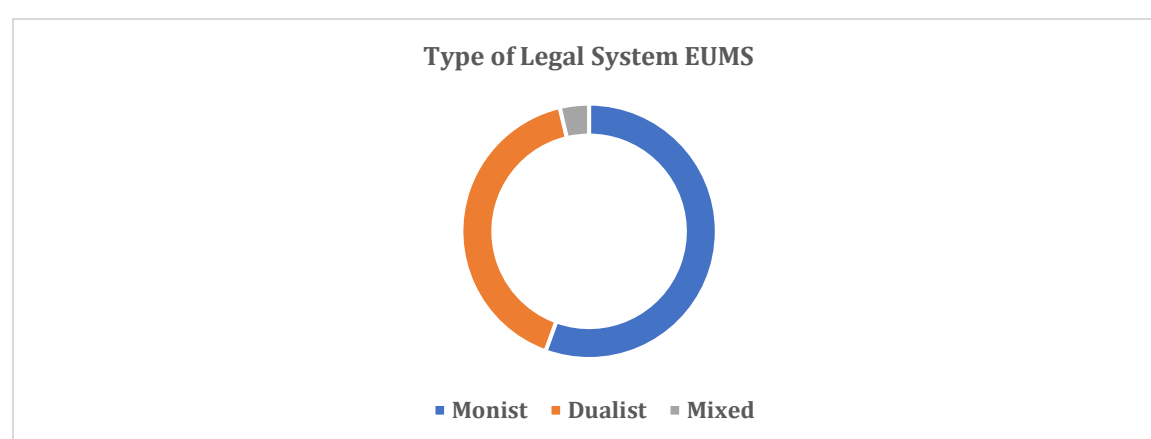


Chart 1: EU Member States investigating and prosecuting core crimes at national level (Eurojust, 2020)

Chart 2: National Implementation – Monist vs Dualist Legal Systems



Mainly Monist Legal System	Mainly Dualist Legal System	Mixed	Yes, has at least one national provision that covers these crimes	No existing laws that contain any provisions to deal with these crimes

Country	Predominantly Monist Dualist Legal System	National Transposition of Core Crimes Definitions			
		Crimes Against Humanity (National Implementing Legislation Database, 2020)	Genocide (National Implementing Legislation Database, 2020)	War Crimes (National Implementing Legislation Database, 2020)	Crime of Aggression (National Implementing Legislation Database, 2020)
Austria	Monist (Sloss, 2011, pp. 6-7)				
Belgium	Dualist (Ciongaru, p. 7)	The Belgian legislation provides much wider coverage in relation to non-international armed conflicts than the relevant Statute provisions (National Implementing Legislation Database, 2020)			
Bulgaria	Monist (Tanchev, 2015, p. 3)				
Croatia	Monist (Lang, Đurđević, & Mataija, 2019, pp. 1139-1177)	The legislation on a number of occasions follows the broader rules of customary international law, rather than the wording found in the Rome Statute. (National Implementing Legislation Database, 2020)			
Cyprus	Monist (Himoni, 2016)				
Czech Republic	Transitioned from a Dualist to Monist Only the treaties relating to human rights stand above the ordinary legislation. (Tanchev, 2015, p. 3) (Bobek & Pouperova, 2018)				
Denmark	Dualist (Sloss, 2011, p. 3)				
Estonia	Monist (Vallikivi, 2001, pp. 222-232)				
Finland	Dualist (Ojanen & Salminen, 2019, pp. 359-404)	All provisions of the Rome Statute of a legislative nature are directly applicable in the Finnish legal system. Where the Rome Statute is not sufficiently detailed or with regard to matters that are not regulated, Finnish courts will apply other relevant national legislation (National Implementing Legislation Database, 2020).			
France	Monist (Sloss, 2011, pp. 6-7)				
Germany	Monist (Sloss, 2011, pp. 6-7)			The traditional distinction between international and non-international armed conflicts is abandoned and war crimes are listed according to the protected legal object. (National Implementing Legislation Database, 2020)	
Greece	Dualist (Contiades, Papacharalambous, & Papastylano, 2019, pp. 641-683)				
Hungary	Dualist (Csatlós, 2014, p. 127)				
Ireland	Dualist (Irish Department of Foreign Affairs , 2020)				
Italy	Dualist (Kolb, 2014)				
Latvia	Monist (Ziemele, 2017)				

Lithuania	Monist (Vaičaitis, 2016, p. 157)				
Luxembourg	Somewhat Monist (Gerkrath, 2019, pp. 221-267)				
Malta	Shift from Monist to a mixed dualism/monism (Aquilina, 2012, pp. 217-249)				
The Netherlands	Monist (Sloss, 2011, pp. 6-7)				
Poland	Monist (Sloss, 2011, pp. 6-7)	Once Poland ratified the Rome Statute, it becomes an integral part of the Polish legal system and are therefore directly applicable. However, the crimes against humanity included under Article 7 of the Rome Statute are not yet penalised under Polish criminal law. (National Implementing Legislation Database, 2020)			
Portugal	Dualist (Tay, 1999)				
Romania	Dualist Only the treaties relating to human rights stand above the ordinary legislation (Tanchev, 2015, p. 3).				
Slovakia	Monist approach after July 2001. Only the treaties relating to human rights stand above the ordinary legislation (Tanchev, 2015, p. 3). (Koroncziová & Kačaljak, 2017, pp. 139-155)				
Slovenia	Dualist (Bardutzky, 2019, pp. 687-744)	Some crimes against humanity are not criminalised under Slovenia's criminal code, e.g. extermination, persecution and enforced disappearance (National Implementing Legislation Database, 2020).			
Spain	Monist (Tanchev, 2015, p. 3)				
Sweden	Dualist (Bondesson, 2015, p. 3)	Sweden has not yet adopted legislation on the crimes under the jurisdiction of the ICC. Currently, only genocide is criminalised in Sweden. The procedure for amendment of the Penal Code has been initiated, but has not been completed to date (National Implementing Legislation Database, 2020).			

Annex 7 : Extensive List of EU Projects

PROJECT	PURPOSE	PARTIES INVOLDED
The SIRIUS project was created by Eurojust and the European Judicial Network (EJN) in October 2017 (Eurojust , 2021).	SIRIUS is a secure web platform that assists investigators and prosecutors in the process of tackling the accumulated electronic information and evidence, such as e-mails, text and messaging apps. Furthermore, it provides trainings, innovative tools and guidelines to support the online investigations (Eurojust , 2021).	The European Commission's Service for Foreign Policy Instruments funds the projects. In addition to all EU Member States and 17 third States that cooperate with Eurojust (Eurojust , 2020). Over 5000 practitioners.
Iraq in 2018	The projects in Iraq provide training, sessions and resources on international humanitarian law and humanitarian regulations to the State, NGOs, CSOs, armed groups, politicians, journalist and traditional/religious leaders. This enhances the compliance for international humanitarian law (Council of the European Union ,General Secretariat, 2019, p. 14) .	The project is funded by the EU's humanitarian aid budget (280.000 euros), the Office for the Coordination of Humanitarian Affairs (500.000 euros), and Geneva Call (700.000 euros) (Council of the European Union ,General Secretariat, 2019, p. 14).
Yemen in 2018	The projects enhanced the monitoring capacity of human rights violations in addition to the quality of these surveillances. Furthermore, it has a proactive role in the engagement with other possible donors such as CSOs, NGOs and EUMS. The projects advocate for access to humanitarian aid and justice (Council of the European Union ,General Secretariat, 2019, p. 14).	The EU humanitarian aid (5.5 million euros) and European Member States are actively involved in the projects.
Bosnia and Herzegovina	The aim is to advance the process of investigating and prosecuting core crimes at national level. In addition to minimizing the accumulated cases in regard to the core crimes. The project also provides support to the International Commission on Missing Persons via financial aid that enables the use of DNA assessment to identify missing persons (Council of the European Union ,General Secretariat, 2019, p. 20).	The EU provided 7.4 million euros from December 2016 until 2019. (Council of the European Union ,General Secretariat, 2019, p. 20)
Serbia	The projects support national judicial authorities in the process of monitoring war crimes, and it provides training and resources to Serbian judges, prosecutors, judicial and prosecutorial assistants, police officers, witness support and protection staff (Council of the European Union ,General Secretariat, 2019, p. 20).	The EU and its MS, Serbian judicial authorities and former ICTY staff are all actively involved(Council of the European Union ,General Secretariat, 2019, p. 20)
Geneva Call	Geneva Call aims to reinforce and strengthen the capacity of the international community in its process of negotiating and engaging with Armed Non-State Actors. In addition to promoting the compliance of international humanitarian law in armed conflict It also provides resources and trainings and toolboxes to national and international practitioners (Council of the European Union ,General Secretariat, 2019, p. 14).	The EU's humanitarian aid, the EU and its Member States, international and national humanitarian practitioners are all actively involved(Council of the European Union ,General Secretariat, 2019, p. 14)