STUDY

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# State of play of existing instruments for combating impunity for international crimes

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STUDY

# State of play of existing instruments for combating impunity for international crimes

The European Union and its Member States have been at the forefront of the fight against impunity for core international crimes, collectively providing political, technical and financial assistance to international, regional and domestic accountability efforts. Focusing on the current EU framework on accountability and six country situations (Rwanda, Colombia, Venezuela, Myanmar, Syria and Iraq), this study offers recommendations to guide future EU policy and the engagement of the European Parliament in the fight against impunity. The recommendations include enhancing the capacity, efficiency and coordination of EU institutions working on accountability, as well as encouraging comprehensive, impartial and inclusive approaches to country situations. EU action in bilateral and multilateral fora is also covered, with a view to enhancing the universal reach of accountability mechanisms and the protection of their integrity, encouraging cooperation and assistance, and to upholding the principle of complementarity.

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# Executive summary

The European Union (EU) has taken a leading role in combating impunity for core international crimes and has supported international and domestic accountability efforts. Together with the Member States, the EU has consistently invested in the necessary political, financial and technical capital beginning with the revival of international criminal justice with the *ad hoc* Tribunals for Rwanda and the Former Yugoslavia in the 1990s. The EU has shown political leadership and been a staunch supporter of the permanent International Criminal Court (ICC). It continues to work towards universal ratification of the Rome Statute, which would provide the Court with a global reach. Acknowledging the importance of addressing crimes in the countries where they have taken place, the EU has also supported and continues to support hybrid courts and specialised chambers in domestic courts. Examples span the globe, including: the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Criminal Court for the Central African Republic, the Kosovo Specialised Chambers and the Specialist Prosecutor's Office, and the Jurisdiction for Justice and Peace and the Special Jurisdiction for Peace in Colombia. The EU has also encouraged its Member States in their efforts as leaders in providing accountability by applying the principle of universal jurisdiction. Under this principle, a State exercises jurisdiction over an offence which occurred outside its territory, based on the nature of the offence. Recognising the importance of new solutions to situations that are currently beyond the reach of international criminal justice, the EU has been among the biggest supporters of the UN Evidentiary Mechanisms for Syria, Iraq and Myanmar.

In this context of staunch EU support for accountability, the role of the EU and its contribution to the fight against impunity for core international crimes is explored. Firstly, by analysing the EU policy framework for accountability and its operationalisation in practise. Secondly, by considering in-depth the EU's engagement in six country situations: Rwanda, Colombia, Venezuela, Myanmar, Syria and Iraq. The primary research method was desktop research, enriched with seventeen semi-structured elite interviews with participants selected for their experience and past or current role, in order to gain essential insights into EU institutions, accountability mechanisms and related work fighting impunity for core international crimes. Drawing on both the desktop research and data analysis, the study concludes with a set of recommendations for future EU policies which include targeted recommendations to the European Parliament.

The EU has a wealth of tools at its disposal and through several of its bodies, such as the Genocide Network, is fully engaged in the fight against impunity. Whilst coordinating the EU response remains a challenge, consistent informal liaising between delegations and headquarters could be a solution. Amid staff turnover, it is necessary to enhance measures which preserve institutional memory and ensure a coherent and consistent approach to accountability issues. Improving inter-institutional coordination should be considered, possibly through the establishment of a dedicated accountability unit within the EEAS. Additionally, to meet both the changing and long-term demands of delivering transitional justice, it would be prudent to provide an inter-institutional link between the Service for Foreign Policy Instruments (FPI) facility on transitional justice and the programmes of the Commission's Directorate-General for International Cooperation and Development (DG DEVCO) and the Directorate-General for Neighbourhood and Enlargement Negotiations (DG NEAR). A welcome step would be to enhance the internal promotion of EU instruments at headquarter and delegation level. An essential step is arguably to increase the capacity of EU bodies involved in accountability efforts, both in terms of resources and of personnel so that they can deliver the EU's ambitions for accountability.

The EU has promoted the universal reach of accountability mechanisms through a campaign for universality of the Rome Statute, and by supporting other instruments which aim to address situations falling outside the jurisdiction of the ICC. The EU conducts important initiatives on ICC universality including diplomatic demarches, with offers for technical assistance, Human Rights Dialogues and ICC

clauses in agreements between the EU and other States, which it should seek to maintain. In order to enhance EU activities, it would be useful to promote monitoring and reporting with a view to assessing their impact, promoting the results achieved and informing future EU policies.

The EU has also supported the universal reach of accountability instruments through the work of its Member States in the UN Security Council, keeping the fight against impunity high on the agenda and engaging to push for referrals to the ICC. A recent development to enhance the international instruments available to States is the work of the International Law Commission on the draft articles on the Convention on the Prevention and Punishment of Crimes against Humanity, to which the EU should continue to contribute and provide political support.

The EU has made the integrity of accountability mechanisms a priority and has focused on providing political, diplomatic and financial support which aims to uphold their mandates. At this time when accountability mechanisms are facing political attacks, including US sanctions against ICC personnel, the EU should strengthen its engagement with them and should continue to oppose challenges on the integrity of existing mechanisms.

In recognition of the challenges posed by the lack of cooperation with accountability mechanisms and UN Evidentiary Mechanisms, the EU has engaged with concerned States on cooperation. It has also encouraged Member States and third countries to cooperate with and assist accountability mechanisms. The EU should strengthen its efforts to promote the adoption of cooperation frameworks in various forms, in order to facilitate coordination, information-sharing and knowledge-exchange among different jurisdictions. It should continue to engage with uncooperative States in bilateral relations and consider exerting its political leverage in all bilateral interactions with them.

In recognition of the role of the ICC as a Court of last resort, the EU has carried out several activities to uphold the principle of complementarity. It has adopted the Complementarity Toolkit, which is a useful resource to guide domestic efforts. However, seven years after its adoption, its implementation status has not yet been assessed. It is, therefore, recommended that monitoring and reporting are conducted to understand the impact of the Toolkit and to inform future EU action on complementarity. Similarly, the EU has promoted the principle of complementarity among its Member States and encouraged the adoption of legislation implementing the Rome Statute. However, not all Member States have adequate legislation or facilities. It would therefore be useful to conduct monitoring and reporting both on the status of domestic legislation and on the ways in which Member States are approaching the investigation and prosecution of core international crimes. To further these aspirations, the EU has also supported the legal and judicial systems of third States. Assistance should focus on capacity-building, especially during transition, forward-thinking training and comprehensive outreach.

Cooperation between Member States and among their internal agencies should be encouraged in order to establish specialised units, or to train dedicated staff, especially to enhance linkages between their own immigration, prosecution and judicial authorities. For this purpose, States could employ funding through the Commission's Structural Reform Support Service. This is pertinent, as EU support for the exercise of universal jurisdiction also requires the EU to invest in the appropriate financial and technical resources in order that Member States can meet related demands. In domestic cases on core international crimes, it is important that acts are prosecuted under the correct characterisation, including through cumulative charging, rather than purely under terrorism offences.

Lessons drawn from the six country situations highlight the development of accountability mechanisms over time, and the changing role of the EU. In Colombia and Rwanda, it is possible to consider the contributions of the EU retrospectively and highlight successful interactions, such as engagement with the International Tribunal, which should inform future interventions. Given that the EU takes a comprehensive approach to situations, encompassing humanitarian aid and wider political concerns, accountability

should continue to be pursued alongside immediate relief measures for the affected population, long-term development and peacebuilding.

The EU engaged with Rwanda on accountability issues throughout the lifespan of the International Tribunal and Residual Mechanism, and its Member States support Rwanda through the exercise of universal jurisdiction. Mindful of the political context, the EU should continue to encourage the Rwandan authorities to apply the law equally to all alleged perpetrators. In contrast to Rwanda, where EU engagement on accountability followed the events in 1994, the EU engagement in Colombia has been tightly linked to peace efforts and the two waves of demobilisation of paramilitary and guerrilla groups. The EU adopted a comprehensive approach with the involvement of the Special Envoy and the establishment of the *Fondo Europeo para la Paz*. Its approach should remain flexible according to the situation on the ground and the EU should continue to support the transitional justice mechanisms with appropriate political, technical and financial assistance.

EU engagement on accountability for alleged crimes in Venezuela should be informed by the lessons learnt from Colombia. Amid widespread domestic impunity and little cooperation with international mechanisms, the EU should consider involving a senior political figure in negotiations with the government led by Nicolás Maduro and the interim government led by Juan Guaidó. The agenda should include re-joining the Inter-American human rights system, cooperation with the UN Fact-Finding Mission and the institution of genuine domestic proceedings.

Although the EU has adopted a comprehensive approach to accountability in Myanmar, it has not yet come to fruition and Member States should support the ongoing investigation by the ICC regarding the deportation of Rohingya people to Bangladesh, and push for a referral of the situation in Myanmar to the ICC. In bilateral relations, the EU should continue supporting the UN Evidentiary Mechanism in the fulfilment of its mandate, including working with the Mechanism to secure appropriate technical, financial and political support. It should also seek to promote the implementation of the recommendations included in the report of the Independent Commission of Enquiry and compliance with the provisional measures issued by the International Court of Justice. This should occur alongside the EU's ongoing efforts to promote ratification of core treaties, cooperation with the ICC, and the UN Evidentiary Mechanism (including access to Myanmar's territory).

EU engagement with Syria is made more complicated by the fact that the EU Delegation is not welcome by the Government of Syria and is delocalised, operating predominantly from Beirut. The regime is similarly uncooperative with the UN Evidentiary Mechanism and other bodies working towards accountability such as the recent UN Board of Inquiry. The situation in Syria has not yet been referred to the ICC and due to the operational context, a referral does not seem likely in the near future. The EU should therefore continue to provide the UN Evidentiary Mechanism with political, financial and technical support, with the aim to foster its evidence collection activities as well as its engagement with victims and survivors. It could also encourage cooperation between Member States and the Mechanism, in particular the adoption of cooperation frameworks which facilitate the collection of evidence in Europe. The EU should also keep promoting the exercise of universal jurisdiction in Member States and third countries including by providing appropriate technical and financial assistance. It should encourage Member States to engage in inter-State cooperation in order to improve investigations and prosecutions.

In Iraq, core international crimes allegedly committed by the so-called Islamic State (IS) are being addressed by the domestic courts, with EU Member States exercising universal jurisdiction over all suspects of core international crimes. The UN Evidentiary Mechanism in Iraq has supported national prosecutions within the EU in collaboration with the Iraqi judiciary. The EU should continue to provide domestic capacity-building support to the Iraqi judiciary, in conjunction with the work of the UN Mechanism which is supporting domestic progress in relation to infrastructure around core international crimes and

fundamental rights protections. The EU should also continue to provide diplomatic and financial support to the UN Evidentiary Mechanism as well as encourage Member States and third countries to cooperate. This is essential in order for the Mechanism to broaden the scope of its investigative activities and deliver meaningful accountability to the diversity of affected communities in Iraq. Similarly to Syria, the EU should continue to promote the exercise of universal jurisdiction, which is a vital avenue of justice.

# 1. Introduction and methodology

The European Union (EU) has taken a leading role in combating impunity for core international crimes (genocide, crimes against humanity and war crimes) and has supported domestic and international criminal justice efforts. The EU and its Member States have stood at the forefront of this endeavour, strongly investing in the necessary political, financial and technical capital. Focusing on the EU's policy framework and efforts to support international criminal justice at a time when the rules-based system is facing significant challenges, this study examines the specific role of the EU in promoting accountability for core international crimes. It explores the contributions which the EU has provided to judicial and non-judicial mechanisms in the fulfilment of their mandates and determines recommendations based on identified strengths, weaknesses and gaps.

In its mission to address core international crimes, the EU engages with mechanisms which fall into several categories: the International Criminal Court; the international *ad hoc* tribunals; regional, hybrid and special courts, specialised chambers within domestic courts or domestic courts; the International Court of Justice; and universal jurisdiction cases. It also supports non-judicial mechanisms such as the United Nations (UN) Evidentiary Mechanisms for Syria, Iraq and Myanmar. Alongside this, the EU works with civil society and other actors, particularly in conflict-affected regions. The study begins by providing an overview of accountability mechanisms before providing and discussing the EU policy framework on accountability for core international crimes. It then moves on to focus on country-specific situations, in which it is possible to examine in-depth the relationships between, and the challenges faced by, accountability mechanisms. The analysis considers their strengths and weaknesses and engages with the differing roles and contributions of the EU.

The countries considered are Rwanda, Colombia, Venezuela, Myanmar, Syria and Iraq. These cross-cutting situations allow for analysis of in-country, regional and EU engagement with the fight against impunity for core international crimes. The analysis considers the strengths, weaknesses and challenges that are faced as well as the interactions between different mechanisms operating within a country. By starting with Rwanda, which features an *ad hoc* international tribunal, and following the development of accountability mechanisms through Colombia, Venezuela, Myanmar, Syria and Iraq, the study examines the use of UN Evidentiary Mechanisms as seen today, to conclude with an informed discussion of the future: namely, the proposed *ad hoc* tribunal to address crimes committed by IS.

The main research method employed was desktop research, which involved sourcing primary and secondary documents emanating from the EU, existing accountability mechanisms and from the selected country situations. Other sources include reports by international, regional and non-governmental organisations (NGOs), as well as academic publications. Mechanisms were assessed partly quantitatively in relation to the prosecutions and convictions they have brought, but primarily qualitatively in terms of their processes and quality. The desktop research was enriched by seventeen semi-structured interviews, which took place during June 2020. These interviews were conducted remotely via electronic communications in light of Covid-19. Sampling was a key issue, as the subject-matter is highly specialised. The methodology therefore used 'elite interviewing', with participants recruited based on their experience and current or previous roles, by extending invitations to interview and through existing contacts within the EU and international justice community. As part of the process of seeking informed consent, participants could choose if they wished to be named.

Participants from within the EU Institutions included members of the three main organs: the Council, Commission and the European Parliament, namely, the Chair of the Sub-Committee on Human Rights, Maria Arena. Others included the EU Special Representative for Human Rights, Eamon Gilmore; representatives from EU Delegations to relevant country situations, including EU Ambassador to Myanmar, Kristian Schmidt; representatives from the European External Action Service; and Head of the Genocide

Network Secretariat, Matevž Pezdirc. Other individuals from across the EU organs and bodies had been extended an invitation but were unable to participate. It was of particular importance to gain perspectives from accountability mechanisms themselves, especially the newly established modes of operation which have not yet been well-studied or had time to form legacies. To that end, the three UN evidentiary mechanisms for Syria, Iraq, and Myanmar were represented by their respective Heads: Catherine Marchi-Uhel, Karim A. A. Khan and Nicholas Koumjian. With prosecutions at the national level being increasingly recognised for their contribution to the fight against impunity, a perspective on conducting national processes for core international crimes was provided in his private capacity by National coordinating advocate - general international crimes in the Netherlands, Simon Minks. Members of civil society were consulted for this study and contacted to participate, however, they were not able to be formally interviewed: predominantly as the interviews took place during the COVID-19 pandemic and addressing its impacts was a matter of urgency. The interviews were extremely valuable and have provided personal insights, or insider perspective, into the complex issues at hand.

# 2. Overview of existing accountability mechanisms

Although the International Military Tribunals established in Nuremberg and Tokyo at the end of the Second World War are considered the fountainhead of international criminal justice, they were followed by nearly fifty years of inactivity during the Cold War. Since the revival of international criminal justice in the early 1990s, the mechanisms mandated with achieving accountability have taken numerous forms.

This section analyses judicial and non-judicial mechanisms beginning with the *ad hoc* international tribunals, which were the first type of accountability mechanism created after the Cold War. It then considers the International Criminal Court, which is unique in its permanent nature and global outlook. The analysis then looks at how accountability for core international crimes has been brought closer to the directly affected communities by hybrid courts and specialised chambers within domestic courts. The section moves on to look at how States have applied the principle of universal jurisdiction to crimes committed outside their territory, before considering the establishment of the UN Evidentiary Mechanisms, which are the newest model. Finally, the analysis examines the role of institutions such as regional human rights courts and the International Court of Justice in the promotion of accountability for core international crimes.

The focus is on accountability mechanisms which are either functioning at the time of writing, or have an operational residual mechanism, and whose jurisdiction *ratione materiae* includes core international crimes. These mechanisms are examined in light of common themes, in order to assess their strengths, weaknesses and the challenges they face: prosecutions and convictions; fundamental rights; cooperation and assistance; and accountability to affected populations.

## 2.1 The *ad hoc* International Tribunals

*Ad hoc* international tribunals are international justice mechanisms which are established to address a specific situation, and which operate for a finite lifespan (Pittman). The first such Tribunal to be established was the International Tribunal for the Former Yugoslavia (ICTY) (ICTY 2016), which was created by UN Security Council resolution 827 of 1993 in response to core international crimes committed during conflicts in the Former Yugoslavia. A year and a half later, UN Security Council resolution 955 of 1994 established the International Criminal Tribunal for Rwanda (ICTR) to address atrocities committed in connection with the genocide in Rwanda (*infra* Section 4.1.1). Collectively known as the *ad hoc* Tribunals, they issued landmark judgments and leave a legacy which has made the process of providing accountability more foreseeable and achievable for subsequent justice mechanisms (Acquaviva).

With UN Security Council resolution 1966 of 2010, the responsibilities of the *ad hoc* Tribunals, including overseeing sentences of imprisonment, were transferred to their successor institution: the International Residual Mechanism for Criminal Tribunals (MICT), which is composed of two branches that respectively carry out the residual functions of the ICTY and ICTR.

The Special Tribunal for Lebanon is also an *ad hoc* Tribunal; however, it is not analysed herein as its jurisdiction *ratione materiae* does not cover the crimes which are the subject of the present study.

### 2.1.1 Prosecutions and convictions

Of the 161 individuals indicted by the ICTY, 90 were convicted, 18 were acquitted, 37 either died or had their indictments withdrawn, 3 cases are ongoing before the MICT at the time of writing and no fugitives are at large (S/2017/662). The Tribunal issued a series of landmark judgments, such as *Tadić*, which contributed to the current definition of non-international armed conflict, removed the nexus between armed conflict and crimes against humanity, and was the first-ever case on sexual violence against men; *Aleksovski*, the first case against a member of a non-State armed group; *Mucić et al.*, which recognised rape as torture; and *Krstić*, which linked rape and ethnic cleansing.

The MICT has convicted Radovan Karadžić and Vojislav Šešelj and, at the time of writing, it is hearing four re-trials, including that of Ratko Mladić (MICT 2020a). On 19 June 2020, the Appeals Chamber issued a decision to ensure *Mladić* proceeds expeditiously in light of Covid-19, including that the Registry should be instructed to provide the technology to facilitate partially remote proceedings.

The ICTR indicted 93 individuals, 61 of whom were convicted, 14 were acquitted and 5 either died or had their indictments withdrawn (S/2015/340). At the time of its closure, six cases against fugitives had been transferred to the Rwandan domestic jurisdiction and three to the MICT (S/2015/340). Landmark ICTR cases include *Akayesu*, which provided the first definition of rape under international criminal law and was the first genocide conviction before an international tribunal; *Nahimana et al.*, recognising the role of the media in the genocide; *Nyiramasuhuko et al.*, the first conviction of a woman defendant by an international Tribunal; and *Karemera et al.*, in which the Tribunal took judicial notice of the genocide against the Tutsi, considering it a 'fact of public notoriety'.

Of the three fugitives transferred to the MICT, the death of fugitive Augustin Bizimana was confirmed in May 2020, concluding an investigation conducted by the MICT in cooperation with national authorities (MICT 2020b). A second fugitive, Félicien Kabuga, was arrested in Paris in May 2020 after a joint effort of the MICT, France, Rwanda, Belgium, the United Kingdom, Germany, the Netherlands, Austria, Luxembourg, Switzerland, the United States, Europol and Interpol (MICT 2020c). After a request seeking temporary transfer of Kabuga to The Hague rather than Arusha due to the impact of Covid-19 was dismissed, on 4 June 2020 a French Court approved the transfer to the MICT (Corbett).

Pursuant to these developments, the MICT is now seized with efforts to locate, arrest and prosecute the remaining fugitive of the ICTR, Protais Mpiranya, and a contempt proceeding in *Turinabo et al.,* which deals with interference in the administration of justice and includes charges such as interfering with protected witnesses. The ICTR and related MICT activity is discussed in further detail in the country section on Rwanda (*infra* Section 4.1.1).

### 2.1.2 Fundamental rights

The Statutes of the *ad hoc* Tribunals complied with the international standards of protection of fundamental rights for the accused, including guarantees of ne *bis in idem* and the exclusion of the death penalty. The MICT has enhanced its legal and regulatory framework in relation to victims and witnesses, detention and sentence enforcement to develop best practices. This has resulted in the application of a modern detention framework for detainees in the UN Detention Facility and the UN Detention Unit

(S/2020/309). However, the Tribunals have faced criticism over the length of their proceedings in relation to the accused individuals' right to trial without undue delay (Cline).

Article 22 of the ICTY Statute and Article 21 of the ICTR Statute also envisaged measures for the protection of victims and witnesses. Since the Tribunals closed, the MICT has supported victims and witnesses pursuant to Article 20 of its Statute (Denis). Approximately 3,150 witnesses benefit from the MICTs judicial or non-judicial protective measures (S/2020/309). However, there have been security concerns for witnesses, especially persons who have relocated, and reports of witness interference have informed the contempt proceedings before the MICT (S/2017/662; S/2020/309).

### 2.1.3 Cooperation and assistance

The cooperation of States was essential for the *ad hoc* Tribunals to fulfil their mandate and remains a significant aspect of the work of the MICT. States from the former Yugoslavia as well as international organisations cooperated successfully on an individual basis with the ICTY to access evidence, and the Tribunal's sentences have been enforced in 14 European countries (S/2017/662). The MICT also monitors the 13 cases that were transferred to domestic jurisdictions from the ICTY, along with the cases which were transferred to domestic jurisdictions by the ICTR (MICT 2020d).

However, both *ad hoc* Tribunals and the MICT have faced significant instances of non-cooperation, with arrest and surrender presenting a particular challenge (McDonald; S/2020/309). Although Serbia cooperated with the ICTY on other aspects, it refused to execute arrest warrants (S/2017/662). Non-cooperation also involved third States. In August 2018, Interpol informed the MICT that a fugitive was located in South Africa and submitted an urgent request for cooperation, but it took over a year for South African authorities to try and execute the request and they were unsuccessful due to the delay (S/2020/309). Moreover, the MICT has had little cooperation regarding relocating acquitted and released persons from a safe house in Arusha, one of whom has been there since his acquittal in 2004, despite calls for assistance on this issue from the UN Security Council (Obote-Odora; S/2020/309).

The MICT provides assistance to national jurisdictions on criminal cases and to other organisations, such as the International Committee of the Red Cross, who are still searching for missing persons (S/2020/309). Transferring evidentiary materials formed part of the closure activities of both *ad hoc* Tribunals and the resulting repository of evidence, including around 9.3 million pages of documents relating to the former Yugoslavia and one million pages on Rwanda, is a source of significant value (S/2020/309; S/2017/662). Requests in this respect increased from 111 in 2013 to 329 in 2019, and in the first months of 2020 the MICT received further 100 requests (S/2020/309). Assistance requests continue to increase, especially from other judicial mechanisms prosecuting related crimes including the Kosovo Specialist Prosecutor's Office, the Prosecutor's Office of Bosnia and Herzegovina, and the French judiciary (S/2020/309). Increased demand may also follow the intentions of Bosnia and Herzegovina, Serbia, Croatia and Montenegro to process outstanding war crimes cases. The MICT also anticipates the provision of significant assistance to Rwandan authorities working to track and prosecute suspects, and to the EU investigative Task Force of Member States which will focus on Rwandan genocide suspects present in Europe (S/2020/309). To meet these needs the MICT has planned to increase its capacity with more secure remote search mechanisms for its databases (S/2020/309).

### 2.1.4 Accountability to affected populations

The ICTY established its outreach programme in 1999, recognising that its work resonates beyond the judicial process and had a role in the efforts to deal with the past in the former Yugoslavia (ICTY 2016). As the closure of the Tribunal approached, the ICTY extended the programme in its final year to further inform the populations. It organised over 20 events reaching more than 1,200 people, with other activities including the seventh documentary about the work of the Tribunal which was screened in Bosnia and

Herzegovina (S/2017/662). Particular challenges for the ICTY affecting reconciliation were widespread revisionism, the denial of the crimes and facts established in its judgments, and that suspects were seen as national heroes (S/2017/662; Milanović).

Both *ad hoc* Tribunals carried out significant capacity building activities with a view to strengthening domestic prosecutions, subsequently leaving additional judicial mechanisms within domestic courts to prosecute core international crimes (Jorda). As part of their completion strategy the Chambers of the *ad hoc* Tribunals looked to transfer cases to domestic courts, with the ICTYs Rules of Procedure and Evidence amended to facilitate such activity (Ivanišević). The ICTR considered the issue in cases including *Munyakazi* (*infra* Section 4.1.1). Transfer was possible provided that the national legal framework criminalised the alleged conduct, included an adequate penalty structure, fair trial rights, and that conditions of detention are in line with international standards. As of 2017, the ICTY was working with national authorities in Bosnia and Herzegovina, Croatia, and Serbia seeking to prosecute war crimes at the domestic level, with mixed results (S/2017/662). In Serbia, the lack of political will to prosecute remained prevalent, whilst Bosnia and Herzegovina was investigating and prosecuting complex cases (S/2017/662).

The work of the ICTY with Bosnia and Herzegovina has facilitated the creation of the War Crimes Chambers and the work of the ICTR with Rwanda strengthened domestic capacity, including legal reforms culminating in the establishment of the Specialised Chamber for International Crimes within Rwanda's High Court (*infra* Section 4.1.2).

## 2.2 The International Criminal Court

Reinvigorated by the work of the *ad hoc* Tribunals, the long-standing conversation around a permanent court for international crimes gained momentum (McGoldrick; Hall; A/49/10). The ICC was established in 1998, with the adoption of the Rome Statute, to fight impunity for 'the most serious crimes of international concern' (genocide, crimes against humanity, war crimes and aggression), and became operational in July 2002.

Alongside the common themes that are identified for all of the accountability mechanisms, this section also analyses the work of the ICC through the lens of two additional themes that are applicable only to the ICC: universality and complementarity.

### 2.2.1 Universality

The Rome Statute is open to ratification by all States. Universal ratification would significantly enhance the fight against impunity by providing the Court a global reach. At the time of writing, the ICC counts 123 States Parties: 33 African States, 19 Asia-Pacific States, 18 Eastern European States, 28 Latin American and Caribbean States and 25 Western European and other States. As is perhaps natural, the rate of ratifications has slowed down and between 2013 and 2020, there have been only four new ratifications: Côte d'Ivoire in May 2013, Palestine in April 2015, El Salvador in June 2016 and Kiribati in November 2019. However, this means that core international crimes taking place in roughly one third of the world's States and territories fall outside the geographical scope of the ICC. Several States have signed but not ratified the Statute, including the United States and Russia, while China has not signed or ratified. That three of the UN Security Council's five permanent members have not ratified is an obstacle to ICCs universality and it impacts on the situations that are referred to the Court by the Council, e.g. Myanmar and Syria (Sweeney; *infra* Sections 4.4 and 4.5).

Furthermore, after the publication of the 2016 Report on Preliminary Examination Activities which detailed the *Ukraine* situation, Russia criticised the ICC for its 'one-sided and inefficient' work and withdrew its signature from the Rome Statute (ICC 2016; Walker and Bowcott). This is a symbolic gesture which has no legal or practical impact on ICC activities, but sent a clear political message. The United States, which had

communicated its intention not to ratify the Statute in 2002, has engaged in political attacks on the ICC in response to the *Palestine* preliminary examination and the *Afghanistan* investigation. This has included scaling up its opposition to the Court through an Executive Order issued on 11 June 2020 which authorises visa restrictions and economic sanctions on certain persons associated with the ICC (Scheffer 2020a). These developments prompted commentators to call for the EU and its Member States to take a strong stance in support of the Court (Leicht). On 16 June 2020 the Statement of the High Representative included reconfirmation of the EU's support for the ICC, commitment to defending the Court from such outside interference and urged the United States to reconsider its position (EEAS 2020a).

The Court has also faced allegations of selectivity which severely strained political relations with the African Union (AU) as several AU Member States lamented a perceived bias against Africa (Mills and Bloomfield). Notably, several AU States have also supported the Court and, of the 10 investigations into AU States, only *Kenya*, *Côte d'ivoire* and *Burundi* were opened following *proprio motu* initiatives by the Prosecutor. *Sudan* and *Libya* were referred by the UN Security Council, and *Democratic Republic of the Congo*, *Uganda*, *Central African Republic I*, *Mali* and *Central African Republic II* were opened following self-referrals.

As a response to the ICC proceedings against its sitting president and vice-president, Kenya proposed an ICC withdrawal strategy at the AU, led efforts to amend the Rome Statute to grant immunity to sitting heads of State, and the Kenyan parliament passed a law on withdrawal which has not been acted upon (Bekou 2018; Mills and Bloomfield). The Gambia and South Africa also announced their intention to withdraw, but the former has revoked the decision after the election of a new government and the latter has reviewed its position and has not yet withdrawn after a ruling of its High Court (Keppler). Burundi and the Philippines withdrew from the Rome Statute in 2017 and 2019, despite an ongoing investigation on the former and a preliminary examination on the latter. Although work on these situations continues, the withdrawals are likely to impact on these States' cooperation with the Court and prevent ICC action on crimes occurring there after the respective dates on which the withdrawals became effective.

Resistance to the ICC exercising its jurisdiction predominantly stems from situations where States have not adequately investigated or prosecuted alleged international crimes (Burundi and Philippines), where there has been non-compliance with cooperation obligations (South Africa), or where powerful States reject any external scrutiny on their actions or those of their allies (Russia and United States). The ICC has acknowledged that its decisions have created tensions with States and other organisations, but recognised that tensions will be a feature of executing the Court's mandate, stating it will engage in and promote dialogue with situation countries (ICC 2019a). Within the context of its current operating environment, the Court is planning strategies to foster political support, mitigate a volatile work environment, monitor evolving situations and manage risk (ICC 2019a).

### 2.2.2 Prosecutions and convictions

The jurisdiction of the ICC covers genocide, crimes against humanity, war crimes and aggression. Although this is not required by the Statute, the Court focuses on senior leaders and those most responsible for these crimes (ICC 2003a). At the time of writing, the Court has opened preliminary examinations into 26 situations: four ended with a decision not to proceed (*Registered Vessels of Comoros, Greece and Cambodia*; *Gabon*; *Honduras*; and *Republic of Korea*), nine are ongoing (*Colombia*; *Guinea*; *Iraq/UK*; *Nigeria*; *Palestine*; *the Philippines*; *Ukraine*; *Venezuela I;* and *Venezuela II*) and 13 were completed with a decision to open an investigation (*Uganda*; *Democratic Republic of Congo*; *Darfur, Sudan*; *Central African Republic I*; *Kenya*; *Libya*; *Côte d'Ivoire*; *Mali*; *Central African Republic II*; *Georgia*; *Burundi*; *Bangladesh/Myanmar*; and *Afghanistan*).

To date, there have been 28 cases before the ICC, for a total of 46 defendants as Ali Abd-Al-Rahman was transferred to the ICCs custody on 9 June 2020 after voluntarily surrendering himself in the Central African Republic (ICC 2020a). Offences have included those against the administration of justice and as of June 2020, 14 defendants remain at large. These cases have resulted in eight convictions (although two cases

are subject to appeals) and four acquittals; four cases are ongoing, four were terminated due to charges being not confirmed, vacated or withdrawn, and 11 have not commenced, as the defendants are not in ICC custody (ICC 2020a).

Notable cases before the ICC included *Lubanga*, the first conviction for conscripting and enlisting children; *Ntaganda*, the first conviction for sexual crimes before the ICC; *Al Mahdi*, which concerned the destruction of cultural property as a war crime; and *Ongwen* in which the defendant is a former child soldier. In relation to ongoing preliminary examinations, on 4 June 2020 the UN released a report criticising the war on illegal drugs in the Philippines for its rhetoric which could be interpreted as 'permission to kill' (A/HRC/44/22). The ICC preliminary examination in the Philippines focuses on alleged crimes committed since at least 1 July 2016, in the context of the 'war on drugs' campaign (ICC 2020b). It is alleged that, since 1 July 2016, thousands of people have been killed owing to their alleged involvement with drugs, with many of the reported incidents involving extra-judicial killings during police anti-drug operations (ICC 2020b).

### 2.2.3 Fundamental rights

The Rome Statute fundamentally promotes international standards of fair trial rights, including guarantees of ne *bis in idem*, the exclusion of the death penalty and the provision of life sentence only as an exceptional penalty. However, a conversation around improving provisions has begun as, similarly to the *ad hoc* Tribunals, the ICC has faced criticism around the length of proceedings, including from its own Chambers (Cline). Following his acquittal on 8 June 2018, Jean-Pierre Bemba Gombo made a request for monetary compensation, arguing that it was unreasonable to have taken a decade to conclude a case with one form of liability, covering events over a five-month period. Subsequently, the Chamber considered Rome Statute Article 85(3), which provides for compensation in the event of a grave and manifest miscarriage of justice resulting in acquittal or termination of proceedings. Whilst the Chamber in *Bemba* dismissed the claim, it was receptive to parts of the submission and recognised that spending ten years in custody is likely to result in personal suffering 'which would trigger compensation in many national systems for violation of the fundamental fair trial right to be tried expeditiously'. It also found that it is an urgent issue for States Parties to review the Statute and consider addressing the absence of statutory limitations on the duration of proceedings or custodial detention, acknowledging that until then it is the responsibility of the Court to be mindful of fundamental fair trial rights, including an expeditious trial (*Bemba*).

Criticisms have also arisen around how the Court engages with victims and witnesses, protections for whom are provided in Article 68 of the Rome Statute. However, instances of witness tampering and interference led to the opening of two cases related to the *Kenya* situation and to one conviction related to the situation in the *Democratic Republic of the Congo*. Victims can participate at the ICC when their personal interests are affected, including having their views and concerns presented by a legal representative of the victims, as provided for in Article 68(3) of the Rome Statute. However, the modalities of participation were not clarified and have been left for the Court to determine through its practice and jurisprudence. Criticism has included concerns that the Court has not adequately communicated with affected populations in order to facilitate participation in its activities. For example, in 2016 during the first seven months of the Georgia investigation only 10 outreach events were organised reaching just 165 people leading to eight interviews (Carayon and O'Donohue).

Regarding participation in trials, the Court has granted participatory status to thousands of victims, however many people have been unable to exercise their right to participate due to difficulties around the written application process (Carayon and O'Donohue). Difficulties primarily arise due to the volume of applications. In *Ongwen,* once the relevant judge's order was issued the Registry began providing information to victims and community leaders on the application process, and training individuals to assist. The number of applicants exceeded the staff capacity to meet the set deadline. One effort to overcome this was an attempt to limit applications to one person per household, however this was of limited success

due to the close relationships and socio-cultural structures within northern Uganda (*Ongwen*). The Registry was also provided a list by community leaders in one location of 2 074 people who had wanted to fill in an application but were unable to at that time due to the short deadline imposed by the Chamber and the restricted resources of the Registry (*Ongwen*). In this case, the restrictive deadline and suggested mitigation potentially excluded many victims as the Registry faced a situation which was, arguably, beyond its resources to fairly meet.

Criticism has also arisen around the representation of victims in trials as their preferences are not always taken into account, and the Chamber has on occasion appointed counsel other than the one selected by the Registry (Human Rights Watch 2017a). Additionally, it was decided in *Ongwen* that victims who appoint counsel other than common legal representatives chosen by the Court may not be entitled to financial assistance, causing civil society to call for clarity and to underline that genuine victim participation in ICC proceedings includes people being able to select their legal representation (Human Rights Watch 2017a).

### 2.2.4 Cooperation and assistance

In the absence of an international police force, the ICC is reliant on the cooperation of States. By ratifying the Rome Statute, States Parties through Articles 86 and 88 respectively are under a general obligation to cooperate with the Court and to ensure that there are national procedures in place enabling them to execute all forms of requested cooperation. The Court has also promoted the adoption of three cooperation agreements on witness relocation, release of persons and enforcement of sentences with States and international organisations (ICC 2017).

Non-cooperation is a significant obstacle for the ICC, in particular for the arrest and surrender of suspects (Bekou 2019; Zhou). The Court has issued 34 arrest warrants: 17 individuals appeared before it, three have died and 14 remain at large. Outstanding arrest warrants and the arrest and surrender of individuals are recognised by the ICC as a critical challenge (A/74/324). The Prosecutor continues to call on the UN Security Council, States Parties and non-States Parties to execute outstanding arrest warrants (ICC 2019b).

Non-compliance has hindered progress on the situation in Libya, and the failure by States Parties including Chad, the Democratic Republic of the Congo, Djibouti, Malawi, South Africa, Uganda and Jordan to arrest and surrender the former President of Sudan, Al-Bashir, left the warrant outstanding and exacerbated political tensions (ICC 2019b; Tladi). At the time of writing, Al-Bashir is detained in Khartoum and the domestic proceedings brought against him are not confirmed to concern the crimes alleged in the ICC warrant (Burke; ICC 2019b). There are four other outstanding warrants against Sudanese citizens and the Prosecutor has stated readiness to work with the government of Sudan to deliver justice to the victims of Darfur, 'whether it be in a courtroom in Sudan or at the ICC in The Hague' (ICC 2019b).

The Court is facing an increasing number of situations where State authorities have been unwilling or unable to investigate or prosecute alleged crimes, and whilst it has discretion, the Office of the Prosecutor has to open an investigation once the legal criteria are met (ICC 2019a). The ability of the ICC to deliver its mandate depends directly on the resources at its disposal. Amid the increase in need, the Court is facing resource constraints. The Assembly of States Parties is ultimately responsible for the funding of the ICC, and there have been considerable demands for reductions in recent years (ICC-ASP/18/Res.1). Given that the integrity and quality of the ICCs work must be assured, where there is a resource shortfall, the impact will be on the quantity of activities that can be undertaken (ICC 2019a). The ICC Strategic Plan for 2019-2021 envisages the Court as a universal, responsive, flexible and resilient organisation: in order to achieve these aims, and to execute its mandate, the ICC requires the support of the international community, including that of the EU and its Member States (ICC 2019a; A/74/324).

### 2.2.5 Complementarity

The ICC system of international criminal justice is based on the principle of complementarity which, under Articles 1 and 17 of the Rome Statute, provides for the admissibility of cases before the Court only when States are unwilling or unable to conduct genuine investigations and prosecutions into alleged crimes within the jurisdiction of the Court. This makes the ICC a 'Court of last resort', activated only when national proceedings are not forthcoming (Bekou 2014). The first Prosecutor of the ICC stated that a measure of the Court's success would be the lack of proceedings before it (ICC 2003b).

A more proactive approach, known as 'positive complementarity' has been developed which offers support for domestic efforts to provide accountability for core international crimes (Bergsmo et al.). The interactions between the Office of the Prosecutor and the national authorities in States where the ICC has conducted preliminary examinations and investigations have had various impacts on the domestic cultures of justice. In order for genuine investigations and prosecutions to occur, States must have legislation in place criminalising conducts that constitute core international crimes. Accordingly, the Prosecutor monitors legal developments in concerned States as part of assessing the admissibility of potential cases before the Court. The impact of the Court therefore varies between States, ranging from the initiation of investigations, or initiating genuine prosecutions, through to driving transitional justice mechanisms to function more effectively and respect international standards (Human Rights Watch 2018a; *infra* Section 4.2).

### 2.2.6 Accountability to affected populations

At the time of writing, there are three cases at the reparations stage (*Katanga*, *Lubanga*, and *Al Mahdi*) involving crimes that have harmed the victims, their families and the affected communities, meaning the role of the reparations mandate of the Trust Fund for Victims is expanding (Dijkstal; A/74/324). Between 1 August 2018 and 31 July 2019, 13,391 victims had participated in cases before the ICC, including 5,229 victims who took part in *Bemba* proceedings and who may still access the Trust Fund for Victims (A/74/324). Trial Chamber III issued a decision in August 2018 which acknowledged the victims who had participated in the proceedings but held that no reparations order could be made against Bemba under Article 75 of the Statute. A further 722 victims were also eligible for reparations during the 2018-19 reporting period, and the Court received 2 095 new victim applications in total, most for both participation and reparations (A/74/324). Field missions have been conducted to Mali to implement the reparations order issued in *Al Mahdi*, with both individual and collective reparations processes required.

The issue of reparations potentially affects thousands of individuals as the future of the ICC may see more cases moving into the reparations phase. During the course of the ongoing *Ongwen* trial, 4 065 victims, represented by their legal counsels, were granted the right to participate in the proceedings (ICC 2020c; Carayon and O'Donohue; A/74/324). The Trust Fund relies heavily on voluntary contributions from States and other entities meaning under-funding is a significant concern in light of increasing demands. Whilst EU Member States (the Netherlands and Sweden) have been among leading donors to the Trust Fund, reparations orders in *Lubanga*, *Katanga* and *Al Mahdi* remained under-funded (Scheffer 2020b). Arguably, the growing need requires a growing commitment from more States, or other entities, to donate (Scheffer 2020b).

## 2.3 Hybrid Courts and Specialised Chambers in Domestic Courts

In an effort to bring international criminal justice closer to the communities affected by core international crimes, the international community and States developed two new models of accountability mechanisms: hybrid courts and specialised chambers in domestic courts.

Hybrid courts encompass both national and international elements, potentially by having international

legal personnel alongside nationals, and they are often (but not always) located in the State where the crimes took place (OHCHR 2008). The hybrid courts considered in this section include the Special Court for Sierra Leone (SCSL) and its residual mechanism; the Extraordinary Chambers in the Courts of Cambodia (ECCC); the Special Criminal Court (SCC) for the Central African Republic; and the Kosovo Specialist Chambers and the Specialist Prosecutor's Office. The category also includes the Iraqi Special Tribunal, whose jurisdiction *ratione materiae* under the *Law of the Supreme Iraqi Criminal Tribunal* covered also international crimes (including enforced disappearances as crimes against humanity). However, this mechanism is not discussed in the study as, since 2011, it is apparently not operational (Williams).

Specialised chambers within domestic courts are embedded within domestic judicial systems, but operate with adjustments to their staff composition or applicable law (Stahn). Included in this category are the International Crimes Tribunal in Bangladesh (ICTB), the War Crimes Chambers in Bosnia and Herzegovina (WCC), the International Crimes Division of the High Court of Uganda and the Guatemala Courts for High Risk Crimes. Rwanda's Specialised Chamber for International Crimes, and Colombia's Jurisdiction for Justice and Peace and Special Jurisdiction for Peace are examined in detail within the relevant country sections (*infra* Sections 4.1.2, 4.2.2 and 4.2.3). There are other mechanisms which could also fall into the category of specialised chambers within domestic courts which have not been included in this study, either because they are no longer functioning or owing to their jurisdiction *ratione materiae*. One example is the Special Panels in the Dili Court, established by the United Nations Transitional Administration in East Timor under *Regulation No 2000/15* in 2000, which finished their work in May 2005 (Reiger and Wierda). Another is the War Crimes Chamber of the Belgrade District Court, which was established in 2003 with the assistance of the international community (ICTY 2020; Republic of Serbia 2016). The Serbian Office of the War Crimes Prosecutor has since established a comprehensive 2018-2023 Prosecutorial Strategy for the Investigation and Prosecution of the War Crimes in the Republic of Serbia, and has an institutional framework which includes War Crimes Departments in the Higher Court and Court of Appeal in Belgrade (Republic of Serbia 2016; Republic of Serbia 2018). The *ratione materiae* jurisdiction of the Specialised Criminal Chambers in Tunisia, which was created in 2014 as a domestic form of transitional justice mechanism, does not include international crimes, although Article 8 of *Organic Law 2013-53* encompasses enforced disappearances, rape and any other form of sexual violence as 'serious violations of human rights' (Varney and Zduńczyk).

### 2.3.1 Prosecutions and convictions

The SCSL was established by the *Agreement Between the United Nations and the Government of Sierra Leone* and mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed on the territory of Sierra Leone since 30 November 1996. The Court sentenced former President of Liberia, Charles Taylor, to 50 years imprisonment for crimes within its jurisdiction committed in Sierra Leone (he is yet to be prosecuted for alleged crimes committed in Liberia) (SCSL 2013). The SCSL was also the first international court to recognise forced marriage as a crime against humanity, to prosecute sexual slavery as a crime against humanity, to prosecute and convict individuals for intentionally directing attacks against UN peacekeepers, and for conscripting and enlisting children under the age of fifteen or using them to participate in hostilities (SCSL 2013). When the SCSL officially closed on 2 December 2013 responsibilities such as sentence enforcement fell under the mandate of the Residual Special Court for Sierra Leone (RSCSL), which was established by a second agreement between the UN and the Government of Sierra Leone.

Another example of a UN-State agreement is the ECCC. The ECCC was created by an *Agreement Between the UN and the Royal Government of Cambodia*, which ultimately facilitated the *Law on the ECCC.* This law was to bring to trial the senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognised by Cambodia committed between 17 April 1975-6 January 1979. Ten people considered to bear the greatest responsibility for crimes committed during the

period of Democratic Kampuchea were charged by the ECCC and grouped in four cases, which were given numerical references. The defendants in cases *001*, *002/01* and *002/02* have been convicted and sentenced to life imprisonment. Within the practice of the ECCC the main issue has been the differing opinion of the Co-Investigating judges on whether defendants fall under the jurisdiction *ratione personae* of the court, leading to cases *003*, *004* and *004/02* to be stuck in the pre-trial phase.

Conversely, the Kosovo Specialist Chambers and Specialist Prosecutor's Office were established pursuant to the *International Agreement Between the Republic of Kosovo and the EU*, Constitutional amendment and the *Law on Specialist Chambers and Specialist Prosecutor's Office*. They have jurisdiction over crimes against humanity, war crimes and other crimes under Kosovo law in relation to allegations reported in the Council of Europe Report on Inhuman treatment of people and illicit trafficking in human organs in Kosovo between 1 January 1998 and 31 December 2000 (Marty). Having been established in 2015, the Specialist Prosecutor's Office filed its first indictment with the Kosovo Specialist Chambers on 24 April 2020 (KSCSPO). The ten-count indictment charges Hashim Thaçi (the current President of the Republic of Kosovo), Kadri Veseli (leader of the Democratic Party of Kosovo) and others with alleged war crimes and crimes against humanity including murder, enforced disappearance of persons, persecution, and torture (KSCSPO). The indictment is currently under review. Whilst a Pre-Trial judge of the Kosovo Specialist Chambers decides whether to confirm the charges, Thaçi has stated that he will resign as President if the charges are confirmed (Bami; KSCSPO). The Specialist Prosecutor said in a press release that there was a need to issue a public notice of the charges due to the efforts of Thaçi and Veseli to avoid justice by obstructing the Kosovo Specialist Chambers (KSCSPO).

At the domestic level in Bosnia-Herzegovina, the WCC in Sarajevo were established with the support of the ICTY as part of its completion strategy, in order to ensure that the Bosnian judiciary could receive and effectively prosecute cases (Mallinder; Ivanišević). The legislation establishing the Chamber was enacted by the Parliament at the end of 2004, and the WCC was inaugurated on 9 March 2005, with a mandate to prosecute crimes committed during the early 1990s conflict in Bosnia-Herzegovina. The WCC has jurisdiction over genocide, war crimes and crimes against humanity, and initially operated in conjunction with ICTY proceedings, as well as Bosnia's lower courts (Mallinder). The domestic mechanisms in Bosnia-Herzegovina were faced with large numbers of cases: the Special Department for War Crimes released data relating to the pending war crimes cases up to 1 October 2008, finding 9,879 suspects and accused (Ivanišević; Mallinder). The WCC has also issued judgments relating to prominent events during the Yugoslav conflict, such as the genocide at Srebrenica and the systematic use of sexual violence in Foča (Mallinder).

The SCC in the Central African Republic was established by the then President of the transitional government Catherine Samba-Panza under *Organic Law 15/003* as a hybrid court integrated into the domestic system, in part through its operation with international and national staff. Starting their operations in 2019 and, as of 26 May 2020, they have arrested 28 armed group members (Grilhot). Due to the drafting of the SCC legislation, complications may arise as the Court progresses. One issue with jurisdiction *ratione materiae* is that it is not clear what serious human rights violations give rise to individual criminal responsibility under the Court's regime (Labuda 2020). Differently from other hybrid courts, the SCC does not focus on those most responsible or high-level suspects, but uses 'the more general criterion of people who played a key role in committing crimes', such as those who exercise command and control functions, planned and physically executed crimes (Labuda 2020).

Another mechanism which has an extremely broad jurisdiction is the Guatemala Court for High Risk Crimes, which was established by Supreme Court *Decree No. 21-2009* in 2009. Under Article 3, the Court has jurisdiction over 'high risk crimes' in Guatemala, including offences related to organised crime, trafficking and terrorism, as well as genocide, 'crimes against protected persons and objects under international humanitarian law', enforced disappearances and torture. The jurisdiction *ratione materiae* was expanded

to include crimes against humanity by a judgment of the Constitutional Court that broadened 'crimes against the obligations of humanity' to include crimes against humanity. The Court has sentenced four defendants for the massacre of 200 people in Dos Erres with a cumulative sentence of over 6 000 years, and five paramilitaries for their role in the massacre of Plan de Sanchez (La Hora; Center for Justice and Accountability 2020a). In 2013 the court sentenced former dictator Rios Montt to 80 years in prison for genocide and crimes against humanity. The decision was quashed by the Constitutional Court over procedural issues, amid concerns around political interference from Montt (Maclean). A retrial was ordered mainly for the victims, as Montt was not fit to stand trial and died whilst proceedings were ongoing (Deutsche Welle 2020a, 2020b). The Court has heard approximately 240 cases per year, although its scope means that not all of them relate to international crimes (Beaudoin).

A similar problem arises for The International Crimes Division of the Ugandan Judiciary, as its location within an overstretched domestic judiciary means it has been used to prosecute cases beyond its original primary role. The International Crimes Division of the Ugandan Judiciary is also fully embedded within the domestic judiciary and was established in July 2008, with two cases currently pending. The first is that of former Lord's Resistance Army (LRA) rebel Thomas Kwoyelo who was captured by the Ugandan army on 3 March 2009, the case had originally begun in May 2016, but reportedly faced several 'false starts' before opening on 12 March 2019 (Mwesigwa et al.; Matsiko). In *Kwoyelo*, the Division is dealing with war crimes and crimes against humanity committed by the LRA, in line with its primary purpose. The other case involves Jamil Mukulu, a former commander of the Allied Democratic Forces, arrested in Tanzania and surrendered to Ugandan authorities in 2015 before being charged in 2019. Mukulu is accused of terrorism and murder (Mwesigwa et al.; Matsiko). The Division has concluded four cases: *Gabula* (petition for amnesty regarding 1993 death sentence on a conviction of treason); *Umutoni* (sentenced for aggravated human trafficking after abducting children from Rwanda into Uganda); *Hussein Hassan Agade and 12 others* (concerned a suicide bombing which killed 76 people and was claimed by Somalia's al-Shabaab, resulted in convictions and sentences of imprisonment); and, *Kamoga Siraje and 13 others* (sentenced high profile Muslim leaders to life imprisonment for terrorism) (Mwesigwa et al.). Amid limited resources the Division's work on *Kwoyelo* has not been prioritised (Matsiko).

In Bangladesh, the ICTB was established in 2010 following the 2008 victory of the Awami League in national elections, based on a law initially enacted in 1973 (Samad; Chopra). Under Section 3 of the *International Crimes Act (Act No XIX of 1973)* the ICTB has jurisdiction over crimes against humanity, crimes against peace, genocide and war crimes. As of May 2020, it has passed judgments on 30 cases involving 81 defendants, 37 of which did not participate in the trials and two of which died during trial (ICTB).

### 2.3.2 Fundamental rights

Considering that the mechanisms examined in this section have been established in different geographical, historical and institutional settings, they have heterogeneous strengths, weaknesses and have faced different challenges in the fundamental rights aspects of their work. Given the recent establishment and few activities carried out to date, this aspect could not be assessed in the practice of the Kosovo Specialist Chambers and of the SCC in the Central African Republic.

For hybrid mechanisms, common issues have arisen in relation to victims and witnesses, such as providing interpretation and translations of materials for participating individuals who may not speak the working language of the court. This has arisen in the SCSL for victims and witnesses who did not speak English, and was also overlooked in the ECCC, especially regarding translations of legal terms between the working languages of the Court for statements in Khmer from witnesses and victims (Hinton). Victim and witness protection have consistently been provided for on paper, however, the implementation has varied. Arguably, the strongest example is the SCSL, which in 2003, established a Witness and Victim Section as a neutral body to manage relocations and provide security, psychological and material support to witnesses

and victims and has produced a best practice guide to support future mechanisms (SCSL 2008; SCSL 2013). At the WCC, the implementation of the special provisions for victims has been mixed. Legally, victims can participate in proceedings either as witnesses or as injured parties and make compensation claims, yet in practice they have been participating as witnesses (Ivanišević). Witness protection measures have been variably applied in the WCC, sometimes without consultation with the victims in its early stages, however, resource limitations were a challenge and the WCC received international support to provide legal representation of witnesses (Ivanišević). In Guatemala, the high-risk nature of these proceedings requires additional measures such as wearing masks to conceal identities and measures to guarantee the personal safety of legal personnel involved in cases related to grave crimes (Beaudoin).

In Uganda, the length of proceedings before the International Crimes Division potentially violates the rights of the accused to an expeditious trial (Mwesigwa et al.). The impartiality of the Division has also been called into question as it has not yet tried senior Uganda Peoples Defence Forces soldiers for international crimes committed in northern Uganda (Mwesigwa et al.). Partiality has been a key concern in relation to the ICTB in Bangladesh, as trials have been heavily criticised regarding breaches of fair trial rights and there have been accusations that the government has used the Tribunal for political ends (Chopra; International Crisis Group; The Economist). The legislation establishing the ICTB has raised concerns as it provides for the application of the death penalty, does not clearly define the offences within it, and does not contain adequate due process rights for the accused (Chopra). The amendments to the 1973 Act in 2009 and 2013 also raised concerns about the retroactivity of the law, as it applies to conduct occurred in 1971 (Samad). There have been significant issues around the fundamental rights of accused individuals in Bangladesh. Two defendants who were spared from the execution of the death sentence due to old age or illness were still imprisoned for life (Robertson 2015). Other issues include proceedings being carried out *in absentia*, with the accused having no right to retrial (Robertson 2015). The ICTB has been extremely hostile to criticism and has brought contempt proceedings against Human Rights Watch and *The Economist* after they published articles criticising procedural flaws in its work (Chopra).

### 2.3.3 Cooperation and assistance

Similar to fundamental rights, cooperation and assistance are context dependent. For the SCSL, this meant seeking cooperation and political will from multiple States regarding the arrest and surrender of Charles Taylor, who was in Nigeria when his indictment was unsealed in June 2003 (SCSL 2013). The SCSL transmitted the arrest warrant to the governments of Liberia and Nigeria in November 2003, and on 29 March 2006, following a request to Nigerian authorities by then Liberian President Ellen Johnson Sirleaf, Taylor was arrested and transferred into the custody of the Court (SCSL 2013).

The SCC is the first hybrid court that has worked alongside the ICC, which has provided technical support for the SCCs work (Labuda 2017). In Cambodia, the ECCC is financed by voluntary contributions and received conspicuous financial assistance inter alia from Japan, Cambodia, Australia, the United States, the EU and its Member States (ECCC 2020a). The Ugandan International Crimes Division is reportedly financed as part of a Justice Law and Order Sector programme funded by the EU and the Ugandan government. However, insufficient resources hinder its proceedings (Matsiko). The High-Risk Court in Guatemala is similarly in need of further financial support (Beaudoin; International Justice Resource Center). In contrast, in Bangladesh the ICTB has refused offers of assistance to help it achieve international standards from the UN, US and EU (Robertson 2012).

Concerns around the WCC have focused on a lack of domestic cooperation which were attributed to political interference, even within the judiciary, regarding information requests which meant deadlines for the National War Crimes Strategy were being missed (Mallinder). The WCC required domestic cooperation as it has been involved in capacity-building within the wider Bosnian domestic legal system to prosecute pending war crimes cases, being responsible for 'harmonising' the prosecution of war crimes throughout

Bosnia-Herzegovina (Mallinder). At the same time as the establishment of the WCC, the Special Department for War Crimes was established within the state Prosecutor's Office and they cooperatively developed both a centralised database of war crimes cases in the country, and a National War Crimes Strategy (Mallinder).

### 2.3.4 Accountability to affected populations

Hybrid courts and specialised chambers have worked in different ways with their respective affected populations. In 2003, the Registry of the SCSL set up its Outreach Section, which established an outreach programme aiming to ensure its work would be understood across Sierra Leone and to provide civil society the opportunity to engage with the Court (SCSL 2013). Additionally, ongoing responsibilities around Witness and Victim protection are central for the RSCSL (SCSL 2013). Similarly, the ECCC has conducted several outreach programmes designed to reach society at all levels conducting institutional visits from foreign embassies and governments to discuss the work of the mechanism with working professionals, through to outreach in rural areas of Cambodia and national school visits to the Court (ECCC, 2020b).

The Kosovo Specialist Chambers has been criticised for lacking local legitimacy and ownership, as despite having been established by the Kosovo Assembly, it has since been argued that this came only under pressure from the international community (Hehir). The lack of genuine domestic political support has resulted in the perceived legitimacy of the Specialist Chambers among parts of Kosovo's population remaining low (Hehir). The fact that the WCC is located in Sarajevo and is governed by domestic law, was hoped to bring a sense of ownership over the proceedings for the Bosnian population who were, at least geographically, distanced from the ICTY (Mallinder). However, victims' groups and civil society (generally) were not consulted before the establishment of the WCC. The Court Support Network of NGOs also suspended cooperation in 2006 due to a perceived lack of interest in the Witness and Victims Section, although the WCC argued it lacked capacity to engage rather than willingness (Ivanišević; Mallinder).

In Uganda, the length of proceedings does not provide justice for victims, who also face issues with poor communication as they struggle to find out the case selection criteria, charges, and whether their views are taken into account (Mwesigwa et al.; Matsiko). Victims do not choose their counsel, who are appointed by the Division, lack information on who their representation is and how to contact them, and the victims' representatives similarly have lacked the resources to contact the victims (Mwesigwa et al.). Another issue in relation to providing justice for victims is how the Division will address amnesties should other cases arise, which is also pertinent to broader concepts of justice and reconciliation in Uganda: in *Gabula v Attorney General* the Division upheld the decision of the Amnesty Commission (Mwesigwa et al.).

The issue of amnesties may also concern the SCC in the Central African Republic due to the provisions in its establishing law, *Organic Law 15/003*, concerning immunities, pardons and amnesties. Article 56 of the *Organic Law*, regarding immunities, replicates only a truncated form of Article 27 of the *Rome Statute*, which states that the law applies equally to everyone, but does not include the part on irrelevance of immunities and official capacity (Labuda 2017). There is no mention of amnesty in the SCC law, but it refers to the *Penal Code*, which states that international crimes cannot be the object of pardon or amnesty. There may also be a conflict where Article 37 of the *Organic Law* potentially violates complementarity, as it establishes primacy of the SCC over the ICC. However, there is no indication yet as to how the Chambers will address these issues.

## 2.4 Universal jurisdiction

Having considered accountability for core international crimes within judicial mechanisms, the overview will now focus on the broader efforts of States at the domestic level, specifically through the application of universal jurisdiction. Universal jurisdiction is a form of extraterritorial jurisdiction exercised by a State over acts which have taken place outside of its territory, based on the nature of the crime rather than a national, personal or territorial connection. States have previously applied the principle of universal jurisdiction sparingly for reasons including

extraterritorial crimes being a lower priority, and political concerns around investigating nationals of other States, especially where the suspect was high-profile. There have also been legal limitations, such as that the suspect must be present in the territory of the State exercising jurisdiction (Ryngaert).

Despite this, the Extraordinary African Chambers established in the Courts of Senegal convicted the former President of Chad, Hissein Habré, for international crimes on the basis of universal jurisdiction (*Habré*). The application of the principle of universal jurisdiction has also seen a surge in recent years, predominantly within the EU, as Member States respond to the situations in Syria and Iraq, which have so far been unaddressed by an international judicial mechanism (*infra* Sections 4.5.2 and 4.6.3). The large numbers of people fleeing conflicts in Syria, Iraq and Afghanistan have led to people seeking refuge within Europe's borders, including victims who are now able to bring cases and suspects who are within the reach of European judicial authorities. Victims and victim communities have often had a large role in case-building in relation to universal jurisdiction through identifying suspects, bringing complaints and assisting with evidence gathering processes (Ryngaert).

At the end of 2019 there were a minimum of 207 suspects under investigation and 16 countries prosecuting crimes under the principle of universal jurisdiction: 40 percent more named suspects than in 2018, and the true number of suspects is unknown due to the increase in structural investigations being undertaken by States (TRIAL 2020). The number grows as cases move to the trial phase, with a reported 146 charges of crimes against humanity, 141 of war crimes, 21 of genocide, 92 of torture, and 37 of terrorism. At the end of 2019, there had been 16 convictions and two acquittals and 11 accused were on trial, however this number has since increased (TRIAL 2020). The States exercising universal jurisdiction in 2019 were: Argentina, Austria, Belgium, Finland, France, Germany, Ghana, Hungary, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland, the United Kingdom and the United States of America (TRIAL 2020).

While the principle of universal jurisdiction is an important tool in the fight against impunity, the focus on domestic security means prosecutions have increasingly been brought under anti-terrorism legislation, either as stand-alone charges or with cumulative charging for core international crimes (Jeßberger). In this respect, it is fundamental that international crimes are fully represented, the nature of the acts which have taken place is revealed and that appropriate penalties are applied. Accordingly, where prosecutions are taking place under immigration or anti-terrorism charges it is essential to use tools such as cumulative charging wherever possible in order to bring justice to the victims of core international crimes. Universal jurisdiction is discussed further throughout this study as it has become a significant aspect of providing justice for core international crimes.

## 2.5 United Nations evidentiary mechanisms

United Nations evidentiary mechanisms are a new type of body tasked with the collection and preservation of evidence with the aim of supporting future international or domestic criminal cases (Kaufman). Briefly introduced here, these mechanisms are dealt with more in detail in the country sections on Myanmar, Syria and Iraq (*infra* Sections 4.4.5, 4.5.3 and 4.6.2).

The first of such mechanisms, the International Impartial and Independent Mechanism for Syria (IIIM), was created with the UN General Assembly resolution 71/248 of 2017 in response to the UN Security Council's paralysis on accountability in the context of the Syrian conflict (Whiting). Having been mandated to independently and impartially assist the investigation and prosecution of persons responsible for serious violations of international law, the IIIM is tasked with consolidating, preserving and analysing evidence of violations of international humanitarian and human rights law; and, preparing files to facilitate and expedite fair and independent criminal proceedings in accordance with international law standards (A/RES/71/248). The Mechanism is working in cooperation with national jurisdictions to support prosecutions, however its work has faced challenges including lack of cooperation by the Syrian regime.

In August 2017, the Government of Iraq made a request to the UN for international assistance to hold the IS accountable for their crimes. In response, UN Security Council resolution 2379 of 2017 was unanimously adopted and provided the mandate for the Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD). UNITAD is tasked with the collection, preservation and storing of evidence of acts which may amount to war crimes, crimes against humanity and genocide committed by IS in Iraq (S/RES/2379). The Iraqi judiciary is the intended primary recipient of UNITAD materials and a cooperative relationship in relation to domestic capacity-building is developing (S/2020/386).

The Independent Investigative Mechanism for Myanmar (IIMM) was established in September 2018 by UN Human Rights Council resolution 39/2, in response to the UN Security Council's inaction in the face of atrocities committed against the Rohingya people in Myanmar (Nichols; Patten Statement). The IIMM is mandated to prepare files in order to facilitate and expedite criminal proceedings, in accordance with international law standards, in national, regional, or international courts or tribunals that have or may in the future have jurisdiction over crimes committed during the 'clearance operations' in Rakhine State, Myanmar (A/73/716). The Mechanism became operational on 30 August 2019, has begun accepting relevant material from interested individuals, groups and organisations and conducted its first mission to Bangladesh from 9 to 14 November 2019.

## 2.6 The role of Human Rights Courts and of the International Court of Justice

In addition to the mechanisms examined thus far, regional human rights systems and the International Court of Justice (ICJ) play a role in the fight against impunity for core international crimes. Regional systems have produced abundant case-law on human rights violations which amount to international crimes, including enforced disappearances. Conduct amounting to the crime of enforced disappearance only began to be considered as a crime against humanity with the adoption of the Rome Statute. The ECCC delivered the only two relevant judgments to date (Cases *002/01* and *002/02*) but, as enforced disappearances had not been an international crime in 1975-1979, the Court considered them as 'other inhumane acts' under Article 5 of the *Law on ECCC*. The Convention on Enforced Disappearances entered into force only in 2010, and subsequently most case-law on enforced disappearances has arisen from regional human rights systems (Keller and Heri). The Inter-American Court of Human Rights has decided cases on enforced disappearances since the late 1980s (see e.g. *Velásquez Rodríguez v. Honduras*) and the European Court of Human Rights has heard relevant cases mainly coming from northern Cyprus (see e.g. *Varnava and Others v Turkey*), South-Eastern Turkey (see e.g. *Çakıcı v. Turkey*) and Chechnya (see e.g. *Aslakhanova and Others v Russia*). Human rights courts may provide viable alternatives for accountability when access to international criminal justice institutions is precluded. The evidentiary standards are significantly lower than in criminal trials and, as the conduct is not characterised as crimes against humanity, there is no need to establish that it occurred as part of a widespread or systematic attack against a civilian population.

At the time of writing, the African human rights system is under reform, as the *Malabo Protocol* is open for ratification. Once in force, it will merge the African Court of Human and Peoples' Rights and the Court of Justice of the African Union, creating a Court with both human rights and international criminal jurisdictions. The international criminal jurisdiction will not be limited to core international crimes, but will also include terrorism, mercenarism, piracy and a series of trafficking and corruption offences. The Court will be complementary to national courts unwilling or unable to investigate and prosecute and has been defined as an 'African solution to African problems' (Matiyas). This creates a regional accountability layer before resorting to the ICC, although the Rome Statute designed a complementarity regime only for national jurisdictions and does not envisage a regional layer (Nimigan). Article 46A *bis,* which provides for immunity for serving Heads of State and Government is arguably the main issue requiring resolution in the

future. However, no ratification instrument has been deposited to date, although fifteen AU States have signed.

The International Court of Justice may also play an important role in the fight against impunity. However, as the Geneva Conventions do not give it jurisdiction and there is currently no standalone convention on crimes against humanity, the ICJs contribution is necessarily limited to the crime of genocide. Even though the ICJ does not decide on individual criminal responsibility, its contribution to accountability includes issuing provisional measures and decisions regarding State responsibility not just for commission of genocide, but also for complicity, conspiracy and failure to prevent genocide under the *Genocide Convention*. To date, the Court has heard three such cases: in *Bosnia and Herzegovina v Serbia and Montenegro*, the Court found that Serbia had not committed, conspired to commit or been complicit to genocide, but held that it had violated the obligation to prevent the crime from happening and its obligation to transfer Ratko Mladić to the ICTY. In *Croatia v Serbia*, the Court dismissed Croatia's claim that Serbia committed genocide in its entirety. Finally, at the time of writing, there is an ongoing case, *The Gambia v Myanmar*, which will be analysed in the country section on Myanmar (*infra* Section 4.4.6). Given the positive contributions made by the ICJ under the *Genocide Convention* and the potential impact of cases, as seen in Myanmar, the adoption of a new Convention on the Prevention and Punishment of Crimes against Humanity, which is currently under discussion in the International Law Commission, would represent another positive step in the fight against impunity.

# 3. Overview of the EU policy framework

The EU is recognised as one of the strongest supporters of accountability for core international crimes. Through initiatives aimed at upholding the founding values embedded in Articles 2, 3 and 21 of the *Treaty on the European Union*, the EU shows strong diplomatic and practical leadership on human rights and the rule of law, the observance of international law and the promotion of peace and security. Commitment to the prevention of core international crimes, accountability and the promotion of international justice mechanisms are reiterated in the main Common Foreign and Security Policy instruments, such as the Global Strategy and the Implementation Plan on Security and Defence (EEAS 2016a; Council 2016a).

EU support for international and transitional justice is illustrated in the 2015-2019 Human Rights and Democracy Action Plan, and the fight against impunity is anticipated to gain further prominence in the 2020-2024 Human Rights and Democracy Action Plan which is under discussion at the time of writing (Interviews 8, 9; Council 2015a; Commission 2020a). Promoting the fight against impunity is therefore within the mandate of the EU Special Representative (EUSR) for Human Rights, who promotes the entirety of the EU's external human rights agenda, facilitating political dialogues and representing the EU in multilateral and bilateral fora (Interview Gilmore; Council 2019a). The EUSR also chairs the most sensitive or challenging Human Rights Dialogues and Consultations which engage the political leadership of third countries and international organisations on the human rights agenda, including accountability issues (Interviews Gilmore, 8). The mandate of the EUSR was enhanced by the Council to specifically include international humanitarian law and international criminal justice after the European Parliament advocated for a subject specific EUSR to provide similar coordination and advocacy, a proposal that was endorsed by the representatives of numerous civil society organisations (Parliament 2017a, 2017b; Kreissl-Dörfler; Council 2019a; Human Rights Watch 2018b; HR/VP 2018a). The concept of a new EUSR had some support as a figure which could have streamlined internal and external EU action, and the coherence of EU initiatives amid a growing number of international accountability mechanisms (Interviews Arena, 2). However, concerns included the potential fragmentation of the EU human rights agenda, meaning others consider the enhanced mandate of the EUSR for Human Rights a welcome development (Interviews 3, 9). The recent mandate expansion means its full impact cannot yet be known, but it will be particularly valuable if it is supported by sufficient specialised human resources (Interview 8, 9).

In recognition of the ICCs central role within the international system as the only permanent international criminal justice institution, efforts to support the Court are prominently featured in the EU framework on accountability for core international crimes. The Council has adopted a robust policy framework for engagement with the Court, including its 2011 Decision on the ICC and a dedicated Action Plan on its implementation. Using the principles of the Rome Statute, the EU has constructed a comprehensive approach with four thematic areas of focus: universality, integrity, cooperation and assistance, and the principle of complementarity (Bekou 2014).

To implement its framework on the ICC, the Council also established the COJUR-ICC, a sub-area within the Working Group on Public International Law whose responsibilities include deciding the common approach among Member States on matters concerning the ICC (Hoffmeister). The EU Focal Point for the ICC sits within the European External Action Service (EEAS) and coordinates EU action on the ICC among Member States, non-Member States, non-governmental organisations, and other entities, as well as the ICC itself. In this respect, the Focal Point works to ensure information exchange, prepare programmes and activities, and continues to ensure support for the ICC is kept on the agenda (Interviews 3, 8, 9; Council 2011a). The European Parliament also plays a key role in relation to the ICC, providing political impetus through resolutions in support of international criminal justice, and through the proactivity of the informal group of MEPs 'Friends of the ICC' who promote support for the ICC in EU policies (Parliament 1999a, 2002a, 2002b, 2017a; Bekou 2014).

Another external action measure that the EU deploys is imposing targeted sanctions on individuals suspected to have committed or participated in the perpetration of core international crimes (Interviews Arena, 1, 7, 15, 17). Beyond the existing approach, at the time of writing, the Council and the Parliament are considering the adoption of a Human Rights Sanctions Regime, which would target individuals alleged to have committed human rights violations, including core international crimes (Parliament 2019a; Rettman). Although this initiative is in the preparatory stage, its adoption, if supported with exchange of information and effective cooperation, would have the potential to induce compliance with ICC arrest warrants and consequently to enhance the Court's capacity to effectively prosecute (van der Have). In addition, the imposition of restrictive measures may affect the behaviour of targeted individuals, halting the relevant conducts. However, sanctions should not be considered as accountability mechanisms or as a substitute for them (Interview 8).

The EU's approach to fighting impunity was expanded with the Policy Framework on Support to Transitional Justice, which forms part of the implementation of the EU Action Plan on Human Rights and Democracy. The Policy Framework provides the basis for EU action on transitional justice and takes the EU approach beyond retributive international criminal law to promote a victim-centred approach which identifies five objectives, including: providing recognition and redress to victims, fostering trust, and contributing to reconciliation. It also provides elements of transitional justice, namely, criminal justice, truth-seeking, reparations, and institutional reforms/guarantees of non-recurrence, along with guidance for implementation. The EU's definition of transitional justice is in line with the UNs, and stated as: 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation' (Council 2015b). This may include judicial and non-judicial mechanisms, international involvement or not, prosecutions, truth-telling, reparations, institutional reform, etc. (Council 2015b). Expanding the EU framework to include transitional justice is an important step in the current global context, especially in light of the new UN Evidentiary Mechanisms.

However, there is a gap between the Policy Framework on Support to Transitional Justice on paper and its current implementation. The implementation of the Policy Framework is coordinated by the Focal Point for Transitional Justice, which sits within the EEAS. Whilst this provides a mandate to coordinate transitional justice across the EU, there is a mixed level of understanding around the policy, where the policy is

accessible and how it should be implemented amid differing country contexts (Interviews 5, 7, 8, 13). The policy is comprehensive and provides a good framework from which to operate, however, external subject experts including consultants working with the EU are not always in alignment with the EU's approach which can create challenges for those trying to action policies (Interview 5, 6, 8, 13, 15). Providing support for the Focal Point for Transitional Justice and increased internal promotion of the Policy Framework should be considered a priority.

On an institutional basis, the Facility on Justice in Conflict and Transition which is the EU's facility to support transitional justice sits within the Foreign Policy Instruments (FPI) and is funded under the Instrument contributing to Stability and Peace (IcSP). It operates short-term flexible missions and provides technical advice to third States on 'transitional justice, constitution building and restoration of justice for the population' (Baumgartner and Mayer-Rieckh 2020a). Although flexibility is an essential aspect of operation within transitional contexts, the long-term nature of transitional justice means the Facility also aims to identify opportunities for longer-term involvements (Baumgartner and Mayer-Rieckh 2020b). Accordingly, the EU should consider ensuring a linkage between the Facility and the development programmes managed by DG DEVCO and DG NEAR (Interview 7).

The Commission funds and monitors projects in support of international and transitional mechanisms as well as domestic legal systems primarily through DG DEVCO, DG NEAR and the work of EU Delegations in partner countries (Interviews 5, 6, 7, 13, 14, 15, 17). Previously, the EU has engaged with *ad hoc* Tribunals, hybrid courts, specialised chambers in domestic courts, on a project basis to address arising political, technical and financial needs of these institutions, which are discussed in detail in the country sections (*infra* Sections 4.1-4.6).

The EU has approached its engagement with the UN Evidentiary Mechanisms in Myanmar, Syria and Iraq in a bespoke manner rather than adopting a subject-specific 'framework for Evidentiary Mechanisms', as each one has context-specific requirements, discussed in detail in the country sections (*infra* Sections 4.4.5, 4.5.3 and 4.6.2). Whilst on face value the Evidentiary Mechanisms have received similar modes of support such as political, diplomatic, technical and financial assistance, these have facilitated different operational capacities depending on the relative need. For example, the location of UNITAD within Iraq has generated requirements for infrastructure, investigative capacity, training of local personnel and security, which differ from the needs of the IIIM and IIMM which are based in Geneva (Interviews Khan, Koumjian and Marchi-Uhel). As the UN Evidentiary Mechanisms are non-judicial and therefore require national, regional or international fora in which cases are taken forward, engagement with EU bodies such as the Genocide Network provides an important opportunity to interact with multiple national jurisdictions simultaneously (Interviews Marchi-Uhel, Pezdirc, Khan). Through such network-based interactions, the EU could also facilitate coordination to support information sharing and knowledge-exchange activities (Interviews 2, 9, 12, 16). Arguably a gap exists in the EU's approach in relation to encouraging evidence sharing between States and the UN Mechanisms; in this regard, the EU and Parliament should enhance support for the adoption of related cooperation frameworks, which may take the form of legislation, agreements or memoranda of understanding (Interviews 12, 16).

To ensure there is no impunity for core international crimes within the EU the Council created the European Network of Contact Points for the investigation and prosecution of genocide, crimes against humanity and war crimes, known as the Genocide Network (Council 2002a, 2003a, 2008). The Genocide Network constitutes a *sui generis* forum where States, accountability mechanisms, institutions, organisations including civil society and practitioners interact to support each other and share knowledge, best practices and operational information (Interview 2). Only EU Member States can be members of the Genocide Network. Third States, the ICC, Eurojust and Europol participate as observers (Eurojust). Institutions or bodies as well as civil society organisations such as the European Commission, Interpol, Human Rights Watch and others participate through associate status (Eurojust). There are 27 EU Member States with

membership, plus observer States Bosnia and Herzegovina, Canada, Norway, Switzerland, and the United States (the United Kingdom opted out and held observer status from 2014 until 31 January 2020) (Eurojust). Apart from the ICC, international accountability mechanisms participate as associates, including the MICT, the Kosovo Specialist Chambers and the IIIM (Interview 2). Considering the crucial role played by the Genocide Network in ensuring accountability within EU borders, it is recommended that the EU enhances the political and financial support provided to its activities. This may be especially important when there is a disconnect between EU external and internal action, as suggested during the 4th EU Day against Impunity (Council 2019b). External action is governed by the Common Foreign and Security Policy, while internal action is governed by the policy on Justice and Home Affairs which upholds the EU's founding values set forth in Articles 2 and 3 of the *Treaty on the European Union*.

The internal action has been further enhanced with the 2002 Council Framework Decision and 2014 Directive which included core international crimes respectively within the scope of the European Arrest Warrant and the European Investigation Order (Council 2002c; Parliament and Council 2014). Following the recommendation of the Genocide Network in its 2014 Strategy, the mandates of Europol and Eurojust were also enhanced to include core international crimes (Genocide Network 2014). The 2014 Strategy of the Genocide Network on core international crimes has also been referred to in Council Decisions from 2015 including Conclusions on strengthening the fight against impunity within the EU (Genocide Network 2014; Council 2015c). Europol established the Analysis Project Core International Crimes (AP CIC) in response to the number of alleged perpetrators present on European soil. Measures in line with the Strategy include the Exclusion Network of the European Asylum Support Office (EASO) for the withdrawal of international protection to individuals when there are serious reasons for suspecting that they committed an international crime, pursuant to the 2011 Directive of the Council and Parliament. With these developments, EU institutions in charge of internal cooperation in law enforcement, judicial matters and immigration all have dedicated frameworks and facilities to support the fight against impunity. Cooperation between these three bodies has enhanced information sharing, including through databases which facilitate relevant investigations and prosecutions (Interview 2). The Parliament, however, is less involved in coordination activities as, for example, it is not able to engage with COJUR-ICC where officials from the EEAS, Commission and Member States regularly attend. Arguably, to ensure that the Parliament is as informed and involved in EU processes as possible, so as to assist its own decision-making processes, it should consider joining the Genocide Network as an associate: a recommended step to keep Parliament appraised of developments occurring in 37 jurisdictions and involve it in consultations on accountability with other EU bodies, Member States and third countries.

Coordination of EU actions is a challenge due to the multitude of EU actors involved in accountability for core international crimes. The EEAS engages with third States, both through Headquarters and Delegations, on both the political and development aspects, which include accountability for core international crimes. There is a disjoint between EU internal and external action which, although partially attributable to the design of the founding Treaties, has not been sufficiently mitigated to work efficiently towards accountability (Interviews 2, 8). Examples include needing to foster better communication between Headquarters and Delegations, and enhance measures to preserve institutional memory with systematic approaches to ensure coherence amid staff turnover (Interviews 3, 5). Coordination between different services is largely left to the initiative of the individual staff members involved, which provides flexibility, and has generally proven preferable for cooperative engagement (Interviews 3, 5 6, 7, 9).

A key challenge facing the EU is the disparity between the available resources and its ambitions on accountability for core international crimes, particularly in relation to staffing levels (Interviews 1, 2, 3, 9). The EEAS does not have a dedicated unit on accountability and, in reality, 'Focal Point' often means one individual with an extremely broad portfolio and coordination task, whilst individuals in EU Delegations have extremely large political and development files. The EUSR for Human Rights is assisted by four

seconded political advisers, one of whom with specific expertise in international criminal justice. The Genocide Network Secretariat comprises only three officials. In this regard, the EU should consider increasing the human resources dedicated to the fight against impunity, in particular to increase the capacity of the Genocide Network Secretariat and ensure further assistance to the EUSR for Human Rights and the Focal Points for the ICC and for Transitional Justice. The limitation on human resources negatively affects monitoring and reporting activities of the EU, especially hindering work on multi-functional periodical documents. Currently the capacity cannot meet the demands on some offices. Reporting must not be reduced to a tick-box exercise by over-stretching capacity, if such processes are to provide value in relation to complex issues such as transitional justice, stock-taking on EU action on accountability, assessing its impact, informing future actions, and promoting the work of transitional justice institutions (Interviews 1, 2, 3, 7, 8). The periodical reporting approach adopted with regards to the implementation of the EU Guidelines on International Humanitarian Law is a welcome development and should be extended to the evaluation of the other initiatives which are discussed below (COJUR).

The available resources of the EU relative to its ambitions are a concern in relation to the establishment of new bodies. This includes the European observatory on prevention, accountability and combating impunity, whose Pilot Project is under budgetary discussion at the time of writing (Parliament 2020a; 2020b). The project is in its initial phases and is conceived as a facility that would enhance the European Parliament's contribution to the fight against impunity through the collection and organisation of information for UN mechanisms, which could focus on 'urgency situations' highlighted in the Parliament's plenary sessions, to ensure continuity of action and follow up (Interview Arena). However, it is not clear whether its scope would only cover core international crimes, nor is it clear which specific activities the body would carry out. Although in principle any initiative aimed at fighting impunity for core international crimes is welcome, its establishment would need to be coordinated so as to avoid overlaps and duplication with other EU bodies (Interviews 1, 2, 3, 6). The creation of the observatory would also require significant funds and serious consideration needs to be given not just to the added value but also to whether it would be more appropriate to strengthen existing bodies working on impunity which are under-resourced or below optimal capacity.

In light of this overview, the following section examines the policy framework for combating impunity for core international crimes through the lens of the four main thematic areas of EU engagement: universality; integrity; cooperation and assistance; and the principle of complementarity.

## 3.1 Universal reach of accountability mechanisms

The EU is committed to 'widening the reach of international norms' including international humanitarian law, international human rights law and international criminal law (EEAS 2016a). To achieve this objective, it has contributed to the universal reach of accountability mechanisms, particularly by promoting the universal ratification of the Rome Statute. The EU has also supported the establishment of other mechanisms entrusted with fighting impunity for core international crimes, and invested in domestic capacity-building to provide accountability such as through the adoption of comprehensive legal frameworks.

Since the adoption of the Rome Statute in 1998, the EU encouraged its Member States to join the ICC and all the then Member States had ratified the Rome Statute by the time it entered into force in July 2002 (Huikuri). Subsequently, all new Member States have become States Parties to the ICC, and the ratification of the Rome Statute and adherence to its values are part of the obligations to be fulfilled by candidate countries which want to join the EU (COJUR-ICC). Universal ratification of the Rome Statute has been central to EU policy commitments since the adoption of the first Common Positions on the ICC (Council 2001, 2002b, 2003b). This has been reiterated in the EU Pledge at the Kampala Review Conference in 2010, and in the current EU framework on the ICC in the 2011 Council Decision and Action Plan, in which

universality constitutes one of the four key areas of engagement with the ICC (Bekou 2014; Council 2011a, 2011b).

The EEAS has conducted hundreds of demarches at a rate of 35 to 45 per year to encourage the ratification and implementation of the Rome Statute and the issue is addressed in Human Rights Dialogues with States that are not Parties to the ICC (Interviews Gilmore, 3, 6, 17). The successful engagement with Cape Verde, Japan, Kiribati, Grenada, Guatemala, the Philippines and Vanuatu has actively contributed to increasing the number of State Parties to the Rome Statute (COJUR-ICC; PGA 2020a; Interview 1). Whilst universality efforts are accompanied by offers of technical assistance aimed at assisting States to ratify the Rome Statute, pursuant to Council Decision 2011/168/CFSP, the uptake has so far been poor (Interview 3).

The EU has reacted to the announcement of withdrawals by ICC States Parties, expressing regret and urging EU authorities to engage in cooperation to ensure that no withdrawal takes place. It also called upon signatories to the Rome Statute who no longer wish to ratify it to reconsider their decision (Austrian Statement; Parliament 2017a). With the view to avoiding duplication of efforts, the EU-led universality campaign should be better coordinated with initiatives by Member States that may have strong ties with third countries. It is also recommended that the EU scales up universality efforts in its interactions with regional fora, such as the ASEAN and the AU.

When core international crimes are allegedly committed on the territory of a non-State Party, the Parliament has taken the political lead urging the concerned State to ratify the Rome Statute and calling upon EU Member States to prompt the UN Security Council to refer such situations to the ICC (e.g. Parliament 2014a, 2019b). Although such efforts have so far been unsuccessful in the examples of Myanmar and Syria, it is important that Member States keep accountability high on the UN Security Council agenda and continue to support accession to the Rome Statute of States where core international crimes are allegedly committed.

As part of the ICC universality campaign, the EU has also included 'ICC clauses' in fifteen agreements with third States and international organisations (EEAS 2020b). Since the adoption of the *Cotonou Agreement*, the clauses have had their wording adapted and are currently taking the form of entry points for political dialogue (Interview 3). This lighter-touch approach provides a springboard for further developments, including cooperation on strengthening domestic legislation around core international crimes. However, there have been limited results in countries where crimes are ongoing. It is therefore recommended that the EU considers strengthening their approach as appropriate in treaties and negotiations with third States, as well as continuing to apply political pressure (Interviews 7, 17).

Universality also includes the ratification of the Kampala amendments, including on the crime of aggression (e.g. Parliament 2020b). In this respect, it is important that the EU and the Parliament call upon both Member States and third States to ratify the aggression amendments, as they number only 39 parties at the time of writing.

The EU efforts for the universal reach of accountability mechanisms are not limited to the Rome Statute ratification campaign. At the time of writing, the ICC lacks jurisdiction over some situations where alleged core international crimes are being committed and therefore EU Member States raise the issue of accountability in UN fora. Furthermore, the EU and its Member States have supported the establishment and assisted the work of the UN Evidentiary Mechanisms in Myanmar, Syria and Iraq which are mandated to investigate the situations over which the ICC does not have jurisdiction (*infra* Sections 4.4.5; 4.5.3; 4.6.2).

Another strand of EU action on the universal reach of accountability mechanisms concerns its activities aimed at ensuring respect for international criminal law. One gap in international law is the lack of a convention criminalising crimes against humanity, which exacerbates the absence of an obligation on States to prevent and punish such crimes. The International Law Commission (ILC) is currently working on

such a convention and the EU is actively contributing through political support and comments on the draft articles. It is recommended that the EU continues to engage in this positive effort.

In addition, the EU has adopted and periodically monitors the implementation of the Guidelines on the Promotion of Compliance with International Humanitarian Law, which aim to promote respect for IHL in the global relations of the EU, reducing the impact of armed conflict and ensuring that individual criminal responsibility for war crimes is assessed by domestic courts, the courts of another country or the ICC.

Periodic monitoring of EU instruments is a useful tool, as it provides up to date information of their status of implementation. It is recommended that the EU conducts periodic assessments and reporting of further initiatives aimed at upholding the universal reach of accountability mechanisms. Accurate quantitative and qualitative data on demarches, Human Rights Dialogues and use of ICC clauses would highlight the challenges and lessons learnt which could then be used to inform future EU action. The impact of EU initiatives, especially in the area of universality, could be disseminated to the wider public. However, one challenge is that universality activities are often implemented by third parties which may present issues around reporting (Interviews 3, 5, 6, 7; CICC). Despite this, considering the potential added value of monitoring, it is recommended that the EU carries out an assessment of its practices.

## 3.2 Integrity of accountability mechanisms

Preserving the integrity of the international criminal justice system concerns protecting its core principles and reconciling the tensions between the principle of legality and political considerations (Bekou 2014; Council 2015a). The concept includes supporting the mandates of international accountability mechanisms and preserving their core values, such as autonomy of the judiciary, protection of human rights in prosecutions and trials, and the rejection of amnesties and immunities.

EU efforts on preserving the integrity of international criminal justice have been primarily incorporated into instruments dealing with the ICC, although it is possible to extend this concept to other courts, tribunals and mechanisms that uphold the same values and experience similar challenges. The EU adopted decisions to support the effective implementation of the mandate of the ICTY such as: freezing the assets of indicted individuals and encouraging third States to do the same, and restricting the travel of persons helping fugitives or who were acting to obstruct the ICTY (Council 2004a, 2004b, 2010). The EU has provided significant political and diplomatic support for other *ad hoc* tribunals, hybrid courts, specialised chambers and the UN Evidentiary Mechanisms (Interviews 5, 6, 7, 10, 12, 15, 17). It has also promoted the autonomy of the judiciary in its human rights policies, particularly in relation to domestic and transitional justice mechanisms (Interviews 5, 6, 7, 8, 9). The EU also has a clear position against granting amnesties in transitional justice processes, accepting them only for the crimes of sedition, rebellion, treason and legitimate acts of war, but categorically excluding core international crimes (Council 2015b).

Integrity of the Rome Statute is one of the four key priorities of the current policy framework on support to the ICC and the EU has taken a multi-pronged approach to this. EU authorities convey political support including through statements and resolutions on the occasion of important developments, such as elections to the Court's organs, the issuance of arrest warrants, the transfer of accused, the delivery of judgments and the submission of referrals (HR/VP 2011a, 2011b, 2011c, 2012; Parliament 2018a). When the ICC mandate has been put at risk by practices adopted by third States, the EU has taken a clear stand, e.g. with regards to bilateral immunity agreements with the United States (Benzing). In this case the Parliament requested to assess their compatibility with the Rome Statute which developed with the adoption of the 'EU Guiding Principles concerning arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States regarding the conditions to surrender of persons to the Court', expressly classing such immunity agreements as being inconsistent with the Rome Statute, thus preserving the integrity of the ICC system (Council 2003c; Parliament 2002b).

In response to attacks by third States on the role of the ICC as an international actor, the EU has conducted demarches aimed at preserving the integrity of the Rome Statute (Interview 3; Council 2015a; COJUR-ICC). The Parliament has organised meetings with the ICC Prosecutor in order to be directly appraised of the challenges faced by the Court (DROI). The EUSR for Human Rights has upheld the integrity of the ICC system in consultations with regional organisations. (Interview Gilmore). The EUSR has also re-opened the high-level discussions with the United States, which had been paused since 2015. The EUSR met with US officials to address the attacks that the US administration has directed at the Court (Interviews Gilmore, 1). In June 2020, the White House issued an Executive Order freezing the assets and suspending the visas of those who have assisted the ICC efforts to investigate personnel of the US or their allies (Scheffer 2020a). In response to this, the HR/VP released a statement expressing concern about the measures and the ten members of the Security Council which are States Parties held a virtual stakeout in support of the Court (including EU Member States Belgium, Estonia, France, Germany) (HR/VP 2020a). Sixty-seven ICC States Parties, which included all EU Member States apart from Hungary and Poland, also released a statement in support of the Court. Lack of unanimity prevented the EU from adopting a common statement on the issue and weakens the EU stance, especially when it is not reached on fundamental issues such as the integrity of the ICC.

The EU has also promoted the integrity of the UN Evidentiary Mechanisms by providing political and diplomatic support for the fulfilment of their respective mandates and by providing them with an important platform to share their progress (Interviews Khan; Koumjian, Marchi-Uhel). Given that the governments of Syria and Myanmar are not cooperating with the IIIM and the IIMM at this time, the Parliament and other EU institutions have consistently called on EU Member States to cooperate with the Mechanisms in order to mitigate issues, including those arising from lack of access to the territory of the concerned States (Parliament 2017a; 2019c; Interviews Gilmore, 7, 12, 16, 17).

## 3.3 Cooperation with, and assistance to, accountability mechanisms

The EU has prioritised cooperation with, and assistance to, accountability mechanisms in the fight against impunity. After the creation of the ICTR, the EU consolidated its stance on cooperation, urging the Rwandan government to cooperate with the Tribunal and 'deliver all information asked (…) regardless of the persons or institutions concerned' (Council 2002c). The most significant contribution however is perhaps the inclusion of cooperation with the ICTY in the conditionality regime for EU Membership (Commission 2005; Dobbels; Wentholt). ICTY conditionality led to the arrest and surrender to the Tribunal of high profile wanted individuals and ultimately to Croatia joining the EU in 2013 (Interview 12). This approach to the enlargement policy has remained consistent and currently cooperation with the MICT and the Kosovo Specialist Chambers is a condition for Western Balkan countries aspiring to become EU Member States (Commission 2015, Council 2018a).

With the establishment of the ICC, the EU reinstated its commitment to cooperation, becoming the first international organisation to sign a cooperation agreement with the Court. Accordingly, the two institutions cooperate closely, consulting and providing information to each other on matters of mutual interest. As part of the Agreement, the EU undertook to take all necessary measures to allow the Court to exercise its jurisdiction, including waiving privileges and immunities; to offer the expertise of gratis personnel to assist the Court and support in the field; and to support the development of training and assistance for judges, prosecutors, officials and counsel in work related to the Court. Member States have also been invited to comply with all requests by the Court and adopt its framework agreements (Parliament 2011). The EU has extended its call for enhanced cooperation through the adoption of framework agreements and this was reiterated in respect of third States at the 17th session of the Assembly of States Parties (Austrian Statement). In this respect, the EU could offer technical assistance to both Member States and third States wishing to adopt a cooperation agreement with the Court.

The EU recognises non-cooperation as one of the major challenges faced by the ICC (Interview 1; Bekou 2014). The Council has included cooperation among the top four priorities in the EU relationship with the ICC and made it a regular item on the agenda of the COJUR-ICC (Council 2011a, 2013a). The Commission has also supported the ICC in efforts to remedy the issue, providing funding for a booklet explaining arrest procedures as part of a broader, arrest-focused, media campaign (A/74/324). The Parliament has urged all Member States to comply with requests by the Court taking all necessary steps to facilitate cooperation (Parliament 2011). Due to repeated instances of non-cooperation, the EU has engaged in diplomatic talks with the Central African Republic, Chad, Malawi and Nigeria, reminding States Parties of their obligations to arrest and surrender individuals indicted by the Court (COJUR-ICC). Statements and demarches followed also Al-Bashir's visit to Djibouti and Uganda (Interview 3; HR/VP 2018b). The Council consolidated this effort with an official position on non-cooperation and its Member States undertook to avoid non-essential contacts with individuals subject to arrest warrants issued by the Court, in order not to undermine the main values enshrined in the Rome Statute (Council 2011a, 2013a). These initiatives show the EU's strong commitment to cooperation. They are welcome developments which demonstrate political support and aim at increasing pressure to comply with ICC arrest warrants. It is recommended that the EU continues to apply this policy to individuals subject to ICC arrest warrants.

In addition to offering cooperation, the EU provides several forms of assistance including funding, which for the ICTR included EUR 1.5 million for projects on witness protection, information management and capacity building, and for the ECCC included contributing over EUR 17 million to the budget (EEAS 2014; MICT 2020e). The EU also funded the ICTY outreach programme for 15 years and, since 2012, it has funded ICC outreach activities with EUR 1 million each year (Interview 6; ICTY 2016). During 2018-2019, the Commission and the Netherlands provided financial support for 17 technical events which were attended by over 600 participants from 140 States. These aimed at strengthening the Court's ability to implement its mandate through improving judicial cooperation, increasing diplomatic support and awareness of the ICC mandate and activities (A/74/324). Financial assistance is, together with political and diplomatic involvement, the most important form of support and the EU should consider it a priority in consultation with the receiving mechanisms in order to strengthen institutions and facilitate the delivery of their mandates.

The EU is also committed to strengthening cooperation and assistance with the UN Evidentiary Mechanisms and it has consistently called on States to cooperate with them. Following their establishment, Member States provided political support in relation to budgetary processes and made significant financial contributions, enhancing the initial capabilities of the Mechanisms (Interviews Gilmore, Khan, Koumjian, Marchi-Uhel). The IIIM has also received extrabudgetary contributions under the IcSP and support from the Netherlands Forensic Institute, whilst UNITAD has received EUR 3.5 million for its digitisation project (Interviews Marchi-Uhel, Khan; MFA Netherlands; S/2020/386). Although the Mechanisms are at different stages, it is important that they continue to receive appropriate political, financial and technical support which allows them to increase their capacity and visibility.

The Genocide Network also plays a critical role in cooperation and assistance provided to the UN Evidentiary Mechanisms, and all of them have had some form of interaction with it (Interviews Khan, Marchi-Uhel, 2, 9). The IIIM is represented in the Network by a contact point, providing it a forum to interact with the prosecution offices of Member States. This has the double function of allowing it to receive effective technical support from European national authorities while, at the same time, presenting what the Mechanism can offer to domestic jurisdictions (Interviews Marchi-Uhel, Pezdirc). Further engagement with the Genocide Network by UNITAD, and the IIMM, in a similar way could potentially provide such benefits.

In order to better support the UN Evidentiary Mechanisms, the EU could play a role in coordinating interactions and cooperation with judicial authorities in the Member States (Interviews 2, 9, 12, 16). EU

authorities, and particularly the Parliament, should encourage Member States to put in place a framework allowing for Evidentiary Mechanisms to collect evidence within their territories. Furthermore, the EU should promote the adoption of agreements or legislation to grant protective measures to individuals who interact with the Evidentiary Mechanisms but who are not connected with ongoing proceedings, as at the time of writing, only one EU Member State has such a framework in place (Interview 12).

## 3.4 Complementarity

The EU recognises and supports the role of the ICC as a Court of last resort, considering the implementation of the principle of complementarity a key priority in both its external and internal action. The Complementarity Toolkit provides practical guidance on how to adopt a framework that addresses relevant issues such as the rights of victims, witness protection, measures to enhance the capacity of judicial actors and the adoption of a legal framework that criminalises genocide, crimes against humanity and war crimes (Council 2013b). Such measures aim to reinforce the domestic justice systems of third States so that they can fully exercise their jurisdiction over individuals who have allegedly committed core international crimes. Enhancing the capacity of the judiciary in countries in transition also aims to promote adherence to international standards. This activity ultimately allows EU Member States to transfer accused persons to the countries in which crimes have been committed so that they can be tried closer to the evidence and the victim communities (Interviews 2, 11). The current framework envisages the provision of technical and financial support to third States for the implementation of the Rome Statute however, similarly to EU offers of technical assistance for the ratification, these are often not taken up (Council 2011a; Interview 3). Although complementarity is discussed in COJUR-ICC meetings, seven years after the adoption of the Toolkit, no report is available on the status of its implementation (Interviews 1, 3). Similarly to other key instruments, the lack of reporting is due to insufficient capacity (Interviews 1, 2, 3, 9). However, it is recommended that the implementation of the Toolkit is reviewed, in order for the EU to reflect on its impact and to inform future action in the area of complementarity.

To provide accountability for core international crimes within Europe, the EU has repeatedly called on Member States to adopt legislation implementing the Rome Statute so as to allow for the effective prosecution of international crimes at the domestic level (Council 2011a). Still some Member States have yet to put in place relevant legislation (Interview 2). A fruitful initiative in this respect would be to monitor and report on the status of legislation implementation and domestic approaches to core international crimes within the EU. This would not only explore the strengths and gaps within the legislation of EU Member States, but could also identify the challenges and lessons learnt providing a valuable tool for internal knowledge-sharing and to inform EU initiatives in third States. Additionally, with an understanding of the domestic situation, the Parliament could call on EU Member States to address any gaps within their domestic legal systems.

The Genocide Network has recommended measures to the EU institutions, Member States, the National Contact Points as well as its own Secretariat with a view to enhancing domestic capacities (Genocide Network 2014). The Network itself is an important forum for the provision of resources, practical guidance and comparative analyses of State practices in the investigation and prosecution of core international crimes. Furthermore, it has published a series of expert reports (on cumulative prosecutions, on the use of open-source evidence and on the prosecution of sexual and gender-based violence committed by IS), which provide a useful tool for Member States' judicial actors.

The EU recognises the applicability of the principle of universal jurisdiction within its own borders to ensure that it does not become a 'safe haven' for international criminals (Ryngaert). However, it is up to Member States to apply universal jurisdiction, not the EU itself. The Parliament has underlined the EU's commitment to universal jurisdiction in resolutions on accountability for international crimes, and reaffirmed States' obligations as members of the regional and international community (Parliament 2017a, 2018b). As a result

of immigration flows from the Middle East and North-Africa (MENA) region and sub-Saharan Africa, both suspects and victims of core international crimes committed extraterritorially are now within European borders. It is, therefore, important that the EU encourages Member States to adopt a thorough approach to improving domestic cooperation among their judicial, law enforcement and immigration authorities.

A further issue at the domestic level, both inside and outside the EU, is charging individuals with membership of, or association with, terrorist organisations. Whilst not all legal systems criminalise core international crimes, and acknowledging the focus on the global threat of IS, it is important that wherever possible war crimes, crimes against humanity and genocide are prosecuted as such. In this respect, the Genocide Network has released a report on cumulative prosecutions, which would ensure 'the full criminal responsibility of perpetrators' (Genocide Network 2020). Considering the different jurisdictions in domestic legal systems, this approach may not be available in all Member States. However, it is important to advocate for a precise characterisation of core international crimes, and for the adoption of an appropriate legal framework in order to comprehensively and fairly provide accountability.

Together with the Council, the Genocide Network has promoted the creation of specialised units to increase domestic capacity within individual Member States and cooperation between the national contact points to better coordinate activity amongst the domestic judiciaries (Council 2002a, 2003a; Genocide Network 2014). Specialised units have subsequently been established by Belgium, Croatia, France, Germany, the Netherlands and Sweden with specialised staff working on international crimes rather than a specified unit in Denmark, Finland, Lithuania, Poland and Spain (Interview 2; Genocide Network 2020). The advantage of specialised units or dedicated personnel within broader units is having dedicated staff who are specifically trained on this type of criminality, including the legal and cooperation requirements, to strengthen investigations and prosecutions (Interview Pezdirc). To establish such capacity, Member States could access the funds provided by the Commission's Structural Reform Support Service and the Parliament could play a role in encouraging Member States to take steps in this direction (Interview 2). Should the Parliament consider that the above recommended review of the domestic approaches of Member States to core international crimes is necessary, the monitoring could include internal organisation (the establishment of specialised units or the provision of dedicated personnel) and intra-State cooperation between domestic immigration, law enforcement and judicial actors. It could also address the impact of Joint Investigation Teams (JIT), which are an important advance in cooperation among Member States in the fight against impunity. Examples of their success include results in association with crimes committed in Syria (the 'Caesar case'), such as the arrest in Germany of three high-ranking former Syrian government officials accused of crimes against humanity, with the JIT remaining an important tool (Council 2017a; Mandel-Anthony; *infra* Section 4.5.2). Such a review could inform Member States' decisions on the enhancement of their legislation and cooperation capacity to increase coherence within the EU, as the situation is not currently homogenous, and some Member States have little or no frameworks in place.

The Parliament and the Genocide Network have also endorsed the adoption of a multilateral treaty on Mutual Legal Assistance on core international crimes, which is aimed at ensuring effective prosecutions of international crimes at the domestic level (Ryngaert; Genocide Network 2018). The 'MLA initiative', spearheaded by Belgium, the Netherlands and Slovenia, promotes the adoption of a treaty which would enhance State cooperation on investigation and prosecutions of genocide, crimes against humanity and war crimes (PGA 2020b). The adoption of such a treaty would be a positive development in the fight against impunity, although the draft available at the time of writing raises some concerns relating *inter alia* to the definition of crimes, especially enforced disappearances, as well as victims' rights (Amnesty 2020). It is, therefore, recommended that the EU and its Member States participate actively in the work of the initiative.

# 4. Country situations

## 4.1 Rwanda

In 100 days between April and July 1994 Rwanda experienced a genocide against the minority ethnic Tutsi population, led by members of the majority Hutu population (Horovitz). During the genocide, serious violations of international law were committed, and moderate Hutus were also attacked. The genocide was perpetrated at the end of a four-year civil war between Hutu-dominated government forces and the Tutsi-dominated Rwandan Patriotic Front (RPF) (Horovitz). After militarily ending the armed conflict and the genocide in July 1994, the RPF established a government of national unity and pursued a policy of accountability in relation to the genocide against the Tutsi.

The EU has a strong cooperation with Rwanda, especially in relation to development. Rwanda was allocated EUR 460 million between 2014-2020 divided between three focal sectors (energy, food security and governance) under the eleventh European Development Fund (EU-Rwanda; EDF; Ministry of Finance and Economic Planning). Accountability is not a focal area but is covered as part of the funding allocated for governance (indicatively EUR 40 million), which encompasses capacity-building in relation to justice and the rule of law (EU-Rwanda). Priority areas were outlined under the 2014-2020 National Indicative Programme in alignment with Rwanda's national development strategy (EU-Rwanda). To support the response to COVID-19 in Rwanda the EU and its Member States have contributed over EUR 100 million to protect both public health and socio-economic development (EEAS 2020c).

Whilst Rwanda is recognised for strong developmental ambition and performance in socio-economic rights, areas of concern for the EU at the domestic level include allegations of serious human rights violations such as excessive use of force, extra-judicial killings, enforced disappearances in relation to political opposition, arbitrary detention and the conditions in which people are detained (EEAS 2020d). Beyond development, the EU and its Member States have focused on two key priority areas of serious human rights violations and significant human rights restrictions around political rights, and freedoms of expression, association and assembly (EEAS 2020d).

In this context, this section considers accountability for international crimes committed in Rwanda. Firstly, by looking at the ICTR, secondly, by considering Rwanda's domestic Specialised Chamber for International Crimes, and finally by examining how EU Member States have applied the principle of universal jurisdiction.

### 4.1.1 The International Criminal Tribunal for Rwanda

The ICTR was established by UN Security Council resolution 955 on 8 November 1994 and issued its completion strategy report on 15 May 2015. The European Parliament provided political support for the establishment of an accountability mechanism for Rwanda, adopting resolutions on the issue (Parliament 1995, 1999b). EU political support continued throughout the operational period of the ICTR, with the Council providing common positions alongside statements on behalf of the Union, which reaffirmed commitment to the work of the Tribunal, highlighting the necessity of outreach and the need to manage the archives in readiness for closure (Council 2002c; Štiglic Statement). The EU also provided significant funding, including EUR 1.5 million approved by the European Commission in 2004 for eight projects to strengthen the managerial and operational capacity of the ICTR in relation to: witnesses and victims; information management and security; and outreach and capacity-building (MICT 2020f). EU Member States similarly provided significant support, including for outreach and capacity-building activities (S/2015/340). The consistent political and financial backing of the EU and its Member States were crucial forms of support for the ICTR, especially when combined with the EU's focus on capacity-building, outreach and legacy planning. Given that similar issues arise today, political and financial support should be maintained in interactions with current accountability mechanisms elsewhere (*infra* Sections 4.4.5, 4.5.3, 4.6.2).

As the ICTR approached closure, its completion strategy faced challenges around transferring cases to national jurisdictions. Despite a global engagement there was hesitance from States to accept cases due to issues such as lack of resources, as the ICTR Prosecutor could not provide assistance for the costs of subsequent national prosecutions (ICTR-OTP; Gahima). There was also a legal capacity issue as compliance with Rule 11*bis,* the ICTR Rule of Procedure and Evidence provision that enabled referrals to national courts, was a prerequisite before a case could be transferred to a national jurisdiction. The ICTR Chambers had to consider whether the legal framework of a potential receiving State criminalised the alleged conduct, provided an adequate penalty structure, whether the accused would receive a fair trial, and whether the conditions of detention were in line with international standards. Motions to transfer the *Bagaragaza* case first to Norway and then to the Netherlands were unsuccessful as their domestic legal frameworks did not criminalise the relevant conduct (ICTR-OTP). The cases of *Munyeshyaka* and *Bucyibaruta* were transferred to France on 20 November 2007 after the accused were arrested in France (S/2015/340).

The need to comply with Rule 11*bis* provided a catalyst for domestic change in Rwanda, as early motions to transfer the *Munyakazi* and *Kanyarukiga* cases to Rwandan jurisdiction were denied. Subsequently, the ICTR Office of the Prosecutor worked with Rwanda, including through an internal Rule 11*bis* committee to improve conditions by providing training, constructing prison cells to meet international standards, and enacting legal reforms (Obote-Odora). Notably, in March 2007, as part of these reforms, Rwanda introduced *Organic Law No. 11/2007* prohibiting application of the death penalty to transferred cases, before abolishing it completely with *Organic Law No. 31/2007* in July 2007. The ICTR subsequently transferred *Uwinkindi* and *Munyagishari* to Rwanda and provided ongoing monitoring (continued by the MICT), being praised for the collaborative working and positive impact on the development of national legislation in Rwanda (S/2015/340; Rowanda and Buckley-Zistel). The EU acknowledged the positive impacts of the completion strategy on domestic justice and therefore consequently on society, stating full support for the strengthening of the Rwandan judicial system in readiness for transferred cases from the ICTR (Štiglic Statement).

The strong emphasis by the Government of Rwanda on accountability and the need for justice as part of reconciliation created a domestic consensus on the need for Rwandan justice, with some acknowledgment among the population of the ICTRs role in prosecuting core international crimes (Rowanda and Buckley-Zistel). However, the lengthy proceedings and location in Arusha have been criticised. Survivors' associations expressed concern about the sentences handed down by the ICTR compared to the acts committed, and that accused were being found not guilty or acquitted over technicalities, with the general consensus among the population being that responsibility to provide justice falls on the government (Rowanda and Buckley-Zistel). As international criminal justice efforts move towards providing accountability closer to the victims, Rwanda exemplifies the need to provide capacity-building support to countries in transition in order to facilitate trials in the country where the crimes took place (Interview 2). The EU should consider the salient lessons from Rwanda around the importance of supporting domestic capacity-building during transition. Within that, there is the need for robust legal and physical infrastructure, forward-thinking training and comprehensive outreach.

In line with its current practice the EU should, however, continue to be mindful of the political context of transition and its effect on fair trial norms. It should be especially mindful of potential associated pitfalls such as the unequal application of justice, which in Rwanda led to allegations of 'victor's justice' and possible political influence over selection of the accused at the ICTR, as the Tribunal did not prosecute RPF crimes (Interview 11; Schabas). In 1999, investigations were opened into RPF crimes by then Prosecutor Carla del Ponte, causing negative reactions from the Government of Rwanda including preventing witnesses travelling from Rwanda to testify (Peskin). After sustained tensions Carla del Ponte was replaced and the ICTR focused on crimes committed by prominent Hutu accused (Al-Jazeera 2020a). In 2008 the ICTR transferred the case files of individuals suspected of involvement in RPF crimes to Rwanda where they

were tried in a military tribunal in Kigali amid heavy criticism of political interference (Human Rights Watch 2020a; Rowanda and Buckley-Zistel). The Government of Rwanda remains reluctant to investigate or prosecute international crimes allegedly committed by the RPF, and political interference in such activity is a concern in relation to every option for accountability (Human Rights Watch 2020a; Rowanda and Buckley-Zistel). Whilst the issue is highly sensitive, the EU and the European Parliament should continue to call for accountability for all international crimes and encourage Member States who, despite potential political repercussions, make efforts to apply the law equally where violations are suspected (*infra* Section 4.1.3).

In line with UN Security Council resolution 1966 (2010) the functions of the Residual Mechanism (MICT) include tracking, locating and arresting the one remaining fugitive of the ICTR, Protais Mpiranya, and prosecuting Félicien Kabuga, who is being transferred to the MICT from French custody (*supra* Section 2.1.1). The MICT is also working cooperatively with Rwanda regarding cases transferred to its jurisdiction from the ICTR. This includes assistance with locating and arresting the five remaining fugitives who are intended to be tried by the Rwandan domestic judiciary: Kayishema, Munyarugarama, Ndimbati, Ryandikayo and Sikubwabo (MICT 2020g). It also includes monitoring proceedings in relation to the ICTR, beginning with the two initial cases (*Uwinkindi* and *Munyagishari*) and latterly the fugitive case (*Ntaganzwa*). For these cases the MICT has a partnership with the Kenyan Section of the International Commission of Jurists (ICJ Kenya) to provide experts for assistance as monitors and to manage the monitoring of referred cases (MICT 2020d). The Memorandum of Understanding between the MICT and the ICJ Kenya regarding monitoring of *Uwinkindi* and *Munyagishari* was signed in January 2015 and was revised in August 2016 to include *Ntaganzwa* (MICT 2020d). Monitoring includes adherence to human rights norms such as fair trial protections and conditions of detention. In order to facilitate the completion of the MICTs work, the EU should seek to provide full cooperation to the mechanism. To this end, the Parliament should also encourage inter-State cooperation and activity such as participation in the European Task Force on Rwandan genocide suspects, the Genocide Network, domestic capacity-building and application of the principle of universal jurisdiction.

### 4.1.2 The Specialised Chamber for International Crimes

The EU made a statement in support of domestic trials to continue the legacy of the ICTR, in which it reiterated that national judicial authorities must conduct fair trials and ensure that sentences are served in line with international standards (Štiglic Statement). In 2012, following *Organic Law No. 11/2007* concerning transferred cases, a Specialised Chamber for International Crimes (Specialised Chamber) was established within Rwanda's High Court to prosecute transferred or extradited individuals. The Specialised Chamber has been hosted at the High Court in Kigali since 2012, with purpose-built premises in Nyanza District completed in 2018: the facility was constructed with co-funding from the Netherlands and the Government of Rwanda and was designed to meet international standards (Tashobya). Although the EU is not interacting directly with the Specialised Chamber at this time, the importance of their work is recognised (Interview Arena). In order to facilitate justice where the crimes have been committed and continue to increase Rwanda's capacity to provide accountability, the EU should remain open to supporting appropriate capacity-building activities related to the Specialised Chamber. Such activities should be locally owned or requested, could include financial or technical support, and the EU should encourage Member States to provide similar support.

Extradition and transfer are important aspects of accountability for Rwanda as many individuals fled the country, including some claiming to be refugees, who took part in the genocide. Suspects remain at large, stood trial in the ICTR, and continue to stand trial in other jurisdictions with international arrest warrants being issued by the Government of Rwanda (Bolhuis et al.; Rowanda and Buckley-Zistel). In 2007, the Rwandan National Prosecution Services established a Genocide Fugitive Tracking Unit to facilitate international cooperation to prosecute the accused elsewhere or extradite them to Rwanda. By 2012, it

had transmitted 156 arrest warrants to other States and issued a list of people who had been convicted by *gacaca* courts *in absentia* (Bolhuis et al.; Rowanda and Buckley-Zistel). Although Rwanda has sought extradition treaties and made requests, States have been reluctant to agree often due to concerns around adherence to fair trial norms and the willingness or ability of witnesses to testify without facing reprisals (Drumbl; Schurr). One particular challenge for the Specialised Chamber which has prevented extraditions is the issue of retroactivity. Rwanda rebuilt its domestic legal infrastructure after the civil war and genocide, including passing the new *Organic Law No. 08/96* in 1996 to prosecute crimes of genocide or crimes against humanity committed since 1991. In 1994, Rwanda was a party to the Genocide Convention, but had not adopted implementing legislation, and its domestic law at that time did not provide for genocide or crimes against humanity (Drumbl). The *Organic Law* of 1996 established Special Chambers within the national courts and trials began in December 1996 (Drumbl; Rowanda and Buckley-Zistel). Whilst retroactivity has not prevented prosecutions within the domestic justice system, it has provided grounds for States not to extradite to Rwanda. In 2014, the French Supreme Court ruled an accused could not be extradited from France to be tried in Rwanda, because the request was based on laws passed after the alleged crimes occurred (TRIAL 2020). Governments began to extradite to Rwanda more readily following the decision of the ICTR to transfer two cases, and subsequently the 2011 European Court of Human Rights decision that Sweden could safely extradite (Rowanda and Buckley-Zistel; Human Rights Watch 2020b).

Prominent convictions for the Specialised Chamber include that of Ladislas Ntaganzwa who was handed a life sentence on 28 May 2020 for his role in the genocide (Kuteesa). Ntaganzwa had originally been indicted by the ICTR but had not been arrested at the time of its closure, his case was one of six suspects at large transferred to Rwandan jurisdiction and he was arrested in the Democratic Republic of the Congo in 2015 before being extradited to Rwanda (Kuteesa). Another prominent conviction is that of Charles Bandora, who was extradited to Rwanda from Norway in 2013 for his role in the genocide and tried in the Specialised Chamber, before his sentence was upheld by the Supreme Court in 2019 (Meinicke). Other individuals who have appeared before the Chamber include Uwinkindi, Munyagishari, Mugesera and Mbarushimana. These cases and others were considered in *Nteziryayo and Others* concerning an extradition request by Rwanda to bring five individuals to its territory from the United Kingdom, which was refused by the Divisional Court of England and Wales. The 2017 Appeal decision in *Nteziryayo and Others* distinguished the approach taken to genocide cases in the Specialised Chamber from the way in which the Rwandan High Court deals with other cases, finding that the biggest risk to fair trials was from public comments made by government ministers. The decision considered that this risk could be reduced by robust and experienced defence teams, combined with international monitoring, without which the judge may be at risk of influence from outside factors or behaving partially. This is an area on which the EU is already partially engaging in a broader sense, as discussed next, and the Parliament should consider that investing in establishing the root causes of issues associated with accountability for core international crimes and supporting appropriate capacity-building with the available policies and tools at the EU's disposal is essential (Interview 8).

The EU works with the domestic justice system generally, rather than specifically on international crimes, to provide assistance and increase effectiveness where appropriate, such as working collaboratively to provide training for judges (Interview 14). Whilst the EU is (rightly) focused on areas of concern relating to detention, the requirement to meet international standards for extradition means that suspects detained in relation to international crimes are held in specific facilities with associated monitoring, which offers some protections. Arguably, a greater concern is the potential for unequal application of justice and political interference. Beyond international crimes the EU addresses this within the EU-Rwanda bilateral political engagement as human rights and democracy issues arise during the regular political dialogue, where concerns are raised with the Government of Rwanda and relevant authorities over the length of pre-trial detention, enforced disappearances, extrajudicial killings, as well as specific cases (EEAS 2020d). The EU engages with NGOs on several related projects, including to provide legal aid to detainees in some cases and EU missions have also attended court hearings where the case concerns a political opponent

(Interview 14; EEAS 2020d). This in itself arguably makes a holistic contribution to accountability for international crimes by pushing for a stronger domestic justice system within Rwanda. Whilst the Specialised Chamber is recognised as functioning more independently than other areas of the Rwandan domestic legal system, there remains a pressure to convict and there are political obstacles to prosecuting alleged RPF crimes. At this time, domestic prospects for justice for victims of alleged RPF crimes are limited and accordingly the EU and the Parliament should appropriately support external efforts to provide accountability such as through universal jurisdiction, especially as the issue is highly sensitive and politically charged.

#### 4.1.3 Universal jurisdiction

The EU has been cognisant of the situation in Rwanda as it developed its current framework in relation to accountability for core international crimes. The European Council Decisions of June 2002 and May 2003 recognised the work of the ICTR, called on EU Member States to cooperate in the investigation and prosecution of international crimes, and to help facilitate this activity, established the Genocide Network. In its 2003 decision, the Council also included a recommendation for States to consider establishing specialist units for investigation and prosecution within their national authorities, which some States such as France, have since gone on to do (Council 2003a). Additionally, there is an investigative Task Force of EU Member States and Europol, which focuses on Rwandan genocide suspects present in Europe, this also coordinates with Interpol to have a global outlook to accountability for genocide (S/2020/309; Interviews Arena, 2). The EU supports the application of universal jurisdiction both as part of its commitment to fighting impunity and ensuring that the EU does not become a safe haven for fugitives. This is pertinent to the Rwandan context where celebration of the location of suspects is tempered with disappointment over the length of time taken, especially where a suspect has been in hiding within an EU Member State for an extended period of time (Interview 14). In this respect, the EU should further support and promote the work of the Task Force and the Genocide Network in order to ensure that its aspiration of not being a safe haven for genocide suspects is met. Furthermore, it is important that the EU continues to encourage cooperation in terms of communication links and knowledge-sharing between all parties involved in investigations. It is recommended that the EU and the Parliament continue to promote universal jurisdiction both for EU and non-EU Member States through financial, technical and expert assistance.

EU Member States have engaged with the EU tools at their disposal and proceedings related to Rwanda have taken place in Belgium, Finland, France, Germany, the Netherlands and Sweden (Human Rights Watch 2020b). The use of specialised units within a framework of cooperation is developing into a successful model which has benefited the application of universal jurisdiction by EU Member States. The *French specialized unit for the prosecution of genocide, crimes against humanity, war crimes and torture within the Paris Tribunal* (the Special Unit) is conducting multiple investigations, with 27 cases pertaining to Rwanda including *Bucyibaruta* and *Munyemana* (TRIAL 2020). Following the genocide against the Tutsi, multiple suspected individuals fled to France, which has since been the subject of sustained civil society pressure to provide accountability (Human Rights Watch 2020b). There is debate around this issue as whilst proceedings in foreign national jurisdictions are positive, capacity-building at the domestic level within the affected State can facilitate extraditions. This could be a preferable solution to universal jurisdiction, being closer to the evidence and to the victim communities (Interview 2). Although in the French case, as seen, retroactivity has prevented extradition to Rwanda.

In the context of Rwanda, one individual is often subject to parallel proceedings by the ICTR, Rwandan mechanisms and other national jurisdictions, which may be at different stages. A complaint was lodged against Bucyibaruta in 2000 by the International Federation for Human Rights (FIDH) and the *Ligue des Droits de l'Homme,* with the French Special Unit finishing the investigation in 2017 (TRIAL 2020). In 2018 the case was referred to the Paris Criminal Trial Court and the trial will go ahead if the Court of Appeal upholds the referral decision (TRIAL 2020). However, Bucyibaruta was also indicted by the ICTR in June 2005 and in

2007 the ICTR issued an arrest warrant and then transferred the case to France (S/2015/340; TRIAL 2020). Similarly, at the same time as ongoing French proceedings against Munyemana, Rwanda had requested and been denied his extradition, and Munyemana had also been found guilty *in absentia* in 2008 by the *gacaca* court in Butare and sentenced to life imprisonment (TRIAL 2020). This context and the complexity of the crimes arguably contributed to the length of proceedings, which has attracted criticism. In 2019, the decision from the French Supreme Court to reject an appeal ended proceedings in a case lasting more than twenty years, which had been criticised in June 2004 for exceeding reasonable time requirements by the European Court of Human Rights (TRIAL 2020). The complaint against the accused had been filed in France in 1995, the accused had been indicted by the ICTR on 20 July 2005, before the case was transferred to France in 2007. Simultaneously, the accused had been tried *in absentia* in Rwanda and sentenced to life imprisonment in 2006 (S/2015/340; TRIAL 2020).

The other key issue in relation to Rwanda is the political context of investigating and prosecuting RPF crimes. On 6 February 2008, Spain issued an indictment charging 40 high-ranking officials of the RPF and its military arm (Armée Patriotique Rwandaise) with crimes committed between 1990 and 2002 including genocide, war crimes, crimes against humanity, and terrorism against the civilian population, especially ethnic Hutus (Commentator; Spanish Indictment). The investigation was initially based on complaints from the families of nine Spanish victims but was expanded to include Rwandan and Congolese victims based on universal jurisdiction (Commentator). Whilst the indictment excludes President Kagame as the sitting head of state, it does not exclude other officials. The Spanish legal system no longer allows trials *in absentia* meaning that the indictment's success relies primarily on extraditions, which is problematic when the Government of Rwanda and the AU reacted very negatively and are unlikely to cooperate (Commentator). In 2015, British police acting on a European Arrest Warrant issued by Madrid arrested General Emmanuel Karenzi Karake whilst he visited London: the Spanish indictment alleges that as Kagame's Supreme Chief of military intelligence from July 1994 to March 1997 Karake knew of and was in agreement to international crimes committed after the civil war (Spanish Indictment). However, the Crown Prosecution Service did not believe it had jurisdiction and could not establish an offence under UK law meaning Karake was released. Spain has, due largely to political context, pulled back from and then recommitted to proceedings in relation to this indictment (Zambrana-Tévar; Rever; Eagle). Despite this, the EU and the Parliament should support such efforts to equally apply the law in the pursuit of accountability for core international crimes, in difficult political contexts, in order to underline that there will be no impunity, regardless of the identity of the suspects.

## 4.2 Colombia

Colombia's recent history has been characterised by protracted periods of violence. State forces have been involved in armed conflicts against left-wing guerrilla groups since 1964 and the emergence of right-wing paramilitary groups in the 1980s further complicated a situation where core international crimes have been allegedly committed by all actors involved, including State forces (ICC 2012a). With the demobilisation of the *Autodefensas Unidas de Colombia* paramilitaries (AUC) between 2003 and 2006 and of the *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* guerrilla (FARC-EP) in 2016, Colombia established its two transitional justice mechanisms, the Jurisdiction for Justice and Peace (JJP) and the Special Jurisdiction for Peace (JEP, *Jurisdicción Especial para la Paz*). As these mechanisms are the result of different negotiations, their scope is limited to the two waves of demobilisation. Potential overlaps and the relationship between the JJP and the JEP present a challenge in the fragmented Colombian transitional justice system (Interviews 4, 7). Although the 2016 Agreement does not address these points, a 2020 decision from the JEP indicated the JJP as the appropriate institution for cases on crimes committed by paramilitaries (JEP).

Challenges still remain at the national level which influence the EU's approach. At the time of writing, the

State forces are still involved in four armed conflicts against the paramilitary "successor" group *Autodefensas Gaitanistas de Colombia* (AUC), the *Ejército de Liberación Nacional* guerrilla (ELN) and dissidents of the FARC-EP and the *Ejército Popular de Liberación* guerrilla (EPL). Armed groups are also fighting among themselves in the northern regions, with allegations of serious abuses against the civilian population and Venezuelans who have fled their country (Human Rights Watch 2019; ICRC; RULAC). Peacebuilding and conflict sensitivity should therefore continue to inform the EU comprehensive strategy on Colombia, which should remain flexible according to the needs and situation on the ground (Interview 7).

The EU and its Member States have adopted a comprehensive approach to the situation in Colombia, with the peace process being at the centre of their interactions with the country. There has been strong political and diplomatic support for peace negotiations. The Parliament has issued resolutions supporting the peace process since the early 2000s, and sent a delegation to observe the 2016 referendum (e.g. Parliament 2001, 2016a, 2016b, 2017c). Several EU Member States have played a critical role in keeping negotiations with the FARC/EP and the ELN alive when the parties threatened their cessation (Castañeda; Ioannides). The HR/VP has supported the peace process with a series of statements and appointing Mr Eamon Gilmore as the Special Envoy for the Peace Process in Colombia (EEAS 2015a, 2016b, 2016c, 2017). The Special Envoy is mandated to accompany the final stages of the peace negotiations and support the initial stages of the implementation of the 2016 Peace Agreement (EEAS 2015b; Oireachtas). Furthermore, in his capacity as EUSR for Human Rights, Mr Gilmore co-chairs the EU Human Rights Dialogue with Colombia.

The EU and its Member States have also provided extensive financial assistance to the peace process, especially through peacebuilding, mobilising EUR 1.5 billion between 2001 and 2016, including projects focusing on victims' rights, land restitution, rural development, de-mining, humanitarian assistance and reintegration of former guerrilla fighters into civilian life (Commission 2016a; EUD Colombia 2016a). Significant financial commitment has been renewed with the creation of the *Fondo Europeo para la Paz* which, as of June 2020, comprises 20 EU Member States, the UK and Chile and has EUR 121.6 million in contributions (Interviews 6, 9, 15; FEpP).

The EU's robust and comprehensive approach to Colombia represents one of the most successful examples of EU intervention to promote accountability in a third State. Its broad scope has covered immediate relief for the affected communities, longer-term development, peacebuilding and transitional justice (Interview 6). Furthermore, the perceived position of impartiality and the integration between EU institutional action and Member States' initiatives have been important determinants of the EU success in Colombia and are valuable factors which should guide future EU interventions in third countries (Interviews Gilmore, 2, 6, 8, 17).

However, at this time, the results obtained are at risk. Three years after its adoption, the implementation of the Peace Agreement has proven slow, with only 25% of its provisions being fully implemented, 15 % at an intermediate stage, 34 % at a minimal stage and 26 % whose implementation has not started yet (Kroc). In addition, particularly the JEP has been subject to political attacks and financial cuts (Interview 6; Gómez; Quintero 2020). Amid these challenges, the EU should renew its commitment to transitional justice in Colombia through political support and the Parliament could call on Member States to consider a temporal extension of the *Fondo Europeo para la Paz* in order to continue and strengthen the EU's comprehensive approach to Colombia's peace process (Interviews 7, 9).

### 4.2.1 The *Colombia* situation before the ICC

Colombia signed the Rome Statute in 1998, as the then government had initiated peace talks with the FARC-EP and hoped that joining the ICC could promote a commitment to the peace process (Aksenova). Upon its ratification in 2002, amid ongoing armed conflict, the government lodged a declaration under Article 124 not accepting the Court's jurisdiction over war crimes for seven years, until November 2009. In June 2004, the ICC Prosecutor opened a preliminary examination focusing on crimes against humanity

committed in Colombia since 2002 and war crimes committed since 2009, which, at the time of writing, remains ongoing (ICC 2011).

The application of the principle of complementarity has shaped the approach to accountability in Colombia in a successful example of complementarity in practice. The focus of the preliminary examination phase has been on assessing the domestic legal system and national accountability efforts on crimes that fall within the jurisdiction of the ICC. The Prosecutor adopted a proactive approach which included country visits, private letters to judges of the Constitutional Court, press interviews, public lectures and public statements on the Peace Agreement in 2016 and 2017 (Alsema 2020a; Stewart; ICC 2013, 2015, 2016, 2017, 2020). Owing to Colombia's domestic efforts, the situation before the ICC has been at the preliminary examination phase for sixteen years. The relationship with the ICC has played an important role in the establishment of the transitional justice mechanisms and the preliminary examination provided the background context to the negotiation and implementation of the 2016 Peace agreement (Interview Gilmore). Interactions with the ICC also led to an overall strengthening of Colombia's legal and justice system. In supporting these efforts, the EU has demonstrated its commitment to the principle of complementarity and to pursuing justice closer to where the crimes have taken place (Interviews Arena, Gilmore).

The EU has supported the ICCs work in Colombia through demarches, Human Rights Dialogues and the involvement of the EU Special Envoy to Colombia (Interview 3; COJUR-ICC). In firm support of the principle of complementarity, direct support to the ICC has been accompanied by political and financial contributions to the domestic mechanisms. Assistance provided to date has been successful, as the situation remaining in the preliminary examination phase indicates that Colombian transitional justice has met the ICC complementarity threshold. The Prosecutor is set to meet with Colombian authorities in 2020 to conceptualise the benchmark for the completion of the preliminary examination. The EU should therefore continue its contributions in order to ensure 'the absence of manifest gaps in the scope of national proceedings or of factors vitiating their genuineness, and the imposition of effective penal sanctions that serve appropriate sentencing objectives of retribution, rehabilitation, restoration and deterrence' (ICC 2019c).

### 4.2.2 The Jurisdiction for Justice and Peace

The Jurisdiction for Justice and Peace, Colombia's first transitional justice mechanism, was established with *Law 975/2005* amid the demobilisation of the *Autodefensas Unidas de Colombia* (AUC) in the country's first negotiated peace agreement that did not grant amnesties (Díaz; Hillebrecht and Huneeus). Justice and Peace proceedings are available to demobilised members of paramilitary groups who fully commit to truth, justice, reparation and non-repetition. If found guilty of crimes against humanity, war crimes or genocide, they benefit from reduced prison sentences of five to eight years. In addition to criminal liability, the competent tribunals rule on reparations and cooperate with the truth-seeking efforts of other domestic institutions. Justice and Peace tribunals have prioritised sixteen macro-investigations based on patterns of criminality. Data from 2015 indicates that this approach has allowed for the adjudications, of 57 883 crimes affecting 84 354 victims (Melamed Visbal).

Since its adoption, *Law 975/2005* has been criticised for not taking into sufficient account the principles of truth, justice and reparation (Amnesty 2005; Alviar García and Engle; Saffon and Uprimny). At the time, the European Council recognised these concerns, but in support of Colombia's efforts to demobilise paramilitary groups it considered the adoption of this law as a positive step in contributing to peace (Council 2004c; 2005; Commission 2007). The mechanism still requires improvements, such as proper investigations of sexual and gender-based violence, enhancement of victims' rights, the provision of psychosocial support to victims and survivors who participate in JJP proceedings and the provision of holistic reparations (Burnyeat et al.). The EU has contributed to tackling these aspects through projects

aimed at providing victim-oriented legal assistance in reparation proceedings and upholding gender perspectives in transitional justice, as well as funding domestic truth-seeking efforts (BICC; Commission 2012a). It is recommended that it continues to do so, in order to support adequate redress to victims of paramilitary violence (Interview 7).

It is important that the EU strengthens its political and financial support to the JJP, especially at this time when some of the 29 paramilitary leaders who were extradited to the US, are returning to Colombia. Their extradition has significantly delayed the JJP proceedings and impaired truth-seeking concerning the ties between paramilitary groups and Colombian politicians. The disruption of the JJP cases involving the leaders of the *Bloque Central Bolívar* led the to the filing of a civil suit for torture, extrajudicial killing, crimes against humanity and war crimes in the US, where Commander Carlo Jiménez Naranjo aka 'Macaco' was serving a 33-year prison sentence (USDC Florida). While the civil suit is still ongoing, Macaco was released early and has returned to Colombia, where he was arrested on the basis of his pending indictments (Center for Justice and Accountability 2020b; TRIAL 2020). The return of paramilitary leaders is a sensitive issue, but it can also represent a new opportunity to provide redress to the victims of paramilitary violence (Interview Gilmore). According to its victim-centred approach, the EU should interact with the Colombian authorities to ensure that paramilitary leaders are held accountable for alleged core international crimes and participate in the truth-seeking process.

### 4.2.3 The Special Jurisdiction for Peace

The Special Jurisdiction for Peace (JEP) is Colombia's second transitional justice mechanism, which was established under the 2016 Peace Agreement. This Agreement is composed of a set of six interconnected agreements on rural reform, political participation, ceasefire and disarmament, illicit drugs, victims and implementation mechanisms, which are to be seen as an indissoluble whole (Olásolo and Ramirez Mendoza). As a result of the key political role played in the peace negotiations, the EU is explicitly mentioned in the Peace Agreement as international partner for the implementation of provisions relating to rural development, reintegration of former FARC-EP members into civilian life and the establishment of the Special Investigation Unit within the Chief Prosecutor's Office. As mentioned above, as part of its comprehensive approach to Colombia, the EU is funding these three areas through the *Fondo Europeo para la Paz*, a linked package promoted by the European Investment Bank and the Instrument contributing to Stability and Peace (Interview 9; Commission 2016b; FEpP).

The Agreement on victims establishes an Integrated System of Truth, Justice, Reparation and Non-Repetition, which includes the Commission for the clarification of truth, coexistence and non-repetition; the Unit for the search of persons disappeared in the context or because of the armed conflict; the Special Jurisdiction for Peace; comprehensive reparation measures for the construction of peace; and measures guaranteeing non-repetition. The connection between judicial and non-judicial aspects of the agreement is a strength in terms of comprehensiveness of the approach to the Colombia situation, but presents coordination challenges, as the Commission, the Unit and the JEP should aim to avoid over-exposing affected individuals to interactions with the justice process (Interview 7). In recognition of the interrelationship between truth, justice, reparation and non-repetition in this system, the EU has provided significant diplomatic and political support to the Commission, the Unit and the JEP, and contributed to their work respectively with EUR 4.5 million, EUR 3.2 million and EUR 3.5 million under the IcSP (Commission 2020b). EU support to the Commission focuses on enhancing its presence in the regions and public awareness, assistance to the Unit is focused on engagement with civil society, and the contribution to the JEP aims to increase its capacity to produce results that contribute to the consolidation of its credibility and legitimacy (Interview Gilmore). These are concrete measures that enhance the comprehensiveness of the EU's approach to Colombia's transitional justice and it is recommended that the EU continues supporting the integrity and sustainability of the system.

The JEP operates in different ways based on the defendants' contributions to truth and whether they accept the facts and responsibility of the case (López Morales). If the accused discloses fully and accepts responsibility for the facts prior to the trial, the penalty they receive involves reparations for the victims and does not involve detention. If the accused accepts responsibility during the trial, the trial Chamber may impose a reduced sentence of five to eight years through alternative punishment arrangements, including house arrest or other restricted freedom (Moffett). If the responsibility is never acknowledged, the JEP may impose the sanctions included in the Colombian Criminal Code. The incentives in the penal regime and the prosecutorial strategy of grouping macro-cases, which cover wide geographical and thematic scopes are crucial tools for enhancing victims' right to truth, justice and reparation.

The Agreement with the FARC-EP, of which the JEP forms part, can be a contentious subject within Colombia, as seen in the referendum with 50.2 % of voters rejecting it. Pressure from some sectors of the society and lack of political will have slowed down its effective implementation. Being the justice branch of the system, the JEP has come under severe attack, including legislative attempts to undermine it and financial cuts, even though it has not yet issued its first judgment. In this context, the ICC and the international community play a crucial role in protecting the JEP system. The preliminary examination acts as a deterrent, as, should the transitional justice mechanism be obstructed or ineffective, an ICC investigation could be opened (Interviews 4, 9; Ambos and Aboueldahab). The international community, including the EU, should continue their political and diplomatic efforts in order to ensure that the domestic mechanisms operate without interference and are funded in a way that allows their sustainability.

#### 4.2.4 The Colombian domestic courts

Colombia's judiciary has heard and decided cases concerning core international crimes allegedly committed by all actors of the conflict. The Colombian criminal code criminalises war crimes and genocide but does not define crimes against humanity. Nevertheless, the Rome Statute was implemented in the domestic system with *Law 742 of 2002* and Colombia's higher courts recognise crimes against humanity in their case law when the contextual elements are met and the culpable conduct fits one of the offences included in the criminal code (e.g. Casación Penal 44312; Corte Constitucional C-578/02).

Since the establishment of the two transitional justice mechanisms, ordinary courts have heard fewer cases against paramilitaries and guerrillas. However, the system of ordinary justice hears cases against members of non-demobilised guerrilla groups and of paramilitary 'successor' groups. Moreover, the Supreme Court is in charge of hearing "parapolitics" cases concerning the promotion, financing and expansion of paramilitary groups which fall outside the remit of the transitional justice mechanisms (ICC 2012b). Another particularly important stream of cases before domestic courts concerns the practices of *falsos positivos*, which involved the killing of civilians by State forces to falsely show that the fight against guerrilla groups was 'giving results' (Alsema 2020b; Human Rights Watch 2015; Rueda Salas). Despite death threats and assassination attempts on witnesses, the domestic courts have been able to prioritise these cases and generally characterise *falsos positivos* as enforced disappearance or extrajudicial killing: data from October 2019 indicates that there were 2,268 active cases involving 3,876 victims for a total of 1 740 convicted within 25 brigades of the Army and 10 742 persons being investigated, including 14 of the 29 commanders who were in charge from 2002-2009 (Alsema 2020c; ICC 2019c; Quintero Mendoza).

The EU's comprehensive support has also extended to Colombia's system of ordinary justice, with projects aimed at promoting the rule of law and fighting impunity, including by strengthening the capacity of the Office of the Attorney-General (EUD Colombia 2016b; Commission 2020c). Moreover, the EU has addressed extrajudicial killings and enforced disappearances at the diplomatic level in demarches and Human Rights Dialogues (Commission 2012b). The EU should continue to provide diplomatic and financial support to assist Colombia's ordinary system of criminal justice as the strengthening of its capacity and efficiency is crucial to ensure respect for the principle of complementarity outside of the transitional justice system.

The criminal branch of Colombia's domestic system is complemented by procedures under the administrative and civil jurisdictions and actions implemented by the executive. The 2011 *Victims' Law* provides for holistic systems of land restitution and reparations for cases decided under the ordinary justice system and both transitional justice mechanisms (Sanchez and Rudling). The land restitution programme produced tangible results as over two million internally displaced persons have made progress towards a durable solution, meaning they have returned, resettled or have been integrated locally (Internal Displacement Monitoring Centre). However, threats and killings of returnees have hampered the success of the land restitution programme and the most vulnerable categories do not want to return (Amnesty 2014a; García-Godos and Wiig; Lamb; Martínez Cortés).

The legal framework is of a high standard, but its implementation has met challenges, which is where the EU should focus its assistance (Interview 7). As the programmes have been extended by the Constitutional Court until 2030, the EU should work on the lessons learnt from the first ten-year term of the Victims' Law, aiming its support towards ensuring that beneficiaries are protected and that the rights guaranteed under the law are effectively enjoyed (ReD). The reparations and land restitution programmes are very ambitious, as their number of victims is far higher, and the list of crimes and victimisation acts are broader than any other reparation programme (Carr Center). Therefore, the EU's financial support should aim to strengthen the capacity of these programmes to ensure both sustainability and the safety of beneficiaries (Zulver).

## 4.3 Venezuela

In recent years, Venezuela has experienced political turmoil and an escalation of political violence, which led to allegations of human rights violations and crimes against humanity. In February 2014, the protests against the government led by Nicolás Maduro became violent. The UN and NGOs reported that State forces and pro-government armed gangs (*los colectivos*) engaged in excessive use of force, arbitrary arrests, killing of protesters, detention of political leaders, torture and ill-treatment of detainees (Amnesty 2014b; Human Rights Watch 2014; OHCHR 2018). A new wave of demonstrations was violently suppressed by State forces and *los colectivos* in 2017, and the UN and NGOs again reported violations, including persecution on political grounds, arbitrary detention, ill-treatment and torture of detainees, violent house raids and attacks on homes, beatings, serious injuries and killing of protesters (Amnesty 2017; Human Rights Watch 2017b; OHCHR 2017). The situation was also addressed by the Inter-American Commission on Human Rights and the Organization of American States (IACHR 2017; OAS 2016, 2017a, 2017b). A report from the latter, authored by a Panel of Independent International Experts, claimed that State forces had committed crimes against humanity and recommended that the situation be referred to the ICC (OAS Panel). Further protests took place in 2018 and 2019, following the re-election of Nicolás Maduro as President and after the self-appointment of opposition leader Juan Guaidó as Interim President. At that time, the United States imposed both collective and targeted sanctions (Ribando Seelke).

The EU has adopted a primarily humanitarian and political approach to the Venezuelan crisis. It has provided relief funding to address immediate humanitarian needs and the subsequent migration crisis. At the donor conference in May 2020, the EU and Member States pledged EUR 231.7 million in grants mostly mobilised under the 'Team Europe' financial package. The European Commission participates with EUR 144.2 million for immediate humanitarian aid, medium and long-term development assistance, and conflict prevention while EUR 400 million are pledged in loans from the European Investment Bank (Commission 2020b). The EU has taken a clear stance in support of a peaceful solution to the crisis and democratic elections (Council 2016b, 2017b, HR/VP 2017, 2018c, 2020b). It contributed to the creation of the International Contact Group on Venezuela (ICG), which is mandated to promote a concerted approach among international actors. HR/VP Mogherini has appointed a Special Adviser for Venezuela to provide advice to the HR/VP and the ICG, and engage in outreach with Venezuelan, regional and international stakeholders (Council 2019c; EEAS 2019a).

The Parliament and a number of Member States have recognised Juan Guaidó as the Interim President of Venezuela, but lack of consensus in the Council has prevented the adoption of a joint position (Parliament 2019d; Reuters 2020a). Accountability for alleged core international crimes has not been prioritised in EU initiatives on Venezuela by comparison to political objectives, such as democratic transition and long-term stability (Interview 4). The EU's support for the ICC in relation to Venezuela has been far less vocal than in other country situations and political support is the only form of assistance provided to the Independent International Fact-Finding Mission. However, the EU has focused financial support on setting up a field office of the Office of the UN High Commissioner for Human Rights (OHCHR) in Venezuela (Interview 15).

Human rights violations have been addressed at the political level through declarations made on behalf of the EU (HR/VP 2019a, 2019b). Another prominent part of the EU's political approach has been the imposition of targeted sanctions on individuals connected to the government led by Nicolás Maduro on the basis of their involvement in serious human rights violations, repression of civil society and the opposition or undermining the rule of law (Council 2017c, 2017d). The sanctions have been gradually expanded as to include thirty-six individuals in June 2020 (Council 2020a, 2020b). In response to these measures, Nicolás Maduro ordered the expulsion of the EU Ambassador in the country, but suspended the order a few days later following the HR/VP's diplomatic engagement (EEAS 2020e). Although sanctions have also targeted persons who are implicated in human rights violations and are a useful political initiative which may incentivise people to cease the relevant conducts, they are not to be considered an accountability mechanism nor a substitute for it (Interview 8). Furthermore, restrictive measures increase the politicisation of the situation and an excessive polarisation may hinder accountability initiatives, as there is a recognised need for the EU to be perceived as an impartial actor in order for these to succeed (Interviews 5, 6, 15).

The success of accountability initiatives promoted by the EU will inevitably depend on its interactions with both the government led by Nicolás Maduro and the interim government led by Juan Guaidó. Despite its potential suitability as a mediating body, the ICG may not be perceived as neutral (Interview 15). Therefore, the EU should look at employing other tools at its disposal. For instance, a more appropriate forum could be the Norway-led negotiations, which were suspended in September 2019 (Reuters 2020b). The EU and its Member States could push for their reopening, as diplomatic talks are an indispensable prerequisite for accountability efforts. Drawing on the lessons learnt from engagement in Colombia, the EU could involve a reputable political figure who would be mandated to engage with both parts. This could be the EUSR for Human Rights who, together with the Special Adviser, could set up an agenda for engagement which would address accountability for alleged core international crimes, and which may be formalised as a Dialogue. Alternatively, the EU could consider an enhancement of the Special Adviser role, so as to resemble a Special Envoy position and involve this figure in the negotiations, similarly to the approach adopted in Colombia.

This section will now analyse the accountability mechanisms that are addressing alleged core international crimes committed in Venezuela, in light of the EU approach. It begins with the ICC preliminary examinations, before moving on to domestic accountability efforts and universal jurisdiction cases. It will then conclude by analysing other international initiatives, including the UN Fact-Finding Mission and the opening of the OHCHR office.

### 4.3.1 The first ICC preliminary examination on Venezuela

Venezuela became a State Party to the ICC in June 2000 and therefore the Court has jurisdiction over crimes committed in its territory or by its nationals since the entry into force of the Rome Statute on 1 July 2002. After having received twelve communications pursuant to Article 15, in 2006 the Prosecutor decided not to open an investigation into the situation in Venezuela for crimes against humanity allegedly committed by State forces during the Chavez presidency. The reasoning included that part of the alleged crimes fell

outside the temporal jurisdiction of the ICC, having occurred during the *coup d'état* of April 2002. Moreover, the allegations of persecution on political grounds did not satisfy the elements of the crime, and the evidence failed to prove that a widespread or systematic attack against a civilian population had occurred (ICC 2006).

### 4.3.2 The *Venezuela I* situation before the ICC

The situation currently known as *Venezuela I* was opened on the initiative of the Prosecutor in February 2018 and it initially concerned crimes allegedly committed in the territory of Venezuela 'since at least April 2017'. State forces are alleged to have engaged in frequent use of excessive force, arrest and detention of perceived opposition members and ill-treatment in detention. Moreover, opposition groups are alleged to have carried out violent actions which resulted in the killing or injury of the security forces (ICC 2018a, 2018b, 2019c). A few months later, six ICC States Parties (Argentina, Canada, Colombia, Chile, Paraguay and Peru) submitted the first inter-State referral in the history of the ICC. The referral essentially focuses on the same situation, extending the temporal scope back to 12 February 2014 (ICC 2018c; Wharton and Grey). It alleges that the Venezuelan State forces committed the crimes against humanity of murder, imprisonment or other severe deprivations of physical liberty, torture, rape, persecution on political grounds and enforced disappearances. The Office of the Prosecutor regards the *Venezuela I* situation as open-ended and continues to record allegations of crimes occurring in Venezuela. The referral does not limit the scope of potential investigations to the crimes included therein and, while the primary focus remains on alleged crimes perpetrated since April 2017, the Prosecutor is also analysing conducts that have occurred since February 2014 with a view to examining the potential linkage between them (ICC 2018a, 2019c).

The only legal effect of this referral is that it exempts the Prosecutor from requesting a Pre-Trial Chamber's authorisation to open an investigation into Venezuela (ICC 2018d). The significance of the referral is mainly political, as it translates 'political support into legal action at an institutional level', making it clear that the referring States have an interest in the expeditious opening of an investigation (Ortiz).

In relation to this ICC situation, the EU has primarily offered political support at this time (Interview 15). The Parliament has welcomed the opening of this situation and invited Member States to 'join the initiative of the ICC State Parties to investigate crimes against humanity committed by the Venezuelan government in the territory of Venezuela and to hold those responsible accountable' (Parliament 2018a, 2019c, 2019d). As a reputable global player and a staunch ICC supporter, the EU should aim to keep the *Venezuela I* situation high on the agenda in its future engagement both with the government led by Nicolás Maduro and the interim government led by Juan Guaidó, and to advocate consistently in favour of cooperation with the Court.

### 4.3.3 The *Venezuela II* situation before the ICC

In February 2020, following the self-referral submitted by the government led by Nicolás Maduro, the ICC Prosecutor opened the *Venezuela II* preliminary examination. The referral concerned alleged crimes against humanity in the territory of Venezuela, which have occurred since at least 2014 as a consequence of sanctions imposed by the United States (ICC 2020f). The referral alleges that the regime of unilateral sanctions breached the rights to food, water, health, education and the rights of the child. The government led by Nicolás Maduro argues that these violations constitute a widespread or systematic attack on the civilian population of Venezuela and the underlying crimes are murder, extermination, deportation, persecution on political and national grounds, and other inhumane acts (ICC 2020f). Considering the geographical and temporal overlap between *Venezuela I* and *Venezuela II,* the Presidency assigned both situations to the same Pre-Trial Chamber. With the referral, the government led by Nicolás Maduro provided considerable evidence, implicitly cooperating with the Court. However, considering that the US is not a State Party to the Rome Statute and the current stance its administration has adopted on the ICC, cooperation with the Court is not forthcoming at this time.

The *Venezuela II* situation has not gained much traction within the EU, although this could be raised as part of the wider EU engagement with the US on ICC matters.

### 4.3.4 Domestic investigations and prosecutions in Venezuela

In light of the principle of complementarity, alleged crimes committed in the territory of Venezuela may be investigated and prosecuted at the domestic level. However, international organisations and NGOs have expressed concerns over the lack of impartiality of the Venezuelan judiciary, prosecutorial inertia and the ensuing widespread impunity. This has a clear impact on cases involving State forces and *los colectivos*, as the same security forces that have been accused of perpetrating the alleged crimes are responsible for the related forensic examinations (Amnesty 2015; OAS Panel; OHCHR 2018). A further obstacle to the institution of domestic proceedings is that, despite some reform attempts, Venezuela has not passed legislation to implement the Rome Statute. While war crimes are partially included in the Venezuelan Criminal Code and in the Military Justice Code, crimes against humanity and genocide have not been defined (Amnesty 2012). Moreover, no judicial decision has yet clarified the relationship between the ICC and the national legal system or whether the Rome Statute is a self-executing treaty in the Venezuelan legal order (García Falconí; Herencia Carrasco; San Miguel).

On behalf of the EU, the HR/VP has addressed the erosion of the rule of law and the dismantlement of the democratic institutions in the country (HR/VP 2019b). Members of the Venezuelan judiciary play a crucial role in ensuring impunity for violations in a pattern of politically-motivated arrests, delayed issuance of arrest warrants and violations of parliamentary immunity (Interview 15). Amid this, the EU has imposed restrictive measures on some members of the judiciary and has decided not to provide financial assistance or capacity building that would benefit the Maduro administration (Interview 15; Council 2020a, 2020b). Nevertheless, should the political situation allow in the future, the EU could seek to address the issues in Venezuela's domestic system examined above, as they are among the root causes of structural impunity. The country's democratic transition necessarily involves a reform of the judiciary and the EU could offer support through political, diplomatic and technical assistance. These efforts should focus on the full implementation of the Rome Statute and the promotion of genuine domestic efforts in accordance with the principle of complementarity.

The domestic investigation or prosecution of crimes against humanity allegedly committed by the US would be challenging, as the potential suspects are not likely to be present on Venezuelan territory. Furthermore, considering the fair trials concerns around trials *in absentia*, domestic prosecutions of the allegations relating to *Venezuela II* are not likely to be practicable paths to ensuring accountability, but should nevertheless be encouraged complementarily to international efforts.

### 4.3.5 Universal jurisdiction

At the time of writing, there are no universal jurisdiction cases in foreign domestic courts. However, in 2016, a case concerning the detention of two members of the Venezuelan opposition following the 2014 protests was filed in Chile on the basis of universal jurisdiction (TRIAL 2016). The Supreme Court of Chile heard the case although the alleged violations did not occur on Chilean territory, the claimants were not Chilean nationals or present on the territory of Chile and they did not have other connections to the country. The Supreme Court ordered the Chilean government to engage with the Inter-American Commission on Human Rights and, when the government refused to comply, the Court sent a request directly to the Commission. However, the Commission did not accept this exercise of jurisdiction (Petrie; Zuñiga Urbina).

Considering the growing preference for exercising universal jurisdiction when suspects are present on the territory of the State for political and fair trial reasons, universal jurisdiction cases concerning the situation in Venezuela are not forthcoming (Interviews 2, 16; Ryngaert). As many potential suspects are enjoying impunity within the country, they have no reason to leave its territory. Accordingly, universal jurisdiction

cases are unlikely to take place whilst the national system perpetuates impunity.

### 4.3.6 Other international initiatives

In light of the lack of prospects for accountability and the obstacles to domestic and international initiatives examined thus far, alternative avenues should be considered. The absence of a convention on crimes against humanity means that the ICJ cannot exercise jurisdiction at the moment. It is, therefore, important that the EU continues to support the efforts in this respect (*supra* Section 2.6). The conventions criminalising underlying crimes, such as torture or enforced disappearances, also offer limited prospects, as they both rely on the exercise of universal jurisdiction. Moreover, Venezuela's withdrawal from the Inter-American system prevents remedies for human rights violations that amount to core international crimes, including torture, enforced disappearances, extrajudicial executions and arbitrary detention (Soley and Stininger). Therefore, it is recommended that the EU includes accession to the relevant treaties in its future interactions with the government led by Nicolás Maduro and the interim government led by Juan Guaidó.

One of the most recent developments in Venezuela is the establishment of the Independent International Fact-Finding Mission (IIFFM). Established with an initial one-year term, the IIFFM is mandated to investigate extrajudicial executions, enforced disappearances, arbitrary detention and torture and other cruel, inhuman or degrading treatment since 2014, with a view to ensuring full accountability for perpetrators and justice for victims. It does not exercise criminal jurisdiction, but the information it collects could be used for future national or international prosecutions. Whilst it is early to comment on the work of the IIFFM, as it is still accepting submissions relevant to its mandate, the main challenge it faces is non-cooperation from the government led by Nicolás Maduro, including lack of access to the territory of Venezuela. Although it backed Human Rights Council resolution 42/25 which established the IIFFM, the EU has considered this challenge and decided to provide political support as the only form of assistance to the IIFFM at this point in time (Interviews 3, 8; Deutsche Welle 2019).

On the other hand, in June 2019, Venezuela and the UN agreed on the establishment of an OHCHR field office in Venezuela (OHCHR 2019a). Considering that the Office would be situated in the country, that it would carry out human rights monitoring and provide concrete protections against violations, the EU decided to focus its financial support on setting up the OHCHR office (Interview 15).

While the allocation of funding does not necessarily need to be limited to one body, the EU should consider extending its financial support to the IIFFM, drawing lessons from its engagement with other UN HRC created bodies which lacked access to the territory where the crimes had occurred. In spite of similar challenges, the Independent International Commission of Inquiry for Syria and the Independent International Fact-Finding Mission on Myanmar, both supported by the EU, were able to document violations. The information they collected provided solid foundations for the respective UN evidentiary mechanisms and, partly, the ICJ case against Myanmar (Interviews 3, 8, 12, 17; *infra* Sections 4.4.4, 4.4.5, 4.5.3). Therefore, while support to the OHCHR office should continue, the EU should also consider the future potential of the IIFFM. The added value of EU financial assistance should be considered in light of this and the Parliament could advocate for these aspects to be taken into account in the decision-making process.

## 4.4 Myanmar

The Rohingya, a Muslim minority population mainly residing in Myanmar's Rakhine State, have suffered severe human rights violations since the 1960s. They have faced serious discriminatory treatment and exclusionary rhetoric, which have prevented them from acquiring the status of a 'national race'. As a result, they have been denied citizenship of Myanmar. Displacement of the Rohingya began in the 1970s and 1990s, during military rule and was accompanied by widespread theft, forced labour, arbitrary arrest, ill-treatment, extortion and sexual violence at the hands of the *Tatmadaw*, Myanmar's security forces. The

situation further deteriorated in 2012 and 2013, leading to a coordinated campaign against the Rohingya. Individuals were killed, injured, tortured, arbitrarily arrested, detained in inhuman conditions and their property was destroyed or set on fire, causing the displacement of more than 140 000 people (Human Rights Watch 2013; A/HRC/42/CRP.5). In 2017, in response to coordinated attacks from the armed opposition group Arakan Rohingya Salvation Army (ARSA), the *Tatmadaw* carried out 'clearance operations' against the Rohingya population, causing over 10 000 deaths, alleged widespread rape and sexual violence, and enforced disappearances. 40 % of all villages in northern Rakhine State were totally or partially destroyed and over 725 000 people fled to other parts of Myanmar or abroad (mainly to Bangladesh) giving rise to allegations of displacement and deportation (Amnesty 2018; Human Rights Watch 2017c; ICC 2018a). The UN Human Rights Commissioner and the Special Rapporteur on the situation of Human Rights in Myanmar respectively defined the situation in Rakhine State as 'a textbook example of ethnic cleansing' and bearing 'the hallmarks of genocide' (Al Hussein; Lee).

The situation of the Rohingya minority and the removal of the discriminatory measures against them have been addressed by the EU in the 2013 Comprehensive Framework on EU policy in Myanmar, the 2014-2020 Multiannual Indicative Programme under the Development Cooperation Instrument (DCI) and the 2016 Strategy vis-à-vis Myanmar/Burma (Council 2013c; EUDCI; HR/VP 2016). After the 'clearance operations', the EU and Member States with diplomatic representation in Myanmar developed a joint strategy for the EU's involvement in the country, employing many of the tools at their disposal, including humanitarian aid, peacebuilding projects and sanctions (Interviews Gilmore, Schmidt). Since 2017, Directorate General European Civil Protection and Humanitarian Aid Operations (DG ECHO) has provided over EUR 140 million in humanitarian assistance to the Rohingya in Myanmar and Bangladesh (Commission 2019). The EU has also led the establishment of the Joint Peace Fund for Myanmar and is one of its donors, together with Member States Denmark, Finland, Germany and Italy, as well as third States. The Fund, which is funding peacebuilding and conflict sensitivity projects, is expected to run until 2021 (Interview 7; JPF). In addition, the Council has adopted a comprehensive embargo on weapons and equipment that may be used for internal repression, as well as targeted sanctions against fourteen individuals (Council 2018b, 2019d, 2020c). Restrictive measures and targeted sanctions have been an important part of the approach on Myanmar and may be employed as tools aimed at altering the behaviour of alleged perpetrators, but are not classed as accountability mechanisms (Interview 8).

Since 2017, the EU has scaled up the emphasis on accountability. Although EU Member States brought the matter to the UN Security Council, no action has been taken to date due to Chinese and Russian opposition, as well as a fragmented international community (Interview 9; Nichols). Amid this impasse, the EU and its Member States have first supported the establishment of the Independent International Fact-Finding Mission (IIFFM) and then the creation of the Independent Investigative Mechanism for Myanmar (IIMM), providing significant political support to both (Interviews Arena, Gilmore, Schmidt, 8). In parallel to the initiatives taken in multilateral fora, the EU has engaged with the government of Myanmar on a bilateral basis through the Human Rights Dialogues chaired by the EUSR for Human Rights. The EUSR visited Myanmar and met with the country's political and military leadership on a high level. Such meetings provide an important forum to address accountability for alleged crimes against the Rohingya, monitoring of human rights standards and accountability initiatives included under the Everything but Arms (EBA) trade preference scheme and Myanmar's accession to the core UN treaties (EEAS 2019b; HR/VP 2020c; Interviews, Gilmore, Schmidt, 8).

The EU's approach has been comprehensive, supportive of international initiatives and coordinated with EU Member States. However, there have been few concrete results in terms of accountability for alleged crimes committed against the Rohingya so far. This lack of significant results warrants strengthening the EU's engagement, especially in bilateral relations. Human Rights Dialogues should continue to address accountability initiatives and the EU should aim to strengthen its follow-up on the effective

implementation of the measures discussed therein. Focusing on international treaties, Myanmar should be encouraged to accede to the Additional Protocols to the Geneva Conventions (particularly Protocol II, as it applies to internal armed conflict), the International Convention on Enforced Disappearance and the UN Convention against Torture. The EU could also offer technical assistance to remove obstacles to ratification and the adoption of domestic legislation.

This section will now consider the accountability mechanisms that address core international crimes allegedly committed in Myanmar. Firstly, it will examine the *Bangladesh/Myanmar* situation before the ICC, domestic investigations, the Independent Commission of Enquiry and universal jurisdiction cases. It will then consider the IIMM and the *Gambia v Myanmar* case before the International Court of Justice.

### 4.4.1 The *Bangladesh/Myanmar* situation before the ICC

Myanmar is neither a State Party to the ICC nor has the situation within its territory been referred to it by the UN Security Council. However, the ICC Prosecutor requested a ruling on whether the Court has jurisdiction over the situation as one of the crimes allegedly committed in Myanmar is deportation, which necessarily occurs between the territories of two States. In this instance deportation is alleged to have occurred from Myanmar to Bangladesh, the latter having been a State Party to the ICC since 2010 (Freuden). The Pre-Trial Chamber ruled by majority that the ICC has jurisdiction because at least one legal element of the alleged crimes had been committed on the territory of a State Party, with a decision that leaves the door open for more migration-related crimes before the ICC (Heller; Wheeler; *infra* Section 4.5). Accordingly, the Court has been seized of jurisdiction for only some of the crimes allegedly committed in Myanmar. In September 2018, the Prosecutor opened a preliminary examination covering alleged crimes committed in part on the territory of Bangladesh since June 2010, and particularly in the context of the escalation of violence which occurred in Myanmar in August 2017 and resulted in the alleged deportation of hundreds of thousands of members of the Rohingya from Myanmar to Bangladesh. The allegations include also deprivation of fundamental rights, killing, sexual violence, enforced disappearance, destruction and looting (ICC 2018a, 2018e). At the time of writing, the situation is at the investigation stage. The Pre-Trial Chamber accepted the request to investigate the crimes committed in the context of the two waves of violence in Rakhine State, as well as any other crimes which are sufficiently linked to these events.

As Myanmar is not a State Party to the Rome Statute, it is not under any obligation to cooperate with the Court. Since the first request from the Prosecutor, the government has taken a clear stance opposing the work of the ICC in the country, reiterating that the Court has 'no jurisdiction on Myanmar whatsoever' and refusing to cooperate with it (Government of Myanmar 2018a, 2018b). Myanmar has not contributed to the proceedings and its Embassy in Belgium has refused to accept communications from the Prosecutor. Lack of cooperation affects potential cases arising from the situation. ICC investigators necessarily have to rely mainly on evidence obtained from victims and survivors based outside Myanmar. As the voluntary appearance of Myanmar nationals before the Court is unlikely, the issuance of public arrest warrants may create issues similar to those raised in the Al-Bashir case in the situation of Sudan (*supra* Section 2.2.4).

The EU has provided primarily political support to the ICC, engaging the government of Myanmar on cooperation with the Court and accession to the Rome Statute. Furthermore, pursuant to the principle of complementarity, it carries out a continuous assessment of whether the domestic efforts can be regarded as genuine (Interview Schmidt). The Parliament has called on the EU Member States sitting on the UN Security Council to refer the situation to the ICC to cover 'the full scope of human rights violations' (Parliament 2018e). A referral would be of great legal significance, as it would allow the situation to cover the entire territory of Myanmar and not be limited to crimes with a trans-boundary element. Considering the impact this would have on accountability, it is recommended that EU Member States in the UN Security Council continue to strive for a referral, even though the international community is currently fragmented on the issue. Similarly, the EU should continue engaging the Myanmar government on acceding to the

Rome Statute, offering technical assistance and using all leverages at its disposal to encourage cooperation and access to Myanmar territory.

### 4.4.2 Domestic investigations and courts martial

At the domestic level, a small number of initiatives have focused on violations suffered by the Rohingya. In relation to incidents that occurred prior to 2017, the government of Myanmar established the Investigation Commission for Maungdaw in Rakhine State, the Rakhine State Investigation, the *Tatmadaw* Investigation Team and the Ministry of Home Affairs Investigation Committee, none of which has provided a suitable avenue for accountability (A/HRC/42/CRP.5; OHCHR 2019b; Human Rights Watch 2018c; Interviews Gilmore, Schmidt, 2).

After the 2017 events, there have been two military investigations. The Constitution of Myanmar and other legislation stipulate that the army is only accountable to the army and therefore courts martial are the only way for the behaviour of soldiers and officials to come under scrutiny (A/HRC/42/CRP.5). As alleged perpetrators were *Tatmadaw* members and the investigations were conducted by the *Tatmadaw* themselves, they lacked impartiality. Furthermore, none of these initiatives focused on alleged core international crimes, but rather on misconduct by the security forces.

The first investigation did not seek the view of victims and generally discounted any responsibility of the *Tatmadaw*, going as far as holding that the Rohingya fled into Bangladesh because ARSA members had burnt their houses. Seven *Tatmadaw* members were convicted for the Inn Din massacre and, although sentenced to 10 years, they were pardoned after a few months (Kine). Referring to this domestic initiative in the request to open an investigation, the ICC Prosecutor considered that the sentences had been imposed 'for the purpose of shielding them from criminal responsibility' (ICC 2019d).

A further military investigation was also established in 2018 in relation to the Gu Dar Pyin massacre, as there were 'grounds to believe that the soldiers did not fully comply with the military instructions in some of the incidents' (Independent Commission of Enquiry). The subsequent court-martial trial, which finished in June 2020, resulted in three convictions for 'weaknesses in following instructions', but relevant details such as their names, their roles in the massacre and sentences imposed were not made public (Human Rights Watch 2020c).

The EU has expressed concern about the lack of accountability for systematic, serious violations committed by Myanmar's armed forces (HR/VP 2020c). Accordingly, EU Member States have taken the lead in multilateral fora to establish and promote international initiatives addressing the situation, including the IIFFM and the IIMM (Interviews Gilmore, Schmidt). However, while continuing to support international mechanisms, the EU should keep engaging Myanmar with the view to conducting genuine efforts at the domestic level.

### 4.4.3 The Independent Commission of Enquiry

Following pressure from the international community, in May 2018, the government of Myanmar established the Independent Commission of Enquiry (ICoE), which, despite its name, defined itself as a 'national special investigative mechanism tasked with addressing accountability for the events that took place in northern Rakhine State from 25 August 2017' but only made recommendations to the government of Myanmar (Independent Commission of Enquiry). The EU welcomed its creation as a step towards ensuring accountability (Council 2018c). Moreover, as the ICoE was the only body outside of Myanmar's army to have access to Rakhine State, the EU provided recommendations on enhancing its operations and credibility. It offered forensic and technical assistance, but the ICoE did not accept any form of support (Interview Schmidt). The work of the ICoE fell short of several standards for proper investigations, such as the lack of a support system to document forensic evidence (Interviews Gilmore, Koumjian, Schmidt).

The final report is not available in full, and its public sections essentially mirror the views of the government of Myanmar. The ICoE has not adequately investigated certain crimes, dismissed allegations of rape and sexual violence, barely acknowledged mass killings and only included vague findings on torture, destruction of property and looting (Independent Commission of Enquiry). Whilst recognising the limitations of the report, the EU and other bodies working on the situation in Myanmar have received it with interest and consider it as a valuable source that partly attests to the violations committed by the *Tatmadaw* (Interviews Gilmore; Koumjian; Schmidt). Importantly, it acknowledges the commission of war crimes. This is not surprising, given that State Counsellor Aung San Suu Kyi had already recognised that such crimes may have occurred (Independent Commission of Enquiry).

The report addresses the ICC and ICJ cases, as they were made public before its publication. It criticises both Courts for relying on evidence obtained mainly from individuals who fled to Bangladesh and for not taking Myanmar's perspective properly into account. Directly referring to the ICJ case (*infra* Section 4.4.6), the ICoE found that 'there is insufficient evidence to argue, much less conclude, that the crimes committed were undertaken with the intent to destroy, in whole or in part' 'the Muslim or any other community in northern Rakhine State'. Addressing the ICC investigation indirectly, the report places much emphasis on internal displacement, downplaying the mass movement of Rohingya towards Bangladesh as a 'natural protection instinct in some families (…) when cycles of communal violence occur' (Independent Commission of Enquiry). Furthermore, it laments the minimal interest shown for domestic initiatives and holds that there is no evidence linking high national authorities to the crimes, both of which are crucial to the admissibility assessment of ICC cases. The report designates Myanmar's military justice as the appropriate forum of adjudication for these crimes and includes a series of recommendations to the government, such as conducting further investigations and enhancing Myanmar's judicial system. The government of Myanmar has accepted the recommendations and committed to implement them, but this has yet to materialise and the mandate of the ICoE has not been extended.

The EU is now set to engage with the government on the implementation of the ICoE's recommendations (interviews Gilmore, Schmidt, 7). Other efforts include encouraging the implementation of the Final Report of the Advisory Commission on Rakhine State, which was established by the Office of the State Counsellor and the Kofi Annan Foundation in order to examine and propose solutions to the challenges facing Rakhine State (Interviews Gilmore; Advisory Commission on Rakhine State). While encouraging genuine proceedings is a key aspect, the EU could expand its focus to include the adoption of legislation on core international crimes, as Myanmar's criminal code only contains a provision on slavery. Furthermore, it could explore the prospects of reforming the army and the judiciary with the view to minimising, or even eliminating, the chances of impunity for members of the *Tatmadaw*. Such political and diplomatic efforts could also be accompanied by an offer for technical and expert assistance for the transition to accountability.

### 4.4.4 Universal jurisdiction

The situation in Myanmar has given rise to very few universal jurisdiction cases to date, despite widespread calls for more increased involvement of foreign jurisdictions (Parliament 2017b; Sendut). In 2018, a private prosecution for crimes against humanity was filed against State Counsellor Aung San Suu Kyi before the Melbourne Magistrates' Court, as she was visiting Australia for the joint Australian-ASEAN summit. Australian legislation requires the consent of the Attorney-General to prosecute, but this was declined because Aung San Suu Kyi was considered to have complete immunity (Arraf). Although a petition sought review of this position, the High Court dismissed the prosecution with a decision that prompted severe criticism of Australia's legislation implementing the Rome Statute (Sinclair-Blakemore).

In November 2019, BROUK (Burmese Rohingya Organisation UK) filed a universal jurisdiction lawsuit before an Argentinian Federal Court for alleged crimes against humanity and genocide committed in August 2017

against the Rohingya (TRIAL 2020). The lawsuit identified a number of military and civilian leaders, including State Counsellor Aung San Suu Kyi and Army Chief Min Aung Hlaing although these were not present on Argentinian territory (Kean). Argentina was purposely chosen over other States exercising universal jurisdiction, including EU Member States, owing to its expansive approach to universal jurisdiction (Deutsche Welle 2019). A first instance Court decided not to pursue the case, but this was overturned in May 2020. The Federal Appeals Court in Buenos Aires ruled that it is necessary to approach the ICC to obtain more information before making a final decision on whether to pursue the case, in order to ensure that a case in Argentina would not duplicate other justice efforts (BROUK).

The possibility of a universal jurisdiction case is of great interest, as it would be the first time that domestic proceedings based on universal jurisdiction would occur in parallel with an ICC investigation. It is, however, unlikely that the Argentinian case would affect the admissibility of an ICC case, as it does not have the same limitations *ratione loci* and *ratione materiae* as the ICC situation (Bo). In fact, the BROUK lawsuit focuses on additional crimes, including genocide, and may cover the whole territory of Myanmar. In this respect, like all universal jurisdiction cases it is a welcome step towards accountability (Interview 12). However, universal jurisdiction cases in which the accused is not present on the territory or does not have a connection with the State exercising jurisdiction, have mainly political value, as it would be difficult to enforce a potential judgment (Interview 2). This also applies to EU Member States, where the exercise of universal jurisdiction is a remote prospect due to the distance from Myanmar, which makes any connections between victims or perpetrators and Europe less likely (Interviews Gilmore, Koumjian, 2, 12). Nevertheless, the EU should keep supporting universal jurisdiction cases and, through the Genocide Network, it could share the information collected on Myanmar and best practices identified in such cases with Member and non-Member States aiming to exercise this form of jurisdiction (Interview 16).

### 4.4.5 The Independent Investigative Mechanism for Myanmar (IIMM)

The IIMM was established in September 2018, when the IIFFM concluded its mandate, after publishing two annual reports and two thematic reports on sexual violence and on the economic interests of the Myanmar military. EU Member States played a critical role, co-sponsoring with the Organisation of Islamic Cooperation, UN Human Rights Council resolution 39/2, which formally established the IIMM. The Mechanism is mandated to collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011, including the information gathered by the IIFFM. The Mechanism was established in recognition that accountability may take time and that it is necessary to preserve evidence and structure it in a way to expedite future proceedings at the international or domestic levels (Interview Koumjian; A/73/716). Acknowledging the IIMM's linkage function between the IIFFM and justice mechanisms, the EU has contributed politically and financially, encouraging cooperation with the IIMM, enhancing the Mechanism's visibility and providing support in budget discussions (Interviews Arena, Gilmore, Koumjian, Schmidt, 3, 7, 10; Parliament 2019b).

Since becoming operational in August 2019, the IIMM has conducted a mission to Bangladesh in November 2019, when its Head, Nicholas Koumjian, met with victims' representatives, assuring them of further engagement and explaining the mandate of the Mechanism (UNHRC 2020). This forms part of the IIMMs engagement with affected populations and Myanmar as a whole, which aims at clarifying the misconceptions on its mandate and the relationship with other mechanisms through outreach in the local language (Interview Koumjian).

The EU is supporting the IIMM with two courses of action. It engages directly with the Mechanism in order to ascertain how EU institutions can assist it in addressing the main challenges it faces, and it also engages the government of Myanmar on the work of the IIMM (Interview Gilmore). One of the main obstacles is Myanmar's refusal to cooperate with the Mechanism and to grant access to its territory, which impairs the collection of physical evidence and witness testimony from inside the country. The IIMM has tried to

engage with Myanmar on this issue and is developing innovative investigative approaches to mitigate the challenges due to the lack of access (Interview Koumjian). The EU considers seeking access and cooperation with the IIMM a top agenda item in its bilateral relations with Myanmar (Interviews Gilmore, Schmidt, 7; Parliament 2019). Considering how such a development would impact the work of the Mechanism, the EU should aim to step up its engagement on this point, perhaps considering to include access and cooperation within the EBA engagement.

The IIMM is also in the process of engaging with the Genocide Network, and access to it would allow valuable cooperation with other national and international jurisdictions (Interview Pezdirc). The EU could play a crucial role in enhancing cooperation between the UN Evidentiary Mechanisms and its Member States, should these be in a position to share evidence, information and best practices (Interviews Gilmore, Koumjian, 12). Such cooperation however needs to be accompanied by adequate funding so as to allow the Mechanism to carry out its mandate (Parliament 2019b; Interview 7).

### 4.4.6 The *Gambia v Myanmar* case before the International Court of Justice

In November 2019, The Gambia filed an application before the ICJ instituting proceedings and requesting provisional measures in relation to alleged violations of the Genocide Convention during the 2017 'clearance operations'. *The Gambia v Myanmar* concerns allegations of direct commission of genocide; conspiracy to commit genocide; attempt to commit genocide; direct and public incitement of genocide; complicity; failure to prevent, punish and enact legislation to give effect to the provisions in the Genocide Convention. The genocidal acts described in the application include the widespread use of rape and sexual assault, mass destruction of villages, targeting of children and a policy of forced starvation through displacement. As part of its request, The Gambia asked that breaches of the Genocide Convention be remedied, that the Rohingya be given full citizenship rights, that guarantees of non-repetition be provided and that accountability by a competent international tribunal be achieved, which may allude to the involvement of the ICC or of an *ad hoc* court (Pillai). Myanmar participated actively in the proceedings, denying genocidal intent. In January 2020, the Court issued a unanimous order on provisional measures. According to the order, Myanmar shall take all measures to prevent the commission of genocidal acts, including those by the hands of the military or other irregular forces, prevent the destruction and ensure the preservation of evidence, before reporting to the Court on the measures taken six months thereafter.

The EU has recognised the significance of the ICJ case and provided considerable political support, calling on its Member States to do the same (HR/VP 2020c). A perhaps more indirect contribution is related to the sources on which The Gambia's application relies: the reports of the IIFFM, whose establishment and mandate were promoted by the EU; and UN Human Rights Council resolution 39/2, which the EU co-sponsored (Interview Schmidt). While the case is ongoing, the EU and its Member States have continued to provide political support and urged compliance with the provisional measures ruling (EU5 Statement). It is important that such support continues and that compliance is monitored regularly and becomes a relevant item on the agenda in bilateral interactions. This could happen through the Human Rights Dialogues, and perhaps consideration should be given to including compliance with the ICJ measures within the EBA monitoring.

## 4.5 Syria

In 2011, the violent repression of peaceful protests by the Assad regime triggered an armed rebellion and subsequently a protracted armed conflict with no clear end in sight, which has caused over 5 million people to flee Syria and over 6 million internally displaced people (Sweeney). External actors are involved in the armed conflict and have provided support to various parties, and non-State armed groups have also controlled territory including gas and oil fields (Commission 2015). The conflict has been marked by serious violations of international law, including humanitarian and human rights law, such as enforced

disappearances and the use of torture by both the Syrian regime and armed groups such as Hay'at Tahrir al Sham (formerly Jabhat al-Nusra) and the so-called Islamic State ([IS] Islamic State of Iraq and Al-Sham [ISIS], Islamic State in Iraq and the Levant [ISIL], Da'esh) (Megally and Naughton). In its 2018 conclusions on Syria, the EU Council strongly condemned these violations, including the use of chemical weapons by the Syrian regime and IS, and reiterated its support for the Global Coalition against Da'esh.

The EU does not foresee a military solution to the Syrian conflict, instead pursues a political approach based on UN Security Council resolution 2254 and the 2012 Geneva Communiqué. The need for the regime to genuinely engage in political negotiations was reiterated on 30 June 2020 by HR/VP Josep Borrell, at the fourth Brussels Conference on 'Supporting the future of Syria and the region' (EEAS 2020f). The EU 'Strategy on Syria' is focused on the need for a political resolution, humanitarian aid and accountability, which is noted as a prerequisite for lasting peace (Commission 2017; Council 2017e, 2017f). However, the Independent International Commission of Inquiry on the Syrian Arab Republic (CoI) reported that despite sustained efforts to invigorate the political process between July 2019 and January 2020, fighting continued and the humanitarian situation deteriorated in many parts of the country (A/HRC/43/57).

As the leading world donors in addressing the consequences of the Syrian crisis by delivering humanitarian and development aid, the EU and its Member States have collectively mobilised over EUR 19 billion since 2011 through initiatives such as the Kuwait 2 pledging conference, and the EU Trust Fund in Response to the Syrian Crisis, 'the Madad Fund', to support refugees and neighbouring countries (European Commission 2020). Members of the European Parliament approved a further EUR 585 million to support refugees from Syria in June 2020, and HR/VP Borrell announced on 30 June 2020 that EU institutions pledged EUR 2.3 billion over two years to continue supporting neighbouring countries hosting Syrian refugees (European Parliament 2020a; EEAS 2020g). Through the IcSP funding of the IIIM and other initiatives, the EU is one of the biggest financial and political supporters of accountability in Syria (Interview Gilmore).

On 28 May 2020, owing to the ongoing repression of the Syrian population, the European Council extended the targeted sanctions regime to 1 June 2021, with the list of targeted persons and entities now at 273 and 70 respectively (European Council 2020a). Restrictive measures include banning the import of oil, certain investments, asset freezes, and a ban on equipment which may be used for internal repression (European Council 2020a). Simultaneously, the EU has pushed for accountability. Accordingly, this section considers prospects for justice in relation to the ICC, how EU Member States have applied the principle of universal jurisdiction, the IIIM, engagement with civil society and transitional justice, and the UN Board of Inquiry. The proposal for an *ad hoc* Tribunal to address IS crimes is discussed in Section 4.6.4.

### 4.5.1 The prospects for justice at the International Criminal Court

The violations which Syrians have so far experienced have been met largely with impunity. Many high-ranking Syrian officials have been accused of perpetrating international crimes in Syria and the Assad regime has not conducted genuine investigations or prosecutions to address the crimes which have allegedly been committed on its territory (Sweeney). Whilst EU Member States are prosecuting a small (but increasing) number of suspects by applying the principle of universal jurisdiction at the national level, and the IIIM is working to collect and maintain an evidence repository to support prosecutions, these forms of justice do not necessarily pressurise the regime in the same way as international criminal justice processes.

The ICC may be the most appropriate forum in which to address the situation as the international community's permanent court, with jurisdiction *ratione materiae* over the alleged crimes. However, the exercise of the Court's jurisdiction presents difficulties, given that Syria is not a State Party to the Rome Statute and the Assad regime has not voluntarily accepted jurisdiction. There is the possibility that jurisdiction could be established following the precedent set by the Myanmar decision in which the ICC considers the crime of deportation in relation to the Rohingya now on the territory of Bangladesh

(Sweeney; *supra* Section 4.4.1). From March 2019, communications have been lodged with the Office of the Prosecutor regarding Syrian refugees and alleged victims of deportation based in Jordan, which is pertinent with 655 216 registered Syrian refugees in Jordan as of January 2020 (Guernica; UNHCR). With Jordan being a State Party, the Prosecutor may be able to exercise jurisdiction for crimes committed on its territory and initiate a preliminary examination *proprio motu*. As the significant actors in the conflict besides Syria (e.g. Russia) are not Parties to the Rome Statute, efforts to exercise jurisdiction based on the nationality of the alleged perpetrators have been unsuccessful and would be limited (Sweeney). In April 2015, the Prosecutor declined to initiate a preliminary examination into crimes committed by nationals of States Parties as members of the IS, as the Court is focused on those most responsible for mass crimes and the group's leaders are indicated to be Syrian and Iraqi nationals, making the jurisdictional basis too narrow (ICC 2020d).

In its Council conclusions and a 2017 Parliament resolution, the EU has called for, and should continue to call for, the Syrian situation to be referred to the ICC. In May 2014, a draft resolution to refer the situation in Syria since March 2011 to the ICC was vetoed by China and Russia, who were condemned for enabling impunity (Sweeney). After continued stalling on Syria, in a resolution in July 2017, the European Parliament deplored the use of the veto by Russia and China and called for reform of the UN Security Council. At the 2018 ASP the EU reiterated its call to have the situation in Syria referred to the Court, but noted that without such a referral, prosecutions in national jurisdictions make an important contribution to securing justice and restated commitment to supporting the IIIM (ASP Statement).

### 4.5.2 Universal Jurisdiction

The recognised need for accountability in the EU Strategy for Syria is underlined by the European Council and Parliament reiterating the importance of prosecuting crimes under national jurisdictions in the absence of international justice (Council 2017f; Parliament 2017e). In its 2018 resolution on the situation in Syria, the European Parliament underlined its commitment to the principle of universal jurisdiction, which noted that the international community and individual States had an obligation to hold violators of international humanitarian and human rights law accountable. In line with these policies, EU Member States have led national accountability efforts for crimes committed in Syria by applying the principle of universal jurisdiction. Notably, Sweden was the first country to hand down a conviction in an individual case concerning war crimes in Syria (Interview 9). It is recommended that the EU continues to promote the exercise of universal jurisdiction in both EU and non-EU Member States including through appropriate financial and technical assistance.

The presence of individuals fleeing the armed conflict in Syria to the territory of EU Member States has brought people from different backgrounds to European judicial authorities (Kaleck and Krocker). There have subsequently been multiple proceedings against low-level individuals which were triggered by the presence of a suspect on European territory (TRIAL 2020; Kaleck and Krocker). Similarly, complaints have also been entered against high-level Syrian officials by victims who are present across Europe and investigations into international crimes committed by the Syrian intelligence service have been opened in Austria, France, Germany and Sweden (TRIAL 2020). Austrian authorities opened an investigation into crimes committed in 13 Syrian detention centres after a complaint filed by victims and civil society organisations including the European Centre for Constitutional and Human Rights (ECCHR), Syrian lawyers Anwar al-Bunni and Mazen Darwish, as well as the Centre for the Enforcement of Human Rights International in Vienna (TRIAL 2020). EU calls for accountability have been driven forward by its Member States taking unprecedented steps. France and Germany issued international arrest warrants in 2018 against high-level suspects of the Syrian regime: German authorities issued an arrest warrant against Jamil Hassan, then head of the Syrian Air Force Intelligence Service, and reportedly sent an extradition request to the Government of Lebanon in February 2019 (Vohra; TRIAL 2020). In January 2020, French authorities arrested the former spokesperson of Jaish al-Islam on suspicion of war crimes, and opened an investigation

into a French national suspected of joining IS accused of genocide and crimes against humanity in Syria (FIDH).

Cooperation between EU Member States has significantly strengthened investigations and prosecutions by allowing States to identify suspects collaboratively, act on information effectively, and make best use of limited resources. In the 'Caesar case', a Joint Investigation Team between France and Germany cooperated on investigations regarding crimes allegedly committed by Syrian officials leading to synchronised arrests on 12 February 2019 (Factsheet on CIC). German authorities arrested two suspected members of the Syrian intelligence service Anwar R. and Eyad A., whilst French authorities arrested a suspected former member of the Syrian General Intelligence Directorate (Alkousaa; TRIAL 2020). On 15 February 2019, the suspect arrested in France was indicted for complicity in crimes against humanity between 2011 and 2013, and on 23 April 2020, the trial of Anwar R. and Eyad A. began in Koblenz, Germany, marking the first proceedings in the world on State torture in Syria (ECCHR). Also in Germany, a trial opened in May 2020, of a German-Tunisian woman who travelled to IS-held territory in Syria and allegedly held a 13 year old Yazidi child as a slave. The defendant is accused of membership of a terrorist group, human trafficking and crimes against humanity (The National 2020a).

EU agencies such as Eurojust, including the Genocide Network, have had a central role in facilitating and coordinating national activities. The Genocide Network has provided a forum for knowledge-exchange, and along with Eurojust, provided analytical and financial support to the bilateral Joint Investigation Team (the Caesar case), along with other EU coordinated activities such as the Europol Analysis Project (AP CIC) which aims to support the authorities of States and organisations combating core international crimes (Interview Pezdirc; Factsheet on CIC). Such coordination with State authorities has proven successful, including legal, analytical and operational support provided by the Genocide Network to Hungarian authorities regarding core international crimes and counter-terrorism. A Syrian national and suspected IS fighter was arrested in Hungary in 2019 having originally been the subject of an investigation in Greece based on Belgian intelligence (Genocide Network; TRIAL 2020). The Hungarian arrest order was based on information from the European national intelligence service. Charges include terrorism and crimes against humanity for acts committed in Syria from 2015-2016. The accused was detained in Nyírbátor asylum detention facility whilst awaiting expulsion (TRIAL 2020). In 2018, he had been convicted in Malta of having forged documents, and was later caught with forged documents in Budapest. Several States including Malta, Belgium and Greece are conducting an ongoing investigation with the Hungarian Counterterrorism Centre (TEK). Whilst this demonstrates the success of Genocide Network assistance to national authorities and such collaborative work, one area of weakness is cooperation within and between Member States' law enforcement and immigration agencies (Interview 2). Accordingly, the Parliament should consider calling for targeted support to encourage and enhance inter-agency communication. It should also encourage Member States to seek the support of the Genocide Network in operations relating to core international crimes, particularly those States with less capacity or experience in this regard.

Accountability is noted as a prerequisite for lasting peace within the EU Strategy on Syria, meaning that valid criticisms around investigations or proceedings potentially undermine the EU Strategy and associated core EU values. To counter one potential criticism, it is essential that all the forms of criminality which have occurred are recognised, especially as an initial focus has been on terrorism (Interview 2). Options include cumulative charging or otherwise ensuring that all relevant conducts are charged rather than relying on proceedings based solely on membership of or association with a terrorist organisation. This is seen in the Netherlands, where an arrest based on witness testimonies from Germany in 2019, led to the accused being charged with war crimes and membership of a terrorist organisation (TRIAL 2020). Another criticism has arisen in relation to the French judiciary for a noticeable pattern of limiting the role of civil society: in the *Lafarge* case, on 24 October 2019, the French Appeals Court decided Sherpa and the ECCHR were not admissible as plaintiffs because they were not direct victims (Tixeire; TRIAL 2020).

Restricting civil society involvement may negatively impact access to justice as organisations routinely facilitate processes for victims in universal jurisdiction cases. The ECCHR is also involved in cases in Austria, Germany, Norway, and Sweden (Kaleck and Kroker). Finally, in Spain, in March 2019 the concept of 'victim' was interpreted narrowly by the Spanish Supreme Court when it decided Spanish Courts lacked jurisdiction over alleged acts of terrorism and enforced disappearance against the complainant's brother, adopting a narrow interpretation of 'victim' (TRIAL 2020). This decision subsequently limits the application of the principle of universal jurisdiction (Day; TRIAL 2020). Guernica 37 International Justice Chambers has requested the Court of Justice of the European Union to determine whether the current Spanish definition meets European regulations, and whether European directives equate the concepts of direct and indirect victim relative to jurisdiction (TRIAL 2020). Whilst variation will occur between EU Member States, opportunities to seek or provide accountability for crimes committed in Syria are currently limited. The EU should therefore support the exercise of universal jurisdiction in its Member States through appropriate financial and technical assistance, and Member States should ensure that they are fully committed to providing accountability for international crimes and delivering justice to victims.

### 4.5.3 The International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM)

The IIIM was established on 21 December 2016 by UN General Assembly resolution 71/248 under the auspices of the UN to operate in cooperation with the Independent International Commission of Inquiry on the Syrian Arab Republic (CoI). Located in Geneva, the IIIM is tasked to independently and impartially assist the investigation and prosecution of persons responsible for serious violations of international law by: consolidating, preserving and analysing evidence of violations of international humanitarian and human rights law; and, preparing files to facilitate and expedite fair and independent criminal proceedings in accordance with international law standards (A/RES/71/248; A/71/755). The relationship between the IIIM and the CoI is complementary. Whilst the IIIM primarily builds on previously collected information to complete its tasks, the CoI focuses on directly collecting information, publicly reporting violations and making recommendations (A/71/755). The IIIM receives evidentiary materials from other sources including the CoI, UN entities, the Organization for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism, States, international or regional organisations, NGOs, foundations and individuals. An important instrument in this regard is the Protocol of Cooperation between the IIIM and Syrian civil society organisations participating in the Lausanne Platform. Supplementary to secondary sources of evidence, the IIIM itself also collects witness testimony, documentation and forensic material (A/71/755).

As part of the EU's Strategy on Syria, the European Council conclusions reiterated that the EU will support the Commission and the IIIM through cooperation and funding. Political support from the EU has been crucial for the IIIM amid challenges to its legitimacy from Russia and Syria, who argued the UN General Assembly had gone beyond its powers to establish the mechanism. Whilst the issue is resolved legally, it is not resolved politically and States not in support of the IIIM continue to protest during debates, for example, over funding (Whiting). Being initially funded solely by voluntary contributions posed a significant challenge for the IIIM, making planning its work more difficult and diverting limited resources into fundraising activities (A/72/764*). During this initial phase the EU contributed crucial financial support, providing EUR 4.5 million in 2018-19 (Interview Marchi-Uhel). The strong diplomatic support of the EU was also vital for the IIIM to move from exclusively voluntary funding to being included in the regular budget of the UN (Interview Marchi-Uhel). On 27 December 2019, the UN General Assembly voted to include the IIIM in the regular budget of the UN providing foreseeable and sustainable funding, which for 2020

amounts to USD 17.8 million before re-costing (A/RES/74/262). This has provided the IIIM resources and sustainability in a way which is essential for accountability (Interview Marchi-Uhel). Whilst the IIIM has overcome its initial challenge of reliance on voluntary funding, the mechanism continues to face opposition from some UN Member States, meaning the EU and its Member States have an ongoing role in spearheading political and financial support (European Commission 2017). It is therefore recommended that the EU continues to support the work of the Mechanism politically and financially, and engages third States on this issue in bilateral and multilateral fora.

The EU is strengthening the tools its Member States have at their disposal through its support for the IIIM. National courts are one intended recipient of its collected evidentiary materials, alongside regional or international courts or tribunals that have or may in future have the required jurisdiction, in accordance with international law (A/71/755). The IIIM will only share information with jurisdictions that respect international human rights law including the right to a fair trial and where the death penalty would not apply (A/71/755). As of June 2020, the IIIM is interacting with 11 States and has had 63 requests for assistance from those jurisdictions (Interview Marchi-Uhel). Challenges arise in facilitating assistance requests in accordance with the requirements of the partners and IIIM systems, however these interactions have informed the IIIMs collection strategies and analytical priorities (A/74/699; Interview Marchi-Uhel). Domestic prosecutions also provide impetus for Syrian civil society actors to share evidence they have collected with the IIIM, as there are visible results relating to the prospects of such materials supporting prosecutions. Through the IIIM's repository of evidence, and through its structural investigations and case-building activities, the mechanism can offer immediate support to ongoing investigations (Interview Marchi-Uhel).

The EU and its Member States are providing an important platform for the IIIM to share its work, and to ask for support (Interview Marchi-Uhel). Starting from its initial phase of operation the Genocide Network is proving an effective and valuable form of ongoing technical support for the IIIM in relation to engagement with other practitioners, investigators, judges and prosecutors conducting investigations into crimes committed in Syria. Having a representative attending the closed sessions of the Genocide Network, where Syria's situation is discussed, was critical and offered a chance to hear directly from the practitioners about their needs as well as present to them what the IIIM can offer (Interview Marchi-Uhel). As a non-judicial mechanism which requires fora for prosecutions, engagement with the Genocide Network provides the IIIM the opportunity to interact with 33 national jurisdictions simultaneously (Interview 2).

As of June 2020, the IIIM does not have access to the territory of Syria, nor has the Syrian regime responded to the mechanisms' communication attempts. The IIIM continues to seek access whilst mitigating limitations through technological means and evidence sharing (A/74/699). Related challenges include not being able to access the places where the crimes took place and having less access to relevant individuals. However, the lack of access to Syrian territory is not considered a priority issue for the mechanism at this time as the conflict has been well documented from the outset by multiple actors including States, international organisations, civil society, and journalists, generating a significant volume of documentation (Interview Marchi-Uhel). The IIIM is primarily mandated to collect this material and then build on that work, with gaps in the collection filled by targeted investigations. The large presence of individuals who have left Syria within EU Member States also facilitates access to evidence and to date the IIIM has collected over 2 million records of information and evidence. Again, the cooperation of EU Member States and the relevant authorities is critical for the IIIM to conduct investigations on their territory. This is also an area which lacks coherence as States have different requirements and processes, however, the mechanism is adaptable and adjusts to the needs of partners (Interview Marchi-Uhel). Its adaptability and capacity to adjust are one of the three biggest strengths which are identified by the Head of the IIIM, Catherine Marchi-Uhel, along with cooperation with Syrian civil society actors and the willingness to seize every opportunity for justice which is compatible with the mandate (Interview Marchi-Uhel).

The IIIM requires more cooperation frameworks with individual States covering areas such as evidence sharing in relation to the mandate (Interview Marchi-Uhel). These agreements are tailored to the requirements of each State and can take multiple forms as some systems require legislation, or a treaty or a memorandum of understanding. Support for and coordination of this effort by the EU would be a valuable measure in terms of encouraging cooperation, but also to enhance specific aspects, such as providing capacity for witness protection. The IIIM faces a specific difficulty in relation to sources for whom there is no connected trial jurisdiction: EU Member States will provide their own witness protection to individuals who are to appear in trials within their jurisdiction. However, without the cooperation of States the IIIM does not have the means to provide witness protection to individuals it interviews independently (Interview Marchi-Uhel). Given that interviews form part of the IIIMs mandate, and protection measures are vital, the EU and the Parliament should encourage Member States to engage with the IIIM on this issue.

There is therefore an enhanced need for cooperation with third States, other mechanisms and civil society. By February 2020, the IIIM had concluded 42 cooperation agreements (with 22 additional frameworks under negotiation) with States, international organisations, and civil society actors, having engaged with over 180 sources, including NGOs reached through increased outreach work, appropriate for the nature of its work (A/74/699; Elliott). The IIIM has also worked with national authorities to develop flexible cooperation agreements or inform new national legislative frameworks as necessary (A/74/699). The ongoing nature of the situation means other mechanisms are conducting investigations including the Organisation for the Prohibition of Chemical Weapons, which concluded in April 2020 that there are reasonable grounds to believe the Syrian regime has used chemical weapons and endeavours to compile records and findings in ways suitable for use by the IIIM (S/1867/2020). There are also two other Evidentiary Mechanisms operating in relation to Myanmar (IIMM) and Iraq (UNITAD), respectively, and the IIIM is cooperating with the IIMM on matters of mutual interest (A/74/699). Within its operational context, new initiatives arise and the changing situation requires the IIIM to take a dynamic approach. For example, the Syrian Democratic Council (a Kurdish-led civilian authority governing north-east Syrian territory recaptured from IS) announced a working group on 20 April 2020: composed of families of missing people, legal professionals and civil society activists it will work with local, regional and international actors to collect data and information on the detention files and develop the necessary plans to meet the aspirations and hopes of the Syrians for truth, justice and accountability (SDC).

Outreach is extremely important for the IIIM, which conducts two-way engagement with Syrian populations from multiple angles, beginning with Syrian civil society actors involved in documenting crimes (Interview Marchi-Uhel). The IIIMs work requires outreach partly as it is predicated on trust building, so actors feel they can entrust their materials to the Mechanism, and partly for knowledge exchange so the staff can better understand the context in which the alleged crimes were committed (Interview Marchi-Uhel). Whilst some staff are from the region, most staff are not and, therefore, engagement with affected populations has been crucial to shaping the work of the IIIM (Interview Marchi-Uhel). Together with NGOs a protocol was drafted for this two-way engagement, which has been central for the work of the IIIM. With the assistance of the Netherlands and Switzerland the Lausanne platform was created, facilitating a meeting approximately twice a year with various civil society actors. Trust-building has grown the Lausanne platform into substantive discussions and gatherings of NGOs that work in areas particularly relevant to specific topics such as detention related crimes and unlawful attacks (Interview Marchi-Uhel).

The IIIM has also developed a victim and survivor-centred approach. It involves constructive collaboration with survivors' groups which shapes the core of its work in terms of understanding the diversity of experiences and affected populations within the Syrian context (Interview Marchi-Uhel; A/74/699). This includes recognition of the essential need to treat the different communities as actors in the accountability process and ensure that processes address their experiences and harms (Interview Marchi-Uhel). Such work also includes the identification of effective humanitarian referral pathways, avoiding re-traumatisation,

soliciting and incorporating their opinions on justice, informing them about the work of the IIIM and integrating gender perspectives (A/74/313). The IIIM is working to ensure that all groups are represented and considered in the way that they have experienced the conflict, including women, male victims of sexual violence, LGBTQ communities, people with disabilities and children (Interview Marchi-Uhel). This in turn assists the Mechanism in working towards connecting criminal accountability processes with reparations, which require nuance according to need. A significant challenge working with the Syrian victim and survivor communities is managing expectations, and in order to do that the Mechanism engages directly and invests time with communities especially through the Lausanne platform (Interview Marchi-Uhel). It is recommended that the EU plays an active role in fostering the IIIMs efforts to engage victims and survivors.

### 4.5.4 Engagement with civil society and focus on transitional justice

EU activities and outreach within Syria have been limited by the fact that the Delegation of the EU to Syria is not welcomed by the government of Syria (Interview 15). The Delegation is working remotely from Beirut having been officially delocalised since 2012, but the office in Damascus remains open and travel into Syria occurs on the basis of missions within the bounds of visa restrictions imposed by the Assad regime. Accordingly, relationships within the region have been limited (Interview 13). In the Syrian context, the Delegation contributes to accountability for core international crimes including through the implementation of projects in which it acts as a programme manager and works with implementing partners (Interview 13). This requires good communication between Headquarters and Delegations, as conflict-affected States generally can have specific issues to be aware of including where a strong diaspora group is lobbying and creating a view at Headquarters which differs from the perspective of the Delegation (Interview 15). The need for consultation and knowledge-sharing should be considered when accountability programmes are being designed, as initiatives often come from Headquarters rather than Delegations (Interview 15).

EU engagement with NGOs in Syria is shaped both by the Syrian context and by the 'EU Strategy for Syria', which holds humanitarian aid as a primary focus, but has accountability at its core (Interviews 1, 9, 13, 15). Relative to accountability there is a focus on collecting evidence and documenting war crimes to support justice processes, especially in preparation for future international criminal justice (Interviews 1, 9). The need for properly obtained evidence to support cases relating to the Syrian context is echoed in practise, along with the need to ensure that all of the affected groups are remembered (Interview Minks). Within the Syrian context it initially proved challenging to find reliable partners to action this priority, with some actors being called into question over their practices and a lack of contact with civil society in some areas (Interviews 4, 13).

Once the IIIM was established, organisations which met the standards threshold were able to transmit their work. However, tensions arose as there was a perception that the work of some NGOs was being dismissed (Interview 15). This variation between standards and methodologies within NGOs collecting evidence in Syria is in keeping with Iraq and other conflict-affected States where practitioners have had mixed experiences (Interviews Minks, 10, 15, 13). Funding Syrian civil society and survivor groups is recognised as essential. Activities for consideration include civil society desires for capacity-building communicated to the IIIM, specifically, on how actors can organise material they have gathered to make it more relevant to the accountability process (Interview Marchi-Uhel). Within conflict-related contexts these kinds of activities are of significant value. Another common problem is that well-meaning organisations may proliferate quickly, to the detriment of communities who are subsequently repeatedly interviewed without coordination or precautions against risks such as trauma, insecurity or possible negative impacts on future accountability efforts: an issue exemplified in Myanmar in relation to Cox's Bazar (Interview 10; Goldberg). Accordingly, once it was operational, shifting the EU's evidentiary focus onto the IIIM, which functions in

line with UN best practices and works collaboratively with local NGOs, provides a more concrete and regulated approach (Interview 13).

Whilst support for evidence gathering activities is essential, it should be tempered with the knowledge that criminal prosecutions and particularly external national or international trials form only one part of providing accountability. Additionally, the slow pace of international criminal justice means that convictions may not arrive for many years and whilst they have symbolic significance, such convictions cannot address root causes of conflict (Interview 15; Cline). There is therefore a need for other aspects of the transitional justice process to be prioritised alongside efforts towards international criminal prosecutions. The complexities and realities of the conflict require a comprehensive approach to providing justice and accountability (Interviews Marchi-Uhel, 15). The scale and gravity of the crimes in Syria, with multiple actors of various affiliations, makes it unlikely that one type of court will suffice (Interview Marchi-Uhel). To this end EU engagement with Syrian civil society should be two-way, consultative and forward-thinking, with processes designed to ascertain the preferences of affected Syrian populations in relation to accountability, while mindful of the need to prepare for future reconciliation (Interviews 13, 15, Marchi-Uhel).

The EU has supported outreach and initiatives with Syrian civil society on human rights issues and accountability with a focus on international mechanisms which aim to increase the understanding of the value of such mechanisms inside Syria, across populations with different political positions (Interview 13). Given the focus on international criminal justice, this type of outreach including supporting the society outreach facility of the IIIM, is considered important at the delegation level to mitigate the risk of future international criminal justice and transitional justice processes failing to resonate with population groups inside Syria (Interview 13; Gready and Robins). However, the difficulties are significant and include both practical logistical concerns of trying to reach all areas of an active armed conflict, as well as the broader political context (Interview 13). Human rights advocacy often has to be international or with diaspora organisations, or was within opposition held areas which have become smaller, meaning there is little opportunity to reach out to organisations within Syria (Interview 1, 13).

The important role of Syrian civil society was recognised by HR/VP Josep Borrell ahead of the fourth Brussels Conference on 'Supporting the future of Syria and the region' from 22-30 June 2020. The HR/VP met with UN Special Envoy for Syria Geir Pedersen and members of the Syrian Civil Society Support Room, reiterating EU support for their work (EEAS 2020f). HR/VP Borrell stated that Syria's diverse civil society 'holds the key to the country's future', noting that the EU has been extensively working with Syrian actors inside Syria and the region on areas including human rights, humanitarian aid and cross-lines dialogues (EEAS 2020f). Increasing EU support for Syrian civil society is also noted as a positive development by the EUSR (Interview Gilmore). The HR/VP highlighted engagement with civil society during the Brussels Conference as an example of the EU's willingness to listen, and it is important that genuine knowledge-exchange with Syrian civil society on the issue of accountability is actioned throughout the work of the EU in relation to Syria.

Collectively the EU has conducted transitional justice activities in Syria through DG NEAR and IcSP managed by the EU Delegation, and since 2013 it has been supporting preparations for a future process of transitional justice by combining support for Syrian civil society with accountability mechanisms, including the International Commission for Missing Persons (ICMP), the CoI, and the IIIM (Interviews 9, 13, 15). The EU is diversifying its approach and is increasingly supporting programmes that look for population-focused and victim-centred justice solutions inside Syria, such as work with the Office of the High Commissioner for Human Rights for Syria (Interviews 13, 15). The ICMP has also facilitated outreach, and takes a victim-centred approach, working with as many families and organisations as possible across Syria from different sides of the conflict including advocacy on their rights as families (Interview 13). The ICMP has, however, been limited to local-level organisations and small family associations that can do such advocacy work,

either outside Syria or limited recently to north East Syria under the Kurdish administration (Interview 13). Arguably, as one of the key actors delivering the EU's ambitions on accountability for core international crimes in the Syrian context, the Delegation should itself be better supported. Measures could include ensuring that EU tools such as the Facility on Justice and Conflict in Transition are functional and of maximum benefit for practitioners. The EU Policy Framework on Support to Transitional Justice is another tool that the EU has at its disposal and could further support. For example, by increasing the capacity of the Focal Point for Transitional Justice to provide bespoke support on aspects of implementation in consultation with Delegations, and to enhance internal cohesion and understanding across EU institutions.

#### 4.5.5 The United Nations Headquarters Board of Inquiry to investigate incidents of international humanitarian law violations in North-West Syria

Alongside those mentioned, other mechanisms established for specific purposes also exist in relation to Syria which may contribute to evidence gathering and documentation of the crimes committed. On 1 August 2019 the UN Secretary-General announced his decision to establish the Board of Inquiry into certain incidents in north-west Syria since 17 September 2018 involving facilities on the UN deconfliction list and UN supported facilities (the Board). The Board is not a judicial body or court, it did not make legal findings, consider questions of legal liability or legal responsibility (UNSG-Letter). It was tasked to investigate 7 incidents which took place in hospitals, healthcare centres, a school, a refugee camp and a protection centre, although upon investigation it found one incident outside the scope of its mandate (UNSG-Summary). The aim was to gather and review evidence, including witness interviews, to produce a report on the facts and circumstances of the incidents and make recommendations for the UN (UNSG-Summary). Commencing its work in New York on 30 September 2019, the Board requested extensions due to the workload and had a report submission deadline of 13 March 2020 (UNSG-Summary). Whilst the Board was operational, a declaration by the High Representative on behalf of the EU called for a cessation of attacks on critical civilian infrastructure and also called for attacks that had taken place to be investigated by the Board, reiterating the EU's call for accountability for perpetrators of war crimes and crimes against humanity (European Council 2020b).

Non-cooperation by the Government of Syria significantly hindered the work of the Board. Not receiving responses to its communications meant that whilst the Board conducted field visits to Amman, Gaziantep and Ankara, it was unable to access Syrian territory and subsequently gathered information from a range of sources, examining the evidence for its reliability (UNSG-Summary; UNSG-Letter). Additionally, of the 10 States the Board contacted for information (including Syria), only 4 provided information and it was of a limited nature (UNSG-Summary). As a result, despite working with other sources including UN entities and non-governmental organisations, insufficient evidence meant the findings were predominantly probable rather than conclusive (UNSG-Summary).

Recommendations of the Board included the importance of a UN staff presence in north-west Syria in order to preserve humanitarian space, promote respect for international law, assess any breaches, undertake an accurate needs assessment, assess implementation, and demonstrate solidarity with the civilian population (UNSG-Summary). Other recommendations related to the work of the Office for the Coordination of Humanitarian Affairs (OCHA), especially regarding the need for transparency relating to records, funding, and the deconfliction mechanism which had suffered issues relating to lack of clarity and communication (UNSG-Summary). For example, at the request of the Humanitarian Country Team in Damascus, in 2014, OCHA established a humanitarian deconfliction mechanism in Syria, which was described in a Guidance Document (UNSG-Summary). However, the Guidance Document did not explicitly situate the mechanism within the context of international humanitarian law (UNSG-Summary).

### 4.6 Iraq

Radical groups including the so-called Islamic State ([IS], Islamic State of Iraq and Al-Sham [ISIS], Islamic State in Iraq and the Levant [ISIL], Da'esh) gained a foothold in northern Iraq in 2014, with allegations of international crimes, including the Camp Speicher massacre (A/HRC/28/18). Crimes have included forcibly transferring Yazidi people into Syria, with international attention drawn to the situation after the UN Human Rights Council concluded that IS had committed genocide, crimes against humanity, and war crimes against the Yazidi community (A/HRC/32/CRP.2).

The European Parliament has provided diplomatic leadership by adopting resolutions since 2014 which condemn IS crimes, urged a comprehensive EU policy for the region, and in 2016 was the first EU body to recognise that genocide was being committed against the Yazidi community (Parliament 2014b, 2015, 2016c; Gotev). Subject-specific instruments include the 'EU strategy for Iraq' adopted by the Council of the EU in January 2018, which sets out objectives in response to crimes committed by IS (Commission 2018; Council, 2018d). The EU-Iraq Partnership and Cooperation Agreement, signed in 2012 and which entered into force in 2018, provides a broad relationship framework and its Article 7 concerns the possibility of Iraq acceding to the Rome Statute.

The EU has supported Iraq with over EUR 1billion in funding since 2014 divided between humanitarian and development aid, political support, counter terrorism, stabilisation and security (EEAS 2020h). Funding has been provided by instruments including the Madad Fund, the IcSP, and the European Instrument for Democracy and Human Rights (EEAS 2020h). EU funding to support Iraq during COVID-19 will encompass broad areas including rule of law and its design may be informed by a subject-specific political economy analysis intended to assist the EU form a meaningful approach to justice in Iraq (Interview 5). Such political economy analyses can be used to inform the EU's approach to funding, and its programmes, as well as the implementation by Delegations and are essential for efficient, bespoke programmes operating in line with the 'do no harm' principle (Interviews 5, 6). As accountability for core international crimes forms one part of a complex political-legal landscape the European Parliament should support analytical efforts which can illustrate root issues (Interview 8). Mindful of the methodology of a political economy analysis, vis-a-vis the resources of the EU, to have value such activity cannot be a tick-box exercise, therefore support should not proliferate reporting and analysis activity but increase the robustness of current activity.

This section first examines the Iraqi domestic system, before considering the work of UNITAD. It then looks at efforts by EU Member States to provide accountability based on the principle of universal jurisdiction. Finally, the section examines the proposal for an *ad hoc* tribunal to address crimes committed by IS.

### 4.6.1 The Iraqi domestic courts

The domestic legal system in Iraq includes proceedings under Federal control and regional proceedings under the Kurdistan Regional Government (KRG). The criminal justice system is inquisitorial with proceedings generally including a pre-trial investigation phase led by an investigative judge, a main trial adjudication phase led by a trial judge, and appeals in the Court of Cassation (OHCHR 2020). Iraqi legislation does not include explicit provisions for core international crimes (Van Schaack). The EU has urged Iraq to become a party to the ICC to prosecute international crimes and the European Parliament has called on the EU, its Member States, and other potential donors to support Iraq in establishing the necessary domestic legal infrastructure (European Parliament 2016b). As the Iraqi domestic judiciary is the intended primary recipient of evidentiary material from UNITAD, a positive relationship in relation to capacity-building is growing and the Government of Iraq is exploring the adoption of national legislation to prosecute IS crimes of genocide, war crimes and crimes against humanity (Interview Khan; S/2020/386). The Iraqi judiciary is also engaging in capacity-building activities with UNITAD in relation to core international crimes, including an anticipated programme designed to strengthen its ability to investigate core crimes in line with international standards and build local expertise in international criminal and humanitarian law (Interview Khan; S/2020/386). The EU should support efforts which are designed to

increase capacity around core international crimes with longevity in mind, such as activities which create independent local capacity. Supportive engagement should be sensitive to both the historic and current context of Iraq, including the fact that the Iraqi Parliament has a multiplicity of actors and its work is complicated by external actors which can breach Iraq's territorial sovereignty (Interviews 8, 10; Al-Jazeera 2020b).

In the absence of specific legislation, individuals suspected of committing core international crimes as part of IS are currently prosecuted under anti-terrorism laws. The Government of Iraq and the KRG each adopted anti-terrorism legislation in the form of *Anti-Terror Law No. 3 of 2006*, applicable in the Kurdistan region, and Federal *Anti-Terrorism Law No. 13 of 2005*. Their broad definitions of 'terrorism' as found in Article 1 of the Federal *Anti-Terrorism Law* can be widely interpreted, giving rise to principle of legality issues around lack of clarity. Prosecutions have been brought based on membership rather than specific acts, as observed by the United Nations Assistance Mission in Iraq (UNAMI) in trials in both the Kurdistan courts and under the Federal *Anti-Terrorism Law*. Sentences were given under Article 4 (penalties) without a punishable act as defined in Articles 2 or 3, meaning judges required only proof of membership or association with a terrorist group (OHCHR 2020). This approach does not account for differences between fighters and people under duress such as forced wives, medics and shop keepers. Accordingly, penalties can be disproportionate for some acts, and the system can appear to be indiscriminate or resemble collective punishment rather than individual criminal responsibility (OHCHR 2020). This may have negative implications for reconciliation between communities in Iraq, and may also alienate communities from the State rather than promote reconciliation and trust between the State and its citizens (Interview 8). Such potential impacts are especially significant in the Iraqi context as alienation from the State was one contributing factor which saw IS gain a foothold (Interview 13; A/HRC/28/18). Not appropriately labelling conduct also does not expose the crimes which were committed and therefore may not provide justice for victims (Akhavan et al.). In response to criticism the Human Rights Department of Iraq has highlighted a proposal to amend the *Anti-Terrorism Law* to provide accountability for all terrorist crimes (OHCHR 2020). The High Judicial Council also responded that the *Penal Code*, *Criminal Procedures Code*, and the *Juvenile Welfare Act* are also being reconsidered (OHCHR 2020).

Iraq's use of the death penalty has caused EU Member States to request clarification as the domestic judiciary intends to receive evidence from UNITAD (UN 2020a). In line with its mandate under UNSC Resolution 2379 (2017) and UN best practice, UNITAD will only share evidence with the Iraqi judiciary where it receives assurances that the death penalty will not apply (Interview Khan). Concerns around the use of the death penalty have called attention to its mandatory application under the Federal *Anti-Terrorism Law* Article 4, as this means that anyone who commits an act defined in Articles 2 or 3 shall be sentenced to death, as shall a person who incites, plans, finances, or assists terrorists. Article 6 of the *International Covenant on Civil and Political Rights* (*ICCPR*) guarantees the right to life and limits applications of the death penalty to the 'most serious crimes' which is restrictive and interpreted by the UN Human Rights Committee to prohibit mandatory application (CCPR/C/GC/36). In response to criticism, the Human Rights Department of Iraq stated that the death penalty has been defined to apply to the most serious crimes as criminal intent in relation to terrorism has general and personal objectives, and a supporter of terrorism may be more dangerous than a single terrorist (OHCHR 2020). However, mandatory death penalty means courts cannot account for the nature or severity of an act or mitigating circumstances and, in practice, the Federal courts have also imposed sentences of imprisonment (OHCHR 2020). Whilst the KRG law also prescribes the death penalty, a *de facto* moratorium has been in place in the Kurdistan region since 2008, although it has been breached at least twice with executions in 2015 and 2016; the EU has condemned the breaches (EEAS 2020b; OHCHR 2020). The European Parliament should support the KRG moratorium and emphasise the importance of allowing judges the ability to account for different or mitigating circumstances when passing sentencing.

The Iraqi judiciary has a huge caseload, processing over 20 000 terrorism-related cases between January 2018 and October 2019 (OHCHR 2020). In 2020, the UNAMI monitored 619 prosecutions under Iraq's anti-terrorism laws in Anbar, Baghdad, Basra, Dhi-Qar, Dohuk, Erbil, Kirkuk, Ninewa, and Wassit governorates, finding that judges were routinely prepared with case files and defence counsel were present during most proceedings (OHCHR 2020). One issue identified was the wide reliance on confessions as evidence in terrorism-related prosecutions, which combined with associated allegations of torture for the purpose of confession raises fair trial and human rights violation concerns that potentially render subsequent sentences arbitrary (OHCHR 2020). Using evidence obtained through torture or ill-treatment contravenes international law, Articles 19(4) and 37(1)(c) of the *Constitution of Iraq,* and Articles 123-129, 152 and 218 of the Iraqi *Criminal Procedure Code*. Article 13 of the KRGs anti-terrorism legislation prohibits torture or inhumane treatment during interrogation, but contrary to international law permits confessions extracted under duress in court when supported by other evidence (OHCHR 2020). There is a need for prosecutions to be based on the full spectrum of evidence and move away from reliance on confessions (Interview 10).

Accordingly, the EU should continue supporting capacity-building activity which assists the Iraqi judiciary to build comprehensive case files. In the Iraq context this is largely delivered through the capacity-building relationship between UNITAD and Iraq, which focuses on expanding the Iraqi judiciary's ability to provide accountability for IS crimes and its adherence to international standards (Interview Khan; S/2020/386). Associated activities are strongly supported by the EU and its Member States through enhancement agreements such as an agreement between Denmark and UNITAD to strengthen Iraqi courts, the judicial system, and forensic capacity. In April 2020, UNITAD and the EU announced a EUR 3.5 million agreement which will fund an 18-month project to digitise and archive evidence of IS crimes held by Iraqi authorities (UNITAD; S/2020/386). This is the largest extra-budgetary contribution to UNITAD to date and provides technical assistance and support to Federal authorities and to authorities in the Kurdistan region, the preservation of this evidentiary material will strengthen the evidentiary basis to develop case-files supporting future domestic prosecutions and helping to secure the archival record (UNITAD). Supporting efforts which increase fundamental protections within the Iraqi domestic judiciary should remain a priority for the EU and its Member States as violations of human rights including alleged torture, unfair trials, and perceived targeting of groups have previously alienated communities from the State and contributed to conditions which enabled IS to find initial support (OHCHR 2020; A/HRC/28/18).

### 4.6.2 The United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant (UNITAD)

In August 2017, the Government of Iraq addressed a letter to the President of the UN Security Council calling for international assistance to hold members of IS accountable for their crimes in Iraq. The international community responded by unanimously adopting UN Security Council Resolution 2379 (2017), which requested that the UN Secretary-General establish an Investigative Team: UNITAD formally commenced activities on 20 August 2018 (S/2018/1031). With strong political support from the EU, the unanimous Security Council support is recognised as UNITADs biggest strength by the Special Advisor and Head of the Investigative Team, Karim A. A. Khan (Special Advisor), as international commitment to combat the global IS threat provides a base for support (Interview Khan). A trust fund has been established and at the request of the government of Iraq, UNITADs mandate was extended until 21 September 2020 by UN Security Council Resolution 2490 (2019).

UNITAD is mandated by Resolution 2379 (2017) to collect, preserve, and store evidence in Iraq of acts which may amount to war crimes, crimes against humanity and genocide committed by IS in Iraq. Its activities are also governed by the terms of reference which were approved by the Security Council on 13 February 2018. UNITAD must ensure the broadest possible usability and admissibility of evidentiary materials, complementary to investigations by the Iraqi authorities and the national authorities of third States

(S/2018/118). Critics have noted that targeting a single armed group may be detrimental to the equal application of justice, or may allow regimes elsewhere to use UNITAD as an example to support one-sided or otherwise biased justice campaigns (Van Schaack). Arguably, this risk is commensurate to how the mandate is executed, including how free and fair the receiving judicial mechanisms ultimately are.

The EU is recognised by the Special Advisor as an important supporter of both international criminal justice and UNITAD (Interview Khan). The EU and its Member States are providing essential support including political leadership, funding, technical support and have provided expert staff members including legal personnel with contributions from Finland, France, Germany, the Netherlands, Slovakia, Sweden and Cyprus (Interview Khan; S/2019/407; S/2019/878; S/2020/386). Political and financial support from the EU has particularly facilitated UNITADs initial work such as recruitment, equipment acquisition, and establishing witness protection (Interview Khan). UNITAD now has a Witness Protection and Support Unit, and a dedicated Sexual and Gender-Based Crimes and Crimes Against Children Unit, and funding from the Netherlands facilitated work to support engagement with vulnerable witnesses including training local practitioners and hiring three clinical psychologists (Interview Khan; S/2020/386; UN 2020b). Such psychological support is recognised across contexts to have significant value for investigative activities and to the affected individuals, who are at risk of trauma (Interview Minks; Brounéus). The EU should support the provision of psychological support for investigation activities and support capacity-building activity which aims to provide sustained local support for communities who may go through trial processes in the future or be facing significant levels of trauma.

As an evidentiary mechanism, UNITAD requires fora in which proceedings related to IS war crimes, crimes against humanity and genocide are taken forward, and the EU can provide networking opportunities with Member State jurisdictions which underline the utility of its work, such as through the Genocide Network (Interviews 2, 10; S/2019/407). Such cooperation can also assist delivery of the mandate as the cross-border nature of IS makes accessing all of the related evidentiary materials a challenge (S/2019/407). EU Member States provided early diplomatic support at the UN Security Council, with Germany encouraging transnational cooperation on investigations (UN 2020a). Cooperation agreements between EU Member States and UNITAD are still being developed as work continues with some States to formalise agreements around evidence sharing and support for proceedings beyond Iraq (Interview Khan; S/2019/878). Additionally, the EU should continue to encourage cooperation between Iraq and other States, including non-EU Members, in order to assist access to relevant evidence and persons (S/2019/878). UNITAD has sought to cooperate with international organisations, academic institutions, journalists and non-governmental organisations to collect the broadest range of evidentiary materials, reportedly accessing over 600 000 videos and 15 000 pages of IS documents originally obtained by journalists (UN 2020a; S/2019/878). It has also developed relationships with the Europol which mirrors its engagement with Interpol (S/2018/1031). Given the opportunities for UNITAD, the EU should continue its commitment to a cooperative approach to providing accountability (Council 2002a, 2003a).

A significant strength for UNITAD is effective cooperation and communication with relevant national stakeholders (S/2020/386). Conditions for cooperation with the Government of Iraq are clarified within UNITADs terms of reference including respect for Iraq's sovereignty, free movement, access to establishments, information, people, security and privileges and immunities (S/2019/878). The need to marry UN best practise and international norms with Iraqi policy, sovereignty and fundamentally different sentences is a potential challenge for UNITAD. However, the mechanism exists because the Iraqi government called for international support to address IS crimes. Cooperation between UNITAD and the Iraqi administration to navigate such issues has been positive (Interview Khan). Such cooperation with the Government of Iraq has been essential for UNITADs evidence collection work, and central to facilitating commencement of UNITAD interviews with IS detainees at the premises of the Investigative Team (S/2020/386). UNITAD has also conducted mutually beneficial investigative work with the Mass Graves

Directorate of the Martyrs Foundation and the Medico-Legal Directorate of the Ministry of Health of Iraq, to ensure that forensic, physical and biological evidence is collected, stored and preserved in line with international standards (S/2020/386). The relationship with the Iraqi judiciary is in its early stages and is developing positive capacity-building activities (Interview Khan).

UNITAD is strengthened by its consistent inclusive engagement with the diverse communities of Iraq, who rightly expect recognition of and investigations into the crimes committed against them (Interview Khan; S/2020/386; Akhavan et al.). UNITAD has consistently engaged with survivors, community leaders, national and regional actors, religious bodies and NGOs, seeking to centralise their voices and experiences, share knowledge and build on the collective will to take action, for example the *Inter-faith Statement on the Victims of Da'esh* (S/2020/386; S/2019/407). Lack of capacity to conduct parallel investigations necessitates outreach and communication to provide clarity and reassure people that there is no 'hierarchy of victims' or preferential treatment (Interview Khan). The initial focus of UNITAD investigative activities has been on three areas: attacks committed against the Yazidi community in Sinjar; crimes committed in Mosul between 2014 and 2016; and, the mass killing of unarmed Iraqi air force cadets from Tikrit Air Academy in June 2014 (Camp Speicher) (S/2019/407; S/2020/386). UNITADs investigative scope is expanded as capacity allows and now includes two additional field investigation units, based on extrabudgetary contributions, which will investigate crimes committed against Christian, Kaka'i, Shabak, Sunni and Turkmen Shia communities (S/2020/386). This work ensures that no community is in danger of having its heritage made extinct or its voice lost in the context of full history and criminal accountability (Interview Khan). With disparity between the scale of the task and the available resources the EU should consider that providing sustained funding for, and encouraging others to support, engagement with communities and broadening the scope of investigative activity would assist UNITAD in delivering meaningful accountability for the diversity of affected communities of Iraq.

An inclusive methodology is fundamental to UNITAD as reflected in its approach to staffing, which recognises the asset of local expertise, and in line with Resolution 2379 (2017) ensures that Iraqi nationals are included at all levels, representing the diversity of Iraq along geographic, linguistic, gender, ethnic and religious lines (Interview Khan; S/2020/386). UNITADs engagement with local personnel and its ability and willingness to adapt its strategic plans based on engagement with affected communities and national authorities has strengthened its work and increased the accountability of the mechanism to local populations (Interview Khan; S/2019/878). Whilst UNITAD is making effective use of its resources to cover essential needs such as security, witness protection, psychosocial support, investigators, interpreters, analysists and lawyers there is a disparity between the resources and the scale of the task. The EU should therefore continue its strong political and financial support, and continue to encourage other actors to support the work of the Mechanism.

### 4.6.3 Universal jurisdiction

In a 2016 resolution on mass graves in Iraq the European Parliament called on the international community to hold suspected members of IS accountable, including via universal jurisdiction: a message strongly underlined in the Syrian context (*supra* Section 4.5.2). EU Member States have accordingly led the application of the principle of universal jurisdiction to hold suspected members of IS accountable for their crimes. Cooperation and knowledge-sharing between States is encouraged through the Genocide Network, and links between States have facilitated proceedings such as cooperation between France and Finland regarding the Camp Speicher massacre (TRIAL 2020). Cooperation is also required between immigration agencies and law enforcement in order to quickly locate relevant persons, with some States having better inter-agency links than others (Interview 2). One example of successful cooperation is the trial of Taha A.-J (an Iraqi national) in Germany, after being extradited to Germany following his arrest in Greece in 2019 with charges including genocide, crimes against humanity and war crimes allegedly committed as a member of IS (The National 2020a; TRIAL 2020). Taha A.-J is the spouse of a German

national, Jennifer W., whose trial also began in Germany in 2019, with charges including murder as a war crime relating to the murder of a 5-year-old Yazidi child taken captive and enslaved with her mother by the defendant and Taha A.-J (The National 2020b; TRIAL 2020).

The EU should consider the disparity between the willingness and ability of its Member States to apply the principle of universal jurisdiction and promote effective cooperation and communication between Member States, national agencies, and EU agencies, particularly in relation to identification processes. The European Parliament should reinforce its call for universal jurisdiction cases with a call for enhanced EU support including funding, technical and expert assistance to Member and non-Member States who wish to institute such proceedings. The aim should be that States can increase their capacities using the wealth of tools and experience present within the EU.

Five States have formally approached UNITAD regarding potential support for ongoing domestic proceedings concerning crimes committed by IS and others have expressed informal interest (S/2020/386). In this regard States requiring an explicit legislative basis for cooperation prior to engaging with UNITAD have been delayed in two situations due to the need for a legal framework, UNITAD has stated it will support States in developing legislative solutions (S/2019/878). The first assistance was provided to Finnish proceedings against two Iraqi nationals following an appeal against the acquittal of the defendants: UNITAD, the Iraqi authorities and Finnish prosecutors collaborated to facilitate the testimony of eight witnesses directly into the proceedings via video-link from the UNITAD premises (S/2020/386). Whilst the original decision was confirmed, the Finnish prosecutors and the presiding judge had positive comments on the added value of the assistance in the case, despite noting some initial discomfort with receiving evidence in this manner and some technical issues (S/2020/386; TRIAL 2019). The Parliament should therefore encourage States to further engage with UNITAD on the issue of cooperation agreements, which can take various forms, in order to facilitate future collaborations.

If the EU is to effectively lead accountability for core international crimes, then European States must apply the principle of universal jurisdiction equally to all suspects. In relation to Iraq, EU Member States including Sweden are going beyond IS crimes to impartially bring proceedings against all individuals suspected of international crimes in the Iraq context (Interview 2; TRIAL 2020). In 2019, Finland sentenced an Iraqi national and former soldier in the Iraqi army for the war crimes of desecrating and violating the dignity of a dead body in Iraq in 2015 (TRIAL 2020). These convictions have an important role in upholding the equality of the law and underlining that there will be no impunity for perpetrators of international crimes. This is essential as there may be little ability or will to prosecute crimes committed by certain actors within a State in which violations have taken place, and is pertinent to Iraq amid criticisms that crimes beyond those committed by IS are being ignored. The EU should support the efforts of its Member States to end impunity and provide accountability for core international crimes in an impartial manner.

### 4.6.4 The proposal for an *ad hoc* tribunal to address crimes committed by the so-called Islamic State

Calls for the creation of an international tribunal to address crimes committed by IS come in the context of thousands of suspected IS fighters, wives and their children being held in the custody of the Kurdish-led Syrian Democratic Forces (SDF), in camps including al-Hol and Roj in north East Syria (UN 2019; Loveluck). The number of foreign nationals held in al-Hol alone suspected of being linked to IS varies between 11 000-14 000 people depending on the source, with authorities beginning a campaign to register them on 10 June 2020 (EASO; Loveluck; Dellanna; France24). Al-Hol also houses thousands of displaced people and the majority of its inhabitants are women and children in conditions which are overcrowded, unhealthy and insecure with the camp facing issues including some women trying to enforce IS ideology (A/HRC/42/51; Loveluck). The SDF has noted its lack of resources and the high security risks, along with the harms of leaving children in such an environment (UN 2019; Ibrahim and François). On 26 June 2020, Maria Arena

made a statement on behalf of the European Parliament's Subcommittee on Human Rights demanding urgent assistance for the detained children (European Parliament 2020b). The statement noted the Parliament's resolution on 20 November 2019 on children's rights and that EU Member States have an obligation to repatriate European children who are currently in a legal limbo, it also stated that they should not be separated from their mothers. The conditions of detention are a cause of concern for the EUSR for Human Rights, who also highlights the risk of further indoctrination (Interview Gilmore).

One factor which should provide impetus for EU Member States to resolve the current detention situation is the potential influence on future terrorist activity. Grouping suspected terrorist fighters in such conditions has previously led to their collaboration on how to improve operations (Interview 9; Weiss and Hassan). Most EU Member States have argued that their nationals should remain and face local justice. Repatriations have been rare with exceptions being made for children in some cases. For example, France repatriated 10 children of French suspected IS fighters on 22 June 2020, although it argues French suspects should remain and face local justice (France24). The SDF has stated that it does not have the resources to continue to hold people for an extended time period. In 2019, senior official Abdulkerim Umer, called for 'a special international tribunal in north-east Syria to prosecute terrorists' in fair trials in line with international law and human rights standards (Coughlin; BBC; UN 2019; Ibrahim and François). The Government of Iraq has already called for international assistance to hold IS accountable.

EU Member States have also provided diplomatic support for the idea. In May 2019 the foreign minister of the Netherlands speaking at the United Nations called for the establishment of an international tribunal to investigate alleged crimes committed by IS across Syria and Iraq (Bays). In June 2019, Sweden hosted an expert meeting of participants from 11 EU Member States (then including the United Kingdom) alongside representatives of the EU and the UN to discuss accountability for crimes committed in Iraq and Syria and called for the conditions for establishing such a tribunal to be investigated (Swedish Ministry of Justice). Another proposal for a tribunal came from the Independent International Commission of Inquiry on the Syrian Arab Republic (A/HRC/32/CRP.2).

Neither Syria or Iraq are members of the ICC and the UN Security Council is unwilling to refer the situation in Syria to the ICC, meaning stakeholders looking to establish an *ad hoc* mechanism must look to alternative routes. Collective action already being taken by the 82 partner States in the Global Coalition Against Da'esh provides a potential forum in which similarly collective action for a justice mechanism could be discussed, as the coalition already recognises the need to fight IS ideology as well as its physical presence (Global Coalition Against Da'esh 2020b; UN 2019). In the absence of global action, the EU could take decisive action akin to the support provided to establish the Special Chambers for Kosovo (UN 2019). Collaborative action to establish a tribunal in the region could occur given Iraqi, KRG and SDF calls for cooperation and the existence of both the IIIM and UNITAD evidentiary mechanisms (Coughlin; BBC; UN 2019). Alternatively, it has been proposed that the EU could expand the jurisdiction of the European Public Prosecutor's Office to include international crimes and pursue a European mechanism with jurisdiction (UN 2019). A fourth option is that Iraq or other State enters a treaty with the UN to establish a hybrid court *as per* Sierra Leone or Cambodia (UN 2019).

Whilst there is political will from the Government of Iraq, the KRG and the SDF, there is unlikely to be political will from the Syrian regime to engage with an international mechanism, nor to willingly allow such a tribunal to exist on its territory. The location of the mechanism therefore needs to account for multiple complex factors, and the SDF call for a mechanism in north east Syria would likely face significant challenges stemming from its being on contested territory. Given the location of most crime scenes in Iraq and Syria at this time, locating the mechanism in the neighbourhood of the Middle East may lessen some logistical challenges such as access to evidence and witnesses (Interview Minks).

On the issue of jurisdiction being restricted only to IS, issues differ depending on whether the mechanism

is conceptualised as having a global reach or whether it is envisaged as applying only to Iraq and Syria. An *ad hoc* tribunal envisaged to try IS crimes only in the region is potentially exposed to criticisms of victors' justice in the context of Iraq, and is overly specific given the multiplicity of actors in Syria (Interviews Minks, 12, 13; Dworkin). Potentially the mechanism could be a starting point, but it should not be the end as there will not be accountability if focus is only on one group amid other actors in a context (Interview Minks). European officials have also suggested that its mandate could be widened in future, although such expansion is itself problematic (Dworkin). The message which such a mechanism would send, and any potential impacts on future conflicts and conflict-affected populations must be considered if justice is applied selectively (Interview 12). Alternatively, given IS activity in Sri Lanka, Niger and elsewhere an *ad hoc* tribunal could be given subject-specific jurisdiction over IS crimes, with a global reach. Functioning in complementarity, with the cooperation of States, as a forum into which States could refer cases and thus overcoming the issue of selectivity within one context (Interview 10).

At this time, opportunities for justice for survivors of crimes committed in Syria by former members of IS remain limited (Interview Marchi-Uhel). An international mechanism with a legal framework which encompasses core international crimes may better expose the range of acts which have been committed than prosecutions based on broad charges such as membership of a terrorist organisation (Interviews 10, 12). Academics have highlighted the scope to address issues such as the destruction of artefacts and sites of cultural heritage perpetrated by the IS in Iraq and Syria since 2014 (Hill). Arguably, the EU should incorporate inclusive consultative processes with victim communities in order to centralise the opinions of affected populations, seeking opinions from communities within Syria and Iraq as well as the diasporas within EU Member States (Interviews 12, 13). Without the input of victim and survivor communities it is possible that advocacy which focuses on calls for international criminal prosecutions, but which is disconnected from transitional processes results in a mechanism to prosecute IS crimes which may not resonate with local populations (Interview 13). It therefore may not make a sustainable impact for accountability. There may be more holistic solutions available which link to sustainable and broader transitional justice efforts.

Each of the options faces challenges, not least the involved costs, which must arguably be viewed in the long term given the risks and associated security costs generated by the IS. In relation to foreign fighters the cost of establishing a new mechanism potentially far outweighs the costs of providing financial and resource support to domestic jurisdictions in order for them to repatriate and process their nationals (Interview 2). Similarly, should a political decision to go ahead occur, a new mechanism could take significant time to establish, whereas there are national jurisdictions which already have legislative frameworks and which, with enhanced resources and support, could take the cases (Interview 2). However, there may be gaps which domestic jurisdictions are unable to meet and thus an international mechanism into which individuals can be referred may become necessary (Interview 10). Answering questions around whether the mechanism should investigate and prosecute all terrorist groups, all parties to a situation, all crimes of concern and the scope of its territorial jurisdiction will have implications for the cooperation, location and funding of the mechanism, as well as its accountability to the affected populations and its legacy (Dworkin).

# 5. Conclusion

Providing an examination of judicial and non-judicial accountability mechanisms has revealed the importance of cooperation between States, between States and accountability mechanisms and between the different accountability mechanisms. It is clear that the different models of accountability mechanisms employed for core international crimes work to complement each other. *Ad hoc* tribunals address core international crimes at the international level upholding fundamental human rights, especially fair trial norms and victim and witness protection. But these institutions have a narrow and specific temporal and

geographical jurisdiction. To support and extend their work, the legacies of the two most prominent *ad hoc* Tribunals, the ICTY and ICTR, include supporting the establishment of domestic mechanisms, such as Rwanda's Special Chamber for International Crimes.

The ICC, which sits at the centre of the system of accountability for core international crimes, is the international community's only criminal justice institution with a global outlook. There remains a strong link with domestic justice as pursuant to the ICCs principle of complementarity, the Rome Statute system encourages genuine and fair justice efforts closer to where the crimes have allegedly taken place. This may include prosecutions in domestic courts, special chambers which exist within domestic courts or extraordinary or hybrid courts. Whilst such efforts can provide more ownership and accountability to the affected communities where the crimes took place, collective efforts by multiple mechanisms, States and actors are often necessary where a country is experiencing ongoing instability or armed conflict.

At this time, the international community is having to overcome the limitations of international criminal justice. Whilst international mechanisms may be better able to adhere to international standards, they can face significant political and operational obstacles. Where an ongoing situation has so far been beyond the reach of international justice mechanisms, the UN Evidentiary Mechanisms are trying to fill this gap by collecting evidence and building cases in readiness for prosecutions. These activities conducted by non-judicial mechanisms provide the foundational work for future proceedings in a range of national and international judicial mechanisms. Their contributions to current proceedings and the growing repository of evidence are indicators of their successes. Further support is however required in respect to all three of the currently operating mechanisms (UNITAD, IIIM and IIMM). One growing strength is the relationship between these mechanisms and States which are contributing to accountability efforts by bringing prosecutions through applying the principle of universal jurisdiction, allowing them to prosecute alleged conduct based on the nature of the crime (for example, in the absence of a territorial link). By working collaboratively, accountability mechanisms and States can offset their strengths and weaknesses, with the interplay between them often producing the strongest fight against impunity. It is therefore important to support genuine national, regional and international efforts to deliver accountability as the EU has done, providing targeted funding, technical, political and diplomatic support. As both accountability mechanisms and the rules based system are facing attacks from certain States, it is imperative that the EU continues to provide such support.

The EU has a wealth of tools at its disposal to address core international crimes including policies, bodies, funding, a wealth of technical expertise and political leverage. These tools are employed by the EU's Member States, by its institutions and by mechanisms involved in the fight against impunity. Within the EU, operationalising support for accountability through different bodies necessarily gives rise to challenges, such as maintaining coherence, which can be overcome through effective liaison between the various actors. To assist in this regard amid staff turnover, improving the measures which foster institutional memory will enhance a coherent approach to delivering accountability for core international crimes. Coordination could be improved by having a dedicated accountability unit within the EEAS structure, and an increased promotion of EU policies such as the Policy Framework on Support to Transitional Justice, at both headquarter and delegation level. Considering the long-term, yet often flexible nature of transitional justice activities, it would also be appropriate to establish an inter-institutional link between the Facility on Justice in Conflict and Transition, which is in charge mainly of short-term interventions, and the longer-term programmes of DG DEVCO and DG NEAR. Arguably, a significant challenge which requires attention is the need to enhance the resources and personnel capacity of the EU bodies entrusted with driving the fight against impunity, especially: the Genocide Network, the EUSR for Human Rights, the Focal Point for the ICC, and the Focal Point for Transitional Justice.

The limitations on EU resources and the need to add value, without replicating or overlapping with existing bodies, should be carefully considered when exploring the creation of new bodies: including the

Observatory on Prevention, Accountability and Combating Impunity. Although new initiatives in the field of accountability are welcome, it would be prudent to avoid duplication, consider the resource allocation and collaboratively determine the added value in practice. In order to further increase coherence across the EU, to ensure it is fully informed and ensure it is fully engaged with efforts to provide accountability for core international crimes, the European Parliament should consider joining the Genocide Network as an associate. This would provide the Parliament the opportunity to interact with Member States, participating third States and other participants such as the IIIM.

Having focused on four key areas identified from the current EU framework on accountability (universal reach, integrity, cooperation and assistance, and complementarity), the study highlighted how the EU utilises the tools at its disposal both globally and in country-specific situations.

The EU should continue its current contributions to the universality of the Rome Statute which it does through direct engagement with non-State Parties, including with demarches, offers of technical assistance, Human Rights Dialogues and in multilateral meetings. These initiatives should also be expanded to include interactions with regional organisations, such as the AU and the ASEAN. In order to increase its effectiveness and avoid duplication, the EU universality campaign could be coordinated with initiatives undertaken by Member States. Given that a number of Member States have not ratified the Kampala amendments, their ratification should be prioritised in the universality campaign. The Parliament is ideally placed to provide the political impetus that the universality campaign needs. It should call on Member States to ratify the Kampala amendments, and on third countries to both accede to the Rome Statute and ratify the amendments. A further tool utilised by the EU to foster universality is the inclusion of 'ICC clauses' in agreements with third countries and international organisations. These clauses can also allow the EU to begin working cohesively with partner countries to address core international crimes. However, where there has been little progress, the EU could consider strengthening its approach as appropriate during negotiations or by otherwise applying political pressure. EU initiatives in support of universality have been ongoing since the establishment of the ICC, yet little data is available on their effectiveness. It would therefore be useful to monitor and report on universality activities in order to assess the impact of EU action, promote the results achieved and inform future EU policies in this area.

The EU has also addressed the universal reach of accountability mechanisms in situations which fall outside the reach of the ICC through its Member States which sit on the UN Security Council. The Parliament should continue to call on such Member States to keep accountability for core international crimes high on the UN Security Council agenda, and to strive to refer relevant situations to the ICC. The EU has also been at the forefront of initiatives which have supported and established accountability mechanisms, including *ad hoc* tribunals, hybrid courts, specialised chambers in domestic courts and UN evidentiary mechanisms, with the aim of ensuring the broadest possible coverage. Alongside these activities, the EU should continue to actively engage with and support the work of the International Law Commission on the draft articles of a Convention on the Prevention and Punishment of Crimes against Humanity.

The EU has made the integrity of international and domestic accountability mechanisms a key priority as part of its role as global leader in the fight against impunity. Accordingly, the EU has provided several forms of assistance, including political, diplomatic and financial support. It is of critical importance that the EU continues to scale up its political and financial support for the mandates of accountability mechanisms, including through Human Rights Dialogues and demarches, during a time when mechanisms are facing challenges of political and financial nature. Examples include the ICC, which faces sanctions imposed by the US and State-Party withdrawals from its Statute; the JEP, which is under attack from some sectors of Colombian politics and society; the IIIM, which faces opposition within the UN from Russia and Syria; and the IIMM, whose mandate delivery is hampered by Myanmar. The Parliament should continue offering its support for and strengthening integrity efforts as it has previously through resolutions on accountability mechanisms and on specific country situations. Future resolutions could call on Member States to work

towards adopting unanimous positions on an issue at Council level, with the view to enhancing the overall EU position on integrity.

Regarding cooperation and in particular international accountability mechanisms, the EU has become the first regional organisation to adopt a cooperation agreement with the ICC. The EU should promote the adoption of cooperation agreements in relation to the ICCs cooperation framework and if necessary, provide technical assistance to Member States and third countries who may require it. Cooperation could also take different forms and the Parliament should continue to call on Member States and third countries to cooperate with accountability mechanisms. Recognising the negative impact of non-cooperation on the work of judicial mechanisms, as experienced by the ICC regarding fugitives, the EU has addressed non-execution of ICC arrest warrants in bilateral and multilateral fora, and avoided non-essential contact with individuals who are subject to ICC arrest warrants. It is recommended that the EU continues this policy and engages with States on cooperation issues.

State cooperation is also essential for the UN Evidentiary Mechanisms, and the EU has taken a two-tiered approach. It has firstly engaged with the Mechanisms in order to understand what forms of support are required, with political, diplomatic and financial assistance being particularly beneficial for all three Mechanisms. The EU should continue to provide such assistance in order to increase their capacity and visibility, along with technical assistance which enhances EU support, potentially as part of efforts to facilitate coordination, and information-sharing between its Member States and the Mechanisms. It should promote the adoption of agreements which would allow the Mechanisms to collect evidence in the territory of Member States, as well as the protection of individuals who cooperate with them but do not have potential jurisdiction in which to testify. The EU has secondly engaged with States to try and enhance their cooperation with accountability mechanisms, especially Myanmar, and it is recommended that it continues to do so, alongside engaging with so far disengaged States on the adoption of cooperation frameworks with the Mechanisms. In this respect, the Parliament should continue to call on Member States and third countries to cooperate with the Mechanisms.

In recognition of the ICCs role as a Court of last resort, the EU has carried out several activities to uphold the principle of complementarity. It promotes the adoption of domestic legislation implementing the Rome Statute, for which it also offers technical assistance. Where core international crimes are alleged, the EU should continue its current engagement with the relevant States to try and encourage genuine domestic investigations and prosecutions, including supporting the legal and judicial systems of third States. Such assistance should focus on locally-owned capacity-building, especially during transition, forward-thinking training and comprehensive outreach. Such activities work towards bridging the gaps which may exist in national proceedings, or moving towards genuine proceedings, as well as applying effective penal sanctions which are appropriate for the context and the crime committed. The Complementarity Toolkit provides valuable guidance on domestic efforts and the EU should continue promoting its implementation. However, seven years after the adoption of the Toolkit, there is no available assessment of its status of implementation. It is, therefore, recommended that monitoring and reporting is carried out in order to understand the impact of the Toolkit as well as to inform future action on complementarity.

The EU promotes the principle of complementarity in its internal action, including through implementation of the Rome Statue and the exercise of universal jurisdiction, which should be promoted and provided with adequate financial and technical assistance. At the time of writing, however, not all Member States have adequate legislation, staff or facilities and a review of domestic capacities in order to identify strengths, weaknesses, gaps, challenges and lessons learnt, would then enable support to enhance the legal systems of both Member States and third countries. It would also be important to monitor and report on the ways in which Member States conduct investigations and prosecutions of core international crimes. This could highlight the benefits of specialised units, dedicated staff, inter-institutional and inter-state coordination,

including the establishment of Joint Investigative Teams. Given the current disparity which exists between EU Member States, and where appropriate, States should especially consider enhancing the cooperation between their immigration, prosecution and judicial authorities. To increase their domestic capacity to investigate and prosecute core international crimes, States could employ funding through the Commission's Structural Reform Support Service. The Parliament could play a crucial role in encouraging these developments and promoting cooperation among Member States as well as with the EU institutions operating in this field, such as the Genocide Network, Eurojust, Europol and EASO. Furthermore, Member States should be encouraged wherever possible to prosecute core international crimes under the correct crime characterisation, either as a stand-alone charge or through cumulative charges, rather than purely as terrorism offences.

Six country situations have been considered in-depth, with Colombia and Rwanda representing two examples where EU approaches to accountability can provide successful lessons to inform future EU interventions. Lessons include coordinating an impartial approach to a country with Member States. Within a comprehensive approach, accountability should be pursued alongside measures of immediate relief to the affected populations, long-term development, peacebuilding and building the capacity of the judiciary to address core international crimes. Other important lessons include the importance of building local, long-lasting capacity during transition and conducting inclusive outreach with the diversity of communities in a country. By considering six countries in-depth, it is possible to see how accountability issues have developed over time, including the ongoing and critical need for EU support.

The EU has consistently engaged with and supported accountability in **Rwanda,** recognising the need to provide accountability for all victims of core international crimes. Since 1994 the EU and its Member States have supported the ICTR and the MICT, and engaged with Rwanda to support national justice, including by applying the principle of universal jurisdiction. The EU should remain open to appropriate capacity-building activities in relation to the Specialised Chamber, which should be locally owned or requested potentially through financial or technical support. Mindful of the political context, the EU should continue to encourage the Rwandan authorities to apply the law equally to all alleged perpetrators. Regarding prosecutions outside of Rwanda, the EU should support the equal application of the law to all suspects of international crimes. It should also continue to support the activities of the MICT, the European Task Force on Rwandan genocide suspects and of the Genocide Network.

EU engagement on accountability in **Colombia** has been tightly linked to the peace efforts and the two waves of demobilisation of paramilitary and guerrilla groups. The EU and its Member States have been prominent actors particularly in the peace negotiations with the FARC-EP and have supported its implementation with the EU Special Envoy to Colombia and the *Fondo Europeo para la Paz*, whose extension should be considered. The EU's comprehensive approach on Colombia should continue to focus on the transitional justice and domestic efforts as well as on the involvement of the ICC, but should remain flexible responding to the needs and situation on the ground. At this time, the Jurisdiction for Justice and Peace needs to enhance its reparations system, the enjoyment of victims' rights, its investigations of sexual and gender-based violence crimes, and the provision of psychosocial support for victims and survivors who participate in proceedings. Furthermore, as the paramilitary leaders who were extradited to the US return, it is important to engage with Colombia concerning accountability for the core international crimes they allegedly committed. The land restitution and reparations programmes under the Victims' Law should be supported as to ensure the protection of beneficiaries and the sustainability of the system. The implementation of the 2016 Peace Agreement with the FARC-EP is slowly proceeding, and the Special Jurisdiction for Peace has been under political attack, putting at risk the important developments achieved so far. Accordingly, the EU should step up its engagement to ensure the full implementation of the Agreement and the integrity of the JEP, while supporting the positive complementarity activities of the ICC.

EU interaction with the government led by Nicolás Maduro in **Venezuela** has been tense in recent times, as shown by the expulsion, now suspended, of the EU Ambassador in the country. However, excessive politicisation is an obstacle to accountability efforts, as these need to be perceived to be impartial in order to gain credibility and be successful. Therefore, drawing on the lessons learnt from the engagement in Colombia, the EU could involve a senior political figure, such as the EUSR for Human Rights, or enhance the mandate of the Special Adviser for Venezuela, to resume negotiations and discuss accountability measures both with the government led by Nicolás Maduro and the interim government led by Juan Guaidó. Accountability efforts at the national level have been scarce and are vitiated by the lack of impartiality of the Venezuelan judiciary. Accordingly, the EU should encourage re-accessing the Inter-American Human Rights System and cooperating with the Independent International Fact-Finding Mission. In relation to the latter, the EU should consider forms of assistance other than political support.

The EU has engaged in a fairly comprehensive approach to accountability in **Myanmar**, although the results of this engagement have yet to fully materialise. Nevertheless, EU Member States should continue to keep the issue of accountability in Myanmar high on the UN Security Council agenda and keep working towards a referral to the ICC. In terms of bilateral relations, the EU should keep engaging with the government on the ratification of core treaties, cooperation with the ICC and the IIMM. In relation to the latter, the EU should continue to encourage Myanmar to allow access to its territory. Domestic efforts have been lacklustre and, despite a few court martial convictions, the army still enjoys widespread impunity. The implementation of the recommendations of the ICoE, albeit accepted by the government of Myanmar, has not started yet. In this respect, the EU should enhance its political pressure in all bilateral interactions with the government of Myanmar. Cooperation with the ICC and the IIMM, access to the national territory, the instruction of genuine domestic proceedings and the implementation of the ICoE report should continue to be addressed in Human Rights Dialogues and inform the EU monitoring of the EBA scheme and other interactions on trade, investment and development. The EU should also engage with Myanmar on implementing the provisional measures decision issued by the ICJ and monitor Myanmar's compliance with it.

The situation in **Syria** is also complicated by the lack of a referral of the situation to the ICC by the UN Security Council. The Government of Syria is at this time not cooperating with accountability mechanisms, including the IIIM, which is mitigating arising issues. The EU should accordingly continue to support the IIIM politically, financially, and technically with the aim to foster its evidence collection activities, especially in cooperation with EU Member States, as well as its engagement with victims and survivors. One method would be to encourage the adoption of cooperation frameworks to facilitate evidence collection in Europe, knowledge-sharing and witness protection. To strengthen its approach the EU could improve coordination between headquarters and delegation and increase the internal promotion of the Policy Framework on Support to Transitional Justice. It is also recommended that the EU engages with the Syrian civil society to ascertain the preferences of affected populations in relation to accountability, and designs projects which take into account the need to prepare for future reconciliation. The EU should also keep promoting the exercise of universal jurisdiction in Member States and third countries including with the provision of appropriate technical and financial assistance. It should encourage Member States to enhance communication between their immigration, law enforcement and judicial authorities and to engage in inter-State cooperation in order to improve relevant investigation and prosecutions.

At the time of writing, the core international crimes allegedly committed in **Iraq** are being addressed by its domestic courts, UNITAD and foreign courts exercising universal jurisdiction. In supporting domestic efforts, the EU should continue engaging with the establishment of domestic legal infrastructure including physical infrastructure, training and the legislation around core international crimes. The EU should also continue providing diplomatic support to UNITAD, including encouraging Member States and third countries to cooperate. It should also consider providing additional financial assistance so as to allow

UNITAD to broaden the scope of its investigative activities and deliver meaningful accountability to the diversity of affected communities in Iraq. EU projects on accountability in Iraq should aim to address the root causes of accountability issues and include capacity-building to provide support for case-building which relies on the full spectrum of evidence, beyond confessions. Similarly, local practitioners should continue to be trained to provide psychological support for communities who may go through trial processes in the future or face significant levels of trauma. Similarly, as for Syria, the EU should also promote the exercise of universal jurisdiction both in Member States and in third countries in relation to Iraq.

An issue of concern, and of which the EU should be seized, is the current detention of thousands of suspected IS fighters, their wives and children in north east Syria in the custody of the Syrian Democratic Forces. There has been a proposal for an international *ad hoc* mechanism to prosecute IS crimes, with calls coming from the SDF, KRG and others. EU Member States including Sweden and the Netherlands have also been active in calling for a prospective solution and indeed the situation cannot remain as it is indefinitely. Given the global consensus on the threat of IS, the need for a remedy arguably extends beyond the EU. Optional discussion forums, beyond the UN, include the collaborative Global Coalition Against Da'esh. Due to the current situation of violations of children's rights and security threat posed by having suspected IS fighters imprisoned together in large numbers in an unstable situation, the EU, Parliament and Member States should arguably consider the matter urgent. Key questions to answer will include whether foreign fighters should be returned to their home States to face trial, and whether a proposed *ad hoc* mechanism will investigate and prosecute all terrorist groups, all parties to a situation, all crimes of concern and the scope of its territorial jurisdiction. These questions are significant as their answers necessarily determine the cooperation, location and funding of the mechanism, as well as its accountability to the affected populations.

# 6. Recommendations for future EU action

## 6.1 General recommendations

- Strengthen the capacity of EU bodies addressing accountability for core international crimes in terms of resources and personnel, e.g. the Genocide Network, the EUSR for Human Rights, the Focal Point for the ICC, the Focal Point for Transitional Justice.
- Promote the Policy Framework on Support to Transitional Justice within EU institutions.
- Promote comprehensive approaches to country situations, including immediate relief to affected populations, longer-term development, conflict sensitivity, peacebuilding and accountability.
- Ensure an institutional link between the Facility on Justice in Conflict and Transition and the longer-term programmes managed by DG DEVCO and DG NEAR.
- Consider the establishment of a dedicated unit on accountability within EEAS.
- Enhance measures to foster institutional memory amid staff turnover in order to ensure a coherent and consistent approach to accountability.

## 6.2 Universal reach of accountability mechanisms

- Scale up universality initiatives in regional fora, such as the AU and the ASEAN.
- Improve coordination between the Rome Statute universality campaign carried out by the EU and the universality initiatives carried out by Member States.
- Include ratification of the Kampala amendments within demarches in support of the universality of the Rome Statute.
- Engage with signatory States on the ratification of the Rome Statute and non-signatories on the accession to it.
- Engage with former ICC States Parties to promote re-accession to the Rome Statute.

- Continue offering technical assistance for the ratification of the Rome Statute and the Kampala amendments.
- Continue including accountability issues in Human Rights Dialogues.
- Continue to include 'ICC clauses' with a focus on entry points for enhancing domestic legislation and domestic capacity-building in relation to providing accountability for core international crimes.
- Continue including 'ICC clauses' in agreements with third States and regional organisations.
- Conduct or commission monitoring and reporting activities on EU universality initiatives e.g. demarches, technical assistance, Human Rights Dialogues and ICC clauses, in order to take stock, assess the impact of EU actions, promote the results and inform future initiatives.
- Continue providing political support to and taking active part in the International Law Commission work on the draft articles on a Convention on the Prevention and Punishment of Crimes against Humanity.

## 6.3 Integrity of accountability mechanisms

- Continue raising accountability issues in multilateral fora, such as the United Nations and the ICC Assembly of States Parties.
- Continue providing political, diplomatic and financial assistance to support the mandates of international and domestic accountability mechanisms.
- Scale up political and diplomatic support to the ICC in the face of attacks by third States.
- Scale up political and diplomatic support of other accountability mechanisms to counter attacks on impartiality.
- Continue carrying out demarches promoting the integrity of the Rome Statute.

## 6.4 Cooperation and assistance

- Engage with Member States and third countries on ICC cooperation issues, especially regarding the execution of arrest warrants.
- Uphold the policy of avoiding non-essential contact with individuals who are subject to an ICC arrest warrant.
- Promote framework agreements on cooperation with the ICC and offer technical assistance to Member States and third countries for their adoption.
- Engage with Member States and third countries on cooperation with and assistance to accountability mechanisms, such as *ad hoc* tribunals, hybrid courts and specialised chambers.
- Engage with UN Evidentiary Mechanisms to understand their needs and provide targeted assistance to foster the fulfilment of their mandate.
- Engage with Member States and third countries on cooperation with the UN Evidentiary Mechanisms.
- Engage with Member States on the adoption of cooperation frameworks with the UN Evidentiary Mechanisms to facilitate evidence-sharing, the direct collection evidence in the territory of Member States, and the protection of individuals who cooperate with the Mechanisms but do not have a potential jurisdiction.
- Facilitate coordination, information-sharing and knowledge-exchange between Member States and UN Evidentiary Mechanisms.
- Continue providing political, diplomatic and financial support to UN Evidentiary Mechanisms so as to increase their capacity and visibility.
- Continue to support and actively engage with the MLA Initiative.

## 6.5 Complementarity

- Continue engaging the governments of States where core international crimes have allegedly taken place to push for and support genuine domestic accountability efforts.
- Continue promoting the implementation of the Complementarity Toolkit.
- Conduct monitoring and reporting activities on the implementation of the Complementarity Toolkit.
- Offer technical assistance to third countries for the adoption of legislation implementing the Rome Statute.
- Promote projects aimed at strengthening domestic legal and judicial systems in third countries, with the view to upholding the principle of complementarity.
- Review the status of domestic legislation of Member States concerning core international crimes.
- Engage with Member States on the establishment of specialised units or trained dedicated personnel for the investigation and prosecution of core international crimes.
- Promote Joint Investigative Teams for the investigation of core international crimes.
- Promote monitoring and reporting on the ways in which Member States address investigations and prosecution of core international crimes.
- Promote cooperation and knowledge-sharing among domestic jurisdictions of Member States on investigations and prosecution of core international crimes.
- Promote inter-agency coordination between the immigration, law enforcement and judicial authorities within Member States.
- Support the exercise of universal jurisdiction in Member States and third countries with appropriate financial and technical assistance.

# 7. Recommendations for the European Parliament

## 7.1 General recommendations

- Consider joining the Genocide Network as an associate to remain appraised of developments, and take part in consultations on accountability for core international crimes along with other EU bodies EU Member States, other domestic and international jurisdictions, and other actors.
- Continue exploring the creation of an observatory on impunity, mindful of the resource input verses added value, and careful determination of both its scope and the potential overlap it would have with other EU bodies.

## 7.2 Universal reach

- Continue calling upon third States, especially where core international crimes have allegedly occurred, to accede to the Rome Statute.
- Call on former ICC States Parties to re-join the ICC.
- Call on signatory States to ratify the Rome Statute.
- Call on Member States and third States to ratify the Kampala Amendments.
- Continue calling on Member States sitting on the UN Security Council to keep accountability high on the agenda and promote the referral to the ICC of situations where core international crimes have allegedly occurred.
- Provide political support to the International Law Commission work on the draft articles on a Convention on Prevention and Punishment of Crimes against Humanity and call on the EU and Member States to participate actively.

## 7.3 Integrity

- Continue providing political support upholding the integrity of the ICC amid attacks by third countries.
- Encourage Member States to adopt a unanimous position on the integrity of the ICC through appropriate political interventions such as calls for support and statements.
- Provide political support upholding the integrity and impartiality of domestic and transitional justice mechanisms.
- Continue providing political support to upholding the integrity of the UN Evidentiary Mechanisms.
- Continue to show political leadership on arising issues which affect the integrity of accountability mechanisms through targeted resolutions and statements.

## 7.4 Cooperation and assistance

- Urge Member States and third countries to cooperate with accountability mechanisms. This could potentially be through a comprehensive resolution on the issue which calls for Member States to adopt cooperation agreements facilitating evidence-sharing and witness protection agreements with the UN Evidentiary Mechanisms.

## 7.5 Complementarity

- In light of the recommended domestic legal status review, urge Member States who have not yet done so to adopt relevant legislation implementing the Rome Statute. Support knowledge-exchange activities between Member States in relation to the implementation of legislation which encompasses core international crimes within their domestic legal frameworks.
- Call on all States where core international crimes have allegedly occurred to institute genuine domestic accountability efforts.
- Support the exercise of universal jurisdiction for situations in which core international crimes have allegedly occurred, and support calls for universal jurisdiction proceedings with recognition of the need to provide those States who are undertaking cases with financial and technical support.
- Particularly encourage countries which are undertaking efforts to apply the law equally to all alleged perpetrators of core international crimes.
- Call on Member States and third countries to prosecute core international crimes using the correct characterisation, either as stand-alone crimes or through cumulative charges.
- Encourage all Member States to establish specialised units or train dedicated personnel on the investigation and prosecution of core international crimes.
- Encourage Member States to establish Joint Investigative Teams for the investigation of core international crimes.
- Encourage all Member States to adopt a thorough approach to investigations and prosecutions for core international crimes, including through cooperation with other Member States and increased communication between their domestic immigration, law enforcement and judicial authorities.

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