POLICY PAPER

INSTITUT CATALÀ INTERNACIONAL PER LA PAU

N. 02 · October 2011

ISSN: 2014-2765

Strategies to redimension the relationship between the EU and the ICC after Kampala

Claudia JIMENEZ CORTÉS
Montserrat PI LLORENS
Esther ZAPATER DUQUE

Until the first Review Conference on the Rome Statute of the International Criminal Court (ICC) held at Kampala in June 2010, both the European Union (EU) and its Member States had shown themselves to be among the principal promoters of this new institution. This policy, however, could be affected by what occurred at Kampala. The fact that an issue as sensitive as the Court's jurisdiction to prosecute crimes of aggression was raised has opened divisions among the states of the Union, which could endanger their participation in this element of the struggle against impunity. This policy paper is aimed at presenting specific proposals so that, despite the dispute over crimes of aggression, policy cooperation between the EU and the Court not only does not diminish but even, as far as possible, may become increasingly effective.

Context

EU support for the ICC before Kampala

From the beginning, the EU gave unconditional and active support to the creation of an international tribunal which could judge the perpetrators of international crimes. This support has a clear political basis in the values of the EU and in its commitment to the rule of law and respect for human rights and fundamental freedoms, both within and outside the EU. However, the means and instruments of which the EU disposes to promote the development of the ICC have been in practice limited by the absence of clear legal authority and by the fragility of its foreign policy. This has prevented the EU from acting with greater unity, coherence and effectiveness.

The relationship between the EU and the Court has operated around a minimum consensus centred on three fundamental commitments: the promotion of the universality and the integrity of the Rome Statute; support for the Court's independence and effective functioning; and, finally, coordinating the activities of the EU and its Member States.

The promotion of the universality and the integrity of the Statute has focused mainly on the EU's external activity, at the bilateral, regional and multilateral levels, through mechanisms such as the insertion of a specific clause concerning the Court in agreements signed between the EU and other countries since 2005, especially in Association or Partnership Agreements. References and declarations which include the need to support the Court and mention its importance in the fight against impunity are also included within the framework of political dialogue with third countries, in regional strategies concerning Africa or Central Asia and in Action Plans with privileged EU partners. The inclusion of references to the Court in the framework of political conditionality was definitely a correct decision which in the medium term will make it possible to take on objectives with relation to the universality and integrity of the Court's Statute.

The EU's commitment to the independence and effective functioning of the Court has been undeniable, although this is perhaps one of the principles the fulfilment of which has come up against most legal obstacles. In this sense we can underline the absence of pressure from the Union towards its Member States so that they unify standards for the implementation of the Rome Statute. This contrasts with the EU's direct cooperation with the Court, embodied, for example, in the agreement signed in 2006, which includes a general obligation to regularly mutually exchange information and documentation, which is only applicable to EU documents. Financially, however, the commitment of the EU and of its Member States to the Court has been decisive[1]. Mechanisms of financial and technical assistance have allowed for the training of experts and the transfer of technical legal knowledge, necessary for the effective operation of the Court.

The means and instruments of which the EU disposes to promote the development of the ICC have been in practice limited by the absence of clear legal authority and by the fragility of its foreign policy

Finally, the coordination of the activities of the EU and its Member States achieved a limited but important success in the adoption of the Decision of 2003 and the creation of the national focal points, a network of points for national coordination in relation to those responsible for crimes which come within the jurisdiction of the Court, essential for the proper investigation and the effective prosecution of these crimes at the national level since, as noted by the Court itself, the investigation, prosecution and exchange of information related to crimes of genocide, crimes against humanity and war crimes are a primordial responsibility of national authorities.

This entire trajectory may, however, be affected by what happened at the ICC Review Conference held at Kampala in June 2010, and more specifically by the events in the second week, which focused almost exclusively on the definition and especially the outlining of the Court's jurisdiction in the crime of aggression.

Analysis

The impact of Kampala on the EU and options for action

The first part of the Review Conference was devoted to the current state of the Court. We should note that while this session was run in an inclusive, open and participatory way, with interesting debates and special attention being paid to the victims, the balance sheet is somewhat disappointing in terms of practical results. The very limited commitments on the critical issues and the fact that the decisions taken were very vague bear this out. This does not exclude the fact that, in more specific terms, we can highlight the positive assessment received by the European Union, especially regarding the cooperation mechanisms implemented, including here both the establishment of national focal points and the agreement for the exchange of information. Both initiatives were proposed as a model to be followed by other regional organisations, thus implying that it would be recommendable to extend activities of this type. In the same vein, we must also welcome the recognition given to the role of those Member States which have always played an proactive role, both individually and as part of the EU. These include, notably, Germany, Belgium and the Netherlands, as well as the United Kingdom and France, which are followed by Spain, Finland, Austria, Slovenia and to some extent Italy[2]. An issue remains pending, however, which is a greater uniformity within the European area of what, in terms of the Assembly of States Parties (ASP) of the ICC, has been called "complementarity", that is to say a correct and full implementation of the Rome Statute so as to facilitate its effective functioning. This includes a wide range of issues, such as Immunity Agreements with the Court; the incorporation of the crimes covered by the Court as offences in domestic legislation; the appointment of bodies responsible for cooperating with the Prosecutor and the Court; the protection of victims and witnesses; or the sensitive issue of the execution of arrest warrants; to name a few points which are still weak in spite of their importance for the proper functioning of the institution, for its credibility and above all, in order to be able to respond to the demands made at Kampala

1 The EU countries' contributions, as at the end of 2010, accounted for 58% of the total contributions from the 114 States Parties to the ICC.

2 Their involvement is illustrated not only in terms of finance and the personnel from these countries working at the Court (of the 150 staff at the Court originating from EU countries, 139 are from the countries mentioned above, accounting for 43% of the total professional staff of the Court) but also in the implementation of the Rome Statute in their domestic legal systems.

by the victims of crimes. Hence the importance of the commitments on these matters made both by the EU and by its Member States, which seek to overcome some of the deficiencies identified.

The second part of the Review Conference was limited almost exclusively to negotiating the definition of the crime of aggression and the Court's jurisdiction in this field. The secrecy of the negotiations, in clear contrast to the first part of the Conference, contributed to the lack of clarity of the outcome, which consisted of an "imaginative" formula agreed *in extremis*, and largely as a result of pressure from non-aligned countries. While the mere inclusion of a definition in the Statute must be considered to be progress, it cannot be ignored that, in terms of jurisdiction, this is a text which in itself does not guarantee the effective exercise of the competence of the Court in this area, due to the many conditions laid down, and it could even be seen as counterproductive, in the sense that it puts into question the principle of universality.

The clear tendency for the debate on this issue to follow strictly geopolitical lines, and the indirect distorting role of the Security Council —given that the issue being dealt with touched so closely on their powers— created within the EU a clear gap between, on one hand, states such as Greece, Germany or Spain and, on the other, the UK and especially France, which took an extremely intransigent position throughout the negotiations, stating formally at the end that it "did not share" the consensus reached because it did not include recognition of the exclusive competence of the Security Council in matters of aggression. This confrontation, and the consequent inability of the EU to play a role to try to save the situation, is extremely worrying. It shows once again the Union's great weakness in foreign policy and could have particularly negative effects in the EU's cooperation with the Court in the future. The promotion of the universality and the integrity of the Rome Statute, the two pillars that underlie the actions of the EU towards the Court and which were reaffirmed in the form of a commitment in Kampala, may be affected. Which Statute will the EU promote, *ad intra* and *ad extra*? That of 1998 or that which incorporates the Court's jurisdiction over the crime of aggression?

At the moment is difficult to give an answer, at least if it is wished to have the approval of France – a country which, for now, does not seem favourable to the amendment. However, given the terms according to which the Court could be competent to deal with a crime of aggression was finally accepted —it will not take effect until at least 2017 and only if the requirements laid down are fulfilled— it should be possible to propose that, at least in a first period post Kampala, efforts should be focused on strengthening and improving the terms of the Statute which are currently in force, which were positively assessed by the Conference. This, incidentally, would be in line with the decision of the APS itself, which in February of this year gave a deadline of 30 September 2011 for the state parties to provide it with the information referred to in its 2006 action plan, dedicated to the universality and complete implementation of the Statute, primarily information concerning the degree of fulfilment of the duties of cooperation and complementarity. Therefore, in our opinion it would be helpful to recover the political will prior to Kampala of the Member States which are proactively in favour of the Court, through a return to an approach based not on the interstate power relations which dominated the debate on aggression, but on the defence of the values shared by the states and by the Union itself; especially the care for victims, respect for human rights and the rule of law. Any other alternative would imply a failure to overcome the political setback produced by the debate on the crime of aggression, which could affect both the effective functioning of the Court and the policies that the EU pursued prior to Kampala, as well as weakening the EU's ability to exercise short-term influence in politically controversial issues including, among others, those which will be debated at the next Assembly of States Parties in December 2011, such as the elections of six judges and of the prosecutor.

The clear tendency (...) to follow strictly geopolitical lines (...) shows once again the Union's great weakness in foreign policy and could have particularly negative effects in the EU's cooperation with the Court in the future

Until now, however, the only concrete measure adopted by the EU to review and update its relationship with the Court was the adoption of a new Decision in March 2011, in the framework of the Foreign and Security Policy. The necessity of unanimity in this area explains, among other things, the absence of a position concerning the amendments to the Statute adopted at Kampala, which are merely noted in the preamble and are therefore left in the hands of the Member States.

As for the objectives sought, the principles of universality and the support for the independence and the effective and efficient working of the Court are maintained, and two new principles related to Kampala are added: complementarity and cooperation with the Court. The Union and its Member States are expected to "closely follow" developments regarding cooperation with the Court, citing the 2006 Agreement and the possibility of concluding other agreements and *ad hoc* arrangements, while urging third party states to do the same. With regard to complementarity, the Decision merely states that the Union and its Member States shall, "where appropriate", adopt actions or measures to ensure the application of this principle at national level but without specifying these.

Finally, it establishes the need to ensure consistency and coherence between the EU's instruments and policies in all its areas of activity, both internal and external, in relation to the most serious international crimes. This can be read as an invitation to advance the internal aspect of the EU's relations with the Court, which until now has been less developed. That is to say, strengthening the measures of cooperation with the Court and reinforcing their effectiveness, not only for the Union as such but also for its Member States. It is in this internal aspect where we can see the importance of the potential of the Lisbon Treaty in the field of criminal cooperation, in contrast to the legal framework of Foreign and Security Policy, which has until now managed the EU's relations with the Court.

From what has been said one can conclude that the 2011 Decision has its limitations, but offers a new framework that may be implemented more ambitiously if all its potential is deployed.

Policy recommendations

1. Relocate human rights at the heart of the policy of the EU and its Member States in relation to the Court, giving greater importance to the victims, to their situation, their needs and their demands.

This would imply, in particular, rethinking the EU's agenda in terms of what the victims themselves have identified as their main priorities:

- A greater financial and technical commitment to the trust fund, funding training programs so that legal counsel is available locally;

- Increased effectiveness of arrest warrants; when such warrants are not executed, it undermines the credibility of the court and betrays the hopes of the victims;

- Greater cooperation in protecting victims and witnesses, for example through the introduction of a specific clause in the code of European visas for these situations and through the development of a policy that provides for preferential treatment for victims, similar to that offered in relation to the victims of illegal human trafficking.

2. Strengthen the instruments developed to promote the universality, the intregrity and the effective functioning of the Court

The 2011 Decision should be implemented through a new and more ambitious Action Plan to replace the present one, which has been in force since 2004. This could, among other things, provide for:

- The systematic inclusion of the standard clause concerning the Court among the political conditions of agreements, strategies and policy dialogues with third countries, with greater emphasis on neighbouring countries and those included in the pre-accession strategy;

- The exercise of effective pressure on third parties not only to promote the ratification of the Statute of the Court but also its effective implementation;

- The full explotation of those powers given by the 2011 Decision to the Council and the High Representative in the task of coordinating the actions of the Union and its Member States to implement the objectives. This should include a significant participation in this issue by the delegations in third party states of the European External Action Service.

3. Promote greater uniformity with regard to the Court within the territory of the EU, using the framework of cooperation in criminal matters within the Area of Freedom, security and Justice

The Union must take a proactive role in coordinating and promoting the actions of its Member States so as to ensure the proper application of the principles of complementarity and cooperation with the Court discussed at Kampala. Specifically:

- Ensure compliance with the commitments made by Member States at Kampala;

- Urge the states that have not yet negotiated an Agreement on Privileges and Immunities with the Court to do so without further delay;

- Promote a code of practice to ensure a better and more consistent implementation of the Rome Statute in the states of the Union;

- Improve coordination on the investigation and prosecution by Member States of the crimes of genocide, crimes against humanity and war crimes, replacing the 2003 Framework Decision by a new Directive and strengthening the involvement of Eurojust in this area.

4. Act in favour of the integrity of the Rome Statute

The EU, to the extent of its possibilities, and as long as this does not imply a breach in its unity of action, should promote the ratification by Member States of the amendments adopted at Kampala. This would improve the image of the Court and the Union, since the inclusion of the crime of aggression in the Rome Statute was proposed by and seen as a victory for the non-aligned countries and this could leave France isolated in its intransigent attitude towards the amendments. The Union would thus take a further step in its commitment to the universality and independence of the Court.

References

- Agreement of 10 April 2006 between the International Criminal Court and the European Union on cooperation and assistance, OJ L 115 of 28 April 2006.

- Review Conference of the Rome Statute of the International Criminal Court, Official Records, RC/11.

- Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP, OJ L 76 of 22 March 2011.

ABOUT THE AUTHORS:

Dr. Claudia JIMENEZ CORTÉS (claudia.jimenez@uab.es), Dr. Montserrat PI LLORENS (montserrat.pi@uab.cat) and Dr. Esther ZAPATER DUQUE (esther.zapater@uab.cat) are professors and researchers of the Autonomous University of Barcelona and have directed a research project entitled "The action of the European Union and its Member States in the Review Conference of the International Criminal Court, 2010", financed by ICIP (2009RICIP00012).

DISCLAIMER:

INSTITUT CATALÀNINTERNACIONAL PER LA PAU

The International Catalan Institute for Peace (ICIP) is a public yet independet institution, whose overarching purpose is to promote a culture of peace, and to facilitate the pacific resolution and transformation of conflicts. ICIP's activities are related to research, the transfer of knowledge and dissemination of ideas and awarness, as well as intervention in the field. With research as on of its focal points, ICIP takes a particular close interest in promoting original research, which allows for new results – not only in the theoretical field, but also in the practical application of solutions. It is in this context that ICIP publishes its *Policy Papers* series.

www.icip.cat / icip@gencat.cat