

PAPER ON THE AGREEMENT BETWEEN THE ICC AND THE EUROPEAN UNION

The draft of the agreement now in negotiations between the ICC and the European Union (EU) on cooperation and assistance follows *a similar* one between the UN and the ICC. This European draft has led to a number of questions ranging from whether it is adequate to achieve its purpose to whether there are provisions in this agreement that could be used out of context in the US administration's campaign against the ICC.

The Agreement's purpose

The purpose is to facilitate cooperation, support and assistance between the EU and the ICC. In the draft the EU commits to promote the ICC's effective functioning and to advance universal support for it by the furthering widest possible participation in the Rome Statute which is the charter for the ICC. Article 3 of the *EU draft agreement* even has the heading of "Obligation of cooperation and coordination" which is probably formulated in this specific way to put emphasis on the legally binding character of the agreement.

The relation between the ICC and the EU; The adequacy of the agreement to fulfill its purpose

It is important to emphasize that the EU as a supranational organization is not and cannot be a party to the Rome Statute. It is committed to furthering the work of the Court. The EU already has established a Common Position and an Action Plan to express its support for the Court. However these commitments are not legally binding. Therefore it is necessary that the parties sign an agreement like the one at hand.

The agreement provides for facilitating the effective discharge of the respective responsibilities of the parties. It orders close cooperation and consultations on matters of mutual interest. Article 5 requires a regular exchange of information and documents of mutual interest. Also if there are pleadings, oral proceedings, judgments and orders of the Court of interest to the EU, the Registrar shall provide information and documentation on these procedures.

Problems between a supranational organization and the Court could come up if there were no clear provisions for collisions of interest between the Union and the ICC, *such as might arise* from immunities of EU personnel or *concerns over* the security of EU operations or activities. The agreement includes the necessary provisions for such situations.

Thus, article 6 requires the Court to order appropriate measures of protection in case the safety and security of EU staff or EU operations could be endangered by the cooperation between the EU and ICC. If the Court requests EU classified information, Article 7 provides certain rules for the Court on how to handle these documents. Article 8 ensures the cooperation of the EU when the ICC asks an EU official to testify. This means a broad simplification of EU and European Community (EC) procedures which will be very helpful to the ICC. *This is because* the EU is legally a branch of the larger entity known as the European Community. Technically, staff serving the EU are employees of the EC. However, under Article 8 of the draft agreement, the EU would not have to get clearance from the EC to allow its staff to testify before the ICC.

If the Court exercises its jurisdiction over a person who is alleged to be responsible for a crime and enjoys immunity under EU law, the EU is held to fully cooperate with the Court. Article 10 particularly obliges the EU to waive privileges and immunities as a measure of cooperation.

The breadth and detail of the agreement will make the cooperation between the ICC and the EU more effective and easier. The agreement is adequate to achieve its purpose because it provides ways to resolve differences of interests between the EU and the ICC.

Elements in the agreement that could be used against the ICC from the US administration's perspective

Subsections 1 and 3 of Article 5 include the provision that the Court and the EU shall exchange documents and information that are of mutual interest and that the Registrar shall provide the EU with information on pleadings, proceedings, judgments and orders of the Court which may be *important* to the EU. This could create the fear that, if the U.S. ratifies the Rome Statute thus expanding the Court's jurisdiction over US citizens, the EU could have access to documents related to the proceedings whose contents could be harmful to the US. There is no real safeguard against this since the formulation "which might be of interest to the EU" is very wide.

Article 11 which includes the support of the EU in training for Court staff, judges and other ICC personnel could be interpreted as exerting too much European influence on the operations of the Court. This could promote the fear that the combination of common and civil law principles in the Court's procedure and practice will become unbalanced in favor of the latter.

Comparability between this agreement and the UN and ICC agreement; Conclusions

Article 19 in the Agreement between the UN and the ICC asks the UN to waive privileges and immunities if a UN staff member has allegedly committed a crime under the ICC's jurisdiction. The language in this article is exactly the same as in Article 10 of the Agreement between the EU and the ICC. There is also identical language in Article 5 s. 2 in the EU-ICC draft and Art. 15 s. 1 of the UN agreement concerning the disclosure of documents and information. These rules are not limited to classified documents. This makes it hard to understand why the United Kingdom apparently *now* favors a more restricted EU-ICC agreement, since it and the US joined a consensus in the UN General Assembly in favor of an agreement with the same language as the EU-ICC draft.

The approach that the UK wants to see realized, namely to cover only the issue of classified EU information and documents in the agreement, would be a terrible mistake and a missed opportunity in many ways. The agreement with its broad language would set an example for other agreements between the ICC and international bodies or States. It could also help in the case of proceedings in front of the European Court for Human Rights. If there is an agreement on cooperation between the EU and the ICC then a state whose national is accused of a crime might make a plea of complementarity that a case against him or her is pending at a court of the European Union. An agreement like the one at hand would promote such cooperation.

Research and drafted by AMICC professional volunteer associate Simge Kocabayoglu.