



# *The International Criminal Court - Supporting A Stronger Multilateral Cooperation In A Changing World*

## **Integrated Projects II – Policy Report**

### **BASS, Governance and Global Affairs**

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## Executive summary

International cooperation is crucial for The Netherlands, but recent trends have placed pressure on the current multilateral system. For this reason, the Security Studies Think Tank of Leiden University's Faculty of Governance and Global Affairs was tasked by the Department of Multilateral Organisations and Human Rights of the Dutch Ministry of Foreign Affairs to recommend ways to increase the influence of the country on the multilateral arena. The Dutch have been at the forefront of human rights, improving international justice with the International Criminal Court [ICC]. However, the ICC has been losing its influence and, in turn, this has diminished the abilities of The Netherlands to pursue its interests.

Three trends are found to be crucial for the diminishing strength of the ICC. Firstly, the rise of populism and isolationism are decreasing the legitimacy of international, multilateral organisations such as the ICC. Secondly, the loss of support from African states, which have been essential to almost all ICC investigations, made the Court less credible and effective. Thirdly, the ICC has been hindered by inherent inefficiency issues, such as budget constraints, problems with collecting evidence, and judge bias,

which has made prosecutions lengthy and complicated.

The problem analysis produced three policy options: increase diplomacy, call for reforms, or try to establish a new international justice body. These three policy options were measured against three criteria: political viability, perceived impact and economic feasibility, with diplomacy emerging as the best option. The recommendations for strengthening the ICC are developed for diplomacy, attempting to tackle the issues identified in the problem's analysis. The recommendations are: (1) pursuing shared interests with non-member states; (2) invest in education in The Netherlands; (3) increase cooperation with African states that support the ICC; (4) work out ambivalence in international law; (5) stress the importance of the acceptance of evidence from NGOs in trials; (6) advocate the reforms for judge appointments at the Assembly of State Parties of the ICC. Through these recommendations, the ICC can again become a legitimate, efficient, multilateral institution that prosecutes the worst of crimes.

# **1. Introduction and background**

The International Criminal Court [ICC] in The Hague, The Netherlands, celebrated its twentieth anniversary in 2018. It is the prime mechanism within the international criminal justice system, and was set up as a permanent institute to prosecute the most high profile transnational crimes outside of the jurisdiction of other regional or national courts. The four cornerstones of its mandate are the investigation and trial of individuals charged with genocide, war crimes, crimes against humanity, and crimes of aggression; these acts and their elements, as described in the Rome Statute, the multilateral treaty that established the ICC in 2002, are recognised as a grave threat to peace, security, and well-being of the entire world (“About the International Criminal Court”, n.d.). It has recently been praised for its conviction of Bosco Ntaganda of eighteen counts of war crimes and crimes against humanity in the Democratic Republic of the Congo (Hartocollis, 2019). This conviction is part of the Court’s participation in holding those responsible accountable for the crimes they committed and helping to prevent further crimes; these are important factors to continue building society towards a world without violence, and to promote international justice in the long-term. However, the ICC has to operate under

scrutiny by major players in the global political sphere, and has had to endure a significant amount of criticism from them in regard to its operations. One of the reasons the ICC is experiencing difficulty in its operation is the diminishing strength of multilateral cooperation and the pressure this places on the organisation.

The authors of this policy paper were tasked with outlining the future of multilateral cooperation in the field of comprehensive international security. The decision to focus on the international justice system and, more specifically, the ICC, was made due to its importance to The Netherlands: the country has some of the main components located within its territory, and has an active role in accomplishing security and justice for all citizens in the world. This policy paper is written for The Ministry of Foreign Affairs Department of Multilateral Organisations and Human Rights, which is looking for policy recommendations that might increase the strength of the multilateral system, and still be feasibly implemented by a small-sized country like The Netherlands. In a briefing, the Ministry put forward three questions that require first exploration and then an answer:

- 1) Why is The Netherlands experiencing pressure on the multilateral system?
- 2) What are the main interests at stake for The Netherlands?
- 3) What should The Netherlands do?

The pressure the ICC has to contend with has multiple facets and decreases the potential strength of the multilateral system; this policy paper will focus on three of these aspects, investigating their particulars, and analysing their implications in more depth. One aspect is the increasing attitude of isolationism and populism, as seen promoted by right wing political parties all across the globe (De Spiegeleire et al., 2017). That is, the concept that countries would rather address issues by themselves instead of through multilateral cooperation. This is a factor that severely influences how functional the Court can be, as it has multilateral cooperation as its basis. Another aspect of the pressure the ICC is experiencing is the critical view of the workings of the Court shown by the African Union [AU], which places the blame on the perceived focus of the Court on African countries and African heads of state; for this reason, the AU has increasingly encouraged its members to withdraw their membership from the Court in recent years (Associated Press in Addis Ababa, 2017). Besides this, multiple

countries, such as South Africa, have blatantly ignored calls for international justice and the impunity of its warmongering leaders; this is evident in South Africa's refusal to extradite Omar al-Bashir, despite multiple arrest warrants (International Crisis Group, 2017; Bower, 2019). The last aspect of pressure included in this paper is that of the ICC's inefficiencies; in this category structural factors such as low conviction rates, biased judge selection procedures, and budget constraints were included.

Without these limiting constraints, the international justice system could function to a much higher degree, but before then these issues must be addressed. If instead these challenges are allowed to become aggravated over time, it could mean the further weakening of international justice throughout the globe, granting impunity for grave crimes, and marginalising victims in society. The Netherlands, as a proponent of international justice, might be able to make a difference in this through foreign policy means and facilitate the process of multilateral collaboration necessary to bridge the current gaps; these gaps and possible steps towards their resolution are explored in this policy paper.

After this brief introduction into the topic and contextual background of the policy problem (1), the background of the problem and

current policies will be analysed in more depth, including factors such as scope and stakeholders (2). Then, the criteria used to formulate and select the policy options, and how these criteria were developed, are explained (3). Following that, all the policy options are outlined, evaluated, and compared to one another, and the preferred policy option for this particular policy problem is selected. Finally, a summary of the major findings and actionable policy recommendations is offered, with some concluding remarks on how to proceed with their implementation.

Due to research time constraints and limitations on the availability of data, secondary data was used throughout this policy paper and adapted to fit the requirements of the research wherever necessary. The documents used to guide and inform the context, arguments, and recommendations in this policy paper were obtained through a wide range of peer-reviewed academic journals, think tanks, and governmental organisations, as these sources generally provide the most accurate and up to date information available. The majority of the literature consulted originated from contemporary academic articles and policy papers to ensure that the data is relevant to the current context and can effectively be used to create valuable recommendations.

## 2. Problem Analysis

*Pressure on the multilateral system, international justice, and the ICC.*

The Netherlands is inextricably linked to the rest of the world; a world that is constantly in motion. Since international cooperation is essential for responding to the numerous global challenges, The Netherlands, a small-sized country, has a clear interest in the continuous development and improvement of multilateral instruments. Multilateralism unites countries and increases the quality of collective solutions to the problems that each of them are facing (de Spiegeleire et. al, 2017). However, international support for the multilateral system, as created after the Second World War, is no longer self-evident, and is under increasing pressure. Strong economic, demographic, and technological forces are forming a new balance of power; the result is an unstable geopolitical landscape in which states are progressively looking at opportunities and challenges through unilateral lenses (“Geannoteerde agenda”, 2019). The once distinct alliance structures and multilateral systems are no longer robust, as states question the value of long-term commitments and adopt a more nationalistic stance with regard to their own interests, placing individual agendas first. In addition to the growing risk of conflict, opportunities to take united action on key global priorities can be lost if stakeholders

focus on immediate geostrategic benefits instead. In the context of countering national threats, The Netherlands is committed to increasing cooperation within, among others, the European Union [EU], thereby giving priority to strengthening the multilateral institutions that contribute to Dutch security interests (Kamerstukken II, 26150, nr. 182, 2019). Contributing to Dutch security interests and multilateral goals is the ICC, which is experiencing increasing pressure due to the decrease in support for the multilateral system. In the section below, the current pressure factors on both international justice in general and the ICC specifically will be discussed in more detail.

Supporting international justice is an integral part of Dutch foreign policy; article 90 of the Dutch Constitution states that the government should be actively engaged in the promotion of the international legal order ("The Netherlands Helps Strengthen," n.d.). However, there are factors that increase pressure on the exercise of this support for international justice, and make the workings of the ICC difficult.

The multilateral system has diminished in terms of popularity, which has had consequences for the effectiveness of the ICC, an institution that by definition requires cooperation between states. There are inherent problems with the ICC itself that

have led to this decrease in popular support, but recent trends have also hampered the work of the Court. We will look at three aspects that negatively influenced the good functioning of the ICC.

Firstly, the rise of populism and isolationism worldwide has made the work of the ICC more challenging. These trends have decreased cooperation between states and, therefore, the legitimacy of the ICC. The United States of America [USA] and its stance on the ICC will be used as a case study for this section. The USA is a crucial actor for the ICC and The Netherlands; its current negative view of the ICC will show the consequences of isolationism and populism on international justice (Ljuboja, 2010; Walt, 2011).

Secondly, while some African states have been crucial in establishing and supporting the ICC, others have become its more vocal opponents. The al-Bashir case, in which the ICC indicted the former Sudanese president for allegedly organising a campaign of mass killing and rape against civilians, will be used as a case study to demonstrate the impact of African states' support on the ICC. African nations have been key players for the ICC, with almost all investigations of the Court taking place in Africa. However, there is criticism directed at the ICC for being politically biased, which has decreased the

legitimacy of the Court as an institution in the region it needs most support from (Needham, 2011)

Thirdly, the ICC as an institution has had to deal with several structural shortcomings. Indeed, the lack of support from the USA and the AU has hindered the performance of the Court; however, other issues, such as low conviction rates, biased judge selection procedures, and budget constraints have also led to the inefficiency of the Court. In effect, these inefficiencies have made the ICC less capable of serving international justice; this can be illustrated by the JP Bemba acquittal, which will be used as a case study for this third aspect (Sadat, 2018; Taffo, 2018; Zenati, 2019).

### *Rise of populism and isolationism*

One of the most severe pressure points on the multilateral system is closely linked to the rise of populism and isolationism, which places international cooperation and its working institutions under strain. Populism refers to a political approach that appeals to individuals who feel disregarded by established elite groups, an approach that has seen a rise in the last decade in The Netherlands, and indeed all over the world (De Spiegeleire et al., 2017). With this increase in populism, right-wing and extreme right-wing parties have gained a great deal of

popularity; the latter, in particular, have given a voice to the extremes in the political climate all over the world, disrupting constructive debate and undermining sitting democracies (Galasso et al., 2017). This was particularly clear in 2016, when the rise of populism reached a peak; this was the year in which anti-establishment populism managed to force a breakthrough in many countries and many anti-system parties gained influence in elections and referendums. In Poland, for instance, the Law and Justice Party (PiS) came to power (Adekoya, 2016). Later that year we witnessed the public vote that led to Brexit in the United Kingdom [UK], and the Ukraine referendum in The Netherlands, as well as Donald Trump's unexpected victory in the American presidential elections (Inglehart & Norris, 2016). Right-wing populist anti-system parties explicitly define themselves as anti-elite, anti-migration, anti-Islam, anti-multilateral internationalism, and anti-minority protective rule of law. This populist discourse supports isolationist policies and is not consistent with the vision of international justice and the ICC. Isolationist policies encourage remaining apart from the affairs and interests that are perceived as pertaining to other states, and are often incompatible with collaboration. In recent years the combination of these political developments were made visible with regard to some major

themes the EU had to contend with (Balfour, 2017). Among other situations that required international cooperation: the inability to effectively deal with the migrant crisis starting in 2011; the uncertainty about the new climate goals; and Brexit, the UK referendum vote to leave the EU (Galasso et al., 2017). These events are often used by populist parties to support their claims for withdrawing from international institutions; however, their sudden gain of popularity is closely related to the influx of these same events, creating a paradox and encouraging more political polarisation, further undermining the effectiveness of international cooperation (De Spiegeleire et al., 2017). That has an impact on the individual, their changing perception of international institutions and, subsequently, on how the country performs in regard to multilateralism. This, in turn, affects the state's political view of and support for the ICC, which endangers the legitimacy of the institution and those that it aims to protect (Bovens & Wille, 2011).

The rise of populism is closely linked with a fear of globalisation. In a research conducted by de Vries and Hoffman (2016, p. 3) it is argued that “the lower the level of education, the lower the income, and the older people are, the most likely they are to see globalisation as a threat” (figure 1, figure 2).

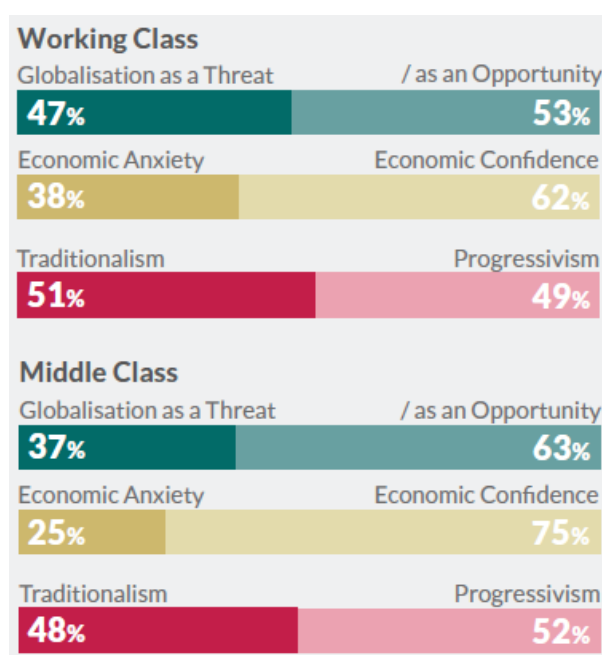


Figure 1 Effect of income (de Vries & Hoffmann, 2016, figure 3)

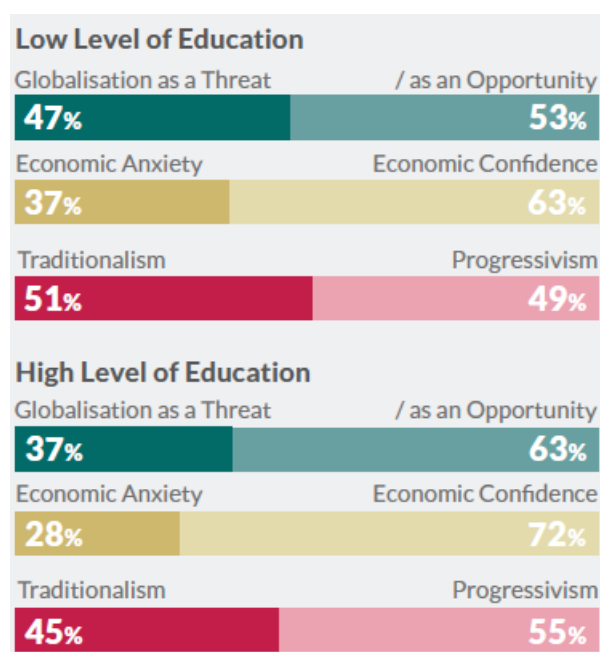


Figure 2 Effect of Level of Education (de Vries & Hoffmann, 2016, figure 4).

De Vries and Hoffman (2016) further elaborate on their argument by claiming that this perceived fear of globalisation can mainly be found in populist right wing parties. Moreover, while the rise of populism has its consequences for the perception of the

individual, in many cases over the last decade it has also had its effect on policy-making, resulting in an increase of isolationist policies and unilateralist approaches (Buti & Pichelmann, 2017). While these policies often begin in terms of a decrease in international trade relations, they also gradually have their effects on wider international cooperation. This further hinders the workings of the ICC as an instrument of international justice (Buti & Pichelmann, 2017). To further emphasise the importance of this phenomenon, we take the changing role of the USA in terms of its foreign as a case study.

Three out of the five permanent members of the United Nations Security Council are not members of the ICC – China, Russia, and the USA –, hindering the possibility of a united front (Bosco, 2014). Despite this, as an important ally of The Netherlands and a crucial international player, the USA is the most important non-member of the ICC. However, while the country has been at the forefront of human rights in some areas, it has also shown neglect towards international justice. The rise of populism in the USA in the last decade has amplified this marked indifference, as populist tendencies contribute to ICC-incompatible isolationist policies.

The reason stated by the USA for refusing to sign the Rome Statute in 2001 was that the country wished to avoid, primarily, that American citizens would be charged for crimes outside of their country (Ljuboja, 2010). This possibility of being charged by the ICC is perceived to have a great impact on the reputation of the USA, since the country considers itself to be the “leader of the world” (Walt, 2011, p.73). On the one hand, refusing to become a member of the ICC in 2001 already displayed a certain disregard for international justice. On the other hand, the USA was still relatively supportive of international justice through other means, such as, for example, assisting the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda in the prosecution of perpetrators of mass atrocities (Cerone, 2007)

Nevertheless, recently, the USA has become more openly opposed to the ICC, in particular since the country came under investigation of their conduct in the war in Afghanistan (McAuley & Constable, 2017). In a speech posted by The Washington Post (2018), American security advisor John Bolton expressed clear opposition against the workings of the ICC, calling the court “an assault on the fundamental rights of the American people and the sovereignty of the United States” (Sterio, 2019, p. 203). The

security advisor went on to stating that, in theory, the ICC can prosecute suspects of genocide, crimes against humanity, war crimes and aggression, offer justice to victims, and prevent atrocities. The security advisor continued to add that, regardless of its goals, “in practice, however, the court has been ineffective, unaccountable, and indeed outright dangerous” (The Washington Post, 2018, 0:07). In line with populism and isolationism, it is the opinion of representatives of the USA that if the law has been broken, the country itself will take action to bring the perpetrators to justice, without interference from the ICC. Furthermore, the USA has threatened to bring action against organisations and countries that assist the ICC in an investigation against American individuals or allies of the state (The Washington Post, 2018). Thus, while the USA has never been a proponent of the ICC, the rise of populism and isolationism has only increased the open opposition against the ICC. For The Netherlands, specifically, the challenge is to find new ways to uphold the positive image of its international institutions in times of political discrepancy.

### *African Union support*

The Netherlands believes that the legitimacy of the ICC should be universal, hence its clear policy in the form of a permanent campaign

to persuade non-member states to join the ICC (Ministerie van Buitenlandse Zaken, 2015). Although the aim is to continue to expand the jurisdiction of the ICC and to have the widest possible ratification, in reality the progress in doing so is stagnant; The Netherlands and the ICC are dealing with serious resistance regarding the expansion of the jurisdiction of the ICC. The standard policy of positive diplomacy will be ineffective towards superpowers like China and Russia. Moreover, the lack of support from arguably the most important ally, the USA, complicates the Dutch policy on the ICC (“Toespraak minister-president”, 2019). With consideration of these factors, more recently, the increasingly diminishing relationship between the ICC and the AU might pose the most substantial contemporary challenge for the Court. In a period where the amount of conflicts in Africa continues to grow, the presence of a strong body that promotes justice for everyone should be a crucial priority (Bakken & Rustad, 2018).

Historically, most African states had been in favor of a transnational court. The Southern African Development Community [SADC] had already organised a pan-African conference on the Court’s establishment in Dakar, 1998. By the time the Rome Statute was signed, SADC had already held two regional conferences on the ICC in both

South Africa and Senegal – Southern and Western Africa, respectively. The result of these conferences was a declaration in which the African states confirmed that they were committed to establishing a transnational court, a step they believed it was important for the African community and for the world at large (Monageng, 2014). When the Rome conference began in 1999, eight out of thirty-one Vice-Presidents in attendance were from Africa (Monageng, 2014), and most African countries were quick to sign on to the Rome Statute. These states were convinced that this was the right course of action, after the tragedies that had occurred on their continent, such as the Rwandan genocide, the civil war in Sierra Leone, and the Apartheid in South Africa (Monageng, 2014).

Despite this, only a few years after the court was established, the relationship between the AU and the ICC grew to become a complicated one. It has become clear that not all countries in the region are currently willing to cooperate with the ICC, a situation that is evident in the case of the al-Bashir arrest warrant. In 2009, in the midst of the al-Bashir case, the AU decided to publicly defy the decision from the ICC to arrest the Sudanese dictator. The history of this particular case will be examined, and its role in establishing the current relationship between the bodies will be analysed.

In 2003, the Sudanese government responded to an attack by the Sudan Liberation Army. This retaliation was carried out with great force and resulted in the deaths of thousands, as well as the displacement of an even larger number of people. The United Nations [UN] urged the Sudanese government to cease these activities, but these requests were to no avail. Over the years since this conflict began, the Sudanese government, under the leadership of military dictator Omar al-Bashir, has been directly responsible for the murder of over 200,000 citizens (Mills, 2012). In response to this, the ICC issued an arrest warrant charging al-Bashir on five counts of crimes against humanity (Needham, 2011). This warrant was widely circulated among Rome Statute signatories and UN Security Council members (Needham, 2011). This warrant prompted criticism from African leaders, which stated that the prosecutor was interfering with the ongoing diplomatic process between the countries. This ICC intervention added to the discomfort that African countries already felt about the perceived focus of ICC investigations on the African continent (Bosco, 2014). Jean Ping, the chairman of the AU, suggested that the ICC was experimenting with their ideas in Africa, and testing their incomplete procedures out on the countries in the continent first (Bosco, 2014). These criticisms are partially grounded in truth, as far as the ICC's focus on the African

country is concerned, with the ICC carrying out investigations in Uganda, the Democratic Republic of the Congo [DRC], Central African Republic, Ivory Coast, Mali, Libya, Sudan, Kenya, and Burundi. However, it is important to note that in half of these cases the Court was invited to conduct the investigation by the same African country in question, or by the UN Security Council (Omorogbe, 2019). Therefore, this focus was not a political move carried out by the ICC head prosecutor to specifically target African countries. Nevertheless, and despite the warrant issued by the ICC, when al-Bashir travelled across the continent to attend AU meetings, no African country attempted to arrest and extradite them (Bower, 2019). South Africa, Chad, the DRC, Djibouti, Jordan, Malawi, and Uganda all refused to cooperate with the ICC in ensuring that al-Bashir was taken to court between 2009 and 2015 (Bower, 2019). These states cited that what held their action was the fact that heads of states have immunity under customary international law, an assumption that is reliant on interpretation and not written in law verbatim (Needham, 2011). In this particular case, it can be argued that the AU wanted to make a stand against the ICC and display their dissatisfaction with the focus the Court has placed on their continent, which they consider unfair and unnecessary. This weakening relationship between the ICC and the AU is the greatest threat to the Court since

the USA has stopped actively interfering against the institution (Bosco, 2014).

In 2017, the AU called for a mass withdrawal of member states to the court (Associated Press in Addis Ababa, 2017). Burundi and South Africa had already announced plans to withdraw from the court, with the former seeing it through in the fall of 2017; this official withdrawal came in the midst of an ICC investigation into crimes against humanity carried out by the Burundian government (Agence France-Press, 2017). South Africa's High Court ruled the country's intention to leave the ICC invalid and unconstitutional ("South Africa's decision to leave ICC ruled 'invalid', 2017). In addition to this, the attempts of African countries to withdraw from the ICC were widely criticised by civil movements throughout Africa, who massively support the ICC and its proceedings (Zamfir, 2017). For the voices of the victims of injustice across the country to be heard, it is essential to ensure that the Court can continue to operate to the best of its abilities within the African continent. As a figurehead for the conservation of human rights on a global scale, it is imperative for The Netherlands that the relationship between African countries and the ICC be officially restored. There are still proponents of the court within the AU, with Nigeria and Senegal as major possible allies (Bower, 2019). However, the

lack of support from other countries in the region towards a universal jurisdiction of the Court is preventing the existence of an overarching standard.

### *ICC policy inefficiencies*

The ICC has experienced both successful and problematic periods since its foundation. Although critics are vocal and universal support is lacking, the Court has shown its potential to function as a fundamental international institution. Its earliest successes included the swift foundation of the ICC itself, only four years after the Rome Statute was established, and the rapid expansion of its doctrine in the years that followed. Throughout the years, with the unwearied efforts of the Dutch and other member states, the ICC proved capable of fulfilling its goal to combat the infringement on human rights ("International Legal Organisations," 2016). During that time, the Court took on several cases, making significant improvements to its procedures in the process (Ministerie van Buitenlandse Zaken, 2015). However, while the ICC has seen a number of successful trials, from a total of 24 situations investigated, only a few of them led to successful court trials ("Situations under Investigation", n.d.). The activities of the Court are not carried out without complications and setbacks, namely in terms of low conviction rates, inadequate judge

selection procedures, and budget constraints; in this section, these policy problems will be discussed, in the context of the JP Bemba acquittal.

In June 2018, the Appeals Chamber of the ICC reversed the decision of the Trial Chamber against JP Bemba of the Democratic Republic of Congo [DRC]. After years of imprisonment, Bemba, who had earlier been found guilty of war crimes and crimes against humanity was acquitted (Taffo, 2018). There are several reasons for this, but one of the main reasons is the current ICC regulation on evidence collection, which leads to inadequate collection of evidence. The ICC has a strict set of rules; for example, the testimonies need to be performed live and in person (Ministerie van Buitenlandse Zaken, 2015) and prosecutors have to take into account the inability to make use of previously recorded or written testimonies, making it a challenge to process evidence. Moreover, the lack of evidence is further exacerbated by the Court's distance to the countries in which the crimes were committed (Zenati, 2019). Consequently, the ICC has become reliant on the support and evidence gathering capabilities of the authorities in a country that is often severely affected by crippling violence. This combination of high standards in regard to the type of evidence accepted and dependence on other, often uncooperative,

parties for evidence gathering, has made convictions much more difficult to achieve (Zenati, 2019).

The ICC could not gather enough evidence to prosecute Bemba; due to the very specific standard of evidence the Court requires, NGO reports are not considered reliable evidence, and key information is difficult to come by. The Appeals Chamber acquitted Bemba stating that, after further examination, he was found to have been too far away from his troops to effectively take measures against them; this geographical distance was a factor that the Trial Chamber allegedly had not taken into account in earlier proceedings. Some of the judges think this lack of evidence is symbolic for the inefficiency of the court; in their separate opinion, Judge Van den Wyngaert writes “It is indeed incumbent upon a Trial Chamber to ensure that the evidentiary basis for its factual findings is set out ‘fully’, which means that its reasons for making a particular finding must be clear, comprehensive and comprehensible” (The Prosecutor v. Jean-Pierre Bemba Gombo, 2018, p. 3).

Besides the deficiencies of the evidence finding processes that can lead to low conviction rates, there are suspicions that the ICC was influenced by political actors to acquit Bemba; this transpired at a time when it became clear that Bemba could be the only

person to defeat Kibila in the upcoming elections in the DRC. Due to this, impartiality was again a topic of discussion, with scholars claiming that some judges did not want a retrial, invoking a lack of trust between judges (Sadat, 2018). This lack of trust is deepened by the lack of a transparent and merit-based election process for judges in the ICC, which, consequently, turns elections into a political power game. Judges are selected for the ICC through an elaborate process of nominations and voting; candidates are first nominated by member states of the Court, before being assessed and interviewed by an advisory committee to ascertain whether the nominee qualifies for the voting round (Assembly of State Parties, n.d.). In theory, this appears to be a solid structure for handling the selection of judges. In practice, however, this legal framework is considerably loaded with political considerations, present during the entire process of nomination, and eventually also weighed in during the final voting process (Open Society Justice Initiative, 2019). Campaigns for these positions usually take place behind closed doors, which also allow for the continuation of problematic vote exchanges by several member states (Open Society Justice Initiative, 2019). In addition to that, 50 member states have failed to put forward judicial nominees altogether, with, according to Open Society Justice Initiative (2019), less than a third of the 122 member

states ever having nominated more than one judge. This system has led the Court to its current situation, where half of the total elected judges have come from the same 10 countries.

Along with inadequate evidence collection and judge selection procedures, there are budgetary concerns. The Bemba case included 15 years of lawsuit expenses that weigh heavy on the already strained ICC budget; while the crimes were committed in 2002-2003, and the case was referred to the ICC in 2004, the arrest warrant was issued only in 2008, with the trial closing in 2018 (Case Information Sheet, 2019). The Netherlands has a vital role in the ICC policymaking process; one weakness in the current Dutch policy is the lack of significant investment in the ICC, a lack for which The Netherlands is not known to be vocal about (Ministerie van Buitenlandse Zaken, 2015). The Dutch link this apprehension to address budgetary deficiencies to the sensitive position of being the host country for the Court. Nonetheless, they fail to take advantage of the very same privileged position they possess within the ICC, which could help in gathering a stronger budgetary support. Last year, the ICC had a budget of approximately 150 million euros, with The Netherlands investing three million euros (International Criminal Court, n.d.; “Geannoteerde agenda”, 2019). Taking into

account the considerable amount of administrative tasks and other forms of work that the ICC carries out for each case, this budget does not provide the opportunity to deal with ten or more cases at a time (International Criminal Court Office of the Prosecutor, 2019). This will lead to cases being delayed or inadequately addressed. Most importantly, the successful resolution of a case such as the Bemba acquittal sets a concerning precedent for other perpetrators of serious crimes to also claim that they were unable to control their own forces, thereby escaping prosecution by the ICC.

Whether it is right that Bemba is indeed relieved of responsibility and accountability for these crimes or not, the acquittal case shows the ineffectiveness of the ICC proceedings (Sadat, 2018; Taffo, 2018; Zenati, 2019). It illustrates how the cumbersome processes of the ICC are ill adapted for current requirements, not only lowering conviction rates and delaying closure for victims, but also leading to distrust between judges, and making trials very lengthy, ineffective, and costly.

### 3. Problem criteria

There are many paths The Netherlands could possibly try to take to improve international justice and the ICC. In this section, these different approaches are measured in a systematic manner, using three different

criteria: political viability, perceived impact, and economic feasibility. These were the three factors that were considered most important when addressing the issues analysed in previous chapters. Other criteria, such as technological constraints and social acceptance were not selected for the purpose of this policy paper. Technology was deemed to be less critical and relevant for this particular international justice issue, and social acceptance was integrated into other criteria, namely political viability and economic feasibility. The criteria chosen cannot be quantified easily, so the assessment in this paper – which ranges from “low” to “high” – should be seen not as an absolute measure, but as a measurement relative only to other policy options.

Firstly, the most favourable policy option needs to be high in political viability. As said before, The Netherlands is a small country with limited powers. Therefore, international cooperation is essential. Momentum, an impetus on which The Netherlands can act, would also be helpful in gathering more international support; an example of momentum could be a new case arriving at the ICC with a lot of potential for success. In terms of national support, there also needs to be political will; the policy of The Netherlands should benefit from a large base of support in parliament and in public opinion. When political viability is high,

implementing a policy option will become more successful.

Secondly, the perceived impact on solving the problem should be high. Strengthen international justice as adequately as possible is the goal. Preferably, whatever policy option is selected should address the problem directly and promptly. In other words, the chosen policy option should be effective in tackling the proposed issues to the best extent of its capability.

Thirdly, economic feasibility needs to be analysed during policy option selection. While this third criteria is potentially less immediately relevant in tackling the proposed issues, high economic costs can be detrimental for the possible implementation of policy options. Investing a substantial amount of funds into the ICC, while potentially very effective, would be an unacceptable expense (Ford, 2017; International Criminal Court Office of the Prosecutor, 2019). Thus, economic costs can make a policy option unfeasible.

## 4. Policy options

Three policy options meant to increase, strengthen, and improve the ICC as a spearhead of international justice in the multilateral system were analysed. This was done by looking into the following three

options: (1) diplomacy, (2) reforms, (3) creating a new international justice body.

One accessible way for The Netherlands to implement changes in its multilateral landscape is through diplomatic means. By making alterations through diplomacy to the Dutch national and foreign policy, the overall image of the ICC could change positively, tackling the first and second problem found in the problem analysis – the rise of populism and isolationism, and the lack of support from the AU, respectively. Increased diplomacy would have little effect and impact on the third problem identified – inefficiencies within the ICC. In terms of political viability, diplomacy seems to be a suitable policy option. Although the Netherlands is a relatively small member state of the EU, public perception shows a positive connection between the country and the protection of human rights (Baehr et al., 2002). One could argue that The Netherlands is too minor to make the necessary changes in the human rights field; nevertheless, it is important that even a small state acts as the forthbringer of attempts to improve human rights in multilateral relations. If these interventions were conducted by superpowers like the USA alone, intentions might be portrayed negatively (Baehr et al., 2002). The perceived impact of diplomacy, on the other hand, is very reliant on the set of diplomacy conducted. Diplomacy might help

The Netherlands in addressing the issues at hand directly, but the overall impact of The Netherlands in the multilateral landscape is mediocre on their own. The support of a superpower state might have more influence in terms of diplomacy. Diplomacy as a way of improving the ICC is also economically feasible, as the costs of diplomacy are rather low, and can be proportionate according to the desired outcome.

Reforms within the ICC are another policy option to positively change the functioning of the ICC and tackle its inefficiencies, therefore addressing the second and third problem. While this may also affect the overall image of international institutions and, potentially, the fear of globalisation, it could also have the adverse effect as intended. Considering the three criteria, the relative political viability of reforming the ICC is rather low. As it stands, the USA as well as some other major international players are not willing to ratify the ICC. Direct changes within the ICC, even if they are meant to improve its mandate, might lead to the decreased support of current members. Moreover, enacting reforms by changing the Rome Statute would entail a complex and long lasting process that many may not agree to. Despite this, while political viability seems relatively low, the perceived impact of reforming the ICC scores high. By directly addressing some of the inefficiencies within

the functioning of the ICC through reforms, the issues at hand could be resolved in an adequate manner. An additional downside to reforms within the ICC would be the costs related to changing procedures, as reforms are time and budget consuming.

Lastly, The Netherlands could strive for an overall change of international cooperation in the field of human rights, by advocating for a new international justice body. This policy option directly tackles the inefficiencies of the ICC, and if planned accordingly could also positively mitigate the fear of globalisation, as well as increase the support of the AU. While this option may sound favourable, engaging all members could prove challenging, particularly now that there is an increase in unilateral policies within different major players in international politics. Due to this, this final policy option scores low in terms of political viability. In regard to the perceived impact, the creation of a new international justice body could be highly effective: by not only tackling the current issues within the ICC, but also creating a whole new body altogether, the future of human rights could be tailored directly to the requirements in the current multilateral landscape. The main downside to this policy option is its economic feasibility; creating a whole new institution would be too costly to effectively tackle the issues at hand. Table 1 offers an overview of the criteria

used to rank the three possible policy options, ranging from “Very Low” (0 points), “Low” (1 point), “Medium” (2 points), “High” (3 points), and “Very High” (4 points).

	Diplomacy	Reforms	Creating New International Justice Body
Political Viability	Very High	Low	Very Low
Perceived Impact	Medium	High	Very High
Economic Feasibility	Very High	Low	Very Low
Total	10	5	3

Table 1 Policy options in multi-criteria decision-making matrix

After comparing and analysing these three policy options in a decision-making matrix, diplomacy appears to be the best suited policy option to improve the current problems faced by the ICC and, subsequently, the standing of The Netherlands in the multilateral landscape.

## 5. Conclusion and recommendations

The Ministry of Foreign Affairs commissioned a policy paper for recommendations on strengthening the diminishing power of the multilateral system.

The authors of this paper investigated different multilateral systems and decided to focus on the international justice system, namely the ICC, as a prime example of a multilateral cooperation in need of improvement. The paper aimed to answer the following three questions:

### *1) Why is The Netherlands experiencing pressure on the multilateral system?*

The Netherlands, being a relatively small country, mostly focused on trade and diplomacy, is reliant on multilateralism to have an impact on a global scale. The pressure the ICC, and indirectly The Netherlands, is experiencing is threefold.

First off, the rise of isolationism and populism throughout the world has made former allies less interested in cooperation. The ideology of isolationism is the antithesis of multilateralism, and a great threat to a country reliant on multilateralism. This trend is also seen within the borders of The Netherlands, with the Ukraine-European Union Association referendum of 2016 (Inglehart & Norris, 2016).

The second point of pressure mentioned in this paper is the lack of support of the international justice system displayed by the AU, caused by a growing sense of aversion to the workings of the ICC within the African continent. This paper has shown, however,

that this sentiment is not unanimous throughout the continent: other governments, such as that in Nigeria and Senegal continue to be major proponents of the Court, and within countries that now oppose the ICC there is still support for the Court.

Lastly, the ICC is dealing with certain inefficiencies that severely limit its current effectiveness in addressing modern security problems. The Netherlands can take a lead role in order to deal with these inefficiencies and improve multilateral cooperation by taking reforming action with other key members.

### *2) What are the main interests at stake for The Netherlands?*

The Netherlands has always been a frontrunner stakeholder with regards to international justice and human rights (Baehr et al., 2002). This is seen in The Hague, which is known internationally as the city of peace and justice and is home to countless major international bodies that promote these values. The status of these bodies is of prime importance to The Netherlands; increasing their productivity and efficiency only stands to garner The Netherlands more political power. Simultaneously, if a major international organisation like the ICC would continue to fail or be disbanded it would

damage international justice in an irreparable manner, which is to be avoided.

### *3) What should The Netherlands do?*

After carefully considering multiple policy options, this paper showed that diplomacy in specific settings is the best option; subsequently, specific, actionable policy recommendations were created to address the proposed issues. First are two policy recommendations that aim to decrease the effects of isolationism and populism:

*Seek out mutual interests with non-member states*

To try and improve on the isolationism experienced by certain allies, The Netherlands should seek out mutual interests with these allies. This could be done by increasing the number of cases that the international justice system should be made aware of. This type of work could be conducted by a joint judicial task force, or justice assemblages. Additionally, increasing the cooperation between countries and NGOs on the basis of mutual interests is recommended.

*Invest in domestic knowledge*

In order to decrease populism and isolationism nationally, The Netherlands can invest in teaching high schoolers about the importance of multilateralism, collaboration,

and diverse cultures in social studies classes. This can be coupled with high school exchange programs within Europe. Moreover, The Netherlands could produce a new generation of activists that will want to support the multilateral system by investing in university courses related to international justice. Besides this, the country could invest in a marketing campaign to educate the Dutch population about: the consequences of populism and isolationism, the importance of multilateralism, the ICC, the ICJ, and the Peace Palace.

Then, two additional policy recommendations were created to address the situation regarding the AU specifically:

*Diplomacy with pro-ICC African Nations*

The Netherlands can take a leading role in rebuilding this relationship by beginning diplomatic talks with Nigeria and Senegal, who are in favor of the ICC. This retreat will build upon the previously held retreats that happened five times over the last nine years (ICC-ASP/18/16, 2019). If this event becomes a yearly event, the African state members will have a set place and time to discuss their concerns and their view on the future of the Court, which might persuade them to remain members of the Court.



### *Resolving uncertainties in International Law*

One of the prime reasons for the fallout between the AU and the ICC was the perceived head of state immunity. The Netherlands can co-host a conference at the Assembly of State Parties [ASP] in 2020, and see whether this can be clarified or modified. Working together with Germany is highly advised, as the country has already hosted a conference at the ICC's ASP on head of state immunity, in 2019, and could prove a valuable ally in this.

Lastly, two policy recommendations that aim to limit certain inefficiencies of the Court:

### *Support acceptance of evidence from NGOs*

Without evidence from NGOs, the trials will continue to be inefficient. To increase the efficiency of the Court, The Netherlands can seek allies to push through a change that would allow for NGO gathered evidence to be used in trials. This would improve the speed and efficiency of proceedings and allow for the process to be much more smooth and fluid.

### *Netherlands should organise a meeting at ASP to reform judge appointments*

The current judge selection procedure is suboptimal at best. The Netherlands can take a leading role in the reform of this process, starting by organising a meeting at the ASP to discuss this. The current process is

politicized and skewed towards certain countries. A process in which every country can nominate a possible judge in good faith and based on their credentials is necessary to prevent the process, and the ICC, from becoming a politically biased body.

### *Concluding remarks*

The increasing pressure on the multilateral system is being experienced by The Netherlands and other countries, with potentially severe consequences for international justice. This policy paper focused on the ICC as one institution that is affected by this problem and warrants adaptation to modern security issue requirements. The recommendations offered address some of the issues seen in the multilateral international justice system in general, and in the ICC in particular; these recommendations, if carried out, can greatly benefit The Netherlands and its position in the international sphere, while having a positive impact throughout Dutch society, and the world.

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