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The European Union and the International Criminal Court: Contested Abroad, Consensual at Home? [1]

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Introduction

The International Criminal Court is the latest step in the normative acceptance that serious violations of human rights cannot go unpunished in a rules-based international order, and that fairness and judicial independence must prevail in the prosecution of these crimes (European Union, 2011).[4] It embodies, operationalises and empowers the fundamental norm of justice, with the corollaries of legal accountability/individual criminal accountability and denial of impunity through its authority to bring to justice individuals guilty of war crimes, crimes against humanity, genocide and – following its activation in December 2017 - crimes of aggression. It is not *just* another institution but rather represents "the establishment of a *system* of international criminal accountability, with the ICC standing firm at its centre" (Bekou, 2014, p. 11 – emphasis in the original).

The EU and member states, with a record of strong support for international criminal justice throughout the last two decades, wholeheartedly identify with the fundamental norm and practices that are administered through the Court; norm and practices that are fully in line with the defining values of the European project. The resulting 'loyal' support for the Court (Aoun, 2008, p. 157; Groenleer & Rijks, 2009, p. 167) tends to be presented as a contrast to the contestation from other international actors. This has earned this institution the title of "EU Court" (Groenleer & Rijks, 2009, p. 167).

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[4] For the rest of the chapter the International Criminal Court will be referred to by its acronym 'ICC' or by the expression 'the Court'.

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Without denying the EU and member states' support for the ICC as an arena to administer the fundamental norm of justice, in this chapter we argue that there are bouts of intra-EU disagreement that have made it at times difficult (but not always impossible) to maintain a common position. Such bouts of disagreement coincide with key junctures when external contestation of the norms embedded in the project of the Court is at its highest. We focus on the relationship between the internal (intra-EU) and external (international) levels and ask how the EU has reacted to external contestation of the ICC. ¿Can the EU rally behind a common position, or does external contestation promote internal differences?

On the basis of a range of sources we analyse three key junctures in the history of the ICC, from its inception in 1998 to date[5]: (1) the US challenge to the authority of the ICC in the form of Bilateral Immunity Agreements; (2) the African Union opposition to ICC cases against sitting heads of state; and (3) the incorporation and activation of the crime of aggression. In line with our interest on the effects of external contestation on EU unity, this chapter is organized in a slightly different manner to other chapters in this edited volume. In the first part of the chapter we identify the norms contested and the motivations and modes of contestation adopted by external contesters, to then move to internal debates within the EU to understand how member states have contested or defended those same norms. In the third and final part of the chapter we use the three case studies to reflect on potential links between both levels, external and internal, and explore EU patterns of behaviour during those key junctures depending on the norms contested and the predominant modes of contestation.

The ICC and Norm Contestation

The idea that the international community needs to ensure individual criminal accountability and fight impunity for the most serious crimes against human rights if justice is not (or cannot be) administered at the national level has a long history. After World War II it inspired the Nuremberg and Tokyo, and it gained momentum during the 1990s, with the end of the Cold War and the changing nature of violent conflicts

[5] In addition to academic sources in the fields of European foreign policy, transitional justice and international criminal justice, our analysis relies on Court documents arising from the Rome and Kampala conferences and meetings of the Assembly of State Parties, documentation from key institutions in the EU and information produced by the Coalition for the ICC (CICC).

(i.e. the predominance of intra-State conflicts). Since then it has been embodied and pursued through the work of *ad hoc* international criminal tribunals and special courts/tribunals for Rwanda, the former Yugoslavia, Sierra Leone and Lebanon. The ICC is also based on this fundamental norm that the international society has to administer justice when human rights suffer the worst violations. Two corollaries of such norm appear self-evident: legal accountability for individuals that have committed criminal offences, and denial of impunity. The Rome Statute, which established the ICC, enshrines this norm in its preamble (1998, p. 1):

> Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity […] the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must been ensured […] determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.

The support for the norm has been reiterated and sustained over time. Every year the Assembly of States Parties (ASP) approves a resolution, usually under the title *Strengthening the International Criminal Court and the Assembly of States Parties*, mimicking, with small variations, the language of the Rome Statute.

The ICC is in fact more than the representation of this seemingly consensual norm. It is meant to complete the process of moving the fight against impunity from states to courts, concluding the transition from "victor's justice" – best represented by Tokyo and Nuremberg – to "true international justice" (Hoover, 2013, p. 265). The distinct way in which the ICC embodies the fundamental norm of justice has led to the elaboration of a particular set of organizing principles and institutional practices. The main novelty of the ICC is that it is a standing body, in contrast with the previous *ad hoc* tribunals created by, and provided with a one-time jurisdictional mandate designed by, the UN Security Council (UNSC). It is thus more prone to develop a greater autonomy vis-à-vis the Council and its veto-power members. In this way, under the veil of consensus around the fundamental norm, contestation has emerged with regards to the Court's limits on matters of judicial independence and jurisdictional scope. This is also the reason why this chapter pays more attention to the institution

than other chapters in this volume: it is the institution that sets the mechanisms by which justice (the fundamental norm) is administered.

The first key organizing principle pertains to matters of 'exercise of jurisdiction' whereby under Article 15 of the Rome Statute the prosecutor of the ICC can initiate investigations and/or prosecutions without the prior authority of state parties, albeit dependent on the ICC judges for decisions on arrest warrants, summons to appear or decisions to proceed to trial (Collantes-Celador, 2016, p. 74). Having said that, the relationship between the Court and national criminal jurisdictions is governed by the principle of complementarity. The ICC is complementary to national criminal courts – it can only deal with cases where it has demonstrated that a state is unable or unwilling to investigate or prosecute on those crimes (Rome Statute, 1998, Articles 1, 17). However, the specific circumstances that would prove lack of ability or willingness are of course far from clear and thus, the subject of ongoing interpretation – and conflict. Secondly, the Court's jurisdiction is not universal and therefore only covers crimes where the nationality of the suspect or the location of the crime belong to a state party, except for those situations where a new state party chooses to exempt itself from ICC jurisdiction over war crimes for a period of seven years after the entry into force of the Statute (Rome Statute, 1998, Articles 12, 13, 124). On the other hand, exceptions to this non-universality rule include non-state parties that approve the Court's jurisdiction for that particular case or referrals made by the UN Security Council (UNSC) using Chapter VII of the UN Charter powers. Finally, another matter pertaining to organizing principles is the independence of the ICC in relation to the UNSC. Although the ICC is an independent judicial institution, there are a number of ways in which this UN organ can influence its work, from referrals to deferrals of specific cases (Collantes-Celador, 2016, p. 75). Yet again, the specific ways in which such powers influence the autonomy of the ICC has been hotly debated – particularly by some permanent members of the UNSC.

Standardized procedures are plenty and occupy most of the Rome Statute and resolutions issued by the Assembly of State Parties (ASP). They have to do with the ways in which investigations and prosecutions take place, the role of victims, decision-making procedures at the ASP itself, funding provisions, and the rules of procedure

and evidence, for instance. They also have to do with the specific ways in which different cases are managed along the process.

Let us see now how contestation played out in our three case studies.

Bilateral Immunity Agreements and International Criminal Justice

Already during Bill Clinton's last term the stance taken by the US towards the ICC was reluctant. However, the inauguration of George Bush's presidency in January 2001 prepared the stage for a head-on confrontation. On 6 May 2002 the new administration withdrew the US signature of the Rome Statute. In June that same year, the US vetoed in the UNSC the renewal of the peacekeeping mission in Bosnia and Herzegovina and "threatened to block all future missions if the Council did not pass a resolution exempting all UN peacekeepers from ICC jurisdiction" (Fehl, 2012, p. 88). Two months later, it enacted the American-Service-Member Protection Act (ASPA), also known as the "Invasion of the Hague Act". It mandated cuts in military aid for states supporting the ICC and provided that "all means necessary" could be used to free US service people from the Court's custody (Fehl, 2004, p. 362). As part of this same effort, the US pressured dozens of states to conclude Bilateral Immunity Agreements (BIAs) that prevented the extradition of current and former government officials, military personnel, civilian contractors and other US nationals to the ICC (Groenleer & Rijks, 2009, p. 171). Sometimes such pressures included serious threats, as in the case of Eastern European countries and the menace to block their NATO applications (Fehl, 2012, p. 89).

Contestation by the United States can be understood in this context as a direct attack on the fundamental norm embodied by the ICC – the norm of justice in the face of the most serious crimes against human rights. Although when it comes to BIAs the attack was focused on an organizing principle – the Court's power to prosecute nationals of non-member states for crimes committed in the territory of a state party – the implications were far broader and threatened the integrity of the ICC project. It could potentially debilitate the Court's capacity to fight impunity with important consequences for its legitimacy and day-to-day effectiveness (see Collantes-Celador, 2016). Moreover, the BIAs did not happen in a vacuum but rather were part of a broader policy of "active marginalization" (Bosco, 2014, p. 178) that also included

public statements from senior members of the Bush administration, attempts to dissuade states from joining and supporting this institution, the use of the veto in the UNSC, and the so-called *unsinging* of the Statute.[6] Against such a broader context of US pressure on the Court from 2002, the EU saw the ICC imperiled (Thomas, 2005, p. 23). The EU interpretation of the US campaign on BIAs was that the "integrity of the Rome Statute" was at stake (Groenleer & Rijks, 2009, p. 172).

Contestation by the US took by and large a justificatory mode, since it was the validity of the fundamental norm itself, and not the application to one particular set of cases, that was at stake. In the early 2000s the US saw the ICC as the organizational embodiment of a norm (the international deliverance of justice to protect human rights against the worst abuses) that had gone too far in its defiance of national jurisdictions and sovereignty and had to be stopped in its tracks. At the same time, the US did frame part of its efforts in ways consistent with the Rome Statute. For instance, BIAs were presented as "article 98 agreements", in reference to Article 98(2) in the Rome Statute that deals with situations when requests by the Court for assistance arresting or surrendering a citizen of a third state are inconsistent with a state parties' obligations under international agreements. In those occasions, the argument was presented in a way that smacked of deliberation.

Sitting Heads of State, between Justice and Sovereignty

African countries were key in ensuring the 1998 signing of the Rome Statute and its subsequent ratification and implementation in subsequent years, as evidenced by the 2004 African Union call to universally ratify the Statute and the fact that Africa is the largest regional grouping in the Court (for a more detailed discussion see Collantes-Celador, 2016). In addition, Uganda, Mali, Central African Republic and the Democratic Republic of Congo are among those that have self-referred cases to the ICC. However, at some point the pendulum swung. Although growing discontent with the Court had been building for a while given that all cases brought to the ICC relate to

[6] Countries like Russia and China do share reservations on the ICC and its powers but, contrary to the US, their policy preference has been to "watch the court closely" through their diplomatic representation in The Hague and the presence of observer delegations at the Court (Bosco, 2014, p. 133). China never joined, and Russia withdraw its signature in 2016 following the Court's decision that the situation between Russia and Ukraine amounts to an armed conflict and that Russia's annexation of Crimea constitutes an occupation.

African 'situations', the tipping point was the Court's decision to indict the at the time sitting heads of state of Sudan (President Omar Hassan Ahmed al-Bashir) in 2009 on the basis of a UNSC referral, and Kenya (President Uhuru Kenyatta and his deputy William Ruto) in 2011 on the basis of actions by the Court's Prosecutor.

What the African Union has protested against is the Court's exercise of its powers under Article 27 of the Statute that extends the "anti-impunity norm" (Rome Statute, 1998; Mills & Bloomfield, 2017), a corollary to the fundamental norm of justice, to sitting heads of state, overriding the immunity prerogatives that have for long been associated with the fundamental norm of state sovereignty, itself based on the UN Charter principles of sovereign equality, non-interference and self-determination (Mills & Bloomfield, 2017, p. 106). In other words, what was at stake was the debate on the territory that the fundamental norm of justice should occupy with respect to the fundamental norm of sovereignty; a crucial debate from the point of view of realizing the Court's objective of fighting impunity.

Some of the tactics employed by the African Union fall under the category of deliberation since it recognized the legitimacy of the Court and tried to use it to stop the cases against the Sudanese and Kenyan Heads of State. Examples include the African Union requests to the UNSC to approve a postponement of the case against President al-Bashir as permitted by Article 16 of the Statute; and the Kenyan campaign to have the rules on the appearance of sitting heads of state at trial changed and which culminated in modifications in the Court's rules of procedure and evidence. Also the use of Article 98(1) of the Statute, whereby requests by the Court for assistance arresting or surrendering a citizen of a third state are inconsistent with a state parties' obligations under international law, in this case the Vienna Convention that provides diplomatic immunity and decisions of the International Court of Justice and the US Supreme Court (Mills & Bloomfield, 2017, p. 104; Sadushaj et. al., 2017). However, other aspects of the contestation by the African Union – albeit with disagreement from some of its member states - relied on a justificatory mode, aimed at weakening the effectiveness, credibility and legitimacy of the Court. Examples include plans for a mass withdrawal from the ICC of its member states or calls to those very same members not to fulfil their obligations as state parties by refusing to cooperate with the Court in apprehending - at the time - President al-Bashir. To this we can add the de-legitimizing

campaign by the African Union and some of its member states that labelled the Court as imperialist, colonial, pro-West and which therefore endangered the much-fought image of a neutral institution in the pursue of universal justice (for more examples see Collantes-Celador, 2016).

The Crime of Aggression and the UNSC

The crime of aggression is mentioned in Article 5 of the Rome Statute, but agreement on a definition, conditions for the exercise of jurisdiction, and for the entry into force of those powers was suspended until the 2010 Kampala Review Conference. The conference "offered states parties the first opportunity to amend the Rome Statute" (Davis, 2014, p. 85), and the debate was accordingly intense. The outcome, known as the Kampala amendments, granted the Court the power to prosecute "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations" (Review Conference, 2010, Annex I.2 – Article 8bis).

Such power was nevertheless granted under a very specific jurisdictional regime. Its activation was postponed until after 1 January 2017 when such decision would need to be adopted by a two-thirds majority of the Assembly of State Parties (ASP), and it could only be exercised over acts committed one year after thirty state parties to the ICC had ratified the amendments. Moreover, the Court's jurisdiction was further limited, not just by other pre-existing clauses included in the Rome Statute (as discussed earlier in this chapter), but also by the inclusion of 'opt-outs' whereby state parties could lodge a declaration of non-acceptance of jurisdiction with the Court's Registrar at any point in time. Moreover, any investigation initiated by the ICC Prosecutor would need to first confirm if the UN Security Council (UNSC) had made a determination of the existence of an act of aggression and, if it had not done so, give it 6 months to consider (Review Conference, 2010).

As per the timeline agreed at Kampala, in 2017 new negotiations took place in the ASP over the activation of the Court's jurisdiction. The most contentious issue during these negotiations was the question of whether the Court would be able to exercise jurisdiction over nationals of state parties that had not ratified the aggression

amendments and who had also not applied for an opt out. The agreement ultimately reached by the ASP sets 17 July 2018 as the day the crime of aggression is officially activated and takes what is considered in the literature as the "restrictive position" on its jurisdictional scope, meaning the Court does not have jurisdiction over the two categories abovementioned (Akande, 2017). The only way of overruling this restrictive position is if the UNSC refers a crime of aggression to the ICC.

In this occasion what was being contested was not the fundamental norm, that is, the administration of justice in the face of the crime of aggression, a corollary to the prohibition on the use of force as described in the UN Charter, and therefore worth of the label of "the arch-crime which most menaces international society" (Cassese, 1999, p. 146). Rather, the attention was on an organizing principle; i.e. the level of independence that the Court should have in relation to the UNSC. In this case the question was whether the ICC should have the authority to independently determine violations of the crime of aggression or whether such authority should remain exclusively in the hands of the UNSC. While the US, who was actively involved as an official observer in the negotiations, had a number of concerns around the crime of aggression, the crux of its position was indeed on the matter of ICC-UNSC relations over this crime, a position that was shared by the other permanent members of the UNSC.

Such divisions of opinion could also be found among key supporters of the Court, namely members of the pro-ICC "Like-Minded Group" of states (that included in addition to the "EU 13", African, Caribbean and Latin American countries as well as Canada and Australia). NGOs that were part of the Coalition for the International Criminal Court (CICC) equally showed doubts on introducing strong provisions on the authority of the ICC over the crime of aggression (Davis, 2014, p. 87; CICC, 2010, Executive Summary). However, as we will see later on, their motivations were different to those of the US.

Contestation was primary based on social practices that fall under the category of deliberation, given that all discussions took place in the formal framework of Statute-related negotiations (Rome and Kampala) and the Assembly of State Parties, and "according to semi-formal soft institutional codes" to use Weiner's terminology (2014, p. 1). In other words, all actors – including known opponents like the US -

shared the legitimacy of the venue, the process by which the issue would be decided, and the fundamental norm embodied by the Court.

The EU and International Criminal Justice

The EU has lent a good deal of support to the ICC. EU member states were amongst the first to ratify the Rome Statute, and they contribute the largest share to the ICC budget. Key ratifications by third states (most notably that of Japan in 2007) have also been attributed to the "tireless efforts of the European Union and its member states" (Groenleer & Rijks, 2009, p. 170). Herman van Rompuy, at the time President of the European Council, explained the relationship between the EU and the ICC as follows: "support to the ICC has become one of the symbolic anchors of the EU's external policies, fully in line with our defining values" (European Council-the President, 2010).

However, during the Rome negotiations the EU's policy towards the ICC was very much driven by the policies of individual member states. Differences were too important regarding organizing principles, particularly between the "EU 13" (those EU Member States that belonged to the pro-ICC "Like-Minded Group") and the UK and France that held positions closer to those of the other UNSC permanent members. Those differences were not minor, as they related to "the definitions of crimes [...], the preconditions for the Court's exercise of its jurisdiction [...], 'triggers' for investigations [...], and the 'admissibility' of cases in light of domestic criminal investigations" (Fehl, 2012, p. 85; see also Aoun, 2008). Such differences precluded the use of the EU as an institutional framework to put together any common position, apart from "broad statements of the Council Presidencies merely welcoming the proposed establishment of the ICC" and the presence of the Commission as an observer (Groenleer & Rijks, 2009, p. 169, 178).

Just after the Rome Statute received the required number of ratifications to enter into force in July 2002, a special subarea on the ICC was added to COJUR (the Council's Public International Law Working Group). COJUR/ICC, a technical body filled with legal experts from the member states, has acted since then as the key internal mechanism for policy coordination in the EU. COJUR-ICC meets between four and five times a year in Brussels and once a year in The Hague in closed sessions, which involve

representatives from the member states, the Council, the EEAS and the Commission. Recommendations made by COJUR-ICC are frequently just channeled through COJUR, taken on by the Political Security Committee, and later adopted by the Council without "much discussion" (Groenleer and van Schaik 2007, p. 981). In this way, since the entry into force of the Rome Statute, socialization dynamics within the CFSP bureaucracy and policy and institutional efforts to streamline internal coherence on ICC-related matters have allowed for broad consensus to prevail (Groenleer & van Schaik, 2007, p. 981; Collantes-Celador, 2012; Costa and Müller, 2018). Nevertheless, such efforts have not produced a perfect socialization into a common position. Differences among member states and other intra-EU actors have re-emerged at significant junctures in the development of the Court, particularly when such junctures have been accompanied by contestation from other key actors in the international system, as illustrated by the three episodes analyzed in this chapter. Such contestation has usually taken place with most of the EU in one side of the debate and France and the UK on the other (together with other permanent members of the UNSC).

Davis has argued that when there are major debates about the relationship between the ICC and the UNSC "the EU does not reach a common position". And it does not even try too hard. Disagreements on the organizing principles that shape this relationship are taken for granted, and thus "EU member states in ASP can and do build alliance with a range of like-minded non-EU ASP members" (Davis, 2014, p. 93). Such shows of disunity have actually even been described as more desirable than pushing the pursuit of consensus too far: "as EU member states already coordinate their positions through the EU" on all the other issues related to international criminal justice, "further coordination could risk a lowest-common-denominator approach" (Davis, 2014, p. 93) that would leave the EU with the worst of two worlds. Intra-EU contestation is thus an imperfect term for what is mostly an overt display of diverging opinions on organizing principles (rather than internal disapproval) among EU member states at meetings of the ASP or the UNSC, on the background of a broad consensus on the day-to-day support for the fundamental norm of justice enshrined in the ICC. With the exception of the BIAs, where there is some evidence of deliberation within the EU, the case studies presented in this chapter illustrate clearly the abovementioned fact.

The EU and BIAs

The move by the US from lukewarm reluctance (Clinton) to all-round opposition (Bush) was seen by many EU member states as demanding a common response. EU countries saw the involvement of the Union as a way to "overcome internal differences on the admissibility and desirability of a compromise with the Bush administration" (Gronleer & Rijks, 2009, p. 181). Having said that, internal coherence did not emerge spontaneously. Initially, EU member states were all over the map. Some EU member states openly opposed such agreements, and wanted to rule them out completely – Germany, Austria, Belgium, Finland, Greece, Ireland, Luxembourg and Sweden. The UK and Italy opposed such prohibition, though, "and even indicated their readiness to follow the US requests". Finally, France, Denmark, Portugal, Spain and the Netherlands seemed to hold a middle position. To take the case of France, on the one hand it "argued that the Rome Statute allowed the Security Council to defer ICC investigations on a case-by-case basis" but, on the other hand, it was also clear in its position that "the Statute was never designed to provide sweeping immunity from prosecution" (all quotes are taken from Fehl, 2012, p. 89; see also Thomas, 2005, pp. 26, 36).

The EU response to US pressure to sign BIAs was strongly shaped by the Rome Statute as such, as it created a corpus of norms to which EU actors could refer to. In early August 2002 candidate states asked the European Commission "whether the EU would consider a bilateral agreement with Washington to be consistent with the requirements of the Rome Statute" (Thomas, 2005, p. 38). The Commission's Legal Service concluded that candidate states should refuse to sign such agreements as proposed by the US. In parallel, COJUR/ICC had concluded also that the US request was unacceptable as it stood, a conclusion endorsed by the Political Security Committee on the 10th of September 2002. In spite the meeting was "contentious", most COJUR/ICC members considered, "regardless of their governments' position", that the US quest for immunity was "an assault on the Court" (Thomas, 2005, p. 37). The leakage of the Commission's opinion to the press two days before the EU foreign ministers had to discuss the issue shaped the debate in terms of whether a minority of member states could "trump the majority of member states, supported by the European Commission, the European Parliament and an attentive public" (Thomas, 2005, p. 36).

Accordingly, by the end of September 2002 the EU General Affairs Council unanimously adopted a number of "guiding principles" that established that BIAs could not be signed as proposed by the US. They could only be permissible under two conditions, which would have made BIAs meaningless for the US: "no impunity" (again a reference to the fundamental norm) – i.e. "if they obliged signatories to prosecute crimes domestically"; and "no reciprocity" – i.e. "if they did not protect the nationals of ICC states parties from surrender to the court" (Fehl, 2012, p. 89). In spite of the initial division, unity among EU members states on this matter was reflected by the fact that none ratified a bilateral non-surrender agreement with the US, including Romania, whose government had initially signed one.

The EU tried to deal with the US proposal over BIAs in a constructive manner, by exploring the leeway enabled by the Rome Statute itself – after all, BIAs had been framed by the US as "article 98 agreements", even if as Thomas (2012, p. 463) points out, most legal experts did not seem to agree with this argument. In other words, it addressed the US concerns as if they had to do with organizing principles, and as if they were advanced in a deliberative manner. However, this effort was to no avail. The limits imposed by the guiding principles left US intentions, which amounted to an all-out contestation of the fundamental norm underpinning the ICC, outside of what was perceived as acceptable by the EU.

The EU and the Immunity of Sitting Heads of State

The EU showed by and large internal unity vis-à-vis the challenge posed by the African Union to the fundamental norm embodied by the Court, defending the anti-impunity norm in their reaction. This position is best exemplified by the words of the President of the European Council,

> All parties to the Rome Statute should fully respect their obligations. These obligations are part of international law, they cannot and must not be overruled by political statements, actions or inaction that are incompatible with their undertakings. The European Union will continue to pay close attention to the implementation of these commitments in its external relations with other partners (2010, cited in Collantes-Celador, 2016, p. 84).

Underlying the EU position was recognition that the Court's credibility and legitimacy depends on states cooperating to ensure it functions and delivers on its objectives of providing justice for the most serious violations of human rights and fighting impunity. This is clearly illustrated in the uncompromising stance towards acts of non-cooperation that the EU presented in its 2013 *Response to Non-cooperation with the International Criminal Court by Third States,* based on the work of the COJUR/ICC. Relations between the EU and Kenya suffered following the implementation of this guidelines: "Nairobi is particularly aggravated by the European Union's policy of limiting contacts, which largely avoids any encounter with the accused president and vice-president but at the same time continues existing cooperation as long as the Kenyan government cooperates with the ICC" (Hellwig-Bötte, 2014, p. 3).

The existence of intra-EU unity does not predetermine the type of policy response that follows. The arrest warrant on al-Bashir is a good example. Bosco points out that there was broad European support when Denmark announced that al-Bashir would be arrested should he appear at the December 2009 Copenhagen climate change conference. But he also shows that "the European major powers – Britain, France, and Germany – were most ideologically inclined to support the court […] often struggled to respond quickly to Bashir's moves" (2014, pp. 156-157). Such a reality prompted former ICC Chief Prosecutor Moreno-Ocampo to complain that "the European Union was 'doing nothing' to pursue Bashir", even if those same EU member states were key to ensuring that the UNSC referred the case of Darfur to the ICC (Bosco, 2014, p. 156). As discussed elsewhere (Collantes-Celador, 2012, pp. 157-158), the British and French considered a deal – that ultimately came to nothing - that would have dropped the indictment of al-Bashir in exchange for Sudan transferring to the ICC other officials indicted in April 2007, supporting the peace process and permitting the hybrid UN-African Union peacekeeping mission in Darfur (UNAMID) to fully deploy. The British and French consideration of this deal may have been influenced by concerns over the impact the al-Bashir's indictment could have on conflict resolution in Darfur, the peace process between north and south Sudan and the safety of international personnel on the ground.

What the examples of the UK, France and Germany show is that, given the complicated situation on the ground due to ongoing conflict, these countries may have

had oscillating positions in relation to the 'peace vs justice' debate, but this fact does not necessarily detract from their support of the EU position on non-cooperation with the Court. The EU as a whole found itself making similar temporary concessions. Those same factors may have been behind the European leaders' consideration in 2011 to put on hold for a year the ICC case against al-Bashir to show support to the Southern Sudan succession referendum and to encourage future restraints on human rights violations in Darfur.

The EU and the Crime of Aggression

As seen above, a sizeable group of pro-ICC actors had deep reservations on extending the jurisdiction of the Court to include the crime of aggression, out of concern that the justice norm embodied by the Court could be harmed. Their hypothesis was that there was a real possibility that the energy spent to ensure that the Court would be shielded from politics could be undermined depending on how much power was afforded to the UNSC over ICC jurisdiction for this type of crime (Davis, 2014, p. 87; CICC, 2010, p. 9). Such politicisation could arise from "the hurdles to its application, interpretations of its meaning, and the political interests involved" (Duerr, 2017) given that ultimately with such crime the ICC would be prosecuting "state policy in a way that other crimes need not" (Bosco, 2014, p. 54).

Complementary to this fear of politicisation were the arguments that activating the crime of aggression could work against the goal of universal acceptance of ICC jurisdiction and/or could endanger military interventions under the umbrella of the 'Responsibility to Protect' (R2P); an organizing principle that operating outside the Court's framework was nevertheless complementary in the pursue of the fundamental norm of human rights protection (for a discussion of the relationship between the ICC and R2P see Ainley, 2015).

Due to significant divisions among EU member states, there was no common position at Kampala, which meant that the Union played a very limited role, if at all (Davis, 2014, pp. 87-88). On the one hand there were countries like the UK and France that sided with the permanent members of the UNSC on the issue of giving exclusive rights to the Security Council to commence prosecutions by the Court "unless there were changes to the jurisdictional filter" (Davis, 2014, p. 87; Bosco, 2014, p. 164;

Marquez Carrasco, 2010). On the other hand, there were countries fully supportive of providing the Court jurisdiction over this crime, such as Greece, Germany – who fought hard to have this included as early as the Rome Statute - or even Poland, whose representative expressed the following view during an October 2017 debate at the UN General Assembly: "throughout history, Poland repeatedly had fallen victim to aggression […] It is our dream to save others from such cruelties" (cited in Duerr, 2017 – see also Kreß, 2018).

The lack of a common position within the EU on the crime of aggression has continued since Kampala, despite the momentum generated by the German ratification of the amendments (June 2013) and European Parliament resolutions calling on all member states to ratify (see, for example, European Parliament, 2011). In this regard, the difference between the Rome Conference (1998) and the Kampala Conference (2010) is striking. In both cases the EU struggled to develop a single voice, but while in the first case the adoption of the Rome Statute allowed member states to rally behind it and make common cause, the Kampala amendments have continued to prove divisive. By 11 April 2019 and out of a total of 37 ratifications, 19 EU member states had completed the ratification process with an additional five working actively towards the completion of that process.[7] Missing from this list were the UK, France, Denmark, and Sweden. Different interpretations among member states on the entry into force procedures for this type of crime as stipulated by the Kampala amendments seem to be behind this slower than expected ratification process (no author, 2013). The lack of internal EU consensus continued during the 2017 negotiations in the Assembly of State Parties over the activation of ICC jurisdiction over this type of crimes, as per the timeline agreed at Kampala. The "restrictive position" that prevailed was advocated by some EU countries, but not all, and those that actively supported this position – UK, France – joined forces with non-EU member states like Japan, Colombia and Canada (Kreß, 2018, p. 9).

[7] This data can be found at https://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/ [last accessed 14.04.2019]

Patterns of EU Behaviour towards Norm Contestation on the ICC

By now it should be clear that agreement within the EU has never been complete when it comes to its policy on the ICC due to debate within the Union on some of the organizing principles that enable the translation of the fundamental norm embodied by the Court into specific actionable decisions. Those instances of lack of unity among members states and other intra-EU actors have tended to coincide with key junctures in the development of the Court when there were significant levels of external contestation. In this chapter we sought to answer the question: Can the EU rally behind a common position or will external contestation promote internal differences too? Another equally interesting question is whether the EU can maintain its authority and credibility as a norm promoter in the face of broad international contestation of the ICC. This chapter cannot provide definitive answers to these two questions on the basis of the three case studies explored: the US BIAs challenge, the African Union challenge and the challenge of incorporating and activating the crime of aggression. Nevertheless, these three cases – the most relevant episodes to date in terms of norm contestation of the Court[8] – allow us to begin to think of potential patterns in EU behaviour when confronted with international contestation.

The three case studies analysed here indicate that the capacity of the EU to articulate a unified response to the challengers of the ICC seems greater in instances of 'hard' contestation, defined here in relation to the issue under contestation and the mode such contestation adopts. When contestation has immediate and substantial consequences on the fundamental norm the Court embodies, and takes a justificatory mode, then it seems to encourage the EU to rally behind a common position, even where there previously was dissent. The Union considers the ICC as an embodiment of its defining values. Actually, it was not until the adoption of the Rome Statute that the EU was able to overcome its own differences and have a common position on international criminal justice. Since 1998 the EU has made the development of the

[8] Although too soon to explore, another potentially key juncture to consider in the future is the Trump administration's increasingly hostile approach to the ICC that includes, in addition to the legal tools provided by the ASPA and BIAs, threats to "ban its judges and prosecutors from entering the United States […] sanction their funds in the U.S. financial system, and, we will prosecute them in the U.S. criminal system. We will do the same for any company or state that assists an ICC investigation of Americans" (Bolton, 2018).

Court – and therefore of the fundamental norm of justice with the corollaries of legal accountability/individual criminal accountability and denial of impunity - into the linchpin of its role in this field (for examples see Collantes-Celador, 2016, 2012). On the other hand, when contestation is 'soft' – i.e. when the contestation accepts the fundamental norm and focuses on challenging organizing principles by making reference to the rule and norms associated with the ICC itself - then the EU can arguably be internally divided. EU member states may align themselves with the different sides of international debates on matters such as the jurisdiction of the ICC and its relationship with the UNSC (with France and the UK often distancing themselves from the majority of the EU and siding with other UNSC permanent members). Table 1 (below) summarizes the findings of our three case studies and presents this potential behavioural pattern in response to 'hard' and 'soft' contestation, the reasons of which seem quite straightforward: there is a broad EU consensus on the fundamental norm, but there is also a tradition of diverging positions at the level of organizing principles.

Table 1: The EU faces contestation over the Court's normative basis

	BIAs	**Sitting heads of state**	**Crime of aggression**
Dominant type of norm contested	Fundamental norm: the US contests the ICC as such.	Fundamental norm: limits of justice in the face of sovereignty (sitting heads of state)	Organizing principle: jurisdiction, relationship with UNSC
Dominant mode of contestation	Justification: the validity of the norm is contested	Justification: the norm is contested with little regard to ICC provisions	Deliberation: debate on the equilibrium between ICC and UNSC, under ICC parameters
EU response	Unity (in spite of initial differences): Openness to negotiate within	Unity (in spite of initial differences) especially on the issue of non-cooperation with the	Division: UK and France closer to other UNSC permanent states, but divergences also found among EU members states

	ICC parameters.	Court.	in the post-Kampala phase

Source: Authors' elaboration

One caveat is on point here. The fact that contestation of fundamental norms (or its immediate corollaries) may promote intra-EU unity does not necessarily mean that it will also have a decisive role in shaping the content, direction or tone of that united response – i.e. it may not necessarily foster a strong, uncompromising response by the EU. To be sure, the EU might face such contestation by way of a forceful response that puts principles first and avoids making any overture to the contesters. But the other option is also possible. The EU might as well unite around a more nuanced position that tries to accommodate some of the demands made by challengers, as we have seen in the case of BIAs. However, such efforts might not always be able to satisfy the contester. Since the EU will be reacting within the limits of the ICC, any offer will probably be far from accommodating the kind of dissent that would animate contestation of the fundamental norm in a justificatory mode.

All in all, we think this chapter provides food for thought on the impact that contestation of the international liberal order can have on EU foreign policy and its authority as a norm promoter. It also allows us to follow on a debate began by Thomas (2009) on the role that the institutional location of negotiations plays when assessing the capacity of the EU to maintain unity when confronted with US norm contestation in the framework of the Court since 2002. What the three case studies explored in this chapter suggest is that the effect of contestation may depend, not only on institutional location, but also on the nature of contestation itself. It could tend to push the EU towards unity if it has to do with fundamental norms; but it can foster (already existing) internal EU differences when it has to with organizing principles. Although too soon to reach firm conclusions, this analysis seems to indicate that the internal legitimacy of EU foreign policy norms and fundamental values in the area of international criminal justice remains unaffected. Externally, the contestation of key organizing principles should not be considered of secondary importance, though, since they are closely associated with the workings of the ICC and thus with the most advanced embodiment of the fundamental norm of justice.

Conclusion

This chapter has looked at the ways in which external contestation at the international level can shape internal contestation within the EU, and has done so by looking at the issue area of international criminal justice. In this policy field the fundamental norm that individual criminal accountability and the denial of impunity for the most serious crimes against human rights must be uphold by the international community has now been broadly accepted, but it has also led to contestation in two different ways. First, the norm itself has been contested – at its margins. In the early 2000s the US saw the administration of this norm by the ICC (a permanent court independent – to a significant extent - from the UNSC) as a threat and campaigned to obtain bilateral immunity agreements to shelter its nationals from the ICC jurisdiction. Later, some African states with the institutional support of the African Union opposed the extension of the norm to sitting heads of state, in what we read as a clash between the fundamental norm of justice and that of sovereignty. On other occasions contestation has revolved around key organizing principles. The debate on the crime of aggression has featured concerns about the jurisdictional independence of the ICC vis-à-vis the UNSC.

Each of these instances of external contestation has had a distinct impact in the EU. It is not possible for us to make causal claims here, but the three cases do provide information that can suggest a hypothesis. The EU has rallied behind the fundamental norm when it has been contested, but it has not responded in a unified way to debates around organizing principles. This reflects the existence of long-lasting intra-EU differences on the relationship between the ICC and the UNSC. These differences go back to the negotiation of the Rome Statute in 1998 and have to do with the fact that France and the UK tend to look at the issue of jurisdictional independence from the vantage point of their permanent membership of the UNSC. In this way, external contestation can resonate with the internal one. However, one should not think about intense debates within the EU decision-making bodies in search for a common position – a lowest common denominator. Internal contestation here has consisted basically in the external display of European disunity at the ASP and the UNSC. At the same time,

when necessary the EU has been able to leave internal differences behind in defence of the fundamental norm. Here the evidence seems to suggest that the weight of legal argument in decision-making within the EU on the matter of international criminal justice might have eased the emergence of a mutually accepted position among previously divergent national positions.

Finally, none of this has stopped the EU from making a difference – not even the recurrent bouts of internal dissensus. The ICC, and thus the fundamental norm embodied in the Rome Statute and operations, has had a steady ally in the EU when it comes to promoting the universalization, effectiveness and day-to-day functioning of the Court. The relationship between external and internal contestation is a nuanced one. That between internal contestation and effectiveness too.

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Chapter 7: The European Union and the international criminal court: contested abroad, consensual at home?

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