The European Union’s ambivalent role in the promotion of the International Criminal Court. The case of the EU/US contention over “Bilateral Impunity Agreements”


FIRST DRAFT

Summary
In 1998, the EU Member States failed to coordinate their positions as regards the elaboration of an International Criminal Court Statute, some of them joining the group of “Like-Minded states” which enthusiastically advocated the creation of the Court, while others, most notably France, adopted a cautious “realist” stance. Since then however, support for the ICC has progressively developed into an official EU norm and a component of EU international identity. A milestone of this process is the Common Position adopted in June 2001, which recognises that the ICC principles and objectives are “fully in line” with those of the EU and commits the latter and its Member States to support the Court. This commitment has materialised through active promotion of the signature and ratification of the ICC Statute by candidates to EU membership and third countries, the providing of financial and political assistance to the Court, the adoption of initiatives to “disseminate” the values of the Rome Treaty, and a close follow up of the negotiation of relevant legal instruments to ensure that they respect the integrity of the Statute.

This policy has brought the EU into collision course with the United States, for the latter has been trying to circumvent the ICC Statute since its inception. One of the most illustrative episodes of this conflict is that of the “Bilateral immunity agreements”. The USA has launched in 2002 a wide-scale campaign to persuade or press other countries to conclude agreements ensuring that no US serviceman or citizen would ever be handed over to the ICC. Since this campaign has targeted both EU Member States and candidates to membership, it has triggered an adverse reaction, with the European Council deeming the agreements “illegal”. However, close observation shows that the EU attitude has been neither void of ambiguities nor constantly unanimous.

Building on this episode, this paper intends to explore how ICC values have evolved into an EU norm and become a distinctive feature of its identity, and to measure the extent to which the EU and its Member States have practically contributed to the inception, consolidation and entry into force of the ICC - and, sometimes, to its weakening. In so doing, it will address the issue of the processes and the various actors (Member States, EU officials, external partners such as the United States, advocacy coalitions and lobbying NGOs) that influence the shaping of the EU role in the promotion of the ICC and weigh on the way the Union actually implements its international
obligations in this regard. The insight will show that in spite of a genuine EU support for the ICC, the EU policy-making and policy-implementing leave room for accommodation with the diverging interests of its own members and its major ally, the USA.

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Europe has been at the very foundation of the present Westphalian international system with its nation states supposedly enjoying equal sovereignty in a self-help world. Launched after the disasters brought by nationalism during World War II, the European integration process has however signalled a will to move beyond traditional power politics to thread instead new solidarities among previously warring states and to redefine governments’ responsibilities towards their citizens whose well-being and collective prosperity rose to the top of political priorities. This re-foundation of (then parts of Western) Europe ushered an era in which, internally, liberal democracy and the rule of law came to be interiorized as the legitimate mode of government while, externally, the absolutism of sovereignty was curbed and increasingly replaced by “pooled-sovereignty” as the scope of European communitarization and cooperation widened. This evolution led to the emergence of a distinctive set of European values largely focused on the individual and his/her fundamental rights. Hence, as it gradually developed into an international actor of a “normative” kind with a “principled” foreign policy, the EC/EU acquired a distinctive role in the promotion and defence of human rights.

When the project of a permanent international criminal court was resuscitated in the 1990s and brought to its final stage with the convening of a diplomatic conference of the plenipotentiaries, the EU Member States (MS) were united by a Treaty on European Union solemnly stating their “attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law”; they also had a routinized framework for cooperation under the CFSP pillar. Yet, the Fifteen did not manage to devise a common approach to engage collectively the Rome negotiations (15 June-17 July 1998). Moreover, even though all of them signed the Rome Statute establishing the ICC and actively involved in the process paving the way to the entry into force of the Court, it took them three years to come up with a Common Position (CP) on the ICC. However, this statement did not totally discard European ambiguities regarding international justice. This has been particularly visible when the United States, under the leadership of the Bush Administration, launched an overall campaign against the Court as its entry into force loomed large in 2002: Europe and its MS hovered then between a firm support to the ICC and accommodation in meeting US demands, notably concerning the “Bilateral immunity agreements” (BIAs) Washington tried to impose upon a vast majority of the world’s states.

This contradictory pattern highlights two of the most deeply entrenched dilemmas of EU’s international posture - and hence obstacles to its full autonomous development - which have been thoroughly analyzed by Gnesotto: the America/Europe dilemma and the nation/integration one. As will be shown, the American and national sides of the equations tilted the balance more than once against a purely
normative” course of action as EU policy-making and policy-implementing under the CFSP intergov-
ernmental provisions leave room for accommodating MS diverging interests and those of their Atlant-
tic partner. Yet it is interesting to observe with hindsight that the EU commitment has stiffened
over time in spite of internal divergences and US pressure. This evolution can be explained by the
combined effects of a widely shared and genuine preference for international justice and a socializa-
tion process fuelled by the dialectical interaction of EU discourses and policies and those of the vari-
os ICC advocates (outside and inside EU) in the globalizing international environment of the 1990s
and 2000s. This interaction has somehow led to the development of a EU “loyalty” towards the ICC.

Focusing mostly on the contention over the BIAs, this paper will try to review the evolution of EU's
position and the role it has played in strengthening and/or weakening the nascent court. In doing so,
it will progressively highlight the processes and actors that influence the EU role in this realm. The
first section will quickly review the divergent courses the EU and the US gradually adopted on the
ICC. The second one will elaborate on the US campaign against the Court and how the EU responded
with a mix of resolve and accommodation. Considering that on the whole the EU stood its ground in
defence of the Court, the third section will try to analyze the dynamics that have reduced – though
not totally erased - the logics stemming out of the often overlapping America/Europe and
integration/nation dilemmas.

I. Going opposite directions: the early evolution of EU and US positions on the ICC

In the early 1990s, while the EC/EU was adapting to the post-Cold War environment by deepening
and enlarging, the US has been championing human rights worldwide and has taken the lead in the
creation of the ad hoc international tribunals for ex-Yugoslavia and Rwanda. When the UN General
Assembly set up in 1995 a Preparatory Committee entrusted with the drafting of a permanent court
statute, the US actively engaged the work of that “PrepCom” and so did EU MS; the participation of
the EU as such was irrelevant since the issue at hand fell under the intergovernmental CFSP pillar and
no common policy was developed. By the time the diplomatic conference was convened to negotiate
the final terms of the statute, a group of “Like-Minded” states favourable to an independent Court
had emerged, comprising almost all of EU MS; France however shared the US preference for an in-
stitution subordinated to the Security Council. The resolve of the Like-Minded group and the unre-
lenting activism of NGOs led to a text based on compromises that gave the Court a certain degree of
independence but circumvented in many respects the universal reach some of its supporters wanted it
to have. Still, the US voted against the Statute, along with a small group of states with questionable
human rights records; on the contrary, France overcame its reservations and signed the Statute
along with its EU partners. This was the starting point for the diverging evolutions of US and EU at-
titudes.

At Rome, US paramount goal was a court it could control via the Security Council. When it failed to
secure additional compromises, the US voted against the text and refused to sign it. However, the
Clinton Administration did not slam the door and opted for a “constructive engagement” with the new
PrepCom set up at Rome to negotiate the texts needed to prepare the entry into force of the ICC.
Many proponents of these negotiations described the US involvement as a constant effort to get the
exemption it sought for its citizens “without acknowledging that such an exemption would require an
amendment to the Statute”. On 31 December 2000, as he was about to leave office, President Clinton
unexpectedly signed the Rome Treaty but plainly stated: “I will not, and do not recommend that my
successor submit the treaty to the Senate for advice and consent until our fundamental concerns are
satisfied”. Though it did not break ties overnight, the Bush Administration started to withdraw from the PrepCom activities. When the entry into force of the Rome Statute loomed large in early 2002 in an international context marked by the 11 September events and the war on terrorism, the US mounted an overt campaign against the ICC. Alleging that the Court will result in spurious and politically motivated complaints against its nationals, the Administration set out to shield all Americans from its jurisdiction. On 6 May 2002, President Bush sent a letter to Secretary-General Annan stating that the US does not intend to ratify the Rome Statute and considers itself released from any legal obligation arising from Clinton’s signature. By that time, the EU MS had a Common Position that allowed them to meet the US decision “with disappointment and regret”.

When the pre-Rome PrepCom started its work in 1996, the CFSP mechanism was a relatively new instrument and there was no decisive attempt by MS to elaborate a common policy on an issue perceived as highly sensitive by most national defence apparatuses. However, a minimal consultation pattern has emerged in New York as MS’ delegates regularly met during the sessions; interestingly, these meetings were open to NGOs. The UK, that held the EU Presidency in early 1998, convened a meeting in London (25-26 February) to broker a common approach to the Rome Conference. The effort to trigger an EU coalescence failed, and so did a resolution unanimously adopted by the European Parliament (12 March) calling on “the Member States, the Council and the Commission to commit themselves to a successful Diplomatic Conference (...) with the prompt creation of an independent and effective international Criminal Court”. Actually, the French position was the main obstacle to a common approach before and during the Rome Conference. Therefore, the EU was absent from Rome: neither the Commission nor the Parliament was represented and Austria limited itself, in its EU presidential capacity, to general well-wishing discourses. As the lack of a common position did not prevent a minimal degree of coordination and consultations, Austria also ran the regular meetings of the Fifteen’s delegations during the Conference. Naturally, the Frenchs knew where their partners stood in the final hours of the Conference and could hardly afford to choose a radically different course once they obtained the inclusion of the controversial “opt-out” Article 124. Actually, France was among the six MS that signed the Treaty right on 18 July 1998 and the second to ratify it on 9 June 2000 (using however Article 124).

As all EU MS ended up on the same side, tensions receded. It became common place to have successive Presidencies reporting on the ratification process and expressing EU’s commitment to the Court in international fora and its willingness to contribute to a prompt entry into force of the Statute and the widest membership possible, and “to share ratification-related experience and expertise with interested States”. More importantly, in the PrepCom sessions to which the EU was invited as an observer, EU coordination amplified. As the US increased its efforts to secure its objectives, so did the Europeans in order “to reach a common position calling for the respect of the integrity of the Statute, while continuing a constructive dialogue with all States”.

When signs multiplied that the Bush Administration was about to antagonize the ICC, the convergence between the Fifteen’s positions had already reached a threshold and CFSP mechanisms - reviewed by the Treaties of Amsterdam and Nice - a certain degree of fluidity. Moreover, most governments “have become comfortable going forward with entry into force and the process of establishing the institution even without the United States”. The context was ripe for a Common Position: on 11 June 2001, the Council recognized the congruence of EU and ICC objectives and principles and committed the Union “to pursue and support an early entry into force of the Rome Statute and the establishment of the Court” by: raising the issue with third states and organizations; adopting initiatives aimed at disseminating ICC values, sharing MS’ experience... The Fifteen also pledged to
contribute in the framework of the PrepCom to the early finalization of the additional instruments and "to support solutions (...) consistent with the letter and the spirit of the Rome State, taking into account the need for ensuring the widest possible participation thereto".

Through this Common Position, the EU unquestionably embraced the cause of the ICC, yet it took the Fifteen almost one year and an insisting EP resolution to come up with an Action Plan developing the means by which they intended to fulfil their pledges. For its part, once the entry into force of the Statute was set on 1 July 2002, the Commission made funds available to an "Advance team" of experts responsible for preparing the effective establishment of ICC's organs the following spring. By that time however, the US were about to unleash their campaign against the incipient Court.

II. European reactions to the US campaign: sorting out normative preferences and political sensitivities

The US "un-signing" of the Rome Treaty, deemed by many as a violation of international law, was followed by frontal attacks launched in two different arenas: the Security Council (SC) where the US enjoys powerful leverage as the dominant Permanent Member, and the world's stage through the combined American Servicemembers Protection Act (ASPA)/BIAs strategy. EU MS have tried to contain this dual assault in order to preserve the ICC while privileging non-confrontational approaches. Therefore, they have bowed in many instances, collectively or individually, to US pressure or have shown some readiness to accommodate US demands, at least in part. In spite of these infidelities to their normative preferences regarding the integrity of the Statute, the Europeans managed to score some victories that were vital to the ICC.

A. Arm twisting in the Security Council: European defeats and scores

Shortly after the un-signing, the Bush Administration threatened to shut down UN peacekeeping operations worldwide if no provisions were made by the SC to deny the ICC any jurisdiction over the personnel involved. The issue was particularly pressing as the UN mission in Bosnia-Herzegovina had to be renewed by the end of June 2002. Taking that opportunity to increase its pressure, the US vetoed the extension of the mission, linking its consent to a solution satisfying its immunity demands. Because of the central role played by the US in peacekeeping, the SC members were facing a big dilemma: either undermine the ICC by rewriting the Rome Statute, or place the future of peacekeeping at risk. Considerable alarm was expressed worldwide; on the insistence of Canada, the SC, presided by a lukewarm UK, held a public meeting where concerns were raised. The next day, the SC unanimously adopted behind closed doors a compromise based on a British-French proposal: Resolution 1422 (12 July 2002).

Congruent with initial US demands, this Resolution requests the ICC "for a twelve-month period starting 1 July 2002 not (to) commence or proceed with investigation or prosecution of any (...) case" involving personnel from non-Rome Statute parties for acts or omissions relating to UN peace operations. However, whereas the US initially sought an exemption that "would remain in effect indefinitely until the Security Council votes to lift it, meaning that any single permanent member of the Security Council could use its veto to block prosecution forever", Resolution 1422 only provided for the possibility of a yearly renewal of the exemption. Unsurprisingly, Resolution 1422 raised sharp criticism, notably for its alleged abusive use of Chapter VII of the UN Charter and of Article 16 of the Rome Statute, for its questionable legality and implicit rewriting of the Statute.
The EU and its MS did not share these objections however. Actually, the UK and France had actively negotiated the terms of the Resolution to broker a classical diplomatic compromise which they presented as a satisfactory outcome, and the EU as such joined in welcoming the Resolution as a suitable solution “that does not harm the integrity of the Rome Statute of the International Criminal Court, and which ensures the uninterrupted continuation of UN peacekeeping operations”.

On that occasion, the EU has again displayed its readiness to bridge practically and discursively the gap between normative commitments and the contingencies of the usual diplomatic business prone to accommodate the sovereign demands of powerful states.

The next year, in the aftermath of one of the most dramatic rows over the Atlantic that saw the EU split into an “Old Europe” opposing the US war in Iraq and a “New Europe” committing troops to the enterprise, France and Germany were less prone to accommodate Washington’s desiderata. Both abstained from voting on a Resolution (no. 1487, 12 June 2003) renewing the twelve-month exemption while the UK and Spain did vote positively. This time however, the reaction of the EU was more mitigated, with the Greek Presidency plainly stated “that an automatic renewal of that resolution would be undermining the letter and the spirit of the Statute of the ICC and of its fundamental purpose”. Finally, the US had to withdraw the draft of a third renewal resolution because it lacked accommodating votes in 2004.

B. The ASPA/BIAs campaign: EU search for a middle ground

Actually, the other US battle against the ICC met a similar fate as it also withered away partly unwon, notably due to EU resistance. The first ASPA draft was introduced in 2000 but opposed by President Clinton for a variety of reasons. Another draft was passed to the Senate in May 2001 but did not translate into legislation. The mitigated success of the US strategy within the SC brought the adoption of the bill in 2002. Less restrictive because of broad Presidential waivers, the final version nonetheless excluded any US cooperation with the ICC and provided for the use of force to free US nationals detained by the Court (hence its renaming the “Hague Invasion Act” by NGOs) and for the withdrawal of military assistance from non-NATO State Parties to the ICC unless they enter into BIAs with the US based on Article 98 of the Rome Statute. Besides making a contentious use of Article 98, these provisions were hardly acceptable for US partners worldwide and in Europe, where the Netherlands was implicitly pointed out as a possible military target. The EU first tried to avert the bill’s adoption: after sending a letter to US lawmakers asking them to abandon the project (13 June), the Council forcefully expressed EU’s concerns about the ASPA. Ignoring EU and international objections and the outrage that swept human rights and ICC advocates, President Bush signed the ASPA into law (2 August 2002) while the US diplomatic apparatus stepped up its pressure on third countries to sign as many BIAs as possible.

When Secretary of State Powell sent a letter to EU MS pressing them to enter such agreements, few countries publicly rejected the request. Actually only the Netherlands, Germany and France did so, while states headed by leaders sympathetic to the US (notably the UK, Spain and Italy) seriously considered compliance. Liable to US pressure because of its eagerness to join NATO, Romania was the first state to conclude a BIA. The European Commission reacted swiftly: while a spokesman deplored “that a candidate country has not waited for the EU to establish its final position”, its President Romano Prodi urged candidate states (and implicitly MS) not to hurry into signing before a coordinated stance could be adopted. As the US attacked the EU for its “inappropriate” effort “to direct sovereign countries’ foreign policy choices in advance of EU accession”, tensions mounted all month. While the Commission unequivocally considered in a non-binding legal advice that BIAs
could undermine the ICC, there were contradictory signals from some of the Fifteen (including the Danish Presidency) indicating that they were not willing to embrace an uncompromising stance. When the Foreign Ministers met in late August, they elusively asked their juridical experts to carve out creative ideas. Notwithstanding NGO advocacy and a strong EP resolution, the Council finally adopted some "Guiding principles concerning agreements between a state party to the Rome Statute of the ICC and the US regarding the conditions to surrender of persons to the Court". Stating the conditions on which entering a BIA would be legal, this document, though welcomed by the CICC, was criticised by high profile NGOs such as the FIDH (Fédération internationale des droits de l'homme) as a violation of the Rome Statute. Dismissing such assessments, the EU considers the text as being in conformity with its "commitment to safeguarding the integrity of the Rome Statute".

Neither allowing nor barring the signature of BIAs, the Guidelines left the door open to renewed US attempts. In the course of October, big states (UK, France, Italy, Spain) were targeted by US diplomats, but in vain. A first US success was recorded at the periphery of Eastern Europe in May 2003, with the conclusion of an "Adriatic Chart" comprising a cooperation agreement and BIAs with Macedonia, Croatia and Albania. As the EU increased its pressure on Eastern states to prevent them from proceeding with such agreements, the US addressed confidential notes to MS to threaten them with serious consequences if they go on hampering the signature of BIAs with candidate countries. As states resisted both in Europe and worldwide, the US suspended its military aid to 35 countries in July 2003.

The BIAs crisis was refuelled in the summer of 2004 when the US decided to adopt the Nethercutt amendment that prohibits aids from the US Economic Support Fund to ICC states which haven't entered into BIAs. Again, the EU tried to prevent this development. A troika delegation met with officials from the Department of State and the Dutch Presidency forcefully reiterated "that the EU is a staunch supporter of the ICC" and "will continue to oppose efforts that would undermine" it. When the Bush Administration, undisturbed, adopted the amendment, the Presidency deeply regretted the move and urged President Bush to fully use his waiver powers; moreover, it restated the obligations of State Parties to the ICC regarding the conclusion of BIAs as enunciated in the EU Guiding Principles. Ultimately, no EU MS has entered a BIA; and even if the US has secured about one hundred agreements, many third states have resisted partly to the alternative EU has created through speech and deeds. The US had finally to face the negative impact of the ASPA-Nethercutt legislation on its foreign policy: in October and November 2006 President Bush signed several acts restoring funds prohibited by the ASPA and in early 2008, another amendment was adopted to repeal restrictions on Foreign Military Financing.

III. The drivers of EU increased loyalty to the ICC

Obviously, the EU has helped curb US assaults against the ICC in the SC and through the ASPA/BIAs instruments. Interestingly, in both cases, the EU and its MS have adopted in the early phases of the crises a pragmatic approach: unable (because of MS' differences and US clout) and unwilling (because of the complexity of Transatlantic relations and the culture of consensus that characterizes the EU) to enter into frontal rows with Washington, the Europeans devised solutions to bridge the gap, at least discursively, between the US demands and the integrity of the Rome Statute. More close to damage-control than to counter-attack, the EU course was, from a strictly normative point of view, criticisable; yet it has helped overcome critical junctures in the early life of the ICC.
Moreover the EU has become on the long run the cornerstone of the ICC through a variety of means. Hence, the "Europe" and "integration" sides of the initial dilemmas have ultimately prevailed over the propensity of some MS to pursue their own interests/follow their own inclinations and accept/surrender to US demands as EU loyalty to the ICC strengthened.

The loyalty concept rests on the hypothesis that due to interdependence and the ensuing constitution of shared values and norms, the international society functions as a court society sui generis in which legitimate standards of behaviour come to exist, by which states are more or less constrained. Developed to account for the spread of democratic loyalty beyond the traditional realist/idealist debate, the concept is promising for the comprehension of the evolution of EU commitment to the ICC. The contention here is that on ICC issues, the EU MS have been driven towards a better tuning of discourse and practice: the international context created by the wide-spread consensus on the ICC (120 countries voted for the Rome Statute) and the massive involvement of NGOs have interacted with the multi-level internal dynamics and initial preferences to boost socialization processes through communicative action and the assignation then interiorization of specific roles. Though the various drivers of increased EU loyalty to the ICC have yielded their full potential by interactively adding up and combining, a distinction has been made here, for the sake of clarity, between "external" dynamics and "internal" ones.

A. Major external dynamics

The most pervasive external dynamic is the one generated by the activism of civil society. At the Rome Conference, NGOs have acted as "norm entrepreneurs", weighing on the negotiations through public shaming, the assignment of legal advisers to small developing countries, and discussions with the delegations of supportive states. This last aspect was key: taking seriously EU long-stated commitment to human rights, NGOs have "spontaneously" engaged into discussions and "real exchanges" with European representatives. This has allowed them to join forces in favour of an independent Court with the majority of European delegations and contribute to the isolation of reluctant states. Beside their capacity to heap opprobrium on the latter (notably France on Article 124), NGOs have entered with MS into a complex interaction of mutual support, cross-legitimization, information-sharing and argumentative exchanges. Geared by a minimal set of shared values and common interests, this interaction yielded short-term fruits through the promotion of specific concerns and some ICC institutional settings; additionally, it raised expectations about respective roles making it more difficult to EU MS to defect.

Moreover, European delegations were operating in a multilateral arena - a condensed international society - where they were also closely watched by third states, many of which have got accustomed "to turn to the EU 'to look for a lead and for a cue on how to vote'". Having a cluster of regular "followers" gave European actors particular responsibility regarding the outcome of the conference. Beyond this stake however lay another: the very credibility of the EU. Actually, the Europeans were expected to play a role in accordance with the values and concerns they have been increasingly pushing on their external relations agenda: failing to do so through an unequivocal support for an independent and effective Court would have undermined the credibility of the EU in its future dealings with third parties in the field of human rights and accountability. Ultimately, such considerations combined with the expectations of NGOs and exercised some sort of social control on MS, inducing them to follow a "logic of appropriateness" in line with their stated normative preferences. These external dynamics weighing on EU and MS conduct on ICC issues have been at work ever since the adoption of the Rome Statute, particularly in the framework of PrepCom sessions and the
crises triggered by US attacks on the ICC. For example, the EU position on BIAs has been awaited impatiently by outsiders and EU guidelines have been “considered an important policy direction by many third states” (above all candidate states) and used as a helpful tool by NGOs to prevent countries from concluding BIAs on the ground that “the EU is against the BIAs as they stand”.

The dynamic driven by NGOs deserves special attention as it has developed in significant ways due to long-term working-relations established with EU and MS officials. The post-Rome PrepCom negotiations offered a first opportunity for NGOs to discuss on a regular basis with EU and MS delegates, bring expertise and raise specific concerns. In this context, both parties learned to work together to come up with constructive solutions to the issues being negotiated. In late 1999, convinced that the EU “can become a driving force for the ICC”, the CICC opened a European Network in Brussels. This increased proximity allowed NGO activists to involve in the daily life of the EU: beside the usual advocacy to push special concerns ahead on the agenda of Parliament and Council sessions, they have established a routinized relation with those in charge of ICC issues in the Commission and General Secretariat. Moreover, NGOs have managed to attract EU and MS officials to their conferences (often organized with Commission’s money). Such repetitive interactions, further enhanced by the creation of ICC specialized organs inside the EU open to NGOs (see below), have offered a fertile soil for cross-breeding ideas and opportunities to deepen common understandings and, beyond, for sustained socialization processes. Consistent with this socialization pattern, NGOs have shown considerable restraint in the use of the shaming instrument: they usually mobilized it in the most critical junctures, targeting specific MS rather than the whole Union and therefore trying to tilt the balance inside EU. This strategy has probably helped bring France into the consensus in 1998 and the UK in late 2002. Interestingly, NGOs have also resorted to symbolic rewards by acknowledging and praising EU efforts in support of the ICC.

Finally, there are two additional external dynamics that are likely to have strengthened EU’s commitment to the ICC. First, it seems that US disruptive policies have encouraged the construction of European self-representations based on the opposition of EU and US attitudes towards the ICC, with the US increasingly perceived as the “laggard” and the EU in a “vanguard” position. Once interiorized, such a vision is likely to incline European actors to stick to their distinctive course. The second dynamic is linked to the very creation of the ICC: not only EU MS were expected to contribute to the daily life of the Court as influential and wealthy State Parties, but the relations established with the Court’s officials, notably the Prosecutor, have raised the expectations regarding EU support and have most likely increased a sense of responsibility towards the new-born institution. These external drivers of EU loyalty to the ICC had their potential considerably increased by their resonance and interaction with internal impulses emanating from different EU agencies.

B. Major internal dynamics

The most vocal agency advocating a full-fledged EU commitment to an effective and independent ICC has been the Parliament. The EP has initiated the European Initiative for Democracy and Human Rights (EIDHR) that has provided financial support to NGOs working in the field of accountability since the mid-90s, enhanced their access to European actors and therefore their advocacy resources. Before the Rome Conference, in a highly symbolic gesture, the EP has unanimously called on the Council, the Commission and MS to do their utmost to make the ICC project succeed; interestingly, it has also asked EU actors to ensure that NGOs “be given ample opportunity to present their views” to the diplomatic conference. Later on, an informal group of Parliamentarians played a pivotal role in pushing for the ratification of the Statute (without Article 124) and for the adoption
of a Common Position and an Action Plan. This group has also been active in raising at the EU level the concerns expressed by NGOs, including those arising from US attacks against the Statute. In this respect, the EP has been persistent in voicing ICC supportive resolutions almost every time the project has been threatened. One of the most forceful resolutions is the one calling on "the Member States to make the Rome Statute a part of the Community acquis" and considering the ratification of an agreement undermining the Rome Statute (i.e. a BIA) "incompatible with membership of the EU". Accordingly, and in reaction to the signing of several BIAs by South-Eastern states, the EP has plainly considered it "undesirable" that a country may accede to EU membership if it has entered into a BIA.

Though less vocal, the European Commission has also played a strategic role in pushing for greater EU loyalty to the ICC. Before the adoption of the Common Position in June 2001, its action was limited to funding NGO initiatives supporting the creation of the Court and, later on, its entry into force and effective running. Once the CP adopted, the Commission has upgraded its involvement in different ways: it has organized conferences to bring together EU and MS officials and NGOs activists to allow for exchanges enhancing cooperation; it has contributed to the elaboration and implementation of the Action Plan; it has also funded important initiatives such as the Advance Team set up to prepare the effective birth of the Court. On a more political level, the Commission has also mainstreamed "ICC issues into external issues falling under the Community competence", introducing ICC language in EU relations, dialogues and sometimes agreements with third parties. In this respect, the Commission has been particularly assertive with candidate states; for instance, it has been the first EU agency to regret the decision of Romania to sign a BIA. As it called on acceding states (and indirectly on MS) not to sign such agreements before a collective position was worked out, it symbolically gave ICC issues the standing of core questions potentially pertaining to the acquis communautaire and that have to be decided upon at the EU, not national, level. The Commission cornered further MS when it considered that the BIAs would undermine the Rome Statute and therefore should not be entered into: though its advice wasn't legally binding, it made it difficult for the Council to adopt a position blatantly contradicting the Commission's recommendations. After that episode, the Commission has further promoted the commitment to the ICC as a core EU value through the regular inclusion of a reference on the issue when reporting on the progress towards accession made by candidate states.

The converging efforts of both the EP and the Commission have also combined with and reinforced those yielded by some MS either when holding the Presidency or through individual initiatives. For example, as President, Sweden has endeavoured in the first half of 2001 to bring about the Common Position and in late 2004, when the USA were in the process of adopting the Nethercutt amendment, the Netherlands has been very active in trying to counter the measure. Though not holding the Presidency then, the Netherlands has also been key players in 2002 when it took the lead in the preparation of the effective birth of ICC's institutions and in the denunciation of the ASPA that threatened its own sovereignty. Likewise, Germany has played a distinctive role as it systematically voiced outspoken reservations about the compromises accepted to meet US demands. Of particular interest is the German government's commentary on the EU Guidelines about BIAs, in which it defended a restrictive pro-ICC interpretation of the text. Beyond such visible actions, the leaders of the countries whose positions coincided with collective preferences - and hence the most legitimate and symbolically powerful - have likely embarked, in the intimacy of the Council's meetings, in a complex interaction with their counterparts consisting of a mix of social control and communicative action.
Though at a lower level, additional fields for such interactions were created with the setting up of a special sub-area group devoted to ICC issues in the framework of the Council’s Public international Law Working Group (COJUR) (May 2002), and of a network of national and EU contact points responsible for “ensuring effective co-ordination and consistency of information, and adequately preparing programmes and activities of the Union in the implementation of the (ICC) Common Position”. Interestingly, both groups’ meetings are open to NGO delegates for exchanges about the issues of the day. Beside providing a platform for potential hybridisation of state-NGO views, these groups have offered new fora where ICC issues could be discussed extensively and differences sorted out by national delegates, where interactions between the individuals involved could breed processes of group identity and interest constitution and, beyond, trigger a rapprochement of states’ views.

One last internal dynamic is the one generated by the very nature of the EU as a community of states claiming common values and willing to defend those collectively. Though elusive, this factor has been particularly salient at the time of the ASPA/BIAs crisis. The fact that EU MS finally opted for a common approach has proven “a smart move (...) because there is greater safety in numbers should (MS) decide not to accede to American wishes”: that move has lowered the costs of resistance to the US and heightened those of internal EU dissent.

Conclusion

Had not the Europeans interiorized the defence of human rights (however partially and ambiguously) as a fundamental value and a dominant component of their identity, all of the drivers that have been reviewed, whether external or internal, would probably have lacked a proper hold on MS. Ultimately, some of the latter have been trapped by EU normative discourses regarding human rights and accountability and have seen the range of their possible courses of action significantly shrink as to exclude options they would have privileged as sovereign states free from any behavioural (symbolic) constraint. Undergoing further processes of socialization, these MS have gradually moved towards an increased loyalty to the ICC through mechanisms that deserve further investigation. This is not to say however that all EU MS have all turned into unconditional supporters of the ICC and international criminal justice: discrepancies are still many, such as the accession of the Czech Republic without the ratification of the Rome Statute or the reluctance of most states to fulfil their international legal obligations under the Statute and other international treaties through universal jurisdiction. Even though the EU has unquestionably moved towards greater loyalty to the ICC, the gap between its discourses and deeds remains, with questions still to be answered about the vitality of states, socialization and civilizing processes, and the power and limits of norms.