# The United States, the European Union, and the International Criminal Court: Similar values, different interests?

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*Not all countries have ratified the Rome Statute of the International Criminal Court (ICC). In particular, the United States has opposed the Court, withdrawing its signature and even starting an anti-ICC campaign. By contrast, individual European Union member states and the EU as a whole have played a significant role in the creation and development of the ICC. How can this apparent difference between the US and EU position towards the Rome Statute of the ICC be explained? This article examines the nature of US and EU commitment to the Rome Statute. It also investigates factors—political and legal, domestic and international—that affect the US and EU support for the Court. The article shows that there is substantial variation along the different dimensions of support for the ICC across the two polities. These transatlantic differences in support for the ICC can be explained by a combination of factors, chiefly international and political. Moreover, these differences have deepened over time, primarily as a result of the interactions among the US and the EU throughout the creation and early development of the ICC.*

## 1. Introduction

On July 1, 2002, the Rome Statute of the International Criminal Court (ICC) entered into force, triggered by the required number of sixty ratifications. In a statement, United Nations (UN) Secretary-General Kofi Annan hailed the "historic" creation of

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the Court reaffirming "the centrality of the rule of law in international relations."[1] Only hours ahead of the Statute's entry into force, the United States had vetoed renewal of the UN peacekeeping operation in Bosnia-Herzegovina, insisting that US soldiers be guaranteed immunity from prosecution by the Court. The standoff in the UN Security Council not only threatened to undermine the Bosnia peacekeeping mission, it also almost "strangled the court at its birth."[2]

Notwithstanding the broad support of states for the ICC, not all countries voted in favor of the Statute at the 1998 Rome Conference. Statements by China, Israel, India, Russia, and, notably, the United States made clear that they were opposed. In the final days of the Clinton Administration, the US nonetheless signed the Statute. It emphasized, though, that it had no intention to submit the Statute as such to the Senate for ratification. Under the Bush Administration, America's opposition turned into outright hostility. The US signature was withdrawn and an anti-ICC campaign was started. The US Congress enacted the American Service-Members Protection Act, aimed at shielding American military personnel from ICC jurisdiction. Moreover, the Bush Administration negotiated legal safeguards against the transfer of American service-members to the ICC with countries that have ratified the Statute.

By contrast, individual European Union (EU) member states and the EU as a whole have played a significant role in the design and development of the ICC. Ever since the creation of an international criminal court was put on the agenda of the UN General Assembly in the late 1980s, individual EU member states were involved in negotiating its tasks and designing its structure. Once the Statute of the ICC had been agreed upon, EU member states were among the first to become parties to the Statute, and they have provided the majority of funding for the ICC to perform its tasks. Moreover, to support and assist the ICC in its activities, the EU has adopted Common Positions and Action Plans and has even concluded a cooperation and assistance agreement with the ICC.

This article focuses on the apparent difference in the US and EU position towards the ICC. How can this difference be explained? To answer this question, the article first of all examines the nature of US and EU support for the ICC. What does it mean for the US and the EU to oppose or support the Court? Are the broad characterizations of the US as a fierce opponent, adopting a rigid unilateralist approach, and the EU as a staunch supporter, showing itself an eager multilateralist, in accordance with reality? The article subsequently investigates factors—political and legal, domestic and international—that affect the US and EU support for the ICC. If the US is indeed a fierce opponent, why is this so? And, if the EU really is a staunch supporter, how can this be explained?

[1] United Nations, *"There Must Be No Relenting in Fight Against Impunity," Says Secretary-General, as International Criminal Court Rome Statute Comes into Force*, Press Release, SG/SM/8293, L/T/4369 (July 1, 2002).

[2] *The International Criminal Court not (quite) Strangled at Birth*, The Economist, July 4, 2002, *available at* http://www.economist.com/node/1213504/print.

The article draws on earlier work investigating the US opposition and the EU support for the ICC.[3] Such work is limited, however, as it does not take a comparative perspective. The scarce research that does deal with both US unilateralism and EU multilateralism in the case of the ICC adopts either an American or a European viewpoint.[4] Moreover, current studies of the US and EU positions concentrate on a restricted period of time, typically the transatlantic disagreement in or around 2002. They neglect important developments before and after the Court's establishment. To address these lacunae, the article applies a framework elaborated by Pollack,[5] which conceptualizes and operationalizes the nature of a state's support for the international legal order and the factors that condition such support. Application of this framework makes it possible to clarify claims about support for the ICC, as well as allowing aggregation of findings across other areas of international law.

The remainder of this article is organized in two sections. It starts with a section examining US and EU support for the Rome Statute and the ICC (Section 2). It subsequently discusses the various factors that may explain the contrast in support for the Court (Section 3). The article shows that there is substantial variation along the different dimensions of support for the ICC across the two polities. These transatlantic differences in support for the ICC, I argue, can be explained by a combination of factors—chiefly international-political, and to a lesser extent domestic-political, international-legal, and domestic-legal. Moreover, I claim that these differences have deepened over time, primarily as a result of the interactions among the US and the EU throughout the creation and early development of the ICC.

## 2. Support for International Criminal Law, the Rome Statute, and the International Criminal Court

Support for international criminal law (ICL) constitutes support for international criminal law as a process of making, interpreting, and enforcing rules about bringing perpetrators of the most heinous crimes, such as genocide, crimes against humanity and war crimes, to justice.[6] I concentrate on the support for and opposition to one specific international legal agreement in the ICL field, the Rome Statute of the ICC, arguably representing the single most important development in ICL in recent decades. The Statute incorporates rules and norms that were already mentioned in treaties such as the Geneva Conventions and the Genocide Convention and

[3] *See, e.g.*, Martijn Groenleer & Louise van Schaik, *United We Stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol*, 45 J. Common Mkt Stud. 969 (2007); Martijn Groenleer & David Rijks, *The European Union and the International Criminal Court: The Politics of International Criminal Justice*, *in* The European Union and International Organizations 167 (Knud E. Joergensen ed., 2009).

[4] *See, e.g.*, Caroline Fehl, Living with a Reluctant Hegemon: Explaining European Responses to US Unilateralism (2012).

[5] Mark A. Pollack, *Who Supports International Law, and Why?: The United States, the European Union, and the International Legal Order*, 13(4) Int'l J. Const. L. 873 (2015).

[6] Adapted from *id.*

is thus more than just another international treaty in the ICL field. At the same time, the Statute cannot simply be considered a proxy for ICL. Opposition to the Rome Statute, and especially to the ICC as embodiment thereof, does not necessarily signify opposition to ICL as such.[7] The creation of the ICC in its current form represents a concrete policy choice; other options were available. This calls for caution regarding generalizations about how support for the ICC translates into support for the overall project of ICL.

In order to assess US and EU support for the Rome Statute, I follow Pollack[8] who disaggregates the concept of "support for international law" into four dimensions: leadership, consent, compliance, and internalization. I evaluate these dimensions across the US and EU polities, also considering differences over time. I follow the sequence of events, which means that I sometimes start with the US position, sometimes with the EU position, and that I begin the account with the EU and its individual member states.

## 2.1. Leadership

Leadership is understood here as the willingness of a state to take an active role in the development of new international criminal law, be it treaty or customary law.[9] I concentrate on the changing US and EU leadership in the negotiation of the Rome Statute and the creation of the ICC.

### *(a) United States: from a leading role to benign abstention*

The United States has been an ardent supporter of international criminal prosecution over the past century. It was instrumental in the creation of the Nuremberg and Tokyo trials after the Second World War and in the establishment of *ad hoc* tribunals following widespread atrocities in the former Yugoslavia and Rwanda in the mid-1990s, providing funds and staff. The US also played a leading role in the construction of a new "species" of tribunal for the prosecution of international crimes perpetrated in Cambodia, East Timor, and Sierra Leone, and, indeed, in the negotiations on a permanent international criminal court, already underway at the UN before the *ad hoc* and internationalized tribunals were created.

Yet, the US has not always been willing to accept ICL commitments that European countries accepted. The US was the last of the permanent members of the UN Security Council to ratify the Genocide Convention, almost forty years after its adoption and with important reservations. It has signed, but so far not ratified, Additional Protocols I and II to the Geneva Conventions, containing protections for persons and objects in modern warfare. Moreover, during the negotiations on a permanent international court, the US defended proposals for a court with limited jurisdiction. It remained committed to its position at a final Diplomatic Conference held in Rome, regardless

[7] *Cf.* Rachel Brewster, *Reputation in International Relations and International Law Theory*, *in* International Law and International Relations: Synthesizing Insights from Interdisciplinary Scholarship 524 (Jeffrey Dunoff & Mark Pollack eds., 2012); Pollack, *supra* note 5.

[8] Pollack, *supra* note 5.

[9] Adapted from *id.*

of the concessions made by other countries. In contrast to a majority of countries, including all EU member states, it did not vote in favor of the Statute for the Court at the end of the conference.

The US, nonetheless, continued to be involved in the process that followed the Rome Conference. Even though the chances of the US joining the ICC soon were slim, European and other countries realized that any future participation would be more likely if Washington's concerns could be assuaged. David Scheffer, US Ambassador-at-Large for War Crime Issues and head of the US delegation in Rome, confirmed this and warned against excluding the US from the ICC process: "We remember the lessons of the early decades of this century when ambitious international institutions were created that, in part because of the lack of American participation and support, either collapsed or became irrelevant." [10] On December 31, 2000, just before George W. Bush took over, President Clinton signed the Statute of the ICC, primarily "to remain engaged in making the ICC an instrument of impartial and effective justice in the years to come."[11]

### *(b) European Union: From divided support to leadership of individual EU countries*

US rejection of the Statute did not mean that the mantle of leadership in the promotion of international criminal treaties or agreements had automatically passed to the EU. Although the fifteen member states of the EU—including Britain and France—had ratified the most important international treaties constituting sources of international criminal law, some, like the UK, had done so only after considerable delay. Early EU support was much more a reflection of the support already expressed—albeit to different degrees—by individual member states. EU member states actively participated in the exploratory talks on the Statute, but coordination within the EU framework was limited.

Indeed, European countries initially were divided in their support, and in the beginning of the negotiations on the Statute, the Union was essentially split. The so-called "EU 13," consisting of all EU member states except the United Kingdom and France, actively lobbied for the creation of a strong and independent ICC. The "EU 13" had agreed on several broad positions that set out the minimal requirements for an ICC on particularly controversial design issues, notably the role of the UN Security Council. The UK and France, by contrast, allied with the US and other permanent members of the UN Security Council. At the end of the Rome Conference, however, the UK and

[10] David J. Scheffer, *Statement on the International Criminal Court, Remarks Before the 53rd Session of the U.N. General Assembly, in the Sixth Committee*, USUN Press Release No. 179 (Oct. 21, 1998), *available at* http://1997–2001.state.gov/www/policy_remarks/1998/981021_scheffer_icc.html. *See also* Ruth Wedgwood, *The International Criminal Court: An American View*, 10 Eur. J. Int'l L. 93 (1999); Peter Malanczuk, *The International Criminal Court and Landmines: What Are the Consequences of Leaving the US Behind*, 10 Eur. J. Int'l L. 77 (2000).

[11] President Clinton, *Statement on the Rome Treaty on the International Criminal Court* (Dec. 31, 2000), 37 Weekly Comp. Pres. Doc. 4 (Jan. 8, 2001), *available at* http://www.gpo.gov/fdsys/pkg/WCPD-2001-01-08/pdf/WCPD-2001-01-08-Pg4.pdf.

France were ready to abandon the US, and within four years, all EU member states had signed and ratified the Statute.

## 2.2. Consent

Even when it does not play a leading role in negotiations, a state may demonstrate consent to be bound by or show commitment to international criminal law, or, in our case, the provisions of the Rome Statute, as well as—at a later stage—the rulings of the ICC.[12] The EU, both individually and collectively, expressed that consent, while the US did not.

### *(a) European Union: From commitment of individual EU countries to internal EU support*

The adoption of the Statute in Rome was only the first step towards an operational ICC. EU involvement in the operationalization of the Court saw a slow start, but gathered pace as internal coordination further increased. Member states were gradually drawn in to an expanding range of policy initiatives.

Under the Common Foreign and Security Policy (CFSP), a common position on the ICC was adopted in 2001. The common position mainly served to reiterate the positions already taken by individual member states.[13] In 2002, an action plan was drawn up to give effect to this common position. The action plan, however, remained a legally unbinding, political document.[14] The EU as such became more involved with the adoption of a revised common position on the ICC.[15] Member states agreed to jointly support a worldwide ratification campaign for the Court to attain a universal character and to assist third countries in the implementation of the Statute. Between 2002 and 2010, the EU carried out over 340 diplomatic demarches to more than 100 countries and international organizations.[16] A revised action plan adopted in 2004 brought a number of new initiatives, most notably the creation of an EU Focal Point for the ICC and the possibility of the deployment of member states' legal experts under "EU flag" to countries requesting assistance with the investigation of crimes under the Statute.[17]

[12] Pollack, *supra* note 5.

[13] Council Common Position (2001/443/CFSP) of June 11, 2001, O.J. L 155/19.

[14] Council of the European Union, Action Plan of May 15, 2002 to Follow-up on the Common Position on the International Criminal Court.

[15] Council Common Position (2002/474/CFSP) of June 20, 2002, O.J. L 164/1. A third common position on the ICC in 2003 did not entail major changes. Council Common Position 2003/444/CFSP of June 16, 2003, O.J. L 150/67. On Mar. 21, 2011, the Council adopted a new decision on the ICC repealing the 2003 Common position.

[16] Council of the European Union, *The European Union and the International Criminal Court* (May 2010), at 10, *available at* http://www.consilium.europa.eu/uedocs/cmsUpload/ICC_may%2010_internet.pdf.

[17] *Action Plan to Follow-up on the Common Position on the International Criminal Court* (Feb. 4, 2004), *available at* http://www.consilium.europa.eu/uedocs/cmsUpload/ICC48EN.pdf. An updated version of the Action Plan was adopted in 2011: *see* Council of the European Union, Action Plan to Follow-up on the Decision of the International Criminal Court, Doc. 12080/11 (July 12, 2011), *available at* http://register.consilium.europa.eu/doc/srv?l=EN&f=ST 12080 2011 INIT.

When it had become clear that the Statute would enter into force in 2002, much faster than anyone had expected, EU efforts were also focused on the practical arrangements for the actual establishment of the Court. This included the drafting of a budget, the election of the judges, the appointment of the prosecutor, and the recruitment of staff. With the operationalization of the Court and, not much later, the start of the first investigations, it was felt that the relationship between the EU and the ICC was in need of a legal footing. A cooperation and assistance agreement between the ICC and the EU was therefore concluded in 2005.[18] The agreement is the first ever legally binding agreement of this kind between the EU and another international organization.

In addition to the cooperation and assistance under the CFSP and as part of the EU–ICC agreement, the Council adopted several decisions in the Area of Freedom, Security and Justice (AFSJ). It, for instance, created a European network of contact points with respect to the investigation and prosecution of persons responsible for genocide, crimes against humanity and war crimes. Perhaps even more clearly than the CFSP common positions, these AFSJ decisions demonstrate EU commitment towards the ICC and, notably, the complementary nature of its jurisdiction.[19]

### *(b) United States: From benign abstention to outright hostility*

In the meantime, the US had started a campaign to actively undermine the Court's operation. The Bush Administration sought in different ways to exempt its nationals, in particular its service-members, from the jurisdiction of the Court: through "unsigning" the Statute, adoption of the American Service-members Protection Act (ASPA), the negotiation of bilateral non-surrender agreements, and through the introduction of UN Security Council resolutions.

Unprecedentedly, in May 2002, the Bush administration announced that it no longer intended to ratify the Statute. Hence, it did not hold itself bound to the obligations that arise from its signing of the Statute. Barely three months later, President Bush signed the so-called "American Service-members Protection Act." This Act restricts US cooperation with the Court. It also makes US support of peacekeeping missions conditional on achieving impunity for US personnel. Military assistance to countries that are party to the ICC is prohibited, with the exception of North Atlantic Treaty Organization (NATO) allies, other important allies and Taiwan.

The US also tried to negotiate bilateral non-surrender agreements with states parties.[20] In these agreements the contracting state agrees not to surrender a broad scope of persons, notably military personnel, to the ICC without the express prior consent of the US. The US claims that these bilateral agreements are in conformity with article 98.2 of the Rome Statute, which stipulates that a state does not have to meet a request

[18] Agreement between the International Criminal Court and the European Union on cooperation and assistance, April 28, 2006, O.J. L 115/50.

[19] Council Decision 2002/494/JHA of June 13, 2002, O.J. L 167/1; Council Framework Decision 2002/584/JHA of June 13, 2002, O.J. L 190/1; Council Decision 2003/335/JHA of May 8, 2003, O.J. L 118/12.

[20] *See, e.g.*, Judith Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements*, 101 Am. Polit. Sci. Rev. 573 (2008).

by the Court to surrender a person to the ICC when this would constitute a breach of other international agreements, including "status of forces" agreements.[21] Between 2002 and 2006, more than 100 countries, including 46 ICC State Parties, signed such bilateral agreements with the US.[22]

Moreover, Washington insisted that a UN Security Council resolution be adopted to permanently exempt all Americans participating in UN-sanctioned peacekeeping operations from ICC jurisdiction and enabling the US to veto a prosecution indefinitely.[23] The resolution was negotiated in the context of the extension of the mandate for the UN Mission for Bosnia and Herzegovina (UNMIBH) and cast a shadow over the entry into force of the Statute. It was nonetheless adopted, granting UN peacekeepers exemption of ICC jurisdiction for a period of twelve months, with possible extension.[24]

## 2.3. Compliance

A state is considered to be compliant with international criminal law, if it acts in accordance with the provisions of the Rome Statute, and the rulings of the ICC. This is not the same as implementing the provisions of the Statute in terms of putting them into effect through legal or administrative actions; it also is distinct from the Statute's actual effectiveness in penalizing individuals for violations of international criminal law and ending impunity for serious atrocities.[25]

### *(a) European Union: From internal to external support*

By 2002, the ICC had become a bone of transatlantic contention. After the Bush Administration withdrew the US signature, the EU reacted with a statement expressing its disappointment with this action and its hope that the US would not foreclose future cooperation with the Court.[26] But the controversy aggravated when in August 2002, US Secretary of State Colin Powell sent a letter to all Ministers of Foreign Affairs of the European Union, requesting them to enter into agreement on the non-surrender of US nationals to the ICC without the explicit approval of the United States.

In responding to the letter, EU member states faced a dilemma: maintaining the integrity of the Statute and ensuring the effectiveness of the Court, and keeping their international commitments,[27] or maintaining the relations with the US and ensuring

[21] These so-called Status of Forces agreements provide that suspects of criminal offenses committed abroad are prosecuted by the troop-sending country.

[22] Most agreements have not been ratified. Coalition for the International Criminal Court (CICC), *Status of U.S. Bilateral Immunity Agreements by Region* (Dec. 2006), *available at* http://www.iccnow.org/documents/CICCFS_BIAstatus_current.pdf.

[23] *See, e.g.*, Marc Weller, *Undoing the Global Constitution: UN Security Council Action on the International Criminal Court*, 78 Int'l Aff. 693 (2002); Neha Jain, *A Separate Law for Peacekeepers: The Clash Between the Security Council and the International Criminal Court*, 16 Eur. J. Int'l L. 239 (2005).

[24] S.C. Res. 1422, UN Doc. S/RES/1422 (July 12, 2002).

[25] Pollack, *supra* note 5.

[26] Council of the European Union, *Statement of the European Union on the Position of the United States Towards the International Criminal Court*, Press Release 8864/02 (May 14, 2002), *available at* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/cfsp/70471.pdf.

[27] Kelley, *supra* note 20.

the future engagement of the US in peacekeeping operations. Some countries, particularly the UK, Italy, and Spain, initially considered entering into negotiations with the US. Other countries, notably Germany and France, made clear that they would not enter into agreement with the US. As a compromise, the EU Presidency elaborated a number of guidelines that set out the parameters for negotiation.[28] While the guidelines do not render impossible the negotiation of bilateral agreements, none of the EU member states eventually concluded an agreement.

The US-proposed resolution to exempt American service-members put EU unity to another test. In an open debate in the UN Security Council in July 2002, several EU countries including France made statements against the adoption of the resolution, but the EU declaration by the Danish Presidency failed to explicitly denounce the draft resolution. The UK swung to support the US and voted in favor of the resolution. France was left isolated and abstained from the vote; the US draft resolution was adopted unanimously.[29] In the spring of 2003, Washington sought to renew the resolution. France and Germany abstained, but the UK and Spain voted in favor, leaving the EU split on the issue and leading to renewal of the resolution.[30] In 2004, however, the US was unsuccessful at mustering support for yet another renewal and eventually had to withdraw the resolution. With only Britain siding with the US, the EU had ostensibly come a step closer to a common position on immunity for UN peacekeepers.

### *(b) United States: From outright hostility to a softened approach*

Since 2006, the US has gradually softened its approach towards the ICC. President Bush waived restrictions on military and economic aid to a large group of countries that refused to sign a bilateral agreement.[31] The US did not reject the adoption of a UN Security Council resolution referring the situation in Darfur to the ICC—indeed, it abstained, showing tacit approval.[32] It also supported the use of the ICC facilities in The Hague for the trial of Charles Taylor by the Special Court for Sierra Leone.[33] While the US still refuses to be bound by the Statute in its entirety, it seems to have accepted at least some of its provisions and has acted in accordance with those provisions.

[28] Council Conclusions on the International Criminal Court (Sept. 30, 2002), *available at* http://www.consilium.europa.eu/uedocs/cmsUpload/ICC34EN.pdf.

[29] S.C. Res. 1422, UN Doc. S/RES/1422 (July 12, 2002).

[30] S.C. Res. 1487, UN Doc. S/RES/1487 (June 12, 2003).

[31] Coalition for the International Criminal Court (CICC), *Development on U.S. Bilateral Immunity Agreements (BIAs): US Removes Military Training Sanctions From BIA Campaign and Issues Economic Aid Waivers to Some ICC Member States* (Dec. 2006), *available at* http://www.iccnow.org/documents/CICCFS-UpdateWaivers_11Dec06_final.pdf.

[32] CICC, *UN Security Council Votes in Favor of Darfur Referral to the International Criminal Court* (Mar. 31, 2005), *available at* http://www.coalitionfortheicc.org/documents/Darfurreferral_31Mar05.pdf.

[33] Legal Adviser to the Secretary of State John Bellinger, *International Courts and Tribunals and the Rule of Law*, Speech at the US Department of State (May 11, 2006); Robert McMahon, *Bellinger Says International Court Flawed But Deserving of Help in Some Cases*, Council on Foreign Relations (July 2007), *available at* http://www.cfr.org/publication/13752.

The Obama Administration has continued a policy of relaxing the American hostility *vis-à-vis* the ICC.[34] Ambassador Susan Rice, in her first speech to the UN Security Council, stated that the Court "looks to become an important and credible instrument for trying to hold accountable the senior leadership responsible for atrocities committed in the Congo, Uganda and Darfur."[35] After the ICC issued the arrest warrant for Sudanese President Omar al-Bashir in March 2009, President Obama reportedly launched a "high-level, urgent review" of the US policy towards Sudan, including its support of the ICC.[36] In November 2009, Stephen Rap, US Ambassador-at-Large for War Crime Issues, stated that, "Our government has now made the decision that Americans will return to engagement at the ICC."[37]

Ever since, members of the Obama administration have positively engaged in the discussions over the future of the ICC. In 2010, the US, for the first time, participated as an observer in the ICC's Assembly of States Parties.[38] The Obama Administration also sent a delegation to the ICC Review Conference, where it participated in discussions on the amendment of the Statute with regard to the crime of aggression and agreed on a compromise definition. This positive engagement should, however, not be taken as a sign of all-out support. There are still concerns about ICC jurisdiction over US nationals, the Bush's administration's unsigning has not been reversed, and ASPA legislation continues to be in force.

## 2.4. Internalization

The final dimension of support for international criminal law I consider is internalization, the process whereby rules and norms of international criminal law are incorporated into the domestic legal order. I again concentrate on the rules and norms laid down in the Statute of the ICC and limit myself to the European case, as the US—not accepting the Statute—does not grant it effect in its domestic legal order.[39]

Incorporating the Rome Statute in the domestic legal order of EU member states has not caused major problems, even though in some countries the process has not been swift. In some EU countries, such as Italy, the constitution allows for automatic implementation of international law into domestic law and internalization is relatively easy. In other countries, including France and Portugal, issues such as immunities for officials and extradition of nationals required complex constitutional amendments.

[34] *See also* American Society of International Law (ASIL), US Policy Toward the International Criminal Court: Furthering Positive Engagement (Mar. 2009), *available at* http://www.amicc.org/docs/ASIL%20ICC%20Report.pdf.

[35] United States Mission to the United Nations, *Statement by Ambassador Susan E. Rice, U.S. Permanent Representative, on Respect for International Humanitarian Law, in the Security Council*, Press Release (Jan. 29, 2009), *available at* http://usun.state.gov/remarks/4445.

[36] *Obama Starts "Urgent Review" of U.S. Policy Toward Sudan*, Wall St. J., Mar. 4, 2009, *available at* http://www.wsj.com/articles/SB123620918926234023.

[37] *See US to Resume Engagement with ICC*, BBC, Nov. 16, 2009, *available at* http://news.bbc.co.uk/2/hi/8363282.stm.

[38] John Crook, *United States Sends Observers to ICC Assembly of States Parties*, 104 Am. J. Int'l L. 126, (2010).

[39] Pollack, *supra* note 5.

Several EU countries, including the UK, Austria, and Spain, have enacted new legislation to enable cooperation with and assistance to the ICC. A number of countries, such as Germany and the Netherlands, have adopted special laws criminalizing ICC crimes in national law to enable national courts to exercise jurisdiction over such crimes.[40]

Acceptance of the Statute has not always brought about new policies at the national level, however. EU member states generally cooperate with the ICC and assist in its operations in terms of financial resources, investigations and trials, and enforcement of orders and sentences. Yet, support for the current investigations of the ICC is uneven. Moreover, the EU could play an important role in strengthening national prosecutions and investigations, as a platform through which member states coordinate their positions. But the willingness to give effect to international criminal law in this way is limited, as is, for instance, reflected in the reluctance to develop binding common policies under the former "third pillar" and, particularly, in the limited application of the principle of universal jurisdiction.

EU countries thus consent to the Rome Statute and comply with its provisions, but a majority is hesitant when it comes to internalization of broader norms and values of international criminal law into the domestic legal order, as required by the principle of complementarity. This is problematic in light of the fact that the Court heavily relies on its member countries, not only those whose nationals are implicated or those on whose territories crimes have allegedly been committed. It also begs the question whether EU countries, individually and collectively, are actually living up to their "normative preferences."[41]

## 2.5. Contrasts in commitment?

In contrast to treaties and agreements that are devoid of external enforcement provisions, and the ratification of which—one could argue—is therefore not more than a symbolical gesture, the choice to support the ICC may have real consequences: it may result in prosecution of alleged perpetrators of international crimes. Support for the ICC may thus be considered a litmus test for ICL support: if a country does not support the ICC, one might argue, it is not really supportive of international criminal law.

Following this argument, the US clearly failed this test, while the EU passed it. From the analysis above, it becomes clear that support for international criminal law, as embodied by the Rome Statute of the ICC, varies considerably between the two polities and over time. American leadership has declined since the Rome conference in 1998, where the US voted against the Statute. Indeed, the US has actively sought to undermine the effectiveness of the ICC thereafter. The EU, by contrast, has demonstrated greater willingness to lead in the ratification and implementation of the Statute as well as to be bound by it, as indicated by its efforts to preserve the integrity of the Court.

[40] For an overview, *see, e.g.*, States' Responses to Issues Arising from the ICC Statute: Constitutional Sovereignty, Judicial Cooperation and Criminal Law (Roy Lee ed., 2005). On the specific case of the Netherlands as host country to the Court, *see* Harry Verweij & Martijn Groenleer, *The Netherlands' Legislative Measures to Implement the ICC Statute*, *in* States' Responses to Issues Arising from the ICC Statute, 83.

[41] Elena Aoun, *The European Union and International Criminal Justice: Living Up to its Normative Preferences?*, 50 J. Common Mkt Stud. 21 (2012).

Yet, as I also demonstrate, not all individual EU countries, while generally proponents of the Court, have always stayed in line, and many are still reluctant to give effect to the provisions of the Statute at the national level. At the same time, the US does not reject an ICC, much less international criminal law, *tout court*; it rejects the ICC in its current form. Since 2009, under the Obama Administration, it has re-engaged positively in the process of further developing international criminal law, notwithstanding the continuing political disagreement on how to react to the Court's existence.

The US and the EU seem to share similar fundamental values when it comes to international criminal law more broadly. Disagreement is about concrete policy choices. This results in support of or opposition to particular agreements or arrangements—notably, the ICC in its current form—rather than a rejection of international criminal law as such. For instance, even though the US remains highly suspicious and deeply ambivalent towards the ICC, it has supported the prosecution of perpetrators of international crimes through the Court. This, of course, raises the question how US and EU preferences with regard to particular agreements and arrangements, notably the ICC, can be explained. It is to this question that I turn now.

## 3. Explaining transatlantic differences

In order to explain why the US and the EU show different levels of commitment to the ICC, I make use of the broad framework constructed by Pollack, distinguishing between two levels of analysis, namely international and domestic, and between two types of factors, political and legal.[42] The four resulting sets of factors may help us to explain the difference between the US and the EU position.

Because the US and EU "cases" are difficult to separate, I again discuss them together. Indeed, I argue that the EU support for the ICC can to a large extent be considered to result from the US opposition. In fact, counter-intuitively, member states appeared more willing to formulate common positions and undertake joint actions because of, rather than in spite of, the US opposition.[43] Interestingly, now that the US has adopted a more conciliatory approach, EU support for the Court seems once again uneven.

### 3.1. International-political

First, with respect to the international-political sphere, I particularly focus on the so-called "special responsibilities" argument. This argument may help us not only explain the difference between the US and the EU over the Rome Statute, but also between the UK and France and the "EU 13."[44]

The US opposition to the Statute stemmed largely from the fear that the ICC would prosecute US troops for crimes committed in the course of their duties.[45] "The worry

[42] Pollack, *supra* note 5.

[43] *See* Fehl, *supra* note 4, for a similar argument.

[44] Pollack, *supra* note 5.

[45] *See, e.g.*, Ruth Wedgwood, *Fiddling in Rome: America and the International Criminal Court*, 77 Foreign Aff. 20 (1998); Wedgwood, *supra* note 10; David Scheffer, *The United States and the International Criminal Court*, 93 Am. J. Int'l L. 12 (1999); Scheffer, supra note 10;

of the United States is that in an unpopular conflict, there is a real chance that an adversary or critic will choose to misuse the ICC to make its point."[46] The US therefore advocated limiting the Court's automatic jurisdiction to the crime of genocide, and to cases in which the suspect was a national of one of the States Parties. It also rejected the notion of an independent Prosecutor and favored a system in which only the Security Council or a State Party could refer a case to the Court.

The argument put forward by the US in the case of the ICC is slightly different from the "special responsibilities" argument as mentioned by Pollack.[47] From the American perspective the ICC is not only seen as limiting flexibility in foreign policy making, and thus tying its hands,[48] it also makes politically motivated referrals possible given that the US is far more active than other countries in military operations around the world.[49] As David Scheffer put it:

> [T]he United States has special responsibilities and special exposure to political controversy over our actions. This factor cannot be taken lightly when issues of international peace and security are at stake. We are called upon to act, sometimes at great risk, far more than any other nation. This is a reality in the international system.[50]

Because the US feels it carries a greater responsibility for military operations than other countries, it considers it unacceptable to "transfer the ultimate authority" to judge US nationals to a Court beyond US control.[51] Whatever safeguards against misuse have been put in place, the US simply does not seem to accept the principle that an international body can exercise jurisdiction over US service-members, no matter how theoretical.[52]

At the Rome Conference, the US felt that its special position, and its related interests and concerns, were not taken seriously by the "Like-Minded Group" (LMG) of countries and non-governmental organizations (NGOs) in favor of a strong and independent Court. This, the US argued, could have major consequences. A lack of US participation could lead to enforcement problems, and thus decrease the effectiveness of the Court. Moreover, the possibility of ICC jurisdiction over its nationals would make the US less willing to engage in peacekeeping operations and thus render the world a less safe place. A lack of US participation would thus also be a concern for European countries and could hamper their interests.[53]

[46] Wedgwood, *supra* note 10, at 101.

[47] Pollack, *supra* note 5.

[48] *Cf.* Beth A. Simmons & Allison Danner, *Credible Commitment and the International Criminal Court*, 64 Int'l Org. 225 (2010).

[49] Apart from Scheffer, supra note 45, *see, e.g.*, Weller, supra note 23; Malanczuk, supra note 10; David Forsythe, *The United States and International Criminal Justice*, 24 Hum. Rts Q. 974 (2002)

[50] Scheffer, *supra* note 45, at 12.

[51] Lee Casey, *The Case against the International Criminal Court*, 25 Fordham Int'l L.J. 840, 843 and 846 (2001).

[52] John Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 64 Law & Contemp. Prob. 167, 186 (2001).

[53] Jamie Mayerfield, *Who Shall Be the Judge? The United States, The International Criminal Court, and the Global Enforcement of Human Rights*, 94 Hum. Rts Q. 93, 103 (2003); Fehl, *supra* note 4.

While the fact that US demands were not accommodated in the Rome Statute for Democrats meant that the US should nonetheless stay involved, Republicans opted for neutralizing the Court. Many policymakers within the Bush Administration came to realize, however, that the US was "shooting [itself] in the foot" with its anti-ICC campaign, as Secretary of State Condoleezza Rice publicly remarked in 2006.[54] It damaged its international reputation as a supporter of human rights, notably among European countries. Moreover, by denying military or economic assistance to countries unwilling to sign bilateral non-surrender agreements, it also moved these countries—especially in Africa—closer to emerging powers such as China.

The positions of individual EU member states in the run-up to Rome can also be explained on the basis of the special responsibilities argument. Although the UK and France publicly supported the creation of an ICC, both countries had similar reservations as to its powers. By contrast, the "EU 13" felt they had nothing to fear from a strong and independent Court—and were thus willing to tie their hands.[55] They were either not active in military operations around the world, or considered their (limited) presence in other countries not to evoke strong criticism. Indeed, supporting the ICC was associated with benefits for member states' international and domestic reputation.

In the absence of a united standpoint by its member states, initial EU support was limited to general declaratory statements. Yet, with the US initiatives to obstruct the successful operation of the ICC, the EU found itself having to step up both the scope and intensity of its support for the Court in order to match Washington's efforts. Within the Union itself, member states, committed to the Court, needed to overcome internal differences on the US proposed bilateral "non-surrender" agreements. Emphasizing the inconsistency with their commitment to the Rome Statute, all EU member states refrained from signing such agreements.[56] Moreover, many third states, confronted with persuasive requests to grant immunity from ICC jurisdiction to US nationals, turned to the EU for guidance and political support.

## 3.2. International-legal

A second factor distinguished by Pollack[57] concerns the international-legal system, particularly the separate, multilateral negotiating body in which the negotiation of the Rome Statute took place and the UN system which played an important yet "unofficial" role in getting the Court off the ground. Unlike the Yugoslavia and Rwanda tribunals, which were created under Chapter VII of the United Nations Charter, the ICC is not a subsidiary organ of the United Nations Security Council. Instead, it is based upon a multilateral treaty, the Rome Statute, negotiated by a very large, sovereign equality body (one-state, one-vote). These international-legal factors help to explain

[54] *International Criminal Court: Let the Child Live*, Economist, Jan. 25, 2007, *available at* http://www.economist.com/node/8599155.

[55] Simmons & Danner, *supra* note 48. *Cf.* Andrew Moravcsik, *Explaining International Human Rights Regimes. Liberal Theory and Western Europe*, 1 Eur. J. Int'l Rel. 157 (1995).

[56] Kelley, *supra* note 20.

[57] Pollack, *supra* note 5.

both why the US got rolled on issues it cared deeply about, and why it was so strongly opposed to the outcome.

Hardly any of the participants, including the US and European delegates, expected a Statute after five weeks of negotiations in Rome. It had taken more than eighty years to get to Rome and most delegates expected it to take at least another five to ten years to end up with a Statute. The negotiations that led to the adoption of the Rome Statute proved different, however. A key difference with other codification conferences that had a significant impact on the US position in the negotiations was the participation of all members of the international community in the preparatory process, including least developed countries and non-governmental delegations. Unlike other codification conferences, a record number of 160 states participated in the Conference. It is fair to say that the US (and the other "P5" countries, including, initially, the UK and France) would have had more influence, if the ICC had been created, like the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, by the Security Council and not by a separate, multilateral negotiating body.

Apart from states, a large number of intergovernmental organizations, specialized organizations and NGOs participated in the Rome Conference. The two hundred NGOs were particularly active. Among the most important NGOs were Amnesty International, Human Rights Watch, the Lawyers Committee for Human Rights, and the "umbrella" Coalition for an International Criminal Court (CICC). The wide participation proved to be critical to the perceived success of the Rome Conference. Yet, it also was one of the main reasons why the US delegation, wary of the role of non-state actors in foreign policy making, did not succeed in influencing the negotiations in such a way that it could vote in favor of the Statute.

US hostility to the ICC, it has been argued, is "all about the UN Security Council."[58] In Rome, many western delegates, with the notable exception of US delegates, were convinced that only creating the Court independently from a political body such as the Security Council could safeguard the independence of the ICC. In the view of European states, this construction at least provided for a minimum safeguard against politicization; in the perspective of the US, this construction could lead to an uncontrollable Court, exercising universal jurisdiction—an international-legal norm rejected by the US, even though its national courts have applied its jurisdiction extraterritorially.[59]

While international-political and international-legal factors are helpful in explaining US opposition, initial EU discord and eventual EU support for the Court, they do not help us to explain why the UK and France, unlike the US, over time changed their positions to the Court. To understand such changes, or the lack thereof in the case of the US, it is necessary to understand what has happened at the domestic level, both politically and legally.

[58] William Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 Eur. J. Int'l L. 701 (2004).

[59] Weller, *supra* note 23, at 710; Wedgwood, *supra* note 25, at 99; Michael Scharf, *The ICC's Jurisdiction over the Nationals of Non-party States: A Critique of the U.S. Position*, 64 Law & Contemp. Probs. 67, 101 (2001).

### 3.3. Domestic-political

The third set of domestic-political factors identified by Pollack consists of three key domestic-political factors: domestic ideology, party/governmental politics and interest group pressures. Here, however, I depart from the framework for this symposium by examining also the divergent views *within* government. The US and certainly the EU are not monolithic actors. Politics within a given state (or polity) is characterized by governmental or bureaucratic politics, for example, infighting between different ministries, such as those of defense on the one hand, and those of foreign affairs or justice on the other.

When it comes to ideological beliefs, the ICC in its current set-up mirrors the "philosophical underpinnings" of the EU.[60] Whereas Americans are wary of transferring power to a higher authority, this is precisely what the EU as a political community is built on: member states voluntarily pool sovereignty, including in the area of foreign policy making. European support for the ICC can be seen as rooted in its deeper commitment to multilateralism. From the US perspective, however, the Court conflicts with "American civic nationalism, conceptions of a separate political community and constitutional culture."[61] While the US generally supports international law, it is much more suspicious of multilateral forums, which it finds lacking in effectiveness and legitimacy. It instead favors a unilateral or bilateral model, extricating itself from the concept of universality and instead practicing "national particularity and cultural relativism."[62]

There is considerable disagreement in Washington on how to approach the Court. This can be seen from the different views of Democrats and Republicans on the signature, the unsigning, ASPA, the bilateral non-surrender agreements, and the UN Security Council resolutions. There is general consensus, however, that the US cannot accept the ICC as it has been designed in Rome. Both Democrats like David Scheffer and Republicans like John Bolton have opposed the negotiation process and its outcome. It reflects another kind of multilateral diplomacy and constitutes a new species of international organization—substantially different from the UN, with a more restricted role and a decision-making prerogative for the five permanent members of the Security Council, and a relatively strong position for the large majority of small and middle powers in the General Assembly.

Both the way the ICC has come into being and the way it is supposed to function reflect the European conception of a broad international community, not only made up of states but also made up of non-state actors such as NGOs. Indeed, most EU member states were part of the Like-Minded Group of countries and NGOs that coordinated their negotiating strategies on contested provisions of the Rome Statute.[63] The concept

[60] Lisa Aronsson, *Europe and America: Still Worlds Apart on the International Criminal Court*, 10 European Political Science 8, 8 (2011).

[61] *Id.*

[62] Forsythe, *supra* note 49, at 976. *See also* Diane Orentlicher, *Unilateral Multilateralism: United States Policy Toward the International Criminal Court*, 36 Cornell Int'l L.J. 415 (2004); Mayerfield, *supra* note 53.

[63] *See, e.g.*, Alistair D. Edgar, *Peace, Justice, and Politics: The International Criminal Court, "New Diplomacy", and the UN System*, *in* Enhancing Global Governance: Towards a New Diplomacy? 133 (Andrew F. Cooper et al. eds., 2002); Philip Nel, *Between Counter-Hegemony and Post-Hegemony: The Rome Statute and Normative Innovation in World Politics*, *in* Enhancing Global Governance 152.

of the LMG was based on a new approach to the negotiation of international treaties, also referred to as the "New Diplomacy."[64] This approach had been effectively applied during the Ottawa landmines conference in December 1997. There, a similar group of like-minded countries, in unprecedentedly close cooperation with civil society, had successfully negotiated a convention banning anti-personnel mines, yet lacking the support of the US.

The only two EU countries initially not part of the LMG were the UK and France. When the Labour Government of Tony Blair took office in 1997, however, the UK dramatically changed its position in favor of a strong ICC. Although the UK had officially reversed its stand, now allying with the LMG, UK Ministry of Defence delegates in Rome reportedly clashed with their colleagues at the Foreign Office on the independence of the Court's prosecutor.[65] The UK Ministry of Defence was overruled by Blair, however, and the dispute was settled in favor of the UK Foreign Office. This shows that a major domestic political change can—albeit not without internal strife—trump the imperatives of Britain's special responsibilities as a global military power.

France, the only EU country not yet part of the LMG at the start of the Rome Conference, changed its position on the independent position of the prosecutor in the course of the negotiations. It also reversed its position on the Security Council's veto power over the ICC. However, apparently also under pressure from its Ministry of Defense, France only joined the other EU countries in support of the draft Statute after it had negotiated an opt-out. For a period of seven years after the entry force of the Statute, it was allowed the possibility of blocking prosecution of their citizens for war crimes. France became a member of the LMG in the last week of the Rome Conference.

In the background, broad parliamentary commitment to a strong ICC has been instrumental in fostering governmental support throughout the EU. In most countries, both left and right parties, including extreme left and extreme right parties that are generally opposed to EU integration, support the ICC. Prominent parliamentarians brought initiatives before their legislatures to support the creation of an ICC.

Since the adoption of the Rome Statute, there has been a gradual increase in volume and scope of common EU policies that aim to promote the ratification and implementation of the Rome Statute by third countries. Having accepted the ICC Statute, it has become in the interest of EU countries to advance universal support for the Court. Over time, however, planning has become increasingly strategic and the number of EU-wide initiatives has proliferated significantly. This suggests that the more reluctant states have also been drawn into the policy making process and at least a minimal level of "Europeanization" of member states' policies towards the ICC has occurred. Two factors in particular are likely to have contributed to a harmonization of member states positions in this area: the background of the actors involved and the special relationship with non-state actors.

[64] *See, e.g.*, Caroline Fehl, *Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches*, 10 Eur. J. Int'l. Rel. 357 (2004).

[65] Human Rights Watch, *HRW Disappointed by U.K. Stand on International Court* (July 9, 1998), *available at* http://www.hrw.org/news/1998/07/09/human-rights-watch-disappointed-uk-stand-international-court/.

First, the officials participating in EU working groups on the ICC tended to share common backgrounds and experience. Most national "ICC units" were staffed by legal experts in international criminal law.[66] Some of them had participated in the 1998 Rome Conference, while others had been involved in the establishment of other international tribunals. Not only was the character of their work pioneering, it was also of a highly technical-legal nature. This provided them with some autonomy from governmental scrutiny, especially when active at the EU level. It also enhanced the potential for the acquisition of new insights, and made the development of a common understanding possible. Legal advisers thus became "'activists' *within* European governments."[67]

Second, a remarkable symbiosis developed between member states and NGOs. NGOs actively participated in the negotiations; sometimes—in the case of least developed countries—NGO representatives even participated on behalf of states. After the Rome Conference, NGOs called upon states to ratify the Statute, assisted in implementation of the Statute into national legislation, and reacted against the efforts of the US to undermine the integrity of the newborn Court, acting as "norm entrepreneurs."[68] NGOs were regularly invited to present their views in the margins of EU working group meetings, which was exceptional under the CFSP framework. And NGO lobbying has produced concrete results, as at least several of their proposals were incorporated in EU common positions and action plans.

### 3.4. Domestic-legal

A final set of domestic-legal factors concerns legal or constitutional institutions that can influence the aggregation of domestic interests and the orientation of the state toward international criminal law, and the Rome Statute of the ICC in particular. I concentrate on constitutional features in regard of the relation with international law and domestic cultures in respect of the rule of law.

Different from European countries, especially the new entrants into the EU, the US does not automatically incorporate international law into the domestic legal order. It typically accepts international rules and norms after attaching reservations, so as to ensure that domestic practice does not have to change. The ICC Statute does not allow reservations, however. Even as it is said to be compatible with most if not all US constitutional protections, the US has decided to opt-out of the Statute completely.[69] This so-called "US exceptionalism" is different from European forms of exceptionalism that generally relate well to multilateralism. It has in the past led the US to engage only with international criminal courts and tribunals (such as the Yugoslavia and Rwanda

[66] Groenleer & Van Schaik, *supra* note 3.

[67] Fehl, *supra* note 4, at 105.

[68] *Id.*; *see also* Nicole Deitelhoff, *The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case*, 63 Int'l Org. 33 (2009).

[69] *See, e.g.*, Diane Amann & Mortimer Sellers, *The United States of America and the International Criminal Court*, 50 Am. J. Comp. L. Supp. 381 (2002).

tribunals) that allow it a significant degree of control in order to make sure its nationals are not prosecuted.[70]

In responding to US requests for protections of military personnel, European governments were not only confronted with the question whether they should keep their international commitments, in line with their domestic rule of law cultures. They also faced additional complexities. Concluding an immunity agreement would require not only a signature by the executive, but also parliamentary ratification. Parliaments in most member states, supported by NGOs, have consistently taken a strong stance in favor of an effective and independent ICC. Signing a "non-surrender" agreement by a government was thus likely to be met with severe domestic criticism, political as well as legal. Most EU governments were therefore seeking a common "European response" that would accommodate US concerns and forestall new US requests to individual member states.

### 3.5. Support for the ICC as the effect of interaction between the US and the EU

The US (op)position to the Rome Statute can thus chiefly be explained on the basis of the "special responsibilities argument," albeit in a slightly different form than referred to by Pollack. The argument has over time become less valid, however, with the Court acting in a fair and prudent manner in respect of the US. The international-legal forum of the Rome Conference, as well as domestic-political factors such as partisan control of the executive also have significant explanatory power. The mere fact that the US saw no other way than to fiercely oppose the Court can be said to result from the dynamics at the Rome Conference. There the US was pushed aside by a coalition of individual EU member states, other countries and NGOs, agreeing upon an "all-or-nothing" package. This outcome combined with a Republican Administration and outspoken critics of the Court, who saw their hostility against the Court confirmed by the refusal of (European) ICC signatories to enter into bilateral non-surrender agreements with the US.[71]

Most individual European countries have always been on board for the ICC, not having any special responsibilities in the international arena. *Before* 1998, however, the EU as such was divided, with the UK and France siding with the US and opposing key design features of the Court. It was only after major domestic-political changes that the UK and France joined the other countries in support of ICC. Explanations for the unified EU position towards the ICC *after* Rome follow primarily from external pressures, in particular the strong US opposition to the ICC, and the demands on the EU from other countries and NGOs. Whereas the adoption of the Rome Statute had increased the intensity of interaction in the EU framework, it was not until the US position changed from benign abstention to outright hostility that the EU as such took a marked stance on the ICC.

[70] Forsythe, *supra* note 49; John Cerone, *Dynamic Equilibrium: The Evolution of US Attitudes toward International Courts and Tribunals*, 18 Eur. J. Int'l L. 277 (2007).

[71] Amann & Sellers, *supra* note 69, at 404.

Ironically, the American opposition to the Court has thus proven instrumental in raising the external profile as well as the internal coherence of EU foreign policy with regard to the ICC. The US position necessitated, it was felt by member states, a European response. This further strengthened interaction, learning and institutionalization of the EU's commitment towards the ICC. It made EU governments increasingly turn to each other, pooling even more sovereignty. Since 2006, the relationship between the US and the EU on the issue of international criminal law, in particular the ICC, has become normalized. Determining the extent to which the EU position has helped bring about the change in the US approach is difficult, as this normalization is at least partly the result of changing and moderating US attitudes.

In spite of some observers' expectations, the EU has always maintained a dialogue with the US.[72] This does not mean the EU and its member states have compromised on the core principles and values underlying the ICC, but rather, that it has taken the US position, its concerns and interests seriously. As suggested in 2005 by Javier Solana, then High Representative for the CFSP, the EU and the US have sought practical solutions trying to establish a *modus vivendi*, based on common goals such as ending impunity for the most heinous international crimes. This view was endorsed by John Bellinger, the former State Department's chief legal adviser: "We believe that divisiveness over the ICC distracts from our ability to pursue these common goals, and hope that supporters of the Rome Statute will join us in constructive efforts to advance our shared values."[73]

## 4. Conclusions

In this article, I have contrasted the US and EU positions towards the Rome Statute and the ICC. I have asked how the apparent difference between the US and the EU position can be explained.

From my comparative analysis, two key conclusions can be drawn. First, while the US and EU positions *vis-à-vis* the Court differ strikingly, support for the ICC is much more nuanced than often depicted. Applying the conceptual framework developed by Pollack[74] to disaggregate US and EU support, I find substantial variation along the different dimensions across the two polities and over time. For a long time, US support has been high, the Americans assuming a leadership role. Over time, US support has turned into opposition, not only abstaining from the Court but also actively undermining it. Today, however, the US has softened its approach, even complying with some of the Statute's provisions. The EU *as such* initially displayed a lack of leadership as support was divided among its member states. Internal EU support has grown, however, into a common position on the Court, and increasingly also into EU leadership *vis-à-vis* third countries. Still, individual EU countries are reluctant to give effect to international criminal law provisions in their national jurisdictions.

[72] Robert Kagan, *Europeans Courting Disaster*, Wash. Post, June 30, 2002.
[73] Bellinger, *supra* note 33.
[74] Pollack, *supra* note 5.

Support for or opposition to the ICC is not necessarily the same as support for or opposition to international criminal law. It appears that US and EU support do not so much differ in the abstract—both are in favor of ending impunity for perpetrators of the world's heinous crimes—but in concrete policy choices. The US is opposed to certain provisions of the Rome Statute and some design features of the Court, as it does not accept the mere possibility that US nationals would be subject to the Court's jurisdiction, no matter how grievous the offenses. The EU, including countries like Britain and France that also send their soldiers abroad and whose militaries have worried about this but were overruled, has ratified the Statute.

Secondly, transatlantic differences in support for the ICC can indeed be explained by a combination of factors. Especially the so-called "special responsibilities" argument may help to elucidate the US position *vis-à-vis* the Court. Its special responsibilities make it vulnerable, the US fears, for politicized prosecutions of a "rogue" Court, triggered by countries or non-governmental organizations hostile towards the US.

Furthermore, the transatlantic differences over the ICC deepened over time, partly as a result of the interactions between the two polities preceding, during and following the Rome Conference: an uncompromising US stance during the negotiation of the Statute prompted European "triumphalism" following the adoption of the Statute, and a hardening of US policy around the entry into force of the Statute triggered a coordinated European response to preserve the integrity of the Statute. EU support, particularly in later years, has grown as a result of US opposition, especially when this turned into hostility, because the EU as such had committed to the Rome Statute and it had thus become in its interest to pursue universal acceptance. Any compromise would mean rewriting the Statute, a carefully negotiated package deal, which could impair the ICC's legitimacy and effectiveness, in the eyes of the EU.

This brings us to two important limitations of this study. The first relates to the "unit of analysis" problem, as described by Pollack.[75] The very growth of the EU support is due to the fact that the EU is a collection of—now—28 member states. Even if the EU decides to coordinate its position towards international criminal law, it does not constitute a single nation state like the US. Indeed, in the case of the ICC, we have seen that a number of member states in conjunction with the EU institutions have been able to influence other member states and shape the outlook of these member states on the Court. As a result, European policy in support and assistance of the ICC could be formulated and further strengthened throughout the years.

An undertheorized element in Pollack's framework, and only dealt with here in passing, is the important role that individual legal experts and diplomats in certain member state governments and in the European institutions, often in symbiosis with non-governmental organizations, have played in promoting the ICC. The same applies to intra-governmental bureaucratic politics, such as between ministries of defense and foreign affairs, that has hampered US support for the Court, and initially also British and French support.

[75] *Id.*

A second limitation concerns the "measurement" problem. Because support for international criminal law as such is difficult to measure, this article restricted its focus to the support of and opposition toward the Rome Statute of the ICC. The US and EU positions on the ICC are not necessarily representative for the broader concept of ICL. In order to deal with this problem, I have sought to point to other international treaties or agreements in the area of international criminal law that the US nonetheless supports. The most obvious example of US leadership has been the support for the creation of the ad hoc tribunals for the former Yugoslavia and Rwanda and the internationalized courts for East Timor, Sierra Leone, and Cambodia. Americans, just like Europeans, are not subject to the jurisdictions of these courts, however, whereas they would be if the US would join the ICC.

The US and the EU thus appear to have similar values as regards bringing foreign mass murderers to justice and extending the rule of law to poorer nations through such tribunals and courts, which is perceived to be in both the US and EU interest. They have different interests when it comes to the Statute as negotiated in Rome, however. In recent years, the US seems to have given the Court a chance. Perhaps it realizes that its opposition not only hurts its international reputation and could actually strengthen the position of China and other emerging powers *vis-à-vis* poorer nations. Or maybe the US recognizes that support for the ICC, which has so far proven to be very careful in taking up situations, would not only be in accordance with its values, but could also be in its interest—to remain the world's most powerful nation.