

Beyond intergovernmentalism and the quest for unity

Democracy or efficiency?

Deliberating CFSP?

European Foreign Policy and the International Criminal Court

The International Criminal Court (ICC) is viewed by many as a success story for international governance and the beginning of a new era in international law. It is the first permanent institution able to prosecute severe violations of international humanitarian law in principle in independence of the nation states, and the speed with which the Rome Statute was developed, resolved and came into force was also impressive. Less than ten years passed between the inception of pre-negotiations and the ICC starting work. Some commentators suggest the proactive stance of the European Union, which supported the ICC from the word go, was a reason for this incredible speed. This paper therefore traces EU policy both within negotiations on acceptance of the Statute of Rome and following the latter's successful adoption, through to the commencement of ICC operations, in order to examine whether the assumption that the EU has pursued a proactive stance is tenable. In this context, we have seen a clear shift in the EU's stance. While during negotiations it hardly wielded a coherent policy, things changed fundamentally once the Statute was resolved. The fact that this proactive stance endured despite the struggle with the United States over the ICC must be seen in light of the fact that the CFSP is more than just an institutional forum to coordinate EU member states' interests. The norms and principles that inform CFSP's goals and strategies, such as democracy, rule of law, fundamental rights, and the CFSP's procedural norms (e.g., regular consultation) are particularly suited to encourage deliberation among member states strengthening a consensus over time, even if the short-term interests of individual members would seem to suggest that they will leave the consensus position.

Nicole Deitelhoff
Collaborative Research Center 597
“Transformation of the State”
University of Bremen / InIIS
Linzer Str. 4
28359 Bremen
+49-(0)421-218-3246
nicole.deitelhoff@iniis.uni-bremen.de

1. Introduction¹

With the resolution of the Rome Statute on July 17, 1998, the international community decided to install a permanent International Criminal Court (ICC) that was meant to prosecute severe violations of international humanitarian law in the realm of crimes against humanity, war crimes, genocide and possibly crimes of aggression. To date, of the total of 139 signatory states, 108 states have ratified the statute, and they include all the member states of the European Union (EU) except for the Czech Republic where ratification is about to be completed in 2008. Ten ratifications were forthcoming on April 1, 2002 in a ceremony held at the United Nations headquarters in New York. This meant that the 60 ratifications required for the statute to be enacted was reached, and it duly passed into law on July 1, 2002 – less than four years after its resolution at the diplomatic conference in Rome. On March 11, 2003 the ICC was ceremoniously opened in The Hague.

Since then, the ICC has been active and has initiated investigations into the situation in the Democratic Republic of Congo, Northern Uganda, the Central African Republic and most recently in Darfur, Sudan, a situation referred to it by the UN Security Council. With this short time span between the beginning of pre-negotiations in 1995 and the commencement of ICC activities in 2003, for many commentators the court comprises a surprising success story in international governance signaling a shift towards a constitutionalization of the international system.

The Rome Statute was supported by many countries and institutions en route to the foundation of the ICC, whereas others have boycotted it, such as the United States, that to this day opposes the ICC through its national legislation and international diplomatic activities. Conversely, the European Union is often described as having played a pioneering role in the development of the ICC. Thus, the EU is said to have taken to the pre-negotiating table as a coherent actor that decisively moved the negotiations forwards (for example Oltsch 2004: 52f). Even after the resolution of the Statute, the EU is regarded as having maintained this role and with its common positions and actions supported the swift foundation of the ICC and the commencement of ICC activities (Groenleer/van Schaik 2005: 1).

Commentary on the EU's foreign policy is rarely as euphoric. Usually, the talk is of a "capabilities-expectations gap", fragmentation or a general standstill when the discussion focuses on the EU's CFSP. These attributes tend to be linked to it remaining outside the

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community methods and to the condition whereby each member state factually has a veto right as regards foreign policy, not to mention the lack of resources and means of enforcement. If we add to this set of arguments the fact that the ICC is one of the fields of transatlantic policy subject to most conflict, as the United States continue to reject its jurisdiction, then the EU's proactive stance may initially seem surprising. Thus, the question arises whether this positive view of the EU's role stands up to the fact (1) and if so, how it can be explained (2).

This paper therefore traces EU policy both within negotiations on acceptance of the Statute of Rome and following the latter's successful adoption, through to the commencement of ICC operations, in order to (1) examine descriptively whether the assumption that the EU has pursued a proactive stance is tenable. In this context, we have seen a clear shift in the EU's stance. While during negotiations it hardly wielded a coherent policy, things changed fundamentally once the Statute was resolved. During the negotiations it was not the EU that had the coordinating function, but the group of the *Like-Minded* states, which included a large number of the EU member states, but by no means all of them. After the Statute was approved, the EU took the floor not only with several common positions, an action plan and a broad spectrum of measures for the swift commencement of ICC operations, but was also in a position to uphold this proactive stance despite the United States' policy of rejecting the ICC intensifying to the point of obstructionism.

The reasons for this change (2) may at first sight seem trivial. While during the negotiations the interests of the individual EU member states were in some case miles apart, the Rome Statute marked a feasible compromise that they could all share despite their initially divergent interests. The fact that this proactive stance endured despite the struggle with the United States can be attributed not just to this compromise, but must also be seen in light of the fact that the CFSP is more than just an institutional forum to coordinate EU member states' interests. It goes beyond simple intergovernmental bargaining. For it is also shaped by norms and principles that inform its goals and strategies. These norms and principles, such as democracy, rule of law, fundamental rights, and the CFSP's procedural norms (e.g., regular consultation) are particularly suited to encourage deliberation and persuasion among member states working as amplifiers to strengthen a consensus over time, even if the short-term interests of individual members would seem to suggest that they will leave the consensus position. As the paper suggests (2), it is this linkage between an initial bargaining compromise and the normative (substantial as well as procedural) norms that can explain this shift.

This characterization draws on the academic debate on the EU's role as a foreign-policy actor in which it is often assigned the status of a normative or civil power (Manners 2002; Smith, K. 2000) that unlike classical foreign-policy actors (states) prioritizes dialog, economic incentives and the general juridification of international politics in order to lend weight to its positions. This image of a normative power (Rosecrance 1998) or of soft diplomacy (Petiteville 2003) is not only considered the logical implication of not having the means of sanction backed up by force available, but also as the intentional export of the intrinsic norms and principles guiding EU action and derived from the positive experiences of the history of European integration itself. Avoiding or overcoming internal competition and recurrent tension in war-ridden Europe through permanent cooperation, institutionalization and democratization is now transposed onto the world outside, as it were. The EU is regarded as a "changer of norms" (Manners 2002: 252) or to become something like a regional cosmopolitan power in the making (Eriksen 2006; Sjursen 2007b) that exports its own positive experiences in order to achieve a similar domestication of the international setting (Petiteville 2003: 128).

Against the backdrop of the weak institutionalization of the Common Foreign and Security Policy (CFSP), on the one hand, and the transatlantic conflicts on the other, I adopt this characterization of the EU as a normative power in my analysis of the EU's role in the establishment of the ICC. After surveying the institutional and the normative foundations for the CFSP (section 2) and the history of the negotiations on the ICC (section 3) I will explore to what extent the EU has played a pioneering role in questions relating to the ICC, as some commentators suggest, and how it brought it to bear (section 4). I will then conclude by exploring the issue of how the EU policy on the ICC offers insights into the conditions of the efficacy of its normative *power* in foreign policy often attributed to the EU (section 5). Although much more research is needed on the nature of and the mechanisms by which the normative power of the EU operates (but see Sjursen 2006, 2007a), the findings suggest that part of its observed success might be its promotion of deliberation and persuasion among member states. However, as the remaining section (section 6) discusses, this kind of deliberation remains a rather exclusive and bureaucratic enterprise, inattentive to issues of transparency, accountability or broader public debate (Curtin 2007). It cannot easily be aligned to ideas of increasing the democratic quality of the European Foreign Policy.

2. The EU's Common Foreign and Security Policy (CFSP): the latecomer of integration

2.1 Institutional basis of CFSP

There has been little progress in giving foreign and security policy a common basis if one compares it to economic integration. Ever since the start of European Political Cooperation (EPC) in 1969, this issue area has also been an object of European integration, but it was excluded from the community's treaties and was only institutionalized to a limited extent. The core of the EPC was more to establish regular consultations between national diplomats in order to ensure communication and coordination. Yet in the course of time this definitely spawned procedural norms and practices for cooperation on foreign policy that then led to a Europeanization of policies (Smith, M. 1998). And within the overarching policy domain of foreign policy there continue to be clear differences as regards the European Union's role.

Already at a very early date foreign economic policy (common trade policy) was included in the Treaty of Rome. In this field, the Commission not only has a monopoly of initiative, but the member states have also delegated the representation at international negotiations to the Commission, whereby decisions are taken in the Council by a qualified majority. In general, the expansion of the EU's ambit in the field of foreign policy (and it was extended in the 1970s to include foreign environmental policy, too) involved locking into the economic aspects of the respective fields involved. Since the European Community was primarily an economic community, this focus on economic issues also enabled the new policy fields to increasingly be included into Community action. Nevertheless, member states have been and still remain reluctant to cede powers to the community level regarding foreign policy (cf. Holzinger et al. 2005: 221f).

Even if the Common Foreign and Security Policy was first formally established with the foundation of the EU in the context of the Maastricht Treaty of 1991, it had a long prior history. Nevertheless, the CFSP is largely intergovernmental in nature, for it is as an independent pillar outside the EC. In terms of decision-making, the member states are the key actors at all levels, almost bereft of supranational elements, such as the European Commission's monopoly of initiative or the supremacy of European law. Although the last years have witnessed an increase in committees and institutions concerned with CFSP which for some has even led to a Brusselsisation of CFSP (Tonra 2001), the central EU institutions within CFSP are still the European Council of Heads of State and Government as well as the

EU Council as the body of the foreign ministers of the member states. Only they can, on the basis of unanimous decisions, take legally binding resolutions in the CFSP framework.

Its major instruments include common strategies, positions and action. From *Common Positions* the strategy of the Union is defined for specific issues. The member states shall thereby “ensure that their national policies conform to the Union positions” (Art. 15, EU Treaty). *Common Actions* are based on *Common Strategies* and/or *Positions* and relate to specific situations in which it is felt that the EU should take operative action (e.g., to send a mission of election observers). According to Art. 13 of the EU Treaty, the European Council shall define the principles and general guidelines for the CFSP. On that basis, the EU Council (Council of Ministers) then takes the requisite decisions to define and implement the CFSP.

The principle of unanimous decision-making in CFSP means each member state factually possesses a right of veto. While the Treaty of Amsterdam (1997) resolved to soften this principle of unanimous decisions, enabling qualified majorities for *Common Action* in the case of unanimously accepted *Common Strategies*, this has not actually been practiced to date. On Balance, CSFP would instead seem to provide an institutional framework within which the member states can fine-tune their interests rather than enabling the EU to take the stage as a unitary actor (Kohler-Koch et al. 2004: 275).

2.2 *Normative basis of CFSP*

There is thus a clear developmental logic to cooperation in foreign policy (and it appears to be based on the fact that the weight enjoyed by the individual member states’ respective foreign policy increases when coordinated in the form of CFSP). Yet the CFSP is also an expression of the European Union’s shared values as are clearly outlined in Art. 11 of the Treaty of Maastricht. There, the primary goals of CFSP are set out as being the preserving the peace, strengthening international security, promoting international cooperation, strengthening democracy and the rule of law, and the adherence to human rights and basic civil liberties. These values are reinforced by the European Security Strategy of 2003 (ESS 2003). This substantive objective of the CFSP is a prime expression of the idea of Europe’s normative power or civil power. The concept of civil power is linked to an operating policy that seeks to achieve its normative goals by dialogue, conviction and cooperation rather than by coercion and the threatened use of power. This is evidenced by the CFSP’s objective of asserting the norms valid within the EU of democracy, basic rights, the rule of law and in general peaceful conflict solution on the international stage, too, as it is by the CFSP’s substantive instruments

that are geared in particular to fostering political dialog, setting positive incentives (assistance programs, association treaties, conditionality) and in general to strengthening multilateral cooperation and international institutionalization.²

The overall setting is thus on the one hand an intergovernmental decision-making process within CFSP geared to unanimity and dependent on approval by the member states, and, on the other, the simultaneous dominance of soft instruments for shaping policies. The question must thus be when and how there can be a coherent CFSP. The International Criminal Court is a prime case for exploring this question. It corresponds to the ideal type of the EU's normative intentions (rule of law, human rights and basic liberties), so that we can a priori expect an active policy here by the EU as a collective actor.³ Additionally, given the opposition by the United States it contains considerable potential for conflict on foreign policy such as should reduce the probability of common action given the only weak degree of the CFSP's institutionalization.

The following overview of the history of the ICC as well as the various negotiations that led to it being established form the basis for assessing the role of the European Union in and following the negotiations and deciding whether the ICC is an example of a coherent foreign policy.

3. The history of the International Criminal Court

3.1 Historical developments and precursors

The idea of international criminal law is by no means new as it goes back a long way. As early as the 19th century there were efforts to advance criminal responsibility based on international humanitarian law. The idea of international criminal jurisdiction was first mooted by Gustave Moynier, President of the International Committee of the Red Cross (ICRC) in 1872 in the wake of the Franco-German War as he sought to punish violations of the Geneva Convention. However, this proposal fell more or less on deaf ears given the

² Although within research on the EU a lively debate is ongoing on whether the addition of the ESDP (European Security and Defence Policy) in the wake of the Petersberg tasks does not spell the gradual end of the character of the EU as a civil power (see Smith, K. 2000; Manners 2002; Lodge 1994), whereby this is hardly of relevance for politics as regards questions relating to the ICC.

³ Thus, Chris Patten, then EU Commissioner for Foreign Policy stated in a speech to the European Parliament on Sept. 25, 2002: "The principles of the Rome Statute, as well as those governing the functioning of the Court, are fully in line with the principles and objectives of the Union. The consolidation of the rule of law and respect for human rights, as well as the preservation of peace and the strengthening of international security, in conformity with the Charter of the United Nations and as provided for in Article 11 of the EU Treaty, are of fundamental importance to the Union," www.europa-eu-un.org/articles/de/article_1640_de.htm.

prevailing notion of law at that time. As of World War I, things started to change. After the end of the war, the victorious allies intended to set up an international tribunal in order to punish the Axis armies and even the German Kaiser himself for the war. At the Paris Peace Conference in Versailles in 1919, the Axis powers were formally found guilty of the war and the possibility discussed that the German Kaiser be prosecuted before an international tribunal. However, the delegates could not agree on the kind of jurisdiction under which the Kaiser would come. The Treaty of Versailles therefore mentioned neither war crimes nor some individual responsibility of the Kaiser under international humanitarian law. Instead, the idea was to bring him before an international tribunal in the context of a primarily political case brought for “severe violations of morality and the inviolability of treaties”.⁴ Despite the fact that this tribunal never sat in judgment over either the Kaiser or members of the Axis armies, it nevertheless demonstrates the trend toward individual responsibility under penal law of heads of state for severe violations of international humanitarian law. With World War II and the Holocaust, the scale of destruction, displacement, dispossession and acts of cruelty against the civilian population reached new heights. After the German Reich capitulated, on May 8, 1945, Great Britain, France, the Soviet Union and the United States signed the Four Power Agreement on the prosecution and punishment of the main war criminals among the European Axis powers, and an annex to the agreement included the Statute for an International Military Tribunal, the IMT. In January 1946, the Commander in Chief of the US Forces for Japan, General MacArthur, issued the Statute for the International Military Tribunal for the Far East, IMTFE.

The Charter of the Nuremberg Tribunal for the first time defined crimes that would today be considered core crimes under international law. They include crimes against humanity, war crimes and crimes against peace. At the same time, the Charter also established the principle of individual responsibility, because what expressly applied to all these crimes was that they were not tied to the existence of the corresponding national law but that personal responsibility was justified direct under international law (Triffterer 1995: 211f). At the same time, the tribunals were no proof of genuine international prosecution: First, the courts were primarily run by the occupying powers, although at least the IMT drew on a treaty which an additional 19 states signed in the course of the proceedings. Second, they were selective in the basis for their scope of responsibility: They did not prosecute the crimes of all parties to the

⁴ The Dutch government refused after the end of the war to extradite the Kaiser, referring to the prevailing legal opinion according to which heads of state enjoyed immunity and to the fact that the Netherlands were not a signatory of the corresponding treaty. There were also no international cases brought against members of the armed forces and instead only some half-hearted cases were brought before the German courts against a slender number of subordinate officers. See on this for greater detail Simpson 1995.

war, but only those perpetrated by the defeated, whereas the at that time relatively uncontroversial war crimes committed by the Allies were explicitly excluded from coming under the ambit of the tribunal. Third there was the problem of *ex post facto* jurisdiction as there were no international law regulations pertinent to crimes against peace and of relevance for penal prosecution (Triffterer 1995: 203). Despite these shortcomings, the two military tribunals can nevertheless be considered milestones in international criminal law and a precedence in efforts to establish an international jurisdiction. Robert Jackson, the US prosecutor at the Nuremberg Trials, put it thus:

“We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow.[...] And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nation, including those which sit here now in judgment.”⁵

3.2 The short heyday of “Never Again”

In 1946, with the Nazi war crimes still at the forefront of people’s minds, the General Assembly (GA) of the newly founded United Nations confirmed the principles of Nuremberg and appointed an International Law Commission to incorporate them into an international criminal code, a *Draft Code of Offences Against the Peace and Security of Mankind*.⁶ In this context, the UN’s founding agenda also included the wish to set up an international criminal court. The Convention on Genocide of 1948 envisaged an international tribunal. The following year, the GA requested that the *International Law Commission* (ILC) assess whether a criminal court was desirable and realizable. After a fierce controversy, the majority of the Commission voted that such a court was desirable and could be realized, but the GA thereupon commissioned a separate committee to elaborate the respective statute. The first draft, produced in 1951, did not meet with agreement among the major powers. While France was largely positively inclined, Great Britain regarded the idea as a whole as politically immature, and the socialist states led by the Soviet Union felt such a court would threaten their national sovereignty; the United States did not, by contrast, indicate their preference (Sadat 2000: 37; Ferencz 1993: 747f). Despite the evident reservations, none of the states were prepared at this point in time to publicly reject the project. Thus, the GA commissioned a newly appointed committee to continue work on the statute, and in 1953 the latter submitted a revised draft to the GA which thereupon resolved to defer a decision on the draft until such

⁵ See Robert Jackson, “21 November 1945”, in: International Military Tribunal, Trial of the Major War Criminals, vol. 2, p. 101, 145.

⁶ The International Law Commission was founded by the General Assembly in 1947 in order to advance codification of international law.

a time as the International Law Commission had completed its work drafting the Nuremberg Principles. In 1954, the Commission then filed a draft of the principles, but the GA likewise deferred a resolution on them, referring to the fact that the definition of an act of aggression had still to be made. Thus, the efforts to establish a permanent international criminal court came to a final standstill. The tension between the former Allies that culminated in the front between East and West hardening into the Cold War eliminated any prospect of a court that could also try and sentence heads of state for war crimes.

Irrespective of this, the codification of international criminal law progressed. In particular, the Geneva Convention of 1949 and its Additional Protocols of 1977 defined numerous war crimes under the regulation of international humanitarian law and thus continued the task of codification. In particular, the *grave breaches* set out in the Geneva Convention make it incumbent upon states to prosecute the crimes, whereby the states shall either try the persons accused of war crimes before one of its own courts or extradite the person to another state that is prepared to initiate criminal proceedings.⁷ Even if there was no progress made in structuring international jurisdiction in this regard, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, the Geneva Convention of 1949, the Additional Protocols to it of 1977, the Anti-Apartheid Convention of 1974, the definition of wars of aggression of 1974 and the Convention Against Torture of 1984 all helped lay the material foundations for a criminal court. However, these regulations “only” created the grounds for a national duty to initiate criminal proceedings under the principle of universal jurisdiction. With the ILC’s recommencement of work on the *Draft code* in 1982 following the consensus decision in the GA on a definition of aggression the work on an ICC came to a standstill again. Not until the end of the Cold War was the issue back on the GA’s agenda.

3.3 *The conflicts in the Balkans and Rwanda as catalysts*

In 1989, the Prime Minister of Trinidad and Tobago proposed on the occasion of a special meeting of the UN General Assembly that an international criminal court be established to get a handle on the increasing international drug trafficking. The GA instructed the ILC to resume its work on a Statute. Since the instruction was not restricted to the drug trafficking and an initial ILC report was favorably received in 1992, in 1993 the Commission tabled a draft that

⁷ See also on the *aut dedere aut judicare* principle Ambos 2001. However, not only severe injuries count as war crimes under the *grave breaches* system, but also violations of individual regulations can be a cause for personal penal responsibility under international law. Instead, the *grave breaches* constitute the minimum consensus for criminal acts that governments are *duty-bound* to prosecute (Triffterer 1995: 180). However, the Geneva Convention contains no references to penal prosecution of such violations under international law, and in the form of the *grave breaches* concept favors decentral prosecution by a particular state.

contained in addition to drug trafficking, the classical crimes of genocide, war crimes and crimes against humanity. This version then formed the basis for its final draft of 1994.

These developments were overshadowed (and fostered) by the civil wars in the Balkans and the genocide that ensued in Rwanda, followed by the whole world. When the first TV images of “ethnic cleansing” in Yugoslavia were broadcast, public pressure mounted on the UN to do something to prevent such crimes. As early as 1992 in its Resolution 764 the UN Security Council emphasized the individual responsibility for crimes committed in the conflict in the Balkans. Only a few months later, in Resolution 780 it advocated establishing a commission of experts to study the reports on violations of international humanitarian law. The Commission recommended to the Security Council that it establish a tribunal to prosecute the crimes. The Security Council complied and resolved, led by the United States and on the basis of Chapter VII of the UN Charter on preserving and restoring international peace, that an ad-hoc tribunal be established to prosecute the war crimes in former Yugoslavia (ICTY).⁸ A mere year later (again led by the USA), the Security Council set up the tribunal for Rwanda (ICTR) in response to the genocide there. In this context, the UN’S GA resolved to establish a preparatory committee open to all interested states in order, on the basis of the ILC draft, to deliberate on the Statute for an permanent court and if necessary resolve it by an international treaty passed by an international conference.⁹

The International Law Commission’s draft

The ILC draft envisaged a court that could be activated when required on the basis of a multilateral convention as a semi-permanent institution. The court was to be responsible for the most severe of crimes that affected the international community as a whole. In the Commission’s opinion, they include crimes against humanity, severe violations of international humanitarian law (war crimes) and acts of aggression. Moreover, the draft suggested that so-called *treaty crimes* such as drug trafficking and terrorism could fall under the ambit of the court. The latter was to function complementarily to national legal systems and only intervene if the state’s powers of penal prosecution were not available (Preamble; Art. 35). With the exceptions of the crime of genocides and referrals by the UN Security Council, the court was only to go into action if both the state in whose territory the crime was committed (territorial state), and the state in whose custody the accused was (custodial state) had consented to the court’s jurisdiction for the crime in question (*state consent*; Art. 21).

⁸ See Security Council Resolutions 827 on establishing the ICTY and 955 on establishing the ICTR.

⁹ In 1995, what was involved, however, was not a preparatory committee, but initially an ad-hoc committee intended to give the member states an opportunity to familiarize themselves with the draft for the International Law Commission.

Accession by a country to the treaty that was supposed to lay the foundations for the court did not automatically also count as approval for the core crimes coming within its ambit, as this was separately regulated by an *opting-in* system that allowed states to decide for which groups of crimes they were prepared to accept the court's jurisdiction and for what period of time (Art. 22). Moreover, the court was strongly dependent on the UN Security Council: For example, acts of aggression could only be prosecuted if the Security Council had beforehand formally determined that such acts had been committed (Art. 23, 2). In addition, the Security Council was authorized as part of its powers to secure and restore the peace under Chapter VII of the UN Charter to refer cases to the court (Art. 23, 1). And the court also required the Security Council's approval if it wished to initiate investigations into cases that touched upon matters with which the Security Council was seized with pursuant to Chapter VII (Art 23, 3). Other than the Security Council only states who were party to the treaty could set an investigation by the court in motion and then only for those crimes that these states had themselves accepted under the *opt-in* regime (Art. 25).

On balance, the ILC draft was extremely conservative. It sought as far as possible not to impinge on the sovereignty of states and relied completely on a consensus for its work and its activation by the Security Council (Crawford 1995).

3.4 *The negotiating setting*

The ILC draft formed the generally accepted basis for negotiations at the beginning of the pre-negotiations in the *Preparatory Committee (PrepCom)* in 1996 – but the draft was by no means uncontroversial. The reason was first the culturally-specific differences in notions on the correct legal system. Second, the court's normative basis was itself not undisputed, or rather the position it was to have within the international system. This controversy primarily arose on those issues that related to its independence and activation and included in particular its relationship to the UN Security Council (veto rights), the question as to what cases could be brought before an ICC (independent prosecutor), and limits to its jurisdiction (states' approval; opt-in regulation; inherent jurisdiction). By 1997 at the latest a dominant fault line had emerged between those states that wanted to see an independent and strong court (the so-called *like-minded* states, and those states primarily worried that their sovereignty might be impaired and who, initially led by the Permanent Members of the UN Security Council,

championed a court directly answerable to the Security Council, which would have spelled the indefinite extension of the ad-hoc courts.¹⁰

At the beginning of the *PrepCom* process, the group of like-minded states was made up of only a handful of states but in the course of the pre-negotiations grew to have about 40 members, including almost all the EU member states (with the exception of Great Britain and France), many African states and Caribbean countries. Prior to the Rome conference to resolve the statute, the group had steadily grown to over 60 members; as of 1997, Great Britain was also among them. The *like-minded* group agreed on common positions on the court. It wanted to ensure that the court exercised inherent jurisdiction over core crimes, had an independent prosecutor, and that the Security Council played only a marginal role in it. All in all, the basic tone was that the ICC would be able to prosecute all crimes irrespective of the political constellation. The group was supported in its activities by a highly active non-governmental coalition (*Coalition for an International Criminal Court, CICC*) that in 1997 already boasted 200 individual organizations.

The group of those opposing the court included from the outset the permanent members of the Security Council and a group of 10-20 states (P5). They wanted to ensure the UN Security Council controlled the court, rejected its inherent jurisdiction for war crimes and crimes against humanity (in part including genocide) and instead called for an opt-in clause. Essentially, this group championed the ILC draft.¹¹

Despite these two dominating negotiating groups, the lion's share of the delegations was not member of either. While some of them presumably did not want to see a court established, even if they did not say so officially, most of them (and they included many developing countries and CIS member states) had no coherent negotiating position and supported now *like-minded* positions now P5 positions. Prior to the Rome conference in 1998 that was to resolve the Statute, the proposed text for it thus included over 99 individual articles and around 1,300 brackets, each of which signaled different options on individual issues. Nevertheless, the majorities had since changed decisively: While at the beginning of the pre-negotiations the majority supported the P5's restrictive positions, it had since switched to support the proposals of the *like-minded* group.

¹⁰ See for details on the negotiation setting Kaul 1997, 1998; Deitelhoff 2006 and in general the *reports* filed by the network of NGOs, CICC, www.lhcr.org/icc/rome/report.htm, Oct. 16, 2002.

¹¹ Then there was an extremely restrictive group whose core was made up of India, Mexico, Iran, Iraq and Libya, that had a position similar to the P5 on regulating jurisdiction and the independent prosecutor, but unlike the P5 rejected any role by the Security Council; see Kaul 1997: 180.

This volte face can be attributed primarily to the joint activities of the *like-minded* states and the NGO network which not only conducted incessant lobbying but also arranged alternative negotiating forums.

The negotiations on the ICC entailed several problems that could not be solved during the preparatory committee meetings in New York. First, the development of the ICC was an extremely complex project as it not only involved setting up an international institution, but also a draft for an international criminal code. Both presumed immense expertise among the delegates, something many smaller countries and in particular developing countries could hardly have given a lack of human resources and financial bottlenecks. A fundamental problem of the committee, and it is one that became exacerbated as time went on, was thus the poor participation of many developing countries and CIS member states. Although the GA resolved a trust fund in 1996 to enable resource-weak states to take part, the problem remained virulent. The fund meant at most one or two delegates could be financed per country, meaning it essentially remained impossible for them to cover the entire negotiations, which thus gradually disintegrated into working groups, informal sub-groups and then into so-called *informal informals*.

The silence on issues being negotiated stemmed not only from a lack of resources, but also from the general suspicion that the ICC was a project by Western countries and in particular by the major powers devised solely to strengthen their dominance over the developing countries and to punish behavior they did not like (Benedetti/Washburn 1999: 4). In particular in Africa, many countries not only had just emerged from phases of violent upheaval, but had to expect that this could recur in the future (Joakim 1998: 219). Thus an NGO representatives from the Senegal summarized the problem as follows: “Apart from its Southern part, the continent remains unmotivated by an ICC because of a lack of information, but also because many Africans feel the ICC is created in order to put their heads of state on trial” (Alioune 1998: 11).

The *like-minded* states and the NGO network addressed this problem of a lack of expertise and the fear of domination. Thus, members of the *like-minded* group and the NGOs held several regional conferences in Africa, Latin America, Central and East Europe and Asia/Oceania between 1997 and the beginning of the Rome diplomatic conference in June 1998, enabling the future Rome delegates from these regions to prepare for the conference. The conferences were staffed by experts who explained the central points in the Statute still under dispute and were intended to help foster shared knowledge in order to counter the lack of information on the ICC and the general suspicion that it was a project designed by the

major powers. Almost all of these regional conferences resulted in positions that approximated the principles of the *like-minded*. Also of importance was that the *like-minded* approached deliberately contrasted with that of the major powers. While the latter spoke of “special responsibility” and “political realities”, the *like-minded* championed equality, impartiality and fairness. As one of the *like-minded* delegates concluded, these were positions that appealed specifically to developing countries:

“Once we [the like-minded; ND] had realized this [that the Americans only wanted a court for the others; ND], we strongly emphasized that a court had to be for all states and with equal rights and duties for all. That had an immense appeal, especially to developing countries. That meant equal opportunities and as a result an ever greater number of states flocked to the [...] key positions held by the like-minded as the opinion-formation process unfolded. You see, the American delegation also spoke to all delegations and was very friendly but what mattered was the difference in principle. We were able to attract support regardless of regional differences because we focused on universal issues and thus could prevent that regional groupings dominated the process.” (Interview LM delegation, July 2002)

3.5 Breakthrough: The Rome Statute

Despite this change in allegiances and the fact that the *like-minded* group now counted over 60 members and could expect for even greater support from the regions, the Rome conference did not reach a consensus. The reason: on the one hand for the first time 160 states sent delegations to Rome, at the time the largest number of states to ever participate in UN codification negotiations. In the opinion of many commentators, just under two thirds of the 2,000 delegates had not been involved in the prior negotiations on the ICC meaning they could hardly appreciate what had already been achieved. That slowed the process considerably because many of the regulations which people thought there was a consensus on had first to be re-established (Bassiouni 1999: 446; Benedetti/Washburn 1999: 16). All the working group coordinators from the preparatory committee, and the vast majority of them came from *like-minded* states, were re-appointed and thus ensured a degree of continuity. Yet over the first two weeks no agreement was reached on many of the contentious issues. Given this standstill, Chairman of the Plenary Committee Phillippe Kirsch started actively exploring the areas where there was consensus. Kirsch’s office developed its own working papers that successively narrowed down the existing options on the political issues. The orientation debates on these papers not only sped up the decision-making process in Rome but made it abundantly clear that a consensus could evidently not be achieved. They also showed that despite the major changes in the composition of the delegations, the vast majority tended in favor of the negotiation approach taken by the *like-minded* group. It was above all the NGOs who emphasized this; they attentively followed all the orientation debates and then

summarized the countries' positions as statistics immediately made available to all the delegations.¹² When despite these majorities there was still no indication of willingness to compromise, and despite fierce criticism above all from the United States, Kirsch decided to assemble a compromise package and present it to the plenary committee. His office announced that this would be the last point in time when applications for amendments could be filed, and scheduled consultations with all the delegations. During this phase, France decided to move over into the *like-minded* camp in return for an *opt-out* clause for war crimes, limited to seven years. By contrast, the United States insisted that the Statute be hanged such that it be impossible to bring the non-contractual parties to it or their nationals before the ICC. However, the *like-minded* delegates and the NGOs refused to give in on this, above all because at this point in time it was already clear that the United States would not become a signatory to the Statute.

On the evening of July 17, 1998 Kirsch then presented the final package. As many had expected, India filed a motion for an amendment that the use of nuclear weapons be included as a war crime.¹³ India had made many prior efforts to get the non-aligned countries to support its goals and it was known that the non-aligned countries as a group supported the motion. The *like-minded* states and the NGOs feared that the emerging majorities might disintegrate if the non-aligned states came round to the proposed amendment. As a prepared response to the Indian motion, Norway therefore moved non-inclusion. Norway's motion was supported by Malawi, another *like-minded* group member country and also one of the non-aligned countries, in this way showing that the non-aligned countries were also not prepared to change the negotiation package on the table. The same happened to a motion by the United States that the court's jurisdiction be dependent on the agreement of the country where the crime took place *and* the state committing it. Finally, the plenary committee approved the package as negotiated. In a closed vote, 120 states voted for the compromise package, seven against it: Yemen, Qatar, Libya, Israel, Iraq, China and the United States; 21 states abstained.

¹² See Kaul 1998: 127; Benedetti/Washburn 1999: 30. In the orientation debate on the second paper for discussion the office put forward, the NGOS documented that 85 percent of the delegations approved of Korea's proposal on jurisdiction, 83 percent wanted an *ex-officio* prosecutor including its guarantee by a pre-negotiation chamber and the vast majority of states opted for different versions of the Singapore suggestion for the role of the Security Council. See "The Virtual Vote," in: On the Record, vol. 1, no. 21, July 16, 1998; www.advocacy.net.org/news_vire/news_125.html (22.04.2002).

¹³ India also demanded that the option for the Security Council to be able to refer cases to the court be cut from the Statute. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, vol. II, in: UN Documentation A/CONF/. 183.13 (vol. II), p. 360.

The Rome Statute

The court as resolved in Rome differs fundamentally from the ILC draft. It possesses wide-ranging powers and under its ambit fall the most severe crimes that affect the international community as a whole as regards the core crimes laid down in international law and defined in the Statute. They include war crimes, crimes against humanity, genocide and (to the extent it can be defined) acts of aggression (Art. 5) if committed after the Statute came into force (Art. 11). The groups of crimes are not only enumerated in the Statutes (as was customary in international legal treaties) but also extensively defined in Art. 6-8.

The definition of genocide in the Statute is taken almost verbatim from the Convention on Genocide (Art. 2). The crimes against humanity as outlined in Art. 7 are based on the definition of such crimes given in Nuremberg and the experiences of the ad-hoc tribunals. Art. 7 for the first time offers a wide-ranging codification of this class of crimes, which, unlike the case in Nuremberg, need not arise in connection with armed conflict.¹⁴ Yet the Statute limits crimes against humanity to such actions that are committed as part of an extensive or systematic attack on a civilian population. The outline on war crimes is largely taken from the Geneva Conventions of 1949, the Additional Protocols of 1977 and the Hague War on Land Convention of 1907. Unlike these, the Statute implicitly constrains the ICC's jurisdiction by stating that the jurisdiction "shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."¹⁵ All in all, the codification of war crimes is positive in terms of developments in international law. The Rome Statute thus at least treats crimes in international and non-international conflicts as formally equal, following the general trend in humanitarian international law and the reality of wars (Art. 8 (c) to (e)). It also enumerates explicit criminal acts as regards sexual violence such as rape and forced pregnancy, which are contained in similar form in Art. 7, too (see Hebel/Robinson 1999: 103-21). In connection with the "general principles of criminal law" laid down in Arts. 22-33 these regulations can be considered the basis for an international criminal code (Gillhoff 1999: 18). As part of the general principles, the Statute also reiterates the principle that individual responsibility is considered over and above the principle of state sovereignty (see Arts. 25-27).

The principle of complementarity forms the core of the jurisdiction of the Rome Statute for the foundation of the ICC. Unlike the ad-hoc tribunals for Yugoslavia and Rwanda, the ICC does not have competing but subsidiary jurisdiction: It only goes into action if it can be

¹⁴ See for an extensive discussion Hebel/Robinson 1999: 90-102, 123.

¹⁵ Art 8; see for critical remarks on this Cassese 1999.

proved that national courts are either not prepared or owing to the partial or complete collapse of the respective national court system unable to fulfill their duty to conduct criminal prosecution (Art. 17).¹⁶ The ICC's jurisdiction will initially not be universal. It can only be active where either the state committing the crime (nationality of the suspect) or the state where the crime is committed has ratified the Statute¹⁷ or has approved by separate declaration the jurisdiction of the court for the special case at hand (Art. 12). This qualification can be sidestepped if the UN Security Council should as part of its powers under Chapter VII UN Charter refer a matter to the ICC (Art. 13 (b)). This option is designed to do justice to the special position of the Security Council in preserving and restoring international peace. The Security Council therefore also has the right to stop a case before the ICC. However, here a qualified majority of the members of the Security Council must agree and no permanent member shall veto it. This regulation, as set out in Art. 16 of the Statute, is often termed reverse veto and starkly limits the influence the Security Council can exert on ICC activities. For this regulation means that a veto by a permanent member suffices to prevent an attempt to stop an investigation by the ICC. An especial positive aspect here is that the ICC's investigators cannot only be approached by states with specific cases, but has an independent prosecutor who can initiate investigations (Art. 14-15).¹⁸ Together, these regulations ensure the ICC is largely independent of the Security Council and nation states, something designed to foster its universality and effectiveness (Sadat 2000: 40f).

3.6 *From Rome to The Hague*

In addition to resolving the Rome Statute proper in the *Final Act* of the conference, Resolution F was passed, a fundamental resolution on establishing a preparatory commission to draft proposals and regulations for the necessary ancillary instruments for the Statute and to handle all other work needed to set up an effective court. Pursuant to Resolution 53/105 of the UN GA, the commission started work in February 1999. It was in particular to draft rules of procedure and proof, agreements between the ICC and the UN, the basic tenets of the treaty

¹⁶ A key achievement by the advocates of the Statute is the fact that the ICC itself and not the states or the Security Council decides whether a country's court system is willing or able to handle a case.

¹⁷ The fact that acceptance of the ICC's jurisdiction is pegged to ratification of the Statute (also termed the ICC's "inherent" jurisdiction) is nevertheless a key move away from the traditional principle of a consensus among states. See Lee 1999: 28. Traditionally, in international law ratification of a treaty founding a court does not automatically mean approving its jurisdiction. The best example is the International Court, which leaves it open to treaty signatories whether they approve is obligatory jurisdiction.

¹⁸ The prosecutor must, however, overcome a legal examination by the pre-trial chamber before s/he can become active.

on the seat of the court, financial regulations and financing structure, agreement on the ICC's prerogatives and immunity, the budget for the first financial year and standing business orders for the assembly of signatory states. These drafts were meant to be conclusively prepared by the time the Statute came into force so that the assembly of signatory states could approve them. Moreover, the commission also worked on formulating a definition of the crime of aggression and the conditions under which the ICC should have jurisdiction for this crime. However, work on this point was not concluded in time and a working party set up by the assembly of signatory states will continue the work in future and prepare proposals. For the Rome Statute came into force on July 1, 2002, less than four years after it was resolved as the necessary number of 60 ratifications had been reached. To date, of the total of 139 signatory states, 108 have ratified the Statute, including all EU member states (the Czech Republic's parliament has finally approved the bill on ratification in October 2008; see Table 1).

Table 1: Ratification by EU member states

Country	Ratification
Austria	28.12.2000
Belgium	28.06.2000
Bulgaria	11.04.2002
Cyprus	07.03.2002
Czech Republic	(parliamentary approval in 2008)
Denmark	21.06.2001
Germany	11.12.2000
Estonia	30.01.2002
Finland	29.12.2000
France	09.06.2000
Greece	15.05.2002
Hungary	30.11.2001
Ireland	11.04.2002
Italy	26.07.1999
Latvia	28.06.2002
Lithuania	12.05.2003
Luxembourg	08.09.2000
Malta	29.11.2002
Netherlands	17.07.2001
Poland	12.11.2001
Portugal	05.02.2002
Romania	11.04.2002
Sweden	28.06.2001
Slovakia	11.04.2002
Slovenia	31.12.2001
Spain	24.10.2000
United Kingdom	04.10.2001

The first assembly of the state parties in early September 2002 accepted the ancillary instruments devised by the preparatory commission, meaning that as of mid-September 2002 the work of actually establishing the court in The Hague could commence.

Since then, the ICC has been active and the prosecuting authorities have inaugurated investigations in four cases. The issues in question are events in the Democratic Republic of Congo (DRC), in Northern Uganda, the Central African Republic and Darfur, Sudan. The investigations of the widespread killings and rapes by government soldiers and rebels in Eastern Congo in June 2004 were the first investigations carried out by the ICC's prosecutors. At the beginning of 2004 the DRC's transition government initiated the process by requesting of the ICC prosecutor's office that it conduct an investigation in the Congo.¹⁹ The investigations of the crimes in Uganda, perpetrated by both sides of the conflict, were initiated in the same way. In January 2004, the Ugandan president informed the ICC on the situation in North Uganda, whereupon Luis Moreno-Ocampo opened the investigation in July 2004.²⁰ A new phase in the ICC's work was heralded with the prosecution of crimes in Sudan as this case was referred to the ICC by Resolution 1593 of the UN Security Council on March 31, 2005. Since the Sudan has not signed the Rome Statute, the Security Council referral is the only way for the ICC to be granted jurisdiction over the crimes committed there.²¹ At present, pre-investigations on the crimes committed since July 2002 in the Central African Republic are taking place, the country's government having referred the matter to the ICC in January 2005.²²

4. The EU and the International Criminal Court

4.1 The EU prior to Rome: much ado about nothing

As indicated at the outset, many commentators are more than euphoric in their estimation of the EU's role in the creation of the ICC. The EU was at any rate active at an early date in the pre-negotiations in the preparatory committee and in the debates in the UN General Assembly's legal committee. Thus, as early as 1995 Spain's permanent representative Juan Antonio Yanez-Barnuevo declared on behalf of the EU that the latter considered there to be a justified need for a permanent International Criminal Court. Ad-hoc tribunals, he argued, were for all the good experience with them not always the suitable response to severe violations of

¹⁹ See www.icc-cpi.int/cases/current_situations/DRC.html

²⁰ See www.icc-cpi.int/cases/current_situations/Uganda.html

²¹ See www.icc-cpi.int/cases/current_situations/Darfur_Sudan.html

²² See www.icc-cpi.int/cases/current_situations/CAR.html

human rights. He stated that the principle of complementarity, jurisdiction only for the most severe human rights violations was an elementary component of a functionally viable court, as were clear criminal-law definitions, adherence to due standards in the rule of law and the obligation of contractual states to cooperate effectively.²³ Harry Verweij, the permanent representative of the Netherlands, affirmed this view on 1997 in another declaration in the EU's name and termed the creation of a permanent international criminal court to be the unprecedented opportunity for jurisdiction over individuals who had committed the worst possible violations of human rights. He emphasized the EU's active participation in the ad-hoc committee and in the preparatory committee and underscored the EU's commitment of full support to the conference to be held the following year in Rome to complete and adopt a convention to establish an international criminal court.²⁴ Shortly before the conference in Rome, a EU coordination meeting in February 1998 in London once more expressed the member states' approval for an effective functionally viable and independent court (Kaul 1998: 126; Oltsch 2004: 52f). Moreover, the European Parliament went into action and in various resolutions called for the swift acceptance of a statute.

Given the breadth of the support and the activities, one could initially assume that the EU was at an early date already one of the most vociferous champions of the ICC project. Yet we must ask whether these activities possibly also reflected a common European foreign and security policy. Here, doubts are in order. All statements made in negotiations in the EU's name were of a general nature. No practical positions were expressed: They focused instead on the general necessity and desirability of a court, not the actual shape it was to have. The real controversies on which the negotiations revolved (namely the issue of an independent prosecutor, the UN Security Council's possible veto, or the scope of jurisdiction for the court-to-be, were all ignored in the EU statements. The reason was probably above all that the positions of the individual EU member states were anything but united. Although a good part of the EU member states advocated the progressive positions of the *like-minded* group from a relatively early stage onwards (and indeed some of them, such as Germany, were among that group's founding members), two of the most important EU members, namely Great Britain and France, could be counted in the P5 camp and together with the United States, Russia and China as well as other countries, supported extremely conservative positions. There were few grounds for expecting or realizing common positions or actions as part of a CFSP. EU member state positions were simply too divergent. Even the change in the tack taken by Great

²³ See www.iccnw.org/documents/statements/intergovtbodies/EU1PrepCmt30Oct95.pdf

²⁴ See www.iccnw.org/documents/statements/intergovtbodies/EUNetherlands6thComm21Oct97.pdf

Britain and France during the negotiations cannot, as some commentators seem to suggest (Oltsch 2004: 51), be attributed to negotiations within the EU, but relate to issues on their respective domestic fronts and negotiation concessions.

Great Britain, for example, changed sides in 1997 in the pre-negotiations, when it quit the P5 camp and began to support the positions of the *like-minded* group. The background to the change was clearly the change of government, with New Labour having won the parliamentary elections in Great Britain and having committed to pursuing an “ethical foreign policy”. As negotiations summaries and interviews suggest, before the change of government there was no sign of flexibility in the British negotiating position.²⁵ Things in France were quite similar, which was among the states pushing for a very restricted form of ICC until shortly before the conclusion of the Rome Conference. The compromise solution that allowed governments a period of seven years after ratification of the Statute during which they could block prosecution of their nationals for war crimes first made France to adopt the Statute. Even though there were a number of EU-meetings during the negotiations, there can be little talk of a tangible effect of internal EU coordination but changes were due to domestic election and hard-nosed bargaining within negotiations.

The EU could not coordinate the actions of its member states during the negotiations; instead, this function was discharged by the *like-minded* states and it was they who succeeded in integrating a very many governments that have since acceded to the EU into the camp of those favoring the ICC. Thus, it was the *like-minded* group, often in alliance with NGOs that organized the regional conferences to prepare the Rome conference and to woo greater approval for an effective court. These conferences, and they also took place in Central and East Europe, significantly changed the balance of power within the negotiations swinging things in the direction of the *like-minded*’s progressive positions and playing a considerable part in the successful outcome of the negotiations. Although many EU member states, including Germany, were among the most active champions of the *like-minded* camp, it was not an EU foreign policy but the foreign policy of individual member states that was involved. It can thus be concluded that while the EU was active during negotiations and there was considerable support at the parliamentary level in Europe for the court, there can be no talk of the EU have had coordinative function let alone of a common foreign policy. While the ICC project promulgated the CFSP’s normative goals, and this was repeatedly emphasized in EU

²⁵ Responses in interviews with negotiation participants attributed the policy change by the British delegation solely to the change of government in Westminster. Only after the change of government the british delegation announced that it would join the *like-minded* platform within negotiations (Interviews with Amnesty International and delegations of the *like-minded*) See also Deitelhoff 2006.

statements during the negotiation process, it did not give rise to a firm policy on the issues being negotiated. However, the picture changed when the Rome Statute was resolved.

4.2 *Change in EU policy after Rome: active involvement*

The Rome Statute comprised a viable result for all EU member states, even if it was brought about in the last minute by bargaining compromises, as in the case of France. Still, the statute settled the controversies among member states by bringing about a viable compromise to which all of them could adhere.

Consequently, after the Statute's resolution, the EU proceeded to be far more coherent than during the negotiations, and here the instruments of CFSP also came to bear. Thus, the EU undertook publicly following conclusion of the conference to actively push in the preparatory commission for a solution of all the unsettled issues and to achieve ratification by many states as quickly as possible. In this setting, the EU Council on June 11, 2001 issued its first Common Position (2001/443/ CFSP) on the ICC in the framework of the CFSP (see Appendix). The goal: to help ensure the ICC was set up quickly and worked efficiently, and to strengthen universal support for the ICC by endeavoring to get as many signatories to the Statute as possible.²⁶ Thus, the position states that the principles of the Rome Statute were fully and completely consistent with the EU's principles and goals and the EU would therefore with great resolve do its utmost to ensure the required number of ratification documents was forthcoming and the Rome Statute was fully applied. Moreover, the position emphasized that the EU and its member states were unlimited in their support for the practical measures that were necessary to establish the ICC and apply the Statute, calling for coordination by the Council of measures that the EU member states could take to apply the position and if necessary for common EU measures.²⁷

In order to achieve these goals only a year later, in May 2002, the Council resolved an action plan consisting mainly of three elements: Member states and institutions would initially coordinate their activities to maximize their efforts. To this end, the Council resolved to establish an ICC *Focal Point* in the Council Secretariat and mandated member states to establish national *Focal Points*. Moreover, the EU was to support other states, in particular so-called Third-World countries, both politically and organizationally in ratifying and implementing the Rome Statute as is, for example, provided for within the revised Cotonou

²⁶ http://ue.eu.int/cms3_fo/showPage.asp?id=404&lang=de&mode=g.

²⁷ Common Council position of June 11, 2001.

agreement of 2005. And, finally, the EU was to help ensure the effective establishment of the ICC.²⁸ In the Common Position 2002/474/CFSP of June 2002, that largely confirmed all these aspects, the EU once again affirmed its common position.²⁹

This proactive stance in EU foreign policy on the ICC is especially striking given the ICC's ongoing rejection by the United States, which following the resolution of the Statute had increasingly tended to actively oppose it. During the Rome conference, in fact, the US delegation openly threatened to opt for "active opposition" if the Statute was not to concur with US notions.³⁰

The United States administration under outgoing President Bill Clinton signed the Rome Statute on Dec. 31, 2000 but in his statement on the signature Clinton declared he felt the Statute to be "seriously flawed" and had no intention of presenting it to Congress for ratification in the immediate future.³¹ He signed, he said, because he wished to keep the road open to further negotiations in the preparatory commission, and signature of the Statute was necessary for that. So no change of position was involved. On the contrary: Large sections of US Congress continued to reject the Statute and branded Clinton's signature "a blatant attempt by a lame-duck-president to tie the hands of his successor."³² With the incoming Republican administration under George W. Bush, the US's policy of rejecting the Statute intensified. After a policy review, the US administration announced in Spring 2002 in a unique step under international law that it would officially withdraw its signature from the Statute. Only a little later the US Congress passed the *American Servicemembers Protection Act* (ASPA), a law prohibiting the US government to cooperate in any way with the ICC and envisaging the cancellation of military assistance for any state that ratified the ICC Statute and was not among the US's close allies.³³

At the UN level the US government increased the pressure on states well-disposed to the Statute, in particular on Great Britain and France. After the Rome Statute came into effect in June 2002, the United States threatened to block the pending extension of the peace mission in Bosnia-Herzegovina by Security Council veto should the Security Council in return not

²⁸ Action Plan to follow-up the Common Position on the International Criminal Court of May 15, 2002.

²⁹ Common Position by the Council of June 20, 2002.

³⁰ The delegation responded to a discussion paper by warning: "If the principle of universal jurisdiction was adopted the United States would have to actively oppose the court". United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, vol. II, in: UN Documentation A/CONF/. 183.13, vol. II, p. 297.

³¹ Clinton's full argument can be read or downloaded from www.wfa.org/issues/wicc/pretext.htm (downloaded on Aug. 13, 2002).

³² As stated by one of the most outspoken ICC opponents in US Congress, Republican Senator Jesse Helms in a press release on Clinton's signature. See www.amicc.org/docs/Helms_Sign.doc.

³³ However, the US President may sidestep these conditions if he considers it necessary.

grant immunity to its soldiers from prosecution by the ICC. After several rounds of negotiations, the crisis on the Security Council was solved by a compromise. US soldiers and members of other non-signatory countries active on UN-authorized missions were assured for a period of 12 months that the ICC would not initiate investigations against them.

The real climax of the US anti-ICC policy were, however, the so-called *Bilateral Immunity Agreements* (BIAs), designed to exclude US citizens from the ICC's jurisdiction. The BIAs involve a renegotiation of the *Status of Forces Agreements (SoFas)* that regulate bilateral military stationing rights and which the USA endeavors to use to ensure that its nationals cannot in any way come under the ICC jurisdiction if they are in the territory of another country. The United States also approached the EU with the BIAs.

Despite these trans-Atlantic disturbances, the EU has not only maintained its proactive stance on the ICC but has also not shied away from direct confrontation with the USA. In order to meet the "obligation" assumed toward the ICC, the European Council not only issued the Common Position of September 2002 and Conclusions in which it declared, among others, that the agreements proposed by the USA did not concur with the principles of the Rome Statute and other international contracts. In June 2003, the European Council working party on public law agreed that it officially appeal to third-party states not to sign BIAs. The EU reiterated its stance in a revised Common Position 2003/444/CFSP of June 2003.³⁴

In the form of the Common Position and Conclusions, the EU Council provided guidelines for the individual member states on the stance on the BIAs.³⁵ Since the Council was convinced of the irregularity of the agreements, it wanted by resolving the principles to at least constrain the scope for concluding precisely such BIAs. While it did not go as far as to forbid negotiating BIAs with the United States, it did set out clear and strict criteria for such negotiations. To date, no EU state except for new member Romania has signed one with the US. This is especially important as the individual member states definitely had different positions on the BIAs. Great Britain tended to allow the USA leeway here and initially opposed a common EU position.³⁶ After several rounds of deliberation within the Council, it then joined the common position and in the final instance told the US it opposed a BIA although the EU conclusions did not entail a strict prohibition thereon.³⁷

³⁴ Common Position by the Council of June 16, 2003.

³⁵ Council conclusion of Sept. 30, 2002, http://europa.eu.int/comm/external_relations/human_rights/gac.htm#hr300902; Council Common Position of June 16, 2003.

³⁶ See Financial Times: "UK to back US on war crimes court," Aug. 31, 2002.

³⁷ However, Great Britain was willing to revise its existing bilateral treaty with the US, whereby this did not involve the core conflict.

In February 2004 the European Union completed another action plan with measures on the Common Position.³⁸ It was again based on three main premises with the focus again on coordination of the activities of the member states and their institutions. Moreover, it sought to further promote the general validity and complete acceptance of the Rome Statute and, in the final instance, to secure the ICC's independence and effective functioning.³⁹

Unlike the negotiations on the Rome Statute, there was a clear change in the EU's role during the phase when the ICC was established and starting operation – it goes as far as an active coordination and structuring function for the foreign policy of the member states, something maintained even in the face of enormous resistance from the United States. And over and above this core area of CFSP, the EU took an active role as regards the ICC. The EU repeatedly refers to the ICC in the context of privileged dialog on human rights. And it makes not only a political but also a financial contribution to many initiatives and projects. Via the *European Initiative for Democratisation and Human Rights* (EIDHR),⁴⁰ for example, the European Union supports the *Coalition for an International Criminal Court* (CICC), the NGO network that from the very outset strongly supported the ICC negotiations. Furthermore, it organizes seminars for lawyers and members of the armed forces explaining what the ICC is (Kemmerer 2004: 1463). When deciding the focus of the EIDHR's activities, the EU Commission in general relies on the positions expressed by the EU through common strategies and common positions – and one of the focal points of the EIDHR is the foundation of the ICC.⁴¹

In general, the European Union seeks to persuade other states of the validity of the ICC by linking acceptance of the Statute and support in other areas. While this does not go as far as to foresee concrete consequences for third-party countries if they do not ratify the Statute, the efforts are nevertheless bearing fruit. Thus, all the new EU member states acceding on May 24, 2004 ratified the Rome Statute (with the exception of the Czech Republic at that time) (Kemmerer 2004: 1462).

5. Explaining a coherent EU foreign policy

³⁸ http://ue.eu.int/cms3_fo/showPage.asp?id=404&lang=de&mode=g.

³⁹ Action Plan to follow-up the Common Position on the International Criminal Court of Feb. 24, 2004, <http://ue.eu.int/uedocs/cmsUpload/ICC48EN.pdf>.

⁴⁰ The EIDHR has since 1994 covered EU measures in the fields of human rights, democratization, election observers and conflict prevention in third-party countries. Groenleer/van Schaik 2005: 9f.

⁴¹ See also the new booklet by the general secretariat of the council "The EU and the ICC" which gives a detailed account of EU-activities on the ICC since 2001; http://consilium.europa.eu/uedocs/cmsUpload/ICC_internet08.pdf

How can we explain this strong shift in the EU's stance towards the ICC? The analysis of the negotiations on the ICC makes it clear that we should take a differentiated view of the EU's role in them. During the course of the negotiations on the Rome Statute, at least, there was no common EU foreign policy in evidence. Despite the concurrence of the ICC project and the normative objectives of the CFSP, given the divergent positions among member states, the EU failed to flesh out a common policy line. The pattern of intergovernmental control on which the CFSP rests means a coherent foreign policy depends largely on mutually compatible positions among the member states. Only if the shared normative goals are backed up with at least corresponding interests, as was the case *after* the compromise that led to the Rome Statute being resolved, then the EU is also capable of successfully pursuing regulatory policy. The ratification of the Statute, which was immensely swift and global in terms of multilateral treaties and was achieved despite considerable need for national adjustments and the USA's vehement opposition can be viewed as the effect of such successful EU foreign policy (see also Scheipers/Sicurelli 2007: 7-9).

Given the transatlantic constellation, the proactive role the EU has played on behalf of the ICC following the Rome conference is all the more impressive. This development cannot be explained *solely* by the legally binding character of the Statute or the compromise achieved between the member states. Instead, it suggests that the initial compromise has been incorporated into a common conviction on the need for the ICC. Precisely in the field of CFSP, which is excluded from judicial examination by the European Court, and whose instruments lack coercive power, information exchange, consultation and coalition building play a key role.⁴²

For this reason, we should not underestimate the importance of common normative objectives: The instruments of the CFSP, common positions and actions, may be less the cause of coherence within the EU but function as amplifiers by creating space for deliberation, i.e. processes of argumentation that repeatedly refer to these common normative goals. The best example of this is the EU's attitude to the bilateral agreements that the United States is trying to push through. Although precisely Great Britain tended in the face of the increasing pressure from the US government to accept bilateral agreements with the US administration and initially opposed the EU firmly rejecting the BIAs, it abandoned this resistance after consultation within the CFSP and toed the EU policy line.

⁴² As Helene Sjursen (2003: 41), for example, has shown a norm for consultation has emerged in the CFSP that rests on each state fine-tuning its interests to those of the partners.

Unlike the foreign policies of the individual member states, European foreign policy rests (to date) on soft policy instruments such as dialogue and economic incentives. Common actions and positions are rather designed to present arguments encouraging common policy. The intention, one could say, is to convince not coerce. Such soft instruments also have an effect. The closed EU ranks as regards the ICC and its consistent campaigning for the court after the end of the Rome conference was a model that other states could be encouraged to follow by also promoting the idea of the ICC. In connection with the bilateral agreements, many countries have turned to the EU to define their stance. Alongside the CFSP resolutions, the EU's activities as regards privileged dialog on human rights and the financing and organization of seminars providing advanced training as well as support in implementing the Statute in national legal systems have played a crucial role as they contain firm assistance for countries of the South (and the former Eastern bloc). Unlike the US bully tactics, which threatened to cancel military assistance and other reprisals, the EU measures are meant to build confidence by attempting on the basis of partnership to alleviate the fears and difficulties of these countries. On the inside, this soft policy also functions as can be seen from the situation on the UN Security Council. While the EU member states during earlier draft resolutions largely gave in to the US wish for immunity for their soldiers from the ICC, since then the resistance has steadily grown and the US government was forced when it came to the violations of humanitarian international law in Sudan to abstain when it came to the vote to refer the matter to the ICC. It is a success that should initially be attributed to the coordination between states favoring the ICC on the Security Council, but certainly is also the result of the constant inner-EU consultations on the issue. If one considers the differences in "coercive means" used by the US and the EU respectively to assert their respective (different) intentions, the effort of persuasion that the EU has made has led to considerable agreement. The EU has not only succeeded in successfully resisting the pressure of the last superpower, but has also brought this to bear in the way it formulates policy.

The concurrence of policies with the normative objectives of CFSP is of itself not sufficient to generate coherent policies. Only in combination with the convergent positions is the EU also able to implement politics beyond simply declamatory symbols. Nevertheless, the normative objectives provide the argumentative frame for the policies that helps strengthen the convergence between positions internally and bring that agreement to bear externally.

Even if in the foreseeable future EU foreign policy will not be able to bring any hard power resources to bear (such as is partly bemoaned, partly praised in the debate on the potential militarization of EU foreign policy) Europe as a civil power or *normative power* need not shy

away from state foreign policy. Its soft instruments and procedures can have a real impact even in highly conflict-ridden fields of politics such as the ICC. The implicit assumption in the current controversies in the debate on whether a militarization of the EU is necessary/desirable if EU foreign policy is to be successful is misleading in part as it overlooks the fact that the basis for successful EU foreign policy stems from the convergence of positions held by the member states that are completely independent of the possible threat of military means in foreign policy (Smith, K. 2000: 20f). The same is true of the ongoing debate on the need for a stronger community basis for CFSP to bridge the so-called “capabilities-expectations gap” (Hill 1994). A monopoly by the Commission on initiatives or consistent qualified majority votes cannot, as Wolfgang Wagner (2003) has shown, of themselves spawn consensus or convergence on positions as the basis for successful EU foreign policy. Here, routines of consultation and coordination as have emerged within CFSP, and the normative goals on which they are based, are far more promising.

Simple bargaining between member states cannot sufficiently explain the strong shift of the EU towards the ICC after the adoption of the Rome Statue and its proactive stance towards an increasing US opposition to the court. This shift rather suggests that EU’s potential to conduct a successful foreign policy seems to rest on its ability to foster deliberation and persuasion. Deliberation, i.e. the giving and taking of arguments or reasons is at present one of the few mechanisms the CFSP has developed to generate consensus on CFSP issues as unanimous agreements remains the main mode of decision-making. Its success depends, as empirical studies on deliberation in contexts beyond the nation-state have emphasized, among other factors, on the existence of shared norms, values and perspectives as well as solidarity and trust among participants (Ulbert et al. 2004; Deitelhoff/Müller 2005). The regular consultation as observed to be ever increasing within CFSP as well as the norms and values on which the CFSP is grounded are nearly ideal typical of this background condition of deliberation (see also Eriksen/Fossum 2000: 258ff). As the study on the ICC-issue highlights, however, this normative background alone does not suffice, it needs to be backed up by at least compatible interests among participants as were achieved by the adoption of the compromise statute.⁴³

6. Concluding remarks: deliberating CFSP?

⁴³ Note that the study does not provide positive evidence of successful deliberation and persuasion. It rather takes the observed shift in the face of growing transatlantic pressure as an indicator that deliberation and persuasion might be the explaining factor.

Even if tentative evidence as presented in this study on the EU role in the development and implementation of the ICC suggest that deliberation and persuasion do play an important role for the formulation of a common foreign policy more research is needed to systematically assess the role that deliberation plays in policy making within CFSP. We know too little about internal coordination mechanisms within CFSP which is partly due to the often informal and exclusive consultation forums in this area.

This informality and executive dominance of CFSP raises issues of the democratic legitimacy that this kind of policy-making entails. Debate on the democratic legitimacy of the EU more broadly and CFSP specifically has come to center on three more or less coherent models, the audit democracy, which sees democratic legitimacy arising purely from the member states, the federal democracy, which sees democratic legitimacy arising from uploading state features to the level of the EU and the model of cosmopolitan democracy, which perceives of the Euro-polity as a regional cosmopolitan order in the making (see esp. Sjursen 2007b).

Certainly, the institutional make-up of the CFSP as well as the kind of decisions taken within CFSP goes beyond inter-governmentalism and pure coordination of national interests as emphasized by the audit democracy model (see also Sjursen 2007b: 6-8). Moreover, informality and the dominance of executives as observed frequently for CFSP are in stark contrast to the hope to ensure democratic legitimacy relying on national chains of democratic legitimization (Wagner 2007). On the other hand, there is little evidence that the institutional mushrooming or Brusselsisation within CFSP is directed towards a supranational decision-making system. Member state resistance towards supranational elements is particularly strong in this area and, as the discussion above signals, it might not even be a functional necessity. Similarly, even though it is often noted that the European Parliament has increased its oversight with regard to CFSP as has the Commission become more active in this field, overall supranational elements of democratic legitimacy are lacking (Curtin 2007; Wagner 2007).

Indeed, what we rather observe is a peculiar decision-making system in which deliberation forums and decision-making arenas are located at various and overlapping levels bound together by a commitment to a set of shared norms and procedures. These shared norms like democracy, rule of law, human rights can be understood as a kind of cosmopolitan imprint of CFSP. With its multi-level decision-making structure as well as the kind of cosmopolitan norms at the heart of CFSP, the model of a cosmopolitan order comes closest to the kind of policy-making one can observe in the case of the ICC. But here again, democratic legitimacy doesn't seem to follow the kind of decision-making to be observed. The Cosmopolitan model

would suggest democratic legitimacy to be ensured at various levels as well. First, policy-making should be guided by a global cosmopolitan law and would be held accountable by deliberation in national parliaments, the European parliament and in the broader public sphere.

As the discussion on CFSP in the ICC-case highlighted, deliberation within CFSP does not necessarily entail a kind of democratization of CFSP as one might envision or even hope for inspired by models of deliberative democracy (Bohman 1996; Habermas 1996). Again, as is observed in most empirical studies on deliberation beyond the nation state, deliberation seems to be most likely (and most likely successful) in cases in which it takes place in exclusive, expert-dominated in-camera settings (Joerges/Neyer 1997; Deitelhoff 2006, 2008; Ulbert/Risse 2005, Deitelhoff/Müller 2005) while public deliberation rather lends itself to populism (Checkel 2001, 2003). The same holds true for deliberation within CFSP. Its institutions are still rather insulated from broader public debate. Even the European Parliament though it has been able to increase its oversight over CFSP during the last years does not come close to counter-balance the executive dominance of CFSP or to open it to a kind of true public scrutiny (see Curtin 2007; Stie 2008 for an attempt to operationalize deliberative democracy). In this way, the study rather emphasizes Helene Sjursens notion of an integration without democracy (Sjursen 2007b).

However, the EU and with it CFSP is still and very much so a polity and politics in the making, hence it would be too early to judge on its potential for democratic legitimacy yet.

Appendix

Key aspects of the common positions

Common Position 2001/443/CFSP June 11, 2001	Common Position 2002/474/CFSP June 20, 2002	Common Position 2003/444/CFSP June 16, 2003
Art. 1 para. 1 ICC as an important means to promote adherence to international humanitarian law and human rights; contribution to freedom, security, justice, and the rule of law as well as to preserving the peace and strengthening international security		
Art. 1 para. 2 Swift enactment of the Rome Statute and establishment of the ICC as the goal	Art. 1 para. 2 Support for the goal of swift establishment and efficient functioning of the ICC; promoting universal support by seeking to achieving the greatest possible participation	
Art. 2 para. 1 To move the process forward by stating during negotiations and in political dialog that as many states as possible should ratify the Rome Statute and that said Statute should be implemented.		
Art. 2 para. 2 Attempt to ensure swift enactment and application of the Statute by other means, too.	Art. 2 para. 2 Seek global ratification and enactment of the Statute by other means, too; the EU shall cooperate with other interested states, international institutions, NGOs and other representatives of civil society	
Art. 2 para. 3 Pass on member states' experiences and promote the stated goal in other ways, too	Art. 2 para. 3 Pass on member states' experiences and promote the stated goal in other ways, too; provide technical and financial assistance for ratification and implementation of the Statute in third-party countries	
	Art. 2 para. 4 Coordination of political and expert support for the court; elaborate country-specific or region-specific strategies	

Common Position 2001/443/CFSP June 11, 2001	Common Position 2002/474/CFSP June 20, 2002	Common Position 2003/444/CFSP June 16, 2003
Art. 3 Use practical measures to support the swift establishment and due functioning of the ICC; support the swift introduction of a suitable planning process	Art. 3 para. 1 Provide practical means to support the swift establishment and smooth functioning of the ICC; support the swift introduction of a suitable planning process incl. a team of experts active in advance	Art. 3 Measures to support the ICC’s independence: <ul style="list-style-type: none">– Call on signatory states to immediately pay their mandatory contributions– Work to ensure the agreement on the ICC’s prerogatives and exemptions are signed and ratified as soon as possible and that the other states also sign and ratify the agreement– Support the effort to elaborate measures to train and provide expert support for judges, public prosecutors, and officials offering legal assistance
	Art. 3 para. 2 Cooperate to ensure that the assembly can smoothly go about its work in all respects, that highly-qualified candidates are appointed by pressing for transparent procedures	
	Art. 3 para. 3 Assess how member states can duly and appropriately held finance the measures before the first ICC budget comes into force; after approval of a budget plan by the assembly of signatory states call for immediate transfer of the respective mandatory sums	
	Art. 3 Para. 4 Support the effort to elaborate measures to train and provide expert support for judges, public prosecutors, and officials offering legal assistance	
Art. 4 Coordinate the above-mentioned measures		

Common Position 2001/443/CFSP June 11, 2001	Common Position 2002/474/CFSP June 20, 2002	Common Position 2003/444/CFSP June 16, 2003
Art. 5 Council Conclusion that the Commission intends to gear its activities to achieving the goals and priorities of the Common Position		Art. 5 para. 1 Carefully follow events as regards cooperation with the ICC in line with the Rome Statute
		Art. 5 para.2 In this context refer third-party states to the Council's Conclusions of Sept. 30, 2002 on the ICC and the attached EU guidelines on the proposals on the agreements and the agreements on terms for committing persons to the ICC
Art. 6 Contribution by and greatest-possible involvement of the member states in the negotiations by the assembly of signatory states		Art. 6 Council Conclusion that the Commission intends to gear its activities to achieving the goals and priorities of this Common Position
		Art. 7 para. 1 Cooperation to ensure the assembly of signatory states can discharge its duties as smoothly as possible in all respects
		Art. 7 para. 2 Contribution by the member states in the negotiations in the special group on crimes of aggression to ensure current consultations can be concluded; support for solutions that correspond in spirit and wording to the Rome Statute and the UN Charter

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