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The Defence of an Institution under Challenge: The EU and the International Criminal Court

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1. Introduction

The International Criminal Court (ICC) came into force on the 1 July 2002 as the first treaty-based permanent international criminal court with the authority to bring to justice individuals guilty of war crimes, crimes against humanity, genocide and, since the Kampala Review conference, also crimes of aggression (Rome Statute 1998: Articles 1, 5-8).² The ICC represents the embodiment of an idea already in the minds of some as far back as the interwar period (Fehl, 2004: 360-362) but since its creation it has faced constant challenge with an inevitable impact on the attainment of universal ratification of the Rome Statute, the Court's institutional development and its day-to-day effectiveness.

On the one hand, this chapter will show that the result of the 1998 Rome Statute was an institution that endorsed prevailing ideas in “defence of universal moral principles and [the]

¹ The author is extremely grateful to the editors of this book – Oriol Costa, Robert Kissack and Esther Barbé – for their feedback during the preparation of this chapter. A preliminary version of this chapter was presented at the ISA Annual Conference, New Orleans, February 2015. Special thanks are also due to the ISA panel discussant Katie Verlin Laatikainen and participants for their insights, questions and comments. All errors and omissions are the author's responsibility. The research that led to this chapter has been possible thanks to the project EU-IANUS (The EU in an Unsettled International System. Crisis, Multipolarity and Multilateralism), funded by Plan Nacional I+D+i, Spanish Ministry of Economy and Competitiveness (CSO2012-33361).

² The treaty that established the International Criminal Court – known as the Rome Statute – was signed on 17 July 1998 by 120 states but came into force on 1 July 2002 after obtaining the required 60 ratifications.

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pursuit of justice for victims of violence” (Hoover, 2013: 264), albeit with limitations on the Court’s powers and independence in order to ensure a successful outcome. However, this normative congruence between ideas and institution – to use the terminology developed in the analytical framework by Costa et. al. (in this volume) – was not aligned with the existing distribution of power in the international structure. A minority of key states did not sign and/or ratify the Rome Statute, at least in part motivated by protectionist agendas that sought to shield their national interests and citizens from possible interferences from the Court (Dietelhoff 2008: 5-11). The US took the most belligerent position in this power-based challenge and, is therefore, the subject of study of this chapter.

The relationship between the ICC and the US has improved under the Obama administration and – in the words of David Bosco – “other sceptical powers have grudgingly acknowledged that the Court has an important role to play” (2014a: 2). However, the ICC is at the time of writing facing a new challenge, in some ways more serious, represented by the increasingly deteriorating relations with the African Union, who voices the concerns of a number of African nations that the Court has become in practice a Western imposition on the Global South, operating on double-standards and neo-colonial attitudes (Collantes-Celador 2012: 155-156). It is important to point out that it is these same African countries that supported the creation of the ICC and it is this same African Union who in 2004 called on its member states to universally ratify the Rome Statute (Mills 2012: 405). This chapter will argue that the challenge posed by the African Union to the ICC is principally ideational since it is questioning the legitimacy of some of the core values – and associated institutional practices – embodied by the Court and that a large majority of African countries have supported from the beginning of the Court’s birth. If the relationship continues to deteriorate, the result could potentially be a period of “institutional lag” (Costa et al: this volume) with the institution of the ICC

increasingly identified with ideas and practices that are no longer accepted as legitimate and prevalent by a growing coalition of actors, including some that initially chose to support those very same ideas.

Individual Member States - and since the Rome Statute in combination with the EU as an actor in its own right – have played a very important role in the long process of negotiation, signing and ratification of the Rome Statute as well as the subsequent institutional development and day-to-day effectiveness of the ICC (for more details see, for example, Collantes-Celador 2012). This reality has merited for some the appellation of the EU as “loyal” to the ICC due to the “interiorized respect for and adhesion to this new normative institution” (Aoun 2008: 157, cited in Collantes-Celador 2012: 143). For Olympia Bekou this prominent role that the EU has established in international criminal justice fits with commitments – such as the pursuit of justice, respect for human rights, consolidation of the rule of law and preserving and strengthening international peace and security - that “lie at the heart of the European project and are shared by the Union’s Member States” (2014: 16). This is something that, already in 2010, was acknowledged by Herman Van Rompuy, President of the European Council, when he stated that “support to the ICC has become one of the symbolic anchors of the EU's external policies, fully in line with our defining values” (European Council-the President, 2010).

Against what is evidently a very close European identification with the normative dimensions of the ICC project, this chapter seeks to map out how the EU and its Member States have reacted to the power-based challenge (US) and ideational-based challenge (African Union) confronting the ICC, as well as how the strategies of “entrenchment” and “accommodation” has been deployed to maintain an influential role on ICC matters, ensuring that this institution does not deviate fundamentally from what the EU and Member States

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wanted/hoped for.³ The chapter will be divided into two sections, each analysing one of the two mentioned challenges and the corresponding EU reaction. This chapter is based on an analysis of EU related documents and existing academic (secondary) sources.

2. The Power-Based Challenge: US-ICC relations and EU Reactions

2.1 The Rome Statute: Institutional Alignment with Ideas against Power

Drawing from the theoretical framework presented by Costa et. al. in this volume, the starting point in this chapter is that the institution of the ICC was at the time of the signing and ratification of the Rome Statute in congruence with prevailing ideas in the international structure but misaligned with the existing distribution of power.⁴ This normative congruence is eloquently captured by UN Secretary-General Ban Ki-moon, “When it comes to peace and justice, we are living in a new world. Those who contemplate committing horrific acts that shock the conscience of humankind can no longer be confident that their heinous crimes will go unpunished [...] We live in an age of accountability” (UN Security Council 2012: 2). The ICC builds on the legacies of the Nuremberg and Tokyo Trials, the ad hoc tribunals for the former Yugoslavia and Rwanda and, as pointed out by Kurt Mills (2012), came into existence the same year as the Special Court for Sierra Leone. However, the ICC was created to go

³ Following Costa et. al (this volume)’s analytical framework, “accommodation” refers to practices of adjustment in order to reach compromise (normally associated with depictions of the EU as a multilateralist), while “entrenchment” refers to the decision to maintain and even harden the original position despite adversity, in turn often associated with the idea of the EU as a norm exporter.

⁴ This chapter adheres to Costa. et. al’s understanding of ‘institutions’ as “persistent set of rules (formal and informal) that prescribe behavioral roles, constrain activity, and shape expectations” (Keohane 1988: 383 – cited in Costa. et. al: this volume).

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beyond all these other initiatives by representing “a permanent court that would be readily available whenever needed. It would deal with clearly defined crimes, and could develop over time a unified body of jurisprudence that would enhance legal certainty for those affected by its work” (Judge Sang-Hyun Song, at the time President of the ICC – UN Security Council 2012: 3-4). As Joe Hoover explains (2013: 265), the ICC is part of the process of ensuring that this fight against impunity moves from states to courts, consolidating the transition from “victor’s justice” to “true international justice”.

The resulting “set of rules” embodied in the 1998 Rome Statute provide the ICC with the authority to bring to justice individuals guilty of war crimes, crimes against humanity, genocide and – following the 2010 Kampala Review Conference – the crime of aggression. The ICC has an independent prosecutor that can initiate investigations and/or prosecutions without the prior authorisation of State Parties (states that have signed and ratified the Rome Statute) (Rome Statute 1998: Article 15). However, the final word on whether to issue arrest warrants, summons to appear or to accept the available evidence as sufficient to proceed to trial rests with the ICC judges (UN Security Council 2012: 4). The idea behind this institutional set up was that – as put by the UN Secretary-General Ban Ki-moon - “the Court is not simply an autonomous international organization. It is also a judicial body, independent and impartial. Once set in motion, justice takes its own inexorable course, unswayed by politics” (UN Security Council 2012: 2).

However, there are some limitations to the powers vested in the ICC. In terms of the “exercise of jurisdiction” the authority of the Court is complementary to that of national criminal courts and consequently it can only take action when it can prove that a state is unable or unwilling to investigate or prosecute on those crimes (Rome Statute 1998: Article 17). Moreover, following Articles 12 and 13 of the Statute, the Court’s jurisdiction is not universal.

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It can operate when the nationality of the suspect or the location of the crime belong to State Parties or to states that have approved the Court's jurisdiction for that particular case, or alternatively, when it receives a UN Security referral (discussed below). Article 124 of the Rome Statute (on "Transitional Provision") allows new State Parties to exempt themselves from the jurisdiction of the ICC over war crimes for a period of seven years after the entry into force of the Statute. The definition of the crime of aggression was settled at the 2010 Kampala Review Conference but with a very specific jurisdictional regime, as explained in the following section. In addition to these limitations it must be added that the ICC depends heavily on the willingness of states and international organizations to cooperate at all stages in the process, from investigation and provision of evidence to arrest and surrender of suspects, witness protection and relocation schemes and the enforcement of sentences since the Court does not have its own police, prisons, etc. (ICC 2015a; Davis 2014). Financially the Court also depends on annual contributions from State Parties and, in the case of UN Security Council referrals, on extra funds from the UN.

The relationship between the ICC and the UN Security Council is the subject of ongoing debate. Article 13 of the Statute allows the Security Council to refer a situation to the ICC using Chapter VII of the UN Charter powers which, one could argue, helps the Court 'universalise' its jurisdiction beyond the limitations imposed by the Statute. However, it has also been portrayed as opening a 'window of opportunity' for the Security Council to influence the cases investigated by the Court. The comments made by the representative of India (page 11) at a 2012 UN Security Council debate on the rule of law in international peace and security

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exemplify this concern.⁵ Similar apprehensions have been raised by Article 16 of the Rome Statute, which allows the UN Security Council to postpone a case before the ICC for a period of 12 months, renewable, using its Chapter VII powers (for more details Collantes-Celador 2012).

The Rome Statute went beyond the wishes of the Permanent Members of the UN Security Council, who wanted to preserve the sovereignty of states over the Court's activities. But it felt short in some respects from what the group of 'Like-Minded States' – which included the so-called 'EU-13' group – and the Coalition for the International Criminal Court (CICC – coalition of civil society organizations) had hoped for.⁶ Such compromise solution contributed to winning over some recalcitrant states, such as France and the UK (Collantes-Celador 2012). But it was not enough for other key states representative of the existing distribution of power in the international structure, who did not sign and/or ratify the Rome Statute: United States (US), China, Russia, India and Japan (the latter subsequently joined – see Collantes-Celador 2012). Of these, the US is the only one that adopted a belligerent approach towards the Court, what Bosco denotes as “active marginalization” (2014a: 178). It is to this that we now turn.

2.2 The EU Reaction to the US Challenge: Moving from Entrenchment to Calculated Accommodation

⁵ For further insights into this debate see also the remarks made by the ICC Office of the Prosecutor during that same debate explaining the safeguards built into the ICC institution to avoid politicization (UN Security Council 2012).

⁶ For a more detailed explanation of the role played by the EU and Member States as well as other actors, see Collantes-Celador 2012, Hoover 2013, Benedetti & Washburn 1999, Fehl 2004, Dietelhoff 2004.

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The US participated in the drafting process of the Rome Statute, voicing concerns over the degree of judicial independence and the jurisdictional scope to be awarded to the Court. It voted against the adoption of the Rome Statute but, once passed, it did sign it on 31 December 2000 (Fehl 2004: 362). Ohlin (2015: 222) explains this decision as President Clinton wanting to “give symbolic resonance to American support for international justice even if he was aware that the US Senate would not ratify it”. The real challenge for the ICC came with the increasingly anti-ICC rhetoric and actions of the subsequent Bush administration motivated by the fear (real or perceived) that states could manipulate the Court to launch politically motivated attacks against US interests and/or citizens in overseas missions (Fehl 2004: 358; Ohlin 2015: 225). The ensuing new US policy towards the ICC is best exemplified by the ‘un-signing’ of the Statute in 2002 and the passing of the *American Service-members Protection Act – ASPA* and the *Bilateral Immunity Agreements – BIAs*. The 2002 ASPA (also known as the “Hague Invasion Act” – Ohlin 2015: 223) excluded any US cooperation with the ICC and allowed for the use of force to free American nationals detained by the Court. It also entrusted the State Department with the legal tools to pursue BIAs (also known as ‘Bilateral Non-surrender Agreements’) with as many countries as possible to protect American current and former government officials, military personnel, civilian contractors and other nationals from the Court, as well as the power to withdraw military assistance should State Parties to the Rome Statute reject to enter such immunity agreements (except for strategic allies such as NATO members) (Collantes-Celador 2012: 153). The US argued these bilateral immunity/non-surrender agreements were allowed by Article 98 of the Statute, something most legal experts do not seem to agree with (Thomas 2012: 463).

The ASPA and the BIAs are a good example of what Bosco (2014a: 178) describes as the US “actively marginalizing” the Court by using bilateral means to debilitate its ability to

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act, with important consequences for its legitimacy and day-to-day effectiveness. The EU 'reacted' to this challenge by issuing a set of *Guiding Principles* in accordance with the conclusions of the 30 September 2002 General Affairs and External Relations Council. The Guidelines specified that "entering into US agreements – as presently drafted – would be inconsistent with ICC States Parties' obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties" (Council of the EU 2002). While at first glance these Guidelines could be interpreted as the EU adopting a strategy of entrenchment, arguably it might be better described as calculated accommodation. The rest of the Guidelines list minimum benchmarks that must be respected when entering a BIA. As argued by Aoun (2008: 165), upon the realisation that it could not force any State Party to follow its legal obligations, the EU Guiding Principles were meant to contain the damage BIAs could have on the integrity of the Rome Statute.

This EU attempt to accommodate was nevertheless limited in its success. Of the EU member states (at the time of writing), only Rumania signed a BIA (in August 2002) but following EU pressure it declared its intention to amend it in line with the mentioned Guidelines and in fact, the agreement has not been ratified. However, of the non-EU European states, Albania, Bosnia, Macedonia and Montenegro entered into BIAs after the EU guidelines had been issued and in clear contravention of these. Norway, Switzerland, Croatia (who is now a Member State) and possibly Serbia refused to enter into BIAs for reasons that had nothing to do with the EU Guidelines (Thomas 2012: 471; Collantes-Celador 2012: 154).⁷ Outside the

⁷ The UK resorted to its pre-existing 1972 legislation to argue that the 2003 UK-US Extradition Treaty did not breach the EU position because it fell within the category of "existing agreements" (international agreements in existence at the time of the Guidelines) and therefore, outside the remit of the policy (Council of the EU 2002, Thomas 2012: 466).

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close remit of the Union the picture is similar. For example, only 7 out of 49 sub-Saharan African countries publicly refused to sign a BIA with the US, many of whom were also State Parties to the ICC (Scheipers & Sicurelli 2008: 613-614). These examples illustrate that the strategy of calculated accommodation did not work. Various explanations have been put forward to explain a common realization; that the EU did not seem to represent a viable alternative to the US. These explanations range from the different EU negotiation style (non-punitive) compared with the US (punitive) to geopolitical and economic considerations for third countries considering entering into a BIA with the US (Thomas 2012: 472; Bekou 2014; Scheipers & Sicurelli: 613-614).

Going back to the EU's decision to accommodate, Caroline Fehl's analysis shows that the EU took a very different approach to US obstructions during the negotiations that culminated in the Rome Statute and during the bilateral negotiations of BIAs with third countries. Using the theoretical framework of Costa et. al. (in this volume), it comes down to an analysis of the repercussions arising from an entrenched vs. accommodating positions against the power-based challenge represented by the US. During the Rome negotiations EU countries were aware that accommodating US concerns to ensure it joined the Court could have endangered support among developing nations and hence, the likelihood of the Court becoming a reality through the attainment of the necessary ratifications. That was a far worse scenario than the creation of a Court weakened by the absence of US support. When the EU responded to the US negotiation of non-surrender agreements, accommodation seemed to be the least damaging option. From an EU point of view, and against the inevitability of these bilateral agreements happening, it would allow third states that had not yet signed up to the Court to consider this option positively without the fear of US sanctions and in so doing, ensure continuing progress towards universal ratification of the Rome Statute. Moreover, the

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possibility of US citizens being tried by the ICC was considered remote by the EU and Member States and therefore, those bilateral agreements posed a minimal threat to the effectiveness of the Court (Fehl 2012: 85-88, 95-99).

Various actions taken during the second Bush administration and, more importantly, Obama's administrations signal the beginning of a new US phase of "positive engagement" albeit still short of becoming a State Party to the ICC (Fehl 2012: 90-91; Ohlin 2015: 223). Bosco (2014a: 178) argues that this change in approach towards the Court result from the realization that the US policy failed to have a long-lasting effect by encouraging other major recalcitrant states to join in actively marginalizing the Court (especially Russia and China) and, in fact, it had become an important point of tension with key allies (Bosco 2016). Such realization left the US looking to re-engage multilaterally in pursuance of its national interest. Whether this change in US policy had anything to do with the EU actions just analyzed is a relevant question for the analysis in this chapter. Certainly, the EU and Members States played a crucial role in ensuring the situation in Darfur was referred to the ICC. Against a US that would have preferred the creation of an ad hoc tribunal closely monitored by the UN Security Council, "European countries, in particular France, Germany and the UK, toughed it out to obtain the Security Council referral" (Brody 2009: 2). The US did not oppose but rather abstained during the vote, as did China and Russia.

At the 2010 Kampala Review Conference the US was actively involved as an observer in the negotiations over the crime of aggression to ensure that the outcome satisfied its interests, shaped by its view that the "crime of aggression" is the prerogative of the UN Security Council. Very few shared this view beyond the permanent members of this UN organ (no author 2010; Fehl 2012: 91; Ohlin 2015: 223). The decision reached at Kampala incorporates this type of crime to the Statute but the activation of the Court's jurisdiction was postponed until after 1

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January 2017 when such decision will need to be adopted by two-thirds majority of the members of the Assembly of State Parties. Moreover, the jurisdiction over this type of crime can only be exercised over acts committed one year after 30 State Parties to the ICC have ratified the Kampala amendments. State Parties may decide to 'opt-out' by lodging a declaration of non-acceptance of jurisdiction with the Court's Registrar. The declaration can be made at any point in time (even before the amendments enter into force) and shall be reviewed by the State Party within three years. The jurisdictional limitations already in existence within the Rome Statute for the other three types of crimes also apply to the crime of aggression except that an investigation initiated by the Prosecutor will need to first confirm if the UN Security Council has made a determination of the existence of an act of aggression and, if it has not done, give it 6 months to consider (ICC 2010: RC/Res.6).

The EU did not react in any significant manner, even if the final decision had a considerable impact on the powers of the ICC over this type of crimes. According to Louis Davis (2014) there was significant division among EU member states and therefore, no common EU position to defend against this US challenge to the congruence of ideas and institution.

The Kampala episode is very important as a reminder that the US-ICC rapprochement has not meant the end of US 'suspicions' and concerns about possible 'interventions' against US individuals and interests, something that the Court's ongoing preliminary investigations in Afghanistan and Palestine are not helping dissuade (see, for example, Bosco 2014b). Leaving this issue aside, the 'warming up' of relations between the US and ICC was a welcomed development in aligning the ICC closer to the existing distribution of power in the international structure. The celebrations were nevertheless short-lived as the ICC was soon after confronting a new challenge, this time in the shape of the African Union, with important implications for

the role and standing of the EU within the Court. It is to this that we now turn.

3. The Ideational-Based Challenge: African Union-ICC Relations and EU Reactions

3.1 The African Union: From Friend to Foe

African nations have been part of the ICC story from the very beginning. Despite fears and suspicions that this project could turn out to be a new mechanism to impose the West's will on Africa, Schiepers & Sicurelli point out that a majority of Sub-Saharan African countries decided to support the LMG attracted by the latter's proposal for an independent Court based on the concept of reciprocity, "to which all states and their citizens would submit equally" (2008: 611-612 – see also Mills 2012: 23). At the time of writing, out of 123 ratifications, 34 African countries are State Parties, which also makes it the largest regional grouping in the Assembly of State Parties (ICC website).⁸ All these African countries are also members of the African Union, a very strong ICC representation if we take into account that the total membership of this regional organization is 54 states.

Against this collaborative approach between North and South that culminated in the Rome Statute, the situation in recent years has been very different, with the African Union voicing the increasing resentment of a number of African nations against the Court. All 23 cases brought before the ICC relate to African countries but what really seems to be at the core

⁸ According to the ICC website (https://www.icc-cpi.int/EN_Menus/icc/Pages/default.aspx), State Parties are organized into the following regional groups: Africa, Asia-Pacific (19 State Parties), Eastern Europe (18 State Parties), Latin America and the Caribbean (27 State Parties), Western European and other States (25 State Parties).

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of the problem is the indictments issued against *sitting* heads of state in Sudan⁹ and Kenya.¹⁰ In the words of Mills (2012: 410), “many realized that with the first sitting head of state to be indicted, there could be others”. A similar conclusion is reached by Kenneth Roth (2014), executive director of Human Rights Watch, when discussing the changing attitude of President Yoweri Museveni, going from a self-referral of the situation in Uganda to now becoming one of the main supporters of the Kenyan campaign against the ICC. Du Plessis et. al. (2013) also consider the possibility that the origins of this dispute rest with the fact that the only two UN Security Council referrals to the ICC have been Sudan/Darfur and Libya, whereas other possible candidates – Israel, Syria – have not followed the same fate.

In the case of Sudan, acting upon Article 13 of the Rome Statute, the UN Security Council used its Chapter VII powers to refer the situation in Darfur to the Court. The ICC subsequently indicted and issued arrest warrants for a number of Sudanese individuals, the most contentious being the two warrants against Sudanese President Omar Hassan Ahmed al-Bashir (in 2009 and 2010) for his role as an indirect co-perpetrator on five counts of crimes against humanity, two counts of war crimes and three counts of genocide committed in Darfur (ICC website). The African Union claimed that its requests to have the UN Security Council

⁹ The indictment of the Sudanese President has also been denounced by the Arab League, the Organization of the Islamic Conference, China and Russia.

¹⁰ The cases brought before the ICC relate to the following African countries. Uganda, Mali, the Central African Republic and the Democratic Republic of Congo, on the basis of self-referrals by those countries. Libya and Sudan on the basis of UN Security Council Chapter VII referrals. Kenya and Ivory Coast on the basis of ICC prosecutor's own initiative. The Ivory Coast was not an ICC member at the time but accepted its jurisdiction, and became a State Party in 2013. The ICC is at the time of writing undertaking preliminary investigations in Afghanistan, Colombia, Georgia, Guinea, Iraq, Nigeria, Palestine and Ukraine (ICC website).

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approve a postponement of the case against the Sudanese President for 12 months, as permitted by Article 16 of the Rome Statute, were not given sufficient attention. The African Union's reasons for proposing such postponement ranged from concern about the impact the arrest warrants against the Sudanese President would have on the possibilities of finding peace in the country, to the injustice it represented since international law was not being applied equally on African countries compared with other nations (Mills 2012). In this regard it is interesting to note the different approach taken here compared with the 2002 UN Security Council authorisation of a 12-month period of immunity for peacekeepers belonging to non-State Parties and which benefited greatly the US, renewed again the following year for another 12 months (for more details see Collantes-Celador 2012: 153).¹¹ The African Union responded to the failure to have its voice heard in the UN Security Council by asking its member states both in 2009 and 2010 not to cooperate with the ICC in apprehending President al-Bashir (Keppler 2012; HRW et. al. 2011). This whole situation also invigorated calls for the development of the African Court of Justice and Human Rights, a process that precedes the 'crisis' with the ICC but that has nevertheless sparked a debate in some circles over the intentions of some African countries to find a regional substitute for the ICC (du Plessis et. al. 2013).¹²

The Kenyan case has complicated matters further. In this case the ICC prosecutor used its own independent powers to initiate investigations into the inter-communal violence that followed the 2007 general elections. In 2011 the Kenyan President Uhuru Kenyatta was

¹¹ This different approach to the use of Article 16 has not gone unnoticed, as illustrated by the statements made by India at a 2012 UN Security Council debate on the rule of law in international peace and security (UN Security Council 2012: 11).

¹² Bekou (2014: 89-90) has a more positive reading of this African Court, as an example of Africa's commitment to the wider system of international criminal justice despite disillusionment with the ICC.

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accused as an indirect co-perpetrator of five counts of crimes against humanity and his deputy William Ruto also as an indirect co-perpetrator of three counts of crimes against humanity (ICC website). President Kenyatta did appear in The Hague but also tried a range of tactics to stop the prosecution, including a successful political campaign to have the rules on the appearance of sitting heads of state at trial changed, which led to some changes in the Court's rules of procedure and evidence (Bekou 2014: 86-87). This episode was heavily criticized by the Coalition for the ICC for constituting political interference that endangers the integrity of the Rome Statute (CICC 2013). President Kenyatta also launched a diplomatic campaign to have a mass withdrawal of African Union members from the ICC, which did not work, and tried to secure with the support of the African Union UN Security Council deferrals following Article 16 of the Statute, which also failed (HRW et. al. 2011; Roth 2014). In December 2014 the ICC Prosecutor withdrew charges against President Kenyatta, allegedly as a result of inability to access important information, but at the time of writing the case of his deputy is still pending. In the meeting of the Assembly of State Parties that took place in late November 2015 in The Hague, Kenya threatened to withdraw from the ICC unless fellow members joined in asking ICC judges to re-interpret rule 68 on the admission of prior recorded testimony for witnesses that subsequently retracted (Amnesty International 2015). The Assembly of State Parties recorded Kenya's stance on the matter but did not act upon it, stopping another serious attempt to change core precepts of the Court, hard fought in the period up to 1998 by the pro-ICC coalition, of which EU member states were part.

In this ongoing conflict between the African Union and the ICC the case of South Africa is emblematic of what is at stake. South Africa played an important role in the creation of the ICC, including among the LMG group that fought for the Court's prosecutorial independence. By November 2000 it ratified the Rome Statute and became a State Party to the ICC (ICC

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website; Mills 2012: 409). In 2011 South Africa sponsored UN Security Council resolution 1970 that, among other things, referred the situation in Libya to the ICC, and that was condemned by the African Union (Stuenkel 2014: 15-16). It is therefore rather interesting that previously, in 2009 at the Assembly of State Parties of the ICC in The Hague, and then at the 2010 Kampala Review Conference, South Africa proposed on behalf of the African Union changes to the guidelines on the use of prosecutorial powers to ensure that the need for peace, not just justice, was given an adequate consideration when deciding where to investigate. At Kampala it also proposed awarding the UN General Assembly the same deferral powers that the Security Council enjoys under Article 16 of the Rome Statute, to be used when the latter does not act upon such requests. In the words of Mills, these proposals, particularly the first one, “were perceived as politicizing justice as well as undermining the independence of the Prosecutor”, core aspects of the ICC (Mills 2012: 428-429). Interestingly this author argues that South Africa committed to introducing these proposals on behalf of the African Union to avoid “even more damaging” reforms being proposed and under the condition that individual African countries, members of both the ICC and the African Union, would decide independently their position (Mills 2012: 430 – see also Bekou 2014). Even if this is the case the controversy has continued. In June 2015 the South African government did not cooperate with the ICC arrest warrant by allowing Sudanese President al-Bashir to leave the country after attending an African Union summit, despite attempts by the South African High Court to the contrary. The ensuing ‘crisis’ between the Court and South Africa prompted the ruling African National Congress (ANC) in October 2015 to make public its desire to withdraw the country from the ICC (The Guardian 2015).

Not all African countries that are member states of both the African Union and the ICC are in favour of the non-cooperative stance taken by the former institution towards the latter.

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Elise Keppler (2012: 4-6) has analysed the discussions that preceded the decision adopted by the African Union at the July 2010 summit held in Kampala, Uganda, and which renewed calls for non-cooperation with the ICC arrest warrants for the Sudanese President. Her findings show deep divisions among members of the African Union over the language and content of the decision and, more generally, over the attempt to criticize and/or disregard the ICC. Moreover, ICC investigations into the situations in Mali and in the Central African Republic followed self-referrals from these countries issued in January 2013 and September 2014 respectively, the second such instance for the latter country and in both cases well into the African Union-ICC 'crisis' (ICC 2015a). Even if some countries (including State Parties to the ICC) have not cooperated with the arrest warrants against the Sudanese President al-Bashir, analysts coincide in that his freedom of movement has been limited substantially following his indictment by the ICC (HRW 2015; ICC 2015b; Roth 2014; du Plessis et. al. 2013).

3.2 The EU's Reaction to the African Union Challenge: Back to Entrenchment

The African Union and supporting African States are contesting the legitimacy of some of the ideas – and related institutional practices – embodied by the Court. Moreover, they are pursuing this ideational challenge, not by leaving the Court (despite some threats), but rather by using the Statute rules to revert or prevent the execution of Court actions, or proposing changes to the Statute rules. The risk is that this deteriorating relationship culminates in an adverse structural shift from “normative congruence” to “institutional lag” (Costa. et. al.: this volume) where the ICC is associated with ideas that are no longer widely perceived as legitimate and prevalent by a growing coalition of actors, including some that initially chose to support them.

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Turning now to how the EU has handled this ideational challenge, the official position seems to have been one of entrenchment. In the words of the President of the European Council, “all parties to the Rome Statute should fully respect their obligations. These obligations are part of international law, they cannot and must not be overruled by political statements, actions or inaction that are incompatible with their undertakings. The European Union will continue to pay close attention to the implementation of these commitments in its external relations with other partners” (2010). The 2013 document on the *EU's Response to Non-cooperation with the International Criminal Court by Third States*, based on the work of the ICC Working Group within the Council of the EU's Public International Law Working Group (COJUR), shows no willingness to compromise on this commitment to the well-functioning of the ICC. The document makes it clear that non-cooperation is considered as one of the serious challenges to ICC effectiveness, that State Parties to the Rome Statute are under a legal obligation to cooperate with the Court (including on arrest warrants), something that also applies to non-State Parties for those cases referred by the UN Security Council (paras. 3-5). The document then moves to the actions that the EU and Member States can take in the face of non-cooperation with a future commitment to revise them in order to strengthen the ‘entrenched’ EU position on non-cooperation. Actions enumerated in the document range from official statements in various forums, including the Assembly of State Parties to the ICC, to remind states of their legal obligations to bilateral meetings with the state in question to discuss the matter (para 7).

There are numerous examples of the EU High Representative or its Office issuing statements every time President al-Bashir travels reminding the affected state(s) of the

obligation to cooperation with the arrest warrants.¹³ In a 2013 speech at the UN Human Rights Council, the Head of the EU Delegation to the UN reminded Kenya that withdrawal from the ICC would not relinquish its legal obligation to collaborate with ongoing ICC proceedings (EU Delegation to the UN 2013). These official statements have been accompanied by face to face contacts. Davis (2014) points out that the EU Special Representative to the African Union – whose mandate went from 1 November 2011 to 30 June 2013 - reported facilitating improved communication between the African Union and the ICC. The Fourth EU-African summit held in April 2014 included in the final declaration a pledge to improve political dialogue on international criminal justice but, interestingly, “contentious” issues like the ICC were not included in the official discussions (FES 2014; General Secretariat of the Council 2014; Bekou 2014).

The position of entrenchment adopted by the EU is arguably the logical outcome of the normative proximity between the ideas embodied by the Court and the values with which the EU identifies and that simultaneously seeks to represent as a ‘normative power’ in the international structure. To this effect adherence to the Rome Statute has led to policy changes within the EU area of Justice, Freedom and Security, the revision of CFSP Common Positions and Action Plans, and country and region-specific strategies, as well as the signing of a cooperation and assistance agreement in 2006 which constituted the first such agreement between a regional organization and the ICC (Collantes-Celador 2012: 147-149). Moreover, certain EU countries (e.g. France, Belgium) have constructed for themselves an active role in international criminal law through the exercise of ‘universal jurisdiction’, which seems to have contributed to the resentment that underpins the African Union’s deteriorating relationship with

¹³ Examples can be found in the European Union External Action website: http://eeas.europa.eu/index_en.htm

the ICC (du Plessis et. al. 2013).¹⁴ In 2008 an African Union resolution called on non-African states (especially EU states) to stop ‘abusing’ the principle of universal jurisdiction to arrest and try African nationals (Mills 2012: 417-418).

Given how important African countries have been throughout the whole process, from negotiations to signing to ratification of the Rome Statute, and how predominant they are in the Assembly of State Parties, one can still wonder if the notion of ‘normative entrenchment’ is enough to explain why the EU has not considered accommodating the African Union requests. Following Fehl’s (2012) analysis of EU behaviour towards the US, perhaps the disunity within the African Union on the non-cooperation stance towards the ICC, and the fact that the US has in recent years shown a willingness to cooperate with existing investigations and arrest warrants, may have led the EU to decide that entrenching would not bring too many costs to the EU’s standing within the ICC and, more generally, to the well-functioning of this institution.

4. Conclusion

The analysis presented here has established that there are two phases in the life of the still very young International Criminal Court. The first phase, the signing and ratification of the 1998 Rome Statute represents a seminal moment in international criminal law because it gave institutional embodiment to prevailing ideas in the international system on issues of human

¹⁴ ‘Universal jurisdiction’ is a contested principle. The idea is that certain crimes – such as genocide, crimes against humanity, war crimes – “transcend nationality and become international crimes” (Mills 2012: 418). In such situations states can use this principle to arrest and try individuals even if the crime(s) “were not committed on the territory of the first state, the crimes were not committed by a national of the first state, and there is not necessarily any direct connection to the first state” (Mills 2012: 418).

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rights, justice and the fight against impunity. However, this institution was not as ambitious in its independence and jurisdictional scope as was hoped by some actors due to the absence of support from some major countries in the international structure, namely US, Russia and China. The US policy of “active marginalization” that ensued constitutes the most important power-based challenge the institution has yet faced even if the US ultimately failed to realise its goals. The second phase, still ongoing, is in some ways a more threatening episode that could lead to a structural shift from “normative congruence” to “institutional lag”, weakening the congruence between institution and prevailing ideas in the international structure in favour of an alignment of the latter with power. This challenge takes the form of efforts by the African Union via some of its members, that are also State Parties to the ICC, to contest the legitimacy of certain ideas (and related practices) embodied by the Court through either non-cooperation or institutional reform.

Throughout these two phases the EU has alternated between a policy of entrenchment and a policy of calculated accommodation based on a search for the least damaging option to the integrity of the Rome Statute, the search for universal ratification, and the Court’s day-to-day effectiveness. In the near future this balancing act could potentially become for the EU a lot more difficult. In a January 2016 commentary, Bosco analyses the possible next moves by the US, preoccupied with the incumbent January 2017 deadline that will re-open the debate over the ICC jurisdictional powers over the crime of aggression. One of the plausible options for the US is capitalizing on African discontent with the ICC to ensure they do not contribute to the two-thirds majority vote in the Assembly of State Parties required for the activation of the Court’s jurisdiction. Such a scenario could arguably move the ICC closer to a period of “institutional lag” and in doing so, make it more difficult for an EU that identifies normatively with the ICC to be able to convincingly play the multilateral game.

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