European Security

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/feus20

The dog that did not bark: the EU and the clash between sovereignty and justice in the International Criminal Court

Oriol Costa, Gemma Collantes-Celador & Diego Badell

To cite this article: Oriol Costa, Gemma Collantes-Celador & Diego Badell (2021) The dog that did not bark: the EU and the clash between sovereignty and justice in the International Criminal Court, European Security, 30:3, 402-417, DOI: 10.1080/09662839.2021.1947801

To link to this article: https://doi.org/10.1080/09662839.2021.1947801

Published online: 25 Aug 2021.

EUROPEAN SECURITY
2021, VOL. 30, NO. 3, 402–417
https://doi.org/10.1080/09662839.2021.1947801

Routledge
Taylor & Francis Group

The dog that did not bark: the EU and the clash between sovereignty and justice in the International Criminal Court

Oriol Costa [a], Gemma Collantes-Celador [b] and Diego Badell [c]

[a]Institut Barcelona d'Estudis Internacionals (IBEI) and Universitat Autònoma de Barcelona (UAB), Barcelona, Spain; [b]School of Defence and Security, Cranfield University at the Defence Academy of the United Kingdom, Shrivenham, UK; [c]European Foreign Policy Observatory, Institut Barcelona d'Estudis Internacionals (IBEI), Barcelona, Spain

ABSTRACT

The cosmopolitan character of the International Criminal Court (ICC) is not immune to the growing surge in the contestation of international institutions. The African Union's reaction to the ICC decision to indict the then sitting heads of state of Sudan and Kenya, and the actions undertaken by the Trump Administration against the Court over possible investigations into Afghanistan and Palestine, are cases in point. This article explores what that surge has meant for intra-EU debates on its position towards the ICC. We present a two-fold argument based on an empirical analysis of key moments in the institutional development of the Court that coincide with the pre- and post-rise phases in the politicisation of international institutions. First, the level of agreement on the ICC within the EU has been grossly exaggerated. Second, despite bouts of disagreement, patterns of political conflict over the ICC within the EU remain constant. That is, there is recurrent polarisation, with a range of opinions on the intractable debate about Westphalian sovereignty vs. cosmopolitan justice, but no change in the other two dimensions of politicisation (salience and actor range).

ARTICLE HISTORY
Received 1 December 2020
Accepted 22 June 2021

KEYWORDS
International Criminal Court; European Union; contestation; polarisation; justice

Introduction

The introduction to this special issue argues that "after its 'high-water mark' in the early 2000s", the international liberal order "and particularly its most cosmopolitan facets" have come increasingly under attack, against a context in which the centrality of the nation-state and its boundaries are at stake and large portions of the public fear the effects of de-nationalisation (De Wilde *et al*. 2019, p. 6, Zürn and De Wilde 2016, p. 285, Börzel and Zürn 2021). This is precisely what the International Criminal Court (ICC) stands for. Founded in 2002, it embodies cosmopolitan norms that pose a renewed challenge to the notion of national sovereignty. More to the point, it represents the idea that serious violations of human rights cannot go unpunished in a rules-based international order, and that fairness and judicial independence must prevail in the prosecution of

CONTACT Oriol Costa oriol.costa@uab.es

these crimes (Collantes-Celador and Costa 2020, p. 113). The implied corollaries of individual criminal accountability and the denial of (sovereign) impunity run counter to a Westphalian worldview that sees little role for individuals as recipients of internationally recognised rights and duties, and that would rather leave the administration of justice (and the management of its trade-offs with stability) to the UN Security Council and hence to the veto power of its five permanent members (P5), including EU member state France and the UK until Brexit.[1] From this point of view, the ICC is a most likely case for an increase in contention and has indeed experienced the effect of this recent uptick in the politicisation of international institutions. What this paper explores is whether such international trends are reflected in intra-EU debates on the ICC.

Arguably, the last decade has seen a surge across-the-board in the contestation of international institutions. Concerning the ICC, the decision by the Court to indict the then sitting heads of state of Sudan (Omar Hassan Ahmed al-Bashir, in 2009), and Kenya (Uhuru Kenyatta and his deputy William Ruto, in 2011), brought African discontent with the Court to a tipping point. This discontent had been brewing among African countries for several years because – at the time of writing – all cases before the ICC since its creation have related to African "situations". Indicting sitting heads of state nevertheless meant overriding the immunity prerogatives long associated with the Westphalian norms of state sovereignty and non-interference, which was considered a step too far in the Court's use of its powers (Mills and Bloomfield 2018, p. 106). The outbursts against the ICC from the Trump administration, culminating in Executive Order 13928, on account of the ICC chief prosecutor's use of its own powers to request the authorisation to investigate the actions of US personnel during the war of Afghanistan, and the actions by Israel in Gaza and the West Bank (US Department of State 2020, The President 2020), reinforce the idea that the Court is not immune to this growing surge in the contestation of international institutions with a post-national nature (Börzel and Zürn 2021).[2]

In this paper, by way of three in-depth case studies in which processes are traced with the help of the literature and of documentary analysis, we ponder whether the contours of the discussion within the EU have changed too. Empirically, we focus on interactions between state representatives taking place at COJUR-ICC, a special subarea of the Council working group on international legal issues. COJUR-ICC was created in May 2002 and it has since, even before the June 2002 entry into force of the Rome Statute, been the venue for debates over the way in which the EU deals with the ICC. In addition, we look for evidence of politicisation in the European Parliament to check for developments beyond the intergovernmental arena – and find none.

We find that the pattern of political conflict has remained substantially unchanged. There are two legs to this argument. To begin with, the level of agreement within the EU on matters pertaining to the ICC has been grossly exaggerated. The EU has shown a "loyal" support to this international institution to the extent that in some circles the Court is considered an "EU Court" (Aoun 2008, p. 157; Groenleer and Rijks 2009, p. 167). This commitment is demonstrated by numerous EU policy statements and also by budget contributions and the introduction of "soft conditionality" (ICC clauses) in summits, strategies and agreements with third countries and regions, such as the Cotonou Agreement. However, there have been recurring bouts of dissensus within the EU too. Already during the run-up to the Rome Conference (1998), the Union could not put together any common position, but only "broad statements of the Council

Presidencies merely welcoming the proposed establishment of the ICC" (Groenleer and Rijks 2009, p. 169). The Rome Statute entered into force in 2002, and from then onwards, the capacity to offer a common stance involved the thorny issue of the requests by the US to adopt bilateral agreements that would grant immunity to US citizens. Again, EU member states were all over the map about this (Fehl 2012, p. 89).

Secondly, the more recent intra-EU differences about the ICC follow a rather recurrent template. Contention usually pits P5 EU member states against the rest, with a spectrum of middle-way positions in between, as it happened during the 1998 debates on the Rome Statute. The core of the disagreement has remained basically unchanged, and it has to do with the balance between a Westphalian understanding of sovereignty and a cosmopolitan understanding of justice. In line with Zürn (2019), Lake, Martin and Risse (2021), or Börzel and Zürn (2021), we associate the Westphalian understanding of sovereignty with communitarian views of international relations in which the right of national communities to sovereignty trumps individual rights. This understanding lies in opposition to cosmopolitan norms designed to protect the right of individuals internationally.

The article proceeds as follows. First, we present our analytical standpoint: we discuss why the ICC should be expected to be subjected to politicisation and introduce the way in which we engage with the introduction to this special issue. This is then followed by an exploration of patterns of intra-EU disagreements during the first years of the ICC, by looking at the episodes of the Rome Conference and Bilateral Immunity Agreements. We also look at a more recent case – the debate around the Kampala amendments and the activation of the crime of aggression. Through this empirical analysis, covering both the periods, previous and contemporary to the rise in the politicisation of international institutions, we draw conclusions in relation to the hypothesis that, despite bouts of disagreement, patterns of political conflict over the ICC within the EU remain constant. That is, there is recurrent polarisation with no change in the other two dimensions of politicisation (salience and actor range). The increasing contestation of the ICC at the international level has not led to its politicisation in the EU along the cleave that pits communitarians against cosmopolitans.

Analytical framework

We claim that the ICC is a likely candidate for politicisation, operationalised, in line with the introduction to this special issue, as an intensification of political conflict manifested through increases in polarisation, actor range and/or salience (Costa, Biedenkopf, and Góra 2021). The ICC embodies the idea that the international community needs to ensure individual criminal accountability, and fight impunity for the most serious crimes against human rights if justice is not (or cannot) be administered at the national level. This idea has a long history, dating back to the end of World War II and the Nuremberg and Tokyo Trials, gaining momentum with the geopolitical changes brought by the end of the Cold War and the changing nature of violent conflicts during the 1990s. This idea has been the driving force behind the *ad hoc* international criminal tribunals and special courts/tribunals for Rwanda, the Former Yugoslavia, Sierra Leone and Lebanon. Nevertheless, the ICC represents an additional step in the process – that of moving the fight against impunity from states, or state-controlled processes, to courts, as part of

the transition from "victor's justice" to "true international justice" (Hoover 2013, p. 265). In other words, the Court's main novelty is that it is a standing body, in contrast with the previous *ad hoc* tribunals created by the UNSC, which provided them with a specially designed, one-time jurisdictional mandate.

As such, the ICC represents an attempt to shift the location of authority away from states in matters of international criminal justice; it is thus part and parcel of the de-nationalisation process alluded to in the introduction to this special issue. To begin with, the prosecutor of the ICC can initiate investigations and/or prosecutions without the prior authorisation of state parties, if a state is demonstrably unable or unwilling to do so (Collantes-Celador 2016, p. 74). Secondly, the capacity of the ICC to independently indict individuals deemed guilty of war crimes, crimes against humanity, genocide and – following its activation in December 2017 – the crime of aggression, has been extended to sitting heads of state through the exercise of the powers conferred by Article 27 of the Rome Statute (Collantes-Celador and Costa 2020). This is a corollary of the idea that no impunity should be allowed for those responsible for such egregious crimes, but at the same time, it clashes with the immunity prerogatives traditionally associated with Westphalian understandings of state sovereignty, itself based on the UN Charter principles of sovereign equality and non-interference with domestic affairs (Mills and Bloomfield 2018, p. 106). Finally, articles 12 and 13 of the Rome Statute arguably pose as well a challenge to the Westphalian worldview, by enabling the ICC to prosecute nationals from countries that are not parties to the Rome Statute if the actions under investigation were committed in the territory of state parties, or in the territory of non-state parties that temporarily surrender their jurisdiction to the Court in relation to a particular case. Hence, during the haggles over the Rome Statute, the crime of aggression, and specific instances of the implementation of Court powers, the key bones of contention were the ICC institutional design and practices (which we address below), primarily in relation to the independence of the Court vis-à-vis the UNSC and its capacity to infringe upon Westphalian understandings of sovereignty.

In sum, the ICC is a quintessential case of the kind of international institutions created during the post-Cold War years that have pushed for an "increasingly vocal promotion of universalized liberal norms" (Rüland 2012, p. 257). Many of these institutions are "far more intrusive than conventional [ones]", to the point that "the notion of delegated, and therefore controlled, agency no longer holds" (Zürn and Stephen 2010, p. 93). Deitelhoff has argued that the ICC "imposes significant sovereignty costs on actors" (Deitelhoff 2009, p. 40). The implication is that the Court epitomises the broader clash between the norm of sovereignty and the norm of internationally recognised human rights (Sandholtz and Stiles 2009, p. 22), or to put it differently, the coexistence of a Westphalian order and a post-national order (Lake, Martin and Risse 2021, Börzel and Zürn 2021; Zürn, Binder and Ecker-Ehrhardt 2012) that results in the tension between national sovereignty and international justice (Collantes-Celador and Costa 2020, p. 118).

Two episodes underline how relevant such contestation has become, internationally. African countries were key in ensuring the 1998 signing of the Rome Statute and its ratification and implementation in subsequent years, as evidenced by the 2004 African Union call to universally ratify the Statute. In addition, Uganda, Mali, Central African Republic and the Democratic Republic of Congo are among the states that have self-referred cases to the ICC. However, the African Union – notwithstanding disagreement from some of its member states – mounted a multifaceted opposition to the indictment by the Court of

the sitting heads of Sudan and Kenya, requesting the UNSC to approve a postponement of the case against the then President al-Bashir, as permitted by Article 16 of the Statute. On its part, Kenya launched a campaign to have the rules on the appearance of sitting heads of state at trial changed, which culminated in modifications in the Court's rules of procedure and evidence. More forcefully, the African Union designed plans for a mass withdrawal from the ICC of its member states and issued calls to those very same members not to cooperate with the Court in apprehending the then President al-Bashir.[3] In this vein, proposals were made to shift the location of authority from the international level to the regional level.

The Trump administration reinstated the US starkly hostile approach to the ICC that characterised at least part of the Bush period, particularly in the face of the Court's intention to investigate alleged crimes against humanity and war crimes committed by US personnel in Afghanistan as well as Israel's actions in Gaza and the West Bank. This has been seen by the US not only as politically motivated, but also as illegitimate since the US is not a party to the Rome Statute (The White House 2018). The clash escalated, in June 2020, in the form of Executive Order 13928 which introduced visa restrictions for ICC officials as well as their families (The President 2020). The Order also imposed economic sanctions on those officials and others that materially support their activities; something that was interpreted as potentially allowing the US to target human rights advocates and NGOs working with the ICC. Following considerable international backlash, the executive order, including visa restrictions and economic sanctions, was revoked by the Biden administration in April 2021. However, Secretary of State Antony Blinken also made it clear that the Biden administration follows on from prior presidential administrations in its opposition to the application of the ICC jurisdiction over non-state parties such as the US and Israel; an opposition that will be pursued through engagement rather than coercion (US State Department 2021).

The preceding paragraphs illustrate that there has been a surge in international contestation of the ICC, but what motivates this paper is to explore what that surge has meant for intra-EU debates. To assess whether the contours of political conflict have changed in the EU, we use the typology advanced by the introduction to this special issue. This typology identifies four different ways in which, under the effect of acts of contestation by challengers, political conflict can change over a policy or a norm associated with CFSP. First, debates can *expand*, including a greater number of actors if, for instance, additional institutional arenas claim a role in the decision-making process, or if previously uninvolved civil society organisations engage in the discussion. Second, debates can become more *polarised*, with the positions of (a stable set of) actors drifting apart. Debates will become harsher and agreement harder to reach. The third option – *elite politicisation* – combines both actor expansion and polarisation. The wider range of elite actors will mobilise around clearly contrasting options – including institutional, political and social elites, well beyond the usually specialised CFSP circles. Finally, *mass politicisation* will add public salience to the mix, with political conflict taking place publicly, in a way that draws attention from laypeople, with the presence of a greater diversity of actors and polarised positions.

We take issue with the conception of change that underpins this typology of options. Measuring change is not as clear cut an exercise as it might seem at first sight. Our empirical analysis looks first at patterns of political conflict that developed within the EU at the time of the Rome negotiations that led to the ICC Statute and subsequently in relation to

the US drive for Bilateral Immunity Agreements. These two episodes took place during the Court's first few years, when cosmopolitan norms had the wind in their sails, and before the era of supposedly rising politicisation of international institutions. We then compare those patterns of political conflict with the debates that developed more recently in relation to the adoption of the Kampala amendments and the activation of the provisions on the crime of aggression, which reopened the debate around whose authority matters in the delivery of justice. From this point of view, change can mean two different things. First, it can be related to each of these episodes individually. In this case, our assessment would focus on the nature of the expansion of the political conflict that each of them represented. Secondly, change can involve comparing such episodes with each other, to see whether the emergence of controversial issues has triggered similar or different sorts of political conflicts.

Our findings show that, to be sure, intra-EU conflict over the ICC became more polarised over the Kampala amendments and the activation of the crime of aggression. However, so it had happened in the past around other key developments in the history of the ICC. Therefore, depending on the time frame of the analysis one might observe change or the continuation of a pattern in which a background of consensus is punctuated by bouts of disagreement. Intra-EU differences at moments of polarisation have followed a rather conventional template, with a range of opinions on the balance between the independence of the organisation administering international criminal justice (the ICC) and the capacity of the UN Security Council to act as the guardian of peace and security.

Bouts of dissensus

The road to Rome

With the end of the Cold War, the old aspiration to create a standing International Criminal Court (ICC) found a more propitious environment. In 1989, the UN International Law Commission (ILC) was asked by the UN General Assembly to draft a Statute for the ICC, which was done by 1994. However, the road that would eventually lead to the Rome Conference in 1998 was contentious.

Countries tended to position themselves with one of two different sides of the debate. On the one hand, there was the "Like-Minded Group" (LMG) of states, composed of Canada, Australia, most European countries and many developing ones; on the other the group of reluctant states led by the P5. The LMG – with over 60 states and strong NGO support by 1998 (Glasius 2002, p. 140) – emerged in favour of the establishment of a strong court, which was seen to entail autonomy vis-à-vis great powers. An epistemic community emerged in which there was no clear delineation of people "into categories of NGO or state representatives, but rather a sense of committed individuals working together towards similar goals regardless of their affiliation" (Pearson 2006, p. 27). The resulting "global specialist debate" involving "academics, NGO advocates, practising lawyers, and state officials" was instrumental in shaping the negotiation stance of the LMG (Glasius 2002, p. 150 – see also Lee 2013, p. 216, Benedetti and Washburn 1999, p. 23). Deitelhoff has described this interaction as an "island of persuasion"; i.e. "[it] changed the structure of the negotiations, the range of legitimate arguments, and finally even the range of possible outcomes of the negotiations" (Deitelhoff 2009, p. 58).

On the contrary, while accepting the existence of an ICC, the group of states led by the P5 and some members of the Non-Aligned Movement would have preferred to give the UNSC a larger role in steering its work, in line with the original ILC text. In other words, in the trade-off between (Westphalian) sovereignty and (cosmopolitan) justice the P5 sided with its role safeguarding the former and the LMG sided with the latter. More to the point, the differences between these two groups referred to "the definitions of crimes (Art. 5-9), the preconditions for the Court's exercise of its jurisdictions (Art. 12), "triggers" for investigations (Art. 13-16), and the "admissibility" of cases in light of domestic criminal investigations (Art. 17-19)" (Fehl 2012, p. 85). Underlying these tensions stood the broader clash between Westphalian and post-national views about the proper balance between justice and stability in the international order, and the role of supranational bodies and great powers in managing such balance. The fact that P5 powers took the former position created in itself a further dilemma that states had to consider: "would states favour an institutionally strong ICC [that] yet lacks the support of the powerful? Or would they opt for an ICC that pays tribute to [their concerns] regarding sovereignty costs and uncertainty, yet contains some loopholes?" (Fehl 2004, p. 380).

Both camps contained EU member states. France and the UK (at the time an EU member state) sided with the other P5 members; the rest of the EU15 with the LMG. Within this latter group, "activists within European governments", namely "principled legal advisers", played a leading role in shaping their countries' positions (Fehl 2012, p. 105). They were very much part of the broad transnational network that involved officials, experts, and NGOs that we have mentioned above (cf. see other contributions to this special issue for a discussion of how this constitutes a politicising move). As a result of this clash, for all the ex-post boasting about the leading role played by the EU on ICC matters, the fact is that during that process it could not put together any meaningful common position. International disagreement over crucial areas of the Rome Statute could be seen reflected in internal disagreement within the EU.

The internal divide was only bridged gradually. Tony Blair assumed office in May 1997, and as part of the new Labour's *ethical foreign policy*, by the end of the year, the UK had joined LMG countries – not without a fair deal of inter-departmental rivalry between the Ministry of Defence and the Foreign Office (Groenleer and Rijks 2009, p. 175). France, on its part, was the only EU country not yet in line with the LMG at the beginning of the Rome conference, which made it impossible for the EU to adopt a common position in the final phase of the negotiations (Fehl 2012, p. 85). France only changed sides in the last week of the Rome Conference after having secured an agreement on an opt-out clause, what became Article 124 – whereby new state parties can exempt themselves from ICC jurisdiction over war crimes for a period of seven years after the entry into force of the Statute – and under strong normative pressure mobilised around the negotiations. In other words, it was by way of international negotiations that internal unity within the EU was possible. The final agreement on a text pulled all EU member states together and they all voted for the Rome Statute establishing the ICC.

Bilateral Immunity Agreements

When it comes to the history of the ICC, Groeenleer and Rijks (2009, p. 173) claim that there is a "before" and an "after" the Bush Administration. The inauguration of George

Bush's presidency in January 2001 marked the beginning of a more confrontational stance by the US towards the ICC, seen as a foreign, intrusive body that infringed upon American sovereignty and claimed jurisdiction over its citizens even as the US remained a non-party. Three significant steps were taken in 2002. First, in May the US withdrew its signature from the Rome Statute, under the advice of John Bolton, then Undersecretary for State. This was followed in June by the US veto in the UNSC on the renewal of the peacekeeping mission to Bosnia and Herzegovina, at the same time that it threatened with blocking "all future missions if the Council did not pass a resolution exempting all UN peacekeepers from ICC jurisdiction" (Fehl 2012, p. 88). Even more significant in terms of US-ICC relations was the decision, two months later, to enact the American-Service-Member Protection Act (ASPA), also known as the "Invasion of the Hague Act". ASPA mandated cuts in military aid for states supporting the ICC and provided that "all means necessary" could be used to free US service people from the Court's custody (Fehl 2004, p. 362). As part of this same effort, the US pressured dozens of states to conclude Bilateral Immunity Agreements (BIAs) that prevented the extradition of current and former government officials, military personnel, civilian contractors and other US nationals to the ICC (Groenleer and Rijks 2009, p. 171). Sometimes such pressures included serious threats, as in the case of Eastern European countries and the threat to block their NATO applications (Fehl 2012, p. 89).

Contestation of the ICC by the US divided the EU. Governments of EU member states found themselves under considerable pressure from the US, including through NATO channels, at a time when the looming US-led intervention in Iraq placed severe strains on transatlantic relations and split EU governments. As a result, EU member states held starkly divergent positions on the issue of BIAs. Some of them openly opposed them, as they saw BIAs as compromising the integrity of the Court's mission to ensure individual criminal accountability and fight impunity against the most serious violations of human rights, and wanted the EU to rule them out. This was the position taken by Germany, Austria, Belgium, Finland, Greece, Ireland, Luxembourg and Sweden. At the other end of the spectrum, the UK and Italy opposed such prohibition "and even indicated their readiness to follow the US requests". Finally, France, Denmark, Portugal, Spain and the Netherlands seemed to hold a middle position (Fehl 2012, p. 89).

Nevertheless, the fact that the EU had (even if belatedly) endorsed the ICC made internal disagreement more problematic: "whereas the UK and France could have their own policy positions before and during the 1998 Rome Conference, this has gradually become less acceptable" (Groenleer and Van Schaik 2007, p. 978). At the same time, a common "European response" was seen as a way to potentially deflect "severe domestic political criticism" as well as a direct confrontation with the US (Groenleer and Rijks 2009, p. 177). Against this backdrop, Germany announced in July 2002 that it would not address the US request before the EU had deliberated on the matter. A few days later, the EU's Political and Security Committee agreed to explore the compatibility between the US proposal and the EU's Common Position of 2001 (2001/443/CFSP) regarding the support to the ICC and the integrity of its Statute (Thomas 2005, p. 31). Consequently, the debate moved to the Council and its associated expert echelons. After a meeting of EU foreign ministers in Elsinore (Denmark), the matter was passed to COJUR-ICC to flesh out how to address the US request constructively while maintaining the integrity of the Rome Statute. On September 2002 COJUR-ICC concluded that the US request was unacceptable.

The meeting was "contentious", but most of its members considered, "regardless of their governments' position on bilateral agreements", that the US quest for immunity was "an assault on the Court" (Thomas 2005, pp. 37–38).

The expert culture that had greased the Rome Statute negotiations and that now resided in the Council working group brought about unity in the EU. At the end of the day, many of the COJUR-ICC members had been their countries' chief negotiators in Rome and were personally committed to the ICC (Groenleer and Rijks 2009, p. 175, Thomas 2009, p. 387). In addition, their view was supported by the legal service of the European Commission, which had been involved in the issue in early August 2002 when it was asked by candidate states whether BIAs were consistent with the requirements of the Rome Statute. Consequently, on 5 September 2002, COJUR-ICC concluded that BIAs as proposed by the US were not acceptable. The Political and Security Committee unanimously endorsed this conclusion five days later. In the end, in spite of the initial divergence in opinion, no member state ratified a bilateral non-surrender agreement with the US.

Polarisation

These two cases illustrate the contours of debates about the ICC within the EU. First and foremost, it takes place mostly between state representatives, who have traditionally shared a normative commitment with the ICC and an expert culture (both things being difficult to disentangle). Second, these representatives have proved to be open to inputs from NGOs, a legacy of the role such organisations played during the run-up to Rome.

Since 2002 the venue of such discussions has been COJUR-ICC, which has come to embody both that expert culture mentioned above, and openness to NGOs – the Coalition for the ICC has a slot at each COJUR-ICC meeting to present their priorities and concerns (Costa and Müller 2019). Nevertheless, debates on the ICC rarely spill beyond the boundaries of the working group. Even representatives from the Coalition for the ICC, a coalition of NGOs, are expected to be constructive and play by the rules of this tightly knitted community. In addition, recommendations made by COJUR-ICC are frequently just channelled through the general COJUR, often taken on by the PSC, and later adopted by the Council without "much discussion" (Groenleer and van Schaik 2007, p. 981).

This has provided for a great deal of background consensus within the EU on the day-to-day support for the operations of the ICC. Polarisation thus appears in a punctuated manner by pulling apart the positions taken by state representatives. Actor range does not change in any remarkable way, and it basically entails EU member state representatives, with NGOs backing one side of the debate or the other. Salience remains very low. To support this conclusion we have also taken a closer look at debates in the European Parliament on the ICC (see more on this below). The Parliament is an important venue for political disagreement, and has been found to be open to the contestation of the international liberal order and its more cosmopolitan facets (De Wilde, Junk and Palmtag 2016). This suggests that if doubts were casted against the ICC, they would be noticed in the Parliament. However, it seems to be less polarised, not more, than the Council, with no evidence of an increase in salience of the debate over time either. If anything, peaks in polarisation dovetail those of international contestation of the ICC.

The crime of aggression

Article 5 of the Rome Statute provides details of the crimes within the jurisdiction of the Court, including the crime of aggression. However, one cannot find a corresponding article in the Statute that – just like with war crimes, crimes against humanity and genocide – details what the Court means by the crime of aggression, the conditions for the exercise of jurisdiction over this crime, and entry into force of those powers. The 2010 Kampala Review Conference provided state parties with the first opportunity to modify the Rome Statute, including in relation to this crime (Davis 2014).

The "Kampala amendments" – as the outcome of this conference became known – include a definition of the crime of aggression: "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations" (Review Conference 2010, Annex I.2 – Article 8bis). There is also a very specific jurisdictional regime attached to this definition. The activation of the jurisdiction over this crime was postponed until after 1 January 2017 when such decision would need to be adopted by a two-third majority of the Assembly of State Parties, and it could only be exercised over acts committed one year after thirty state parties had ratified the Kampala amendments. Moreover, the Court's jurisdiction was further limited, not just by other pre-existing clauses included in the Rome Statute, but also by the inclusion of "opt-outs" whereby state parties could lodge a declaration of non-acceptance of jurisdiction with the Court's Registrar at any point in time. Any investigation initiated by the ICC prosecutor would also need to confirm first if the UNSC had made a determination of the existence of an act of aggression and, if it had not done so, give it 6 months to consider. If we move forward to the year 2017, the re-opening of discussions concluded with the activation of the Court's powers over the crime of aggression from 17 July 2018 but denied the Court jurisdiction over instances of this crime if the affected state party has not ratified or accepted the Kampala amendments, even if that affected state party has not filed for an opt-out. Bypassing these jurisdictional limitations would require a referral by the UNSC.

The administration of justice when the prohibition on the use of force – as described in the UN Charter – is violated through "illegal" wars was not the object of polarisation. Rather, what was contested was the location of such power. In other words, the main question was whether the ICC should have the authority to independently determine occurrences of the crime of aggression or whether such authority should remain exclusively with the UNSC. Underpinning what turned out to be a rather intense debate was, once again, the balance between the norm of justice and the norm of state sovereignty, as well as the balance between justice and stability in the international order (see Collantes-Celador and Costa 2020). As expected, the US – present as an observer at Kampala – was one of the strongest voices warning against providing the Court with more powers at the expenses of the UNSC, a position that was shared by the other P5 states.

The EU did not have a common position at Kampala and, therefore, played a limited role, if at all (Davis 2014, pp. 87–88). Fracture lines within the EU appeared with regard to ICC-UNSC relations over the crime of aggression. UK (at the time a member state) and France positioned themselves with the P5 on requesting exclusive rights for the

Security Council on decisions to commence prosecutions by the Court unless additional jurisdictional limitations were placed on the ICC with regard to this crime. In the words of a UK Foreign Office spokesperson, "the UK has no plans to ratify the crime of aggression amendments. We believe the UN Security Council bears the main responsibility for maintaining international peace and security and should be the primary body to determine when an act of aggression has occurred" (The Guardian 2018). A similar position was expressed by the French Ministry for Europe and Foreign Affairs Spokesperson (French Embassy in London 2018):

> Today, 17 July 2018, also marks the start of the ICC's jurisdiction over the crime of aggression […] These [Kampala] amendments have not been ratified by a very large majority of states parties, including France, which does not accept this jurisdiction. Indeed, it could lead to contradictory decisions by the Court and the Security Council on the existence of an act of aggression.

The restrictive jurisdictional position that prevailed in 2017 was, in fact, actively supported by both UK and France, who joined forces with non-EU member states countries, such as Japan, Colombia and Canada (ICC 2017, Annexes, Kreß 2018, Davis 2014, Bosco 2014, Marquez Carrasco 2010).

EU member states, such as Germany, Greece or Poland, were at the opposite end of the spectrum, fully supportive of providing the ICC jurisdiction over this crime. Germany fought hard at the time of the Rome Conference to have this crime added to the Statute. It is also the sixth country to have ratified the Kampala amendments, in 2013. Poland's position was clearly articulated during an October 2017 debate at the UN General Assembly: "throughout history, Poland repeatedly had fallen victim to aggression […] It is our dream to save others from such cruelties" (cited in Duerr 2017). Intra-EU dissensus on the Kampala amendments persisted into 2017 resulting in a lack of unity at the debates in the Assembly of the State Parties as well as a slow ratification process by EU member states of such amendments. Even so, by November 2019 of the 39 ratifications of the Kampala amendments on the crime of aggression, 19 belong to EU member states with an additional six member states (Bulgaria, Denmark, Greece, Hungary, Italy, Romania) actively working on the ratification process. France, the UK (at the time a member state) and Sweden were missing from those figures. Sweden did nevertheless welcome the activation of the Court's jurisdiction during the December 2018 meeting of the Assembly of State Parties.[4]

To be fair, the fact that, compared with the previous two other episodes, dissensus has continued within the EU is not surprising if we consider that the activation of the crime of aggression proved divisive among LMG states and the coalition of NGOs CICC. Concerns ranged from the possible politicisation of the Court given that it had effectively been given powers to prosecute the very essence of state policy (Bosco 2014), to the effect that the activation of the crime of aggression could have on other hard-won but still contested practices like military interventions in the name of the Responsibility to Protect (Collantes-Celador and Costa 2020). It is indeed noteworthy that Canada – always identified as a LMG state – was behind the restrictive jurisdictional regime that prevailed in 2017, and that was also supported by the UK and France.

Davis has argued that when there are major debates about the relationship between the ICC and the UNSC, "the EU does not reach a common position" (Davis 2014, p. 93). And

it does not even try too hard. Diverging opinions on the ICC-UNSC relationship (rather than internal disapproval) are taken for granted and need to be seen in the framework of a general consensus on the operational support for the ICC. Thus, "EU member states in ASP [Assembly of State Parties] can and do build alliances with a range of like-minded non-EU ASP members" (Davis 2014, p. 93).

The debates around the Kampala amendments (2010) and their activation (2017) offer again the view of recurring polarisation against a backdrop of broad consensus, as did the episodes presented in the previous section. The Council becomes the venue for bouts of disagreement that, more often than not, are well aligned with the international clash between countries that would prefer a more or less autonomous and powerful ICC vis-à-vis the UNSC. There are no signs that this implies anything else than a recurring polarisation of political conflict within the Council. We have looked at the European Parliament in search of hints of different patterns of change in political conflict. We have found none. If anything, peaks of polarisation seem to be weaker. Resolutions on the ICC have nearly always counted with cross-party support in the Parliament, including the 1998 resolution in the opening days of the Rome Conference, and the 2002 resolution regarding BIAs. In 2014 the Parliament held a thematic session on the crime of aggression and approved a joint motion (Greens/EFA, S&D, GUE/NGL, EPP and ALDE) calling for the EU to adopt a common position on the matter, as well as urging the member states to be "at the forefront in pushing for the Kampala "Amendment"", by ratifying it, aligning national legislation accordingly and "positively support the one-time decisions by the ASP […] to active the ICC's jurisdiction for the crime of aggression" (European Parliament 2014a). The only sign of disagreement in the Parliament can be registered precisely at this moment, as the Tory MEP Charles Tannock, of the group of European Conservatives and Reformists, presented a different resolution that did not urge the member states to ratify the Kampala amendments but reminded that the "decisions to ratify [them] is solely a matter for individual State Parties" (European Parliament 2014b). This text was voted down. In 2017, a year in which we could have expected quite some polarisation, the resolution on "Addressing human rights violations in the context of war crimes, and crimes against humanity, including genocide" was passed, with only 5% of MEPs voting against, and 17% abstaining, including most of the MEPs from the French Front National, the British UKIP and the Polish Law and Justice (PiS).

In addition, there is no indication that salience has increased over time in the European Parliament. Up until 2019, the Parliament (EP 4th to 8th) has voted on 14 resolutions (legislative and non-legislative) on the ICC. Five of those votes took place in 2002, the year of the entry into force of the Rome Statute and of the US BIAs campaign. Other than that, only one year (2008) has seen more than two such votes (two of them, in relation to Sudan and the indictment and bringing to trial of the warlord Joseph Kony).

Conclusion

The International Criminal Court (ICC) embodies the idea that serious violations of human rights cannot go unpunished in a rules-based system and, therefore, the international community has the responsibility to uphold the norm of justice, with the corollaries of legal accountability/individual criminal accountability and the denial of impunity, when nation states are unwilling or unable to deal with such situations on their own. As this

international institution has put in practice the powers conferred by the Rome Statute, as well as others acquired through its evolution, it has found itself "under attack", increasingly drawn into the intractable debate of Westphalian sovereignty vs. cosmopolitan justice. In other words, the post-national character of the Court has not been immune to the growing politicisation of international institutions outlined by Zürn, De Wilde and others.

Using this reality as a starting point, the objective of this paper has been to explore if similar patterns of politicisation can be found within the EU on its position towards the ICC. The argument presented here is two-fold. First, the level of agreement on the Court within the EU has been exaggerated. There have always been moments of dissensus. Second, intra-EU differences follow a rather conventional template. The episodes explored in the paper corroborate this argument. They show dissensus within the EU resulting in the lack of common positions at crucial moments in ICC negotiations, and those disagreements generally coming down to the critical question of who should have the authority to deliver justice, leading to different opinions on the right balance between Westphalian sovereignty and cosmopolitan justice. More importantly, within the EU the transfer of authority to the international level remains unquestioned. Debates are structured around the scope of powers that the Court should be given at the expense of the UNSC or the powers it should have over countries that are not state parties to the Statute. France and the UK (when it was part of the EU) have normally sided with the P5, while other EU member states have taken a number of alternative positions. These are disagreements member states have learned to navigate. There are nevertheless some differences among the three episodes. Following the entry into force of the Rome Statute and the issuance of a clear position by the consensus-prone, expert-driven COJUR-ICC (endorsed by the Political and Security Committee) on BIAs, one finds EU member states falling in line with one common position. On the contrary, when it comes to the Kampala amendments on the crime of aggression, dissensus within the EU has persisted, which explains why not all EU member states have, to date, accepted or ratified the Kampala amendments.

However, even when taking this into account, what the three episodes show is that, despite peaks of disagreement, patterns of conflict over the ICC within the EU remain very similar. Polarisation increases in similar ways in all of the three cases; salience remains low in all of them, and actor range stays constant – and limited to state representatives. And a broader focus beyond the Council does not substantially change the picture. If anything, the European Parliament seems to be less polarised, and we have found no evidence of an increase in salience over the ICC.

There is limited variation in how political conflict evolves within the EU, with polarisation as its peak. This is puzzling. The Court could have been expected to be subject to a much greater degree of political conflict. In other words, one could have expected the Kampala amendments to bring politicisation to a higher level in the typology presented in the introduction to this special issue, or the backlash coming from the Trump administration to have had at least a modicum of resonance in the EU. None of that has happened. Within the EU, ICC matters still inhabit one of Deitelhoff's (2009) "islands of persuasion".

Notes

1. The analysis presented here stops before Brexit, and, therefore, does not include observations on how the departure of the UK may affect the dynamics that we map out in this article with respect to the nature of political conflict within the EU on matters of the ICC.
2. See Lake, Martin and Risse (2021) for a discussion on the US and the ICC vis-à-vis the debate between the Westphalian order and the post-national order.
3. The Sudanese transitional government has pledged full cooperation with the ICC and, while it has announced it might be prepared to hand over to the Court the now deposed President Al-Bashir (Lynch 2020), at the time of writing this had not yet happened.
4. By May 2021 there had been no additional ratifications by EU member states. The data come from The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, available from: https://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/ [Accessed 18 February 2020]; and UN Treaty Collection, Chapter XVIII, 10. b Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, available from: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en [Accessed 7 June 2021].

Acknowledgements

The authors are very grateful to the editors of this special issue, the two anonymous reviewers, and participants in the February 2020 Vienna workshop "Contestation and Politicisation of EU Foreign Policy: New Realities or Same Old?", for their valuable feedback on previous versions of this article. This research would not have been possible without the funding support from the EU-NormCon and COST Action ENTER research projects. The authors are fully responsible for any errors and omissions.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Funding

This article falls under the EU-NormCon research project (Normative contestation in Europe: Implications for the EU in a changing global order), funded by the National R+D Plan of the Spanish Ministry of Economy and Competitiveness (CSO2016-79205-P); and by the COST Action ENTER (EU Foreign Policy Facing New Realities, grant number CA17119), supported by COST (-European Cooperation in Science and Technology).

ORCID

Oriol Costa http://orcid.org/0000-0002-2033-576X
Gemma Collantes-Celador http://orcid.org/0000-0002-4282-4871
Diego Badell http://orcid.org/0000-0002-6013-9544

References

Aoun, E., 2008. Beyond EU/US early contentions over the International Criminal Court: the development of the EU's loyalty to the ICC. *Studia diplomatica*, LXI (4), 155–171.

Benedetti, F., and Washburn, J.L., 1999. Drafting the International Criminal Court treaty: two years to Rome and an afterword on the Rome diplomatic conference. *Global governance*, 5 (1), 1–37.

Börzel, T., and Zürn, M., 2021. Contestations of the liberal international order: from liberal multilateralism to postnational liberalism. *International organization*, 75 (2), 282–305.

Bosco, D., 2014. *Rough justice: the International Criminal Court in a world of power politics*. New York: Oxford University Press.
Collantes-Celador, G., 2016. The defence of an institution under challenge: the EU and the International Criminal Court. *In*: E. Barbé, O. Costa, and R. Kissack, eds. *EU policy responses to a shifting multilateral system*. Basingstoke: Hampshire: Palgrave Macmillan, 71–92.
Collantes-Celador, G., and Costa, O., 2020. The European Union and the International Criminal Court: contested abroad, consensual at home? *In*: E. Johansson-Nogués, M. Vlaskamp, and E. Barbé, eds. *European Union contested foreign policy in a new global context*. Cham: Springer, 113–131.
Costa, O., Biedenkopf, K., and Góra, M., 2021. Introduction. Shades of contestation and politicizations of CFSP. *European Security*, 30 (3).
Costa, O., and Müller, P., 2019. Une liaison transnationale. Exploring the role of NGOs in EU foreign policy-making on the ICC. *Comparative European politics*, 17, 696–713.
Davis, L., 2014. Discreet effectiveness: the EU and the ICC. *In*: E. Drieskens, and L.G. van Schaik, eds. *The EU and effective multilateralism: internal and external reform practices*. London: Routledge, 84–100.
De Wilde, P., Junk, W.M., and Palmtag, T., 2016. Accountability and opposition to globalization in international assemblies. *European journal of international relations*, 22 (4), 823–846.
De Wilde, P., *et al*., 2019. *The struggle over borders: cosmopolitanism and communitarianism*. Cambridge: Cambridge University Press.
Deitelhoff, N., 2009. The discursive process of legalization: charting islands of persuasion in the ICC case. *International organization*, 63, 33–65.
Duerr, B. 2017. ICC jurisdiction set to expand: Will states be deterred from war? *CSS Blog Network*, 15 December. Available from: https://isnblog.ethz.ch/justice/icc-jurisdiction-set-to-expand-will-states-be-deterred-from-war [Accessed 12 April 2019].
European Parliament. 2014a. *European Parliament Resolution of 17 July 2014 on the crime of aggression*. Brussels: European Parliament, 2014/2724(RSP).
European Parliament. 2014b. *Motion for a resolution on the crime of aggression. Charles Tannock, on behalf of the ECR group*. Brussels: European Parliament, 2014/2724(RSP).
Fehl, C., 2004. Explaining the International Criminal Court: a 'practice test' for rationalist and constructivist approaches. *European journal of international relations*, 10 (3), 357–394.
Fehl, C., 2012. *Living with a reluctant hegemon: explaining European responses to US unilateralism*. Oxford: Oxford University Press.
French Embassy in London. 2018. *France reaffirms backing for International Criminal Court*. Press briefing by the Ministry for Europe and Foreign Affairs spokesperson (excerpt), Paris, 17 July. Available from: https://uk.ambafrance.org/France-reaffirms-backing-for-International-Criminal-Court [Accessed 12 July 2020].
Glasius, M., 2002. Expertise in the cause of justice: global civil society influence on the statute for an International Criminal Court. *In*: M. Glasius, M. Kaldor, and H.K. Anheier, eds. *Global civil society yearbook 2002*. Oxford: Oxford University Press, 137–168.
Groenleer, M.L.P., and Rijks, D., 2009. The European Union and the International Criminal Court: the politics of international criminal justice. *In*: K.E. Jørgensen, ed. *The European Union and international organizations*. London: Routledge, 167–187.
Groenleer, M.L.P., and Van Schaik, L.G., 2007. United we stand? The European Union's international actorness in the cases of the International Criminal Court and the Kyoto protocol. *JCMS: Journal of common market studies*, 45 (5), 969–998.
Hoover, J., 2013. Moral practices: assigning responsibility in the International Criminal Court. *Law and contemporary problems*, 76 (3-4), 263–286.
International Criminal Court, 2017. Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression. ICC-ASP/16/24. New York, 27 November.
Kreß, C., 2018. On the activation of the ICC jurisdiction over the crime of aggression. *Journal of international criminal justice*, 16, 1–17.
Lake, D., Martin, L., and Risse, T., 2021. Challenges to the liberal order: reflections on International organization. *International organization*, 75 (2), 225–257.

Lee, J., 2013. Enough rope: the role of Minervian actors in establishing the International Criminal Court. *In*: Y. Tiberghien, ed. *Leadership in global institution building - Minerva's rule*. London: Palgrave, 213–231.

Lynch, J. 2020. Will Sudan's Bashir be handed to the ICC at last? *Foreign Policy*, 12 February. Available from: https://foreignpolicy.com/2020/02/12/sudan-omar-al-bashir-icc-darfur/ [Accessed 13 July 2020].

Marquez Carrasco, C. 2010. The EU and the ICC. Post in IntLawGrrls: Voices on International Law, 15 June. Available from: http://www.intlawgrrls.com/2010/06/eu-and-icc.html [Accessed: 8 March 2012].

Mills, K., and Bloomfield, A., 2018. African resistance to the International Criminal Court: halting the advance of the anti-impunity norm. *Review of international studies*, 44 (1), 101–127.

Pearson, Z., 2006. Non-Governmental organizations and the International Criminal Court: changing landscapes of international law. *Cornell International law journal*, 39 (2), 243–284.

Review Conference. 2010. *Resolution RC/Res.6 – The crime of aggression*. Adopted at the 13th plenary meeting, Kampala, 11 June. Available from: https://asp.icc-cpi.int/en_menus/asp/reviewconference/resolutions%20and%20declarations/Pages/resolutions%20and%20declarations.aspx [Accessed 15 August 2018].

Rüland, J., 2012. The rise of 'diminished multilateralism': East Asian and European forum shopping in global governance. *Asia Europe journal*, 9 (2-4), 255–270.

Sandholtz, W., and Stiles, K.W., 2009. *International norms and cycles of change*. Oxford: Oxford University Press.

The Guardian. 2018. ICC crime of aggression comes into effect without key signatories. 17 July. Available from: https://www.theguardian.com/law/2018/jul/17/icc-crimeof-aggression-comes-into-effect-without-key-signatories-uk-law-war [Accessed: 28 August 2018].

The President. 2020. *Executive order 13928 of June 11, 2020 blocking property of certain persons associated with the International criminal court*. 85 (115), 15 June. Washington, DC: Federal Register.

The White House. 2018. Remarks by President Trump to the 73rd session of the United Nations General Assembly. New York, 25 September. Available from: https://www.whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/ [Accessed 18 February 2020].

Thomas, D.C., 2005. *The institutional construction of EU foreign policy: CFSP and the International Criminal court*. Paper presented at the European Union studies association conference, Austin, Texas.

Thomas, D.C., 2009. Rejecting the US challenge to the International Criminal Court: normative entrapment and compromise in EU policy-making. *International politics*, 46 (4), 376–394.

US State Department. 2021. *Ending sanctions and visa restrictions against personnel of the International Criminal Court – Press Statement - Antony J. Blinken, Secretary of State*. Washington, DC, 2 April. Available from: https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/ [Accessed 5 June 2020].

US State Department. 2020. *Remarks by Secretary Michael R. Pompeo at a press availability with Secretary of Defense Mark Esper, Attorney General William Barr, and National Security advisor Robert O'Brien*. Washington, DC, 11 June. Available from: https://www.state.gov/secretary-michael-r-pompeo-at-a-press-availability-with-secretary-of-defense-mark-esper-attorney-general-william-barr-and-national-security-advisor-robert-obrien/ [Accessed 30 June 2020].

Zürn, M., 2019. Politicization compared: at national, European, and global levels. *Journal of European Public Policy*, 26 (7), 977–995.

Zürn, M., Binder, M., and Ecker-Ehrhardt, M., 2012. International authority and its politicization. *International theory*, 4 (1), 69–106.

Zürn, M., and De Wilde, P., 2016. Debating globalization: cosmopolitanism and communitarianism as political ideologies. *Journal of political ideologies*, 21 (3), 280–301.

Zürn, M., and Stephen, M., 2010. The view of old and new powers on the legitimacy of international institutions. *Politics*, 30 (1 suppl), 91–101.