

The two faces of impunity: the EU and the International Criminal Court

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Since its creation in 1998, the European Union (EU) has offered numerous gestures of support to the International Criminal Court (ICC), a fact which has been clearly manifested at the institutional level. The EU has also been criticised by a number of states over the same period, either because of the form its support has taken, because there is not enough of it, or finally, because it is seen as trying to “appropriate” the ICC for itself.

With greater or lesser steadfastness, the EU has demonstrated an unconditional attitude of support to the first permanent international court since the very beginning, making use of a range of different instruments to effectuate this backing. On the political level, a number of agreements have been made between both institutions, while special attention has been paid to updating common positions within the EU at the same time.

The first common position,¹ which dates back to June 2001, includes a call for successive revisions of the same every six months. These revisions were carried out in June 2002 and June 2003, thus strengthening the EU position.

The 2002 revision² introduces a specific reference to the “universal support” the EU offers the Court, calling specifically for the collaboration of non-member states and the international community at large. In this way it touches upon the offer of practical, technical, political and financial help in creating the legal framework necessary to put the Rome Statute (RS) into practice in non-member states. It gives special emphasis to the EU’s legal contribution, encouraging transparency in the designation of experts and an appropriate level of training for all personnel.

The aim of the second revision³ of the common position is to give the EU’s activities a new orientation with respect to the ICC, referring repeatedly to the conclusions reached by the Council on 30 September 2002 regarding the ICC and the adherent guiding principles of the EU.⁴ This revision mentions the crime of aggression for the first time and requests that member states contribute to the activities of the special working commission and back its findings.

¹ Council Common Position 2001/443/CFSP, 11 June 2001. See: www.consilium.europa.eu/uedocs/cmsUpload/ICC25EN.pdf

² Council Common Position 2002/474/CFSP, 20 June 2002. See: www.consilium.europa.eu/uedocs/cmsUpload/ICC25EN.pdf

³ Council Common Position 2003/444/CFSP, 16 June 2003. See: www.consilium.europa.eu/uedocs/cmsUpload/ICC25EN.pdf

⁴ Conclusions on the ICC by the EU General Affairs and External Relations Council, 30 September 2002. See: ue.eu.int/ueDocs/cms_Data/docs/pressData/en/gena/72321.pdf

In addition, it demands a concentrated involvement by member states in the advancement of the Court, calling on them to “follow closely developments concerning effective cooperation with the Court” and focus their attention on the principle of independence. Previously, the Justice and Home Affairs department had adopted various decisions in the fight against impunity aimed at member states.⁵

After failing to comply with the calendar of revisions on two occasions, the Council decided in article 8 that future revisions would be carried out “as appropriate”. This kind of exactitude leads one to fear lesser implication from the Council and members states thereafter.

The first common position (2001) already reflected the need for further development by means of an action plan. The revised version of the plan⁶ was adopted by COREPER in February 2004 and was structured in three essential parts: co-ordination of EU activities; principles of universality and integrity of the Treaty of Rome (TR); and, finally, the independence and effective working of the ICC.

The action plan focussed on the need for the EU to put political pressure on non-member states to ratify the RS and the fight against impunity by, for example, including recognition of the ICC as an essential prerequisite to the signing of international agreements. The terms and conditions of the Cotonou Agreement⁷ are fruit of this policy in the same way - albeit on a different plane - as the global lobbying by the EU which has led to the situation in Darfur finally being referred to the ICC despite contradictory positions in the international community. In this respect, negotiations are being held with countries such as Indonesia, Thailand, South Africa, Russia and China. These clauses do not merely require ratification, but also the legal adjustments necessary for the ICC to function properly, something which has on some occasions proven an insurmountable obstacle.

The EU has made many official declarations openly opposing the US policy of signing treaties with non-member states, known as Bilateral Immunity Treaties,⁸ which go against the spirit of the RS. While it is a fact that numerous formal requests have been made to the USA in this regard, the EU ought to apply the same principles with the USA as it does when dealing with other non-member states. The ratification and full implementation of the RS should be a prerequisite for the conclusion of all bilateral agreements, regardless of which state is on the other side of the negotiating table.

If the global reach of the ICC is to be empowered, it is essential to continue in the same direction the EU has been moving, with considerable success in recent years, in every geographical region of the world. Of late, this has been aimed primarily at Asia, Africa having been the principal focus before. In this regard, it's worth emphasising the healthy relationship between the ICC and non-governmental organisations working in the same field. A degree of respect and common purpose exists on both sides, making for a mutually beneficial working relationship.

The last big step forward was taken on the 10 April 2006 when the EU signed the Treaty for Cooperation and Assistance with the ICC.⁹ Through this document, the line of

⁵ Decision 2002/494/JHA, Framework Decision 2002/584/JHA, 13 June 2002, and Decision 2003/335/JHA, 8 May 2003.

⁶ Action Plan to Follow-up on the Common Position on the ICC, 4 February 2004. See: www.consilium.europa.eu/uedocs/cmsUpload/ICC48EN.pdf

⁷ Bilateral Immunity Agreements allowed by the so-called US Nethercutt Amendment. See: www.iccnw.org/?mod=nethercutt

⁸ Agreement between the ICC and EU on Cooperation and Assistance, 10 April 2006. See: www.icc-cpi.int/library/about/official-journal/ICC-PRES-01-01-06_English.pdf

⁹ Agreement between the ICC and EU on Cooperation and Assistance, 10 April 2006. See: www.icc-cpi.int/library/about/official-journal/ICC-PRES-01-01-06_English.pdf

cooperation between both institutions was given continuity. It formally regulated the sharing of information (including classified information), periodical meetings between both institutions, testimony by EU personnel, matters of security, immunity, training and resources, in addition to direct cooperation between the EU and the ICC's prosecutor.

An agreement between the EU and the ICC as a whole was not possible, a piecemeal approach being required to reach agreements between departments of both institutions. On the other hand, this agreement does not bind member states individually, but rather the EU as a collective. As the ICC Prosecutor Luís Moreno Ocampo has stated on several occasions, the implication of sovereign states in matters relating to justice is essential, and this also includes European governments.¹⁰

The EU backing of the ICC is open and clear, but not quite as complete as it could be in relation to, for example, witness protection.¹¹ The support offered by the EU in technical and economic resources remains a fundamental element in the development of the Court.

The financial contribution the EU has made to the ICC is so significant¹² that it has caused a certain mistrust in some sections of the international community; the unconditional support offered, financial or otherwise, has led to suspicions arising about a possible process of assimilation between the two organisations. The preservation of the independence of the judicial body is essential, and any confusion with the political element of the EU would be counterproductive. In addition, it's worth remembering that the ICC has only ever begun legal proceedings on the African continent, the focus of attention now having shifted to Asia. Justice, in order to be respected, must be equal for all.

In spite of the initiatives carried out by the EU, the Czech Republic - a member state - has still not ratified the RS; nor have candidates for accession such as Turkey. In a similar way, it's imperative that all of the member states ratify the Agreement on Privileges and Immunities of the ICC¹³ as soon as possible. Countries such as the Czech Republic, Poland, Portugal, The United Kingdom, Spain, and the Netherlands have still to do so. What's more, any states which might join the EU in the future have to understand the necessity of the aforementioned ratification.

More specifically, as a consequence of the European commitment to justice and the fight against impunity, some grey areas remain with respect to the EU position on Serbia. Any possible Serbian incorporation into the European Union must involve a prior and total assumption of its principles, which is to say, complete and effective cooperation with the International Criminal Tribunal for the former Yugoslavia, in matters such as detentions, as well as the implementation of justice at the national level.

It is fundamental that the ICC have a global reach, but any actor which defends universal values outside its frontiers¹⁴ cannot allow them to be violated in its own backyard.

¹⁰ "ICC prosecutor calls for help in apprehending Darfur war crimes suspects", published in *Jurist*, 14 October 2007. See: jurist.law.pitt.edu/paperchase/2007/10/icc-prosecutor-calls-for-help-in.php

¹¹ "Amnesty International's recommendations to the European Union on improving the effectiveness of international justice", 31 August 2007. See: web.amnesty.org/library/Index/ENGIOR530102007?open&of=ENG-385

¹² "La UE ha destinado más de 20 millones de Euros a la Iniciativa Europea para la Democracia y los Derechos Humanos (EIDHR) destinados a proyectos cuyo fin sea el de apoyar a la CPI y la justicia penal internacional" ("The EU has provided over EUR 20 million under the European Initiative for Democracy and Human Rights (EIDHR) for projects aimed at supporting the ICC and international criminal justice"). See: ec.europa.eu/external_relations/human_rights/icc/index.htm#funding

¹³ Agreement on Privileges and Immunities of the Court (APIC). See: www.un.org/law/icc/asp/1stsession/report/english/part_ii_e_e.pdf

¹⁴ Speech by Commissioner Ferrero-Waldner on "The ICC, Transatlantic Relations and Cooperation with Third Parties to Promote the Rule of Law". See: www.europa-eu-un.org/articles/en/article_4569_en.htm

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