

Like Ancient Beacons: The European Union and the International Criminal Court – Reflections from afar on a Chapter of European Foreign Policy

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A. Times and Spaces, Shifts and Intersections

That the Law is never frozen in time and space is quite a trivial insight – but one, however, that is nonetheless particularly true for the area of international human rights law and the jurisdiction to see human rights norms respected and enforced. No less is it true for international criminal law and European law. It is, of course, true at the intersection of these three fields of the law as well, exactly the place I intend to explore in this paper. And, as we shall see, poetry, that rarely unveiled subtext of the law, is never steady in its foundations.

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International criminal law evolved at rapid, even breathtaking speed during the last decade. While textbooks in the mid-nineties still concluded their – rather brief – sections on international criminal law with a short outline of the Nuremberg trials, and sometimes with a short reference to the work of the International Law Commission, international criminal law has now become a reality to which an impressive canon of commentary and literature is devoted.¹ There is the International Criminal Court (ICC) at The Hague² and there are ad hoc international tribunals such as the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR).³ At the end of the 20th Century, a new generation of “internationalized” criminal justice bodies emerged, their benches consisting of both international and national judges, applying both international and national law.⁴ There are academic programs and summer courses, and specialized journals, providing detailed analysis and comprehensive documentation.

Yet, the story of Law is never just a success story, a narrative of progress, but merely a narrative of asymmetry⁵ - and asynchronicity.

The layers of diverging and overlapping time frames which Daniel Thym recently identified in his doctoral dissertation on “Asynchronicity and European

¹ A development strikingly mirrored in the books. See and compare, e.g., the 3rd edition and the recently published 5th edition of the classical German textbook edited by Knut Ipsen: *VÖLKERRECHT* (K. IPSEN / E. MENZEL, EDS., 3RD ED., 1990) and *VÖLKERRECHT* (K. IPSEN, ED., 5TH ED., 2004). For an excellent introduction see A. CASSESE, *INTERNATIONAL CRIMINAL LAW* (2003), for a discussion of international criminal law in a human rights law context, see M. Lattimer, *Enforcing Human Rights through International Criminal Law*, in *JUSTICE FOR CRIMES AGAINST HUMANITY* 387 - 418 (M. LATTIMER / P. SANDS, EDS., 2003).

² On the ICC, there is already endless literature. For an introduction, see W.A. SCHABAS, *INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT*, (2ND ED., 2004), for an illuminating kaleidoscope see *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* (A. CASSESE / P. GAETA / J.R.W.D. JONES, EDS., 2002), and for an enlightening discussion of key questions of international criminal law related to the establishment of the ICC, see B. BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT* (2003).

³ On international tribunals, too, the literature is endless. For a first overview, see A. Cassese, *From Nuremberg to Rome: from ad hoc international criminal tribunals to the ICC*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 3 - 19 (A. CASSESE / P. GAETA / J.R.W.D. JONES, EDS., 2002). For an interesting legal-sociological perspective on the International Criminal Tribunal for the Former Yugoslavia (ICTY), see J. HAGAN, *JUSTICE IN THE BALKANS* (2003).

⁴ See *INTERNATIONALIZED CRIMINAL TRIBUNALS* (C.P.R. ROMANO / A. NOLLKAEMPER / JANN K. KLEFFNER, EDS., 2004).

⁵ From a “cosmopolitan” perspective, Ulrich Beck and Edgar Grande draw a rough, yet matching sketch of the “European Empire” as asymmetric system of government and governance, see U. BECK / E. GRANDE, *DAS KOSMOPOLITISCHE EUROPA* 101 - 102 (2004).

Constitutional Law" (*"Ungleichzeitigkeit und Europäisches Verfassungsrecht"*)⁶ within an European context are not only characteristic features of European law, but essential elements of all legal structures in a globalized world. As the evolution of law is ever accelerating,⁷ asymmetries in space and time allow polities to find their own rhythm of interaction, internally as well as externally. In the European Union, "asymmetry originates in and illustrates the gradual transition from the functional integration logic of the single market to political union."⁸ Asymmetry, and by that asynchronicity, allows for diversity without risking fundamental ruptures.

Before turning back to international criminal law, let us cast an eye on Europe. Let us look at the EU from a transatlantic perspective. The clocks are ticking differently. Not that "Americans are from Mars and Europeans are from Venus,"⁹ not that a "European Dream"¹⁰ could be the easy solution for all challenges a globalized world confronts. But the clocks *are* ticking differently.

Early on 29 October 2004, six hours before this paper was first presented at Duke Law School, at 11.45 a.m. Central European Time, the Heads of States and Governments of the Member States of the European Union gathered for a solemn ceremony in the *Palazzo dei Conservatori* in Rome and signed the Treaty and the Final Act establishing a Constitution for Europe.¹¹ Again, as so often in these last

⁶ D. THYM, *UNGLEICHZEITIGKEIT UND EUROPÄISCHES VERFASSUNGSRECHT* (2004). Whilst Thym himself translates the German term "Ungleichzeitigkeit" as "asymmetry" in his book's English summary, it is nonetheless a focus on *time* rather than space which makes this book a fresh and enlightening contribution to European constitutional law, continuing and transcending a differentiation discourse shaped by remarkable contributions such as F. TUYTSCHAEVER, *DIFFERENTIATION IN EUROPEAN UNION LAW* (1999) and D. HANF, *DIFFERENTIATION IN THE LAW OF THE EUROPEAN UNION* (2002) - and still inspired by Eberhard Grabitz, who so emphatically dismissed the distinction between differentiation in time and differentiation in space, see, e.g., E. Grabitz, *Community Law and Differentiation between the Member States*, in *GEDIFFERENTIEERDE INTEGRATIE IN DE EUROPESE GEMEENSCHAPPEN*, Asser Instituut (1985), at 21.

⁷ On that acceleration and its impact on lawyers and legal literature, see R.M. Kiesow, *Zeitnot*, in R. M. KIESOW, *DAS ALPHABET DES RECHTS* 281 - 290 (2004).

⁸ D. THYM, *supra* note 6, at 391.

⁹ R. KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* (2003), at 3. For a multifaceted discussion of Robert Kagan's position, see the contributions by Afsah, Bratspies, Buckel, Dilling, Lotherington, Miller, Paulus, Smith, and Wissel, 4 *German Law Journal* No. 9 (1 September 2003) at www.germanlawjournal.com.

¹⁰ J. RIFKIN, *THE EUROPEAN DREAM* (2004).

¹¹ See, e.g., *FINANCIAL TIMES*, 30 October 2004, at 1. The revised final version of the Treaty establishing a Constitution for Europe (TEC) (CIG 87/1/04 Rev. 1, 13 October 2004) is available at <http://ue.eu.int/igcpdf/en/04/cg00/cg00087-re01.en04.pdf>

few months of European Constitution-Building, the event was accompanied by much *Pathos and Patina*:¹² The ceremony took place in the *Sala degli Orazi e Curiazi*, the same room in which the six original member countries signed the Treaty establishing the European Economic Community in 1957.

So much history, so much hope. Yet, whether hope and history in Europe will ever rhyme seems uncertain.¹³ Even the solemn ceremony in Rome was overshadowed by a major crisis without precedent: The Buttiglione *fiasco* launched a heated and ongoing public debate across Europe on diversity, tolerance and values, even “European values”!¹⁴ Who would predict when the final text signed on this golden autumn day will have passed the ratification procedures in all Member States? Or whether it will survive them at all? Whilst a Union-wide referendum was not seriously considered by the Convention or the IGC, more and more Member States turned towards the option of a referendum on national level.¹⁵ As a means to mobilise public debate, this shift is to be welcomed. On the other hand, it can also be seen as a serious risk for the overall future of the EU.¹⁶

¹² See, for more of the same and a critical assessment: U. Haltern, *Pathos und Patina: The Failure and Promise of Constitutionalism in the European Imagination*, 9 *European Law Journal* 14 – 44 (2003), and U. HALTERN, *DAS POLITISCHE IN EUROPA* (forthcoming).

¹³ They rhyme probably always only for moments in time. Referring to the solemn signing ceremony of the Rome Statute of the International Criminal Court on 17 July 1998, William Pace and Jennifer Schense quote some classic lines by Seamus Heaney, see W.R. Pace / J. Schense, *The Role of Non-Governmental Organizations*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 105 – 143 (A. CASSESE / P. GAETA / J.R.W.D. JONES, EDS., 2002). Heaney’s words read: “History says, ‘Don’t hope / On this side of the grave.’ / But then, once in a lifetime / The longed-for tidal wave / Of justice can rise up, / And hope and history rhyme.” See S. HEANEY, *THE CURE AT TROY* (1991).

¹⁴ See, e.g., M. Marrin, *In one bloody bout Brussels reveals its true hypocrisy*, *SUNDAY TIMES*, 31 October 2004, at 21; and, for a comparative reflection: P. Bahnert, *Der Krieg der Welten*, *FRANKFURTER ALLGEMEINE ZEITUNG*, 4 November 2004, at 37. Meanwhile, Rocco Buttiglione stepped back, but the heated discussion is far from over, further fuelled by the quarrels about European multiculturalism following the murder of the Dutch film director Theo van Gogh.

¹⁵ See N. Walker, *Europe’s Constitutional Momentum and the Search for Polity Legitimacy*, in *ALTNEULAND: THE EU CONSTITUTION IN A CONTEXTUAL PERSPECTIVE* (J.H.H. WEILER / C.L. EISGRUBER, EDS., 2004) www.jeanmonnetprogram.org/papers/04/040501.html, at 52. On the “currently prevailing anti-referendum constitutional pattern” in the new EU Member States, see A. Sajó, *Accession’s Impact on Constitutionalism in the New Member States*, in *LAW AND GOVERNANCE IN AN ENLARGED EUROPEAN UNION* 415 – 435 (G. BERMANN / K. PISTOR, EDS., 2004), at 421 – 425.

¹⁶ P. Pettit, *Europe’s Constitutional Momentum and the Search for Polity Legitimation* in *ALTNEULAND: THE EU CONSTITUTION IN A CONTEXTUAL PERSPECTIVE* (J.H.H. WEILER / C.L. EISGRUBER, EDS., 2004) www.jeanmonnetprogram.org/papers/04/040501.html, at 9.

But even if the new Constitutional Treaty will never enter into force: The “Debate on the Future of the European Union,” launched in Nice in December 2000, enhanced reflection about the project of European integration, its legitimacy, perspectives and limits, about enlarged and deepened integration and about the price to be paid for both.¹⁷ When analyzing Europe’s “Constitutional moment” we should, as Joseph Weiler reminds us, not confine our observations to the Convention and the IGC: “Citizens and intellectuals are also part of the Convention and have a role in ‘constituting’ Europe (...). They become part of the Convention by helping to define, through and by their thoughts, passions and responses, the very political culture which shapes who we are, what our values are, and how, in light of that, our polity and its multifaceted society will be constituted.”¹⁸

B. Making New Meanings Flare? Constitutionalizing European Foreign Policy

Among politicians and academics, citizens and intellectuals, there has been - and still is - much talk about identity, thicker and thinner identity, about federal visions and a “Citizens’ Europe,” and even about an evolving European *Verfassungspatriotismus* (Constitutional Patriotism) in the Habermasian sense.

Yet, the debate did not bring Europe closer to its citizens. A skilfully designed website does not already create the “European Public Sphere” scholars and politicians are longing for so desperately. The reconstitution of European *public spheres* requires, as Damian Chalmers stresses on the basis of his deliberative approach to European governance, a “constitutional framework for communication” - as precondition for political participation and, thus, enhanced legitimacy.¹⁹ Democratic legitimacy requires informed citizens and, hence, communication. As Joseph Weiler observed with regard to the often deplored European democratic deficit: “Transparency and access to documents are often

¹⁷ A detailed interdisciplinary picture of the convention process is to be found in EUROPE EN VOIE DE CONSTITUTION: POUR UN BILAN CRITIQUE DES TRAVAUX DE LA CONVENTION (O. BEAUD / I. PERNICE / A. LECHEVALIER / S. STRUDEL, EDS., 2004). For a critical reflection *au fond*, see the contributions in ALTNEULAND: THE EU CONSTITUTION IN A CONTEXTUAL PERSPECTIVE (J.H.H. WEILER / C.L. EISGRUBER, EDS., 2004) www.jeanmonnetprogram.org/papers/04/040501.html

¹⁸ J.H.H. Weiler, *A Constitution for Europe? Some Hard Choices*, in LAW AND GOVERNANCE IN AN ENLARGED EUROPEAN UNION 39 - 59, at 59 (G. BERMAN / K. PISTOR, EDS., 2004). See, also, an earlier version of this essay in 40 JMCS 563 - 580 (2002).

¹⁹ See D. Chalmers, *The Reconstitution of European Public Spheres*, 9 EUROPEAN LAW JOURNAL 127 - 189 (2003).

invoked as possible remedy to this issue. But if you do not know what is going on, which documents will you ask to see?"²⁰

Much has been written on European identity, on citizen's identification with the supranational beast and on the Constitutional Treaty's identity-building force.²¹ *Alors, encore*: What makes us Europeans European? An answer is obviously not to be found through internal exchange and reflection exclusively. Thus, do we Europeans need the view of others, *le regard d'autrui*, to define ourselves?

The inaugural conference of the European Society of International Law, held at New York University's Villa La Pietra in Florence in May 2004, submitted the question of what precisely Europe "is" to the international lawyers.²² The answer will, however, not be given in an academic preliminary reference procedure. If answers are to be expected at all, they will be given *in praxi*. And foreign policy issues, external relations, will be crucial – even if one does not follow Jürgen Habermas and Jacques Derrida in their interpretation of the Europe-wide protests against the war in Iraq as "constitutional momentum."²³

Since the early days of the integration process, the European polity, first the Community and then the Union, sought to define its identity as a "global actor."²⁴ Whereas in the initial stages of the current reform process, external relations were not a central concern, the Laeken Declaration on the Future of the Europe identified "Europe's new role in a globalized world" as one of the key challenges facing the Union (the other – internal – challenge was the challenge of democracy and

²⁰ J.H.H. Weiler, *To Be a European Citizen: Eros and Civilisation*, in *THE CONSTITUTION OF EUROPE* 324 – 357 (J.H.H. Weiler, 1999), at 349.

²¹ See, e.g., A. von Bogdandy, *The European Constitution and European Identity: Potentials and Dangers of the IGC's Treaty Establishing a Constitution for Europe*, in *ALTNEULAND: THE EU CONSTITUTION IN A CONTEXTUAL PERSPECTIVE* (J.H.H. WEILER / C.L. EISGRUBER, EDS., 2004) [www.jeanmonnetprogram.org/papers/04/040501.html]; See, also, F.C. Mayer / J. Palmowski, *European Identities and the EU – The Ties that Bind the Peoples of Europe*, 42 *JOURNAL OF COMMON MARKET STUDIES* 573 – 598 (2004).

²² See M. Goodwin / A. Kemmerer, *As Sounding Brass, or a Tinkling Cymbal? Reflections on the Inaugural Conference of the European Society of International Law*, 5 *GERMAN LAW JOURNAL* NO. 6 (1 June 2004), at www.germanlawjournal.com

²³ J. Habermas / J. Derrida, *Nach dem Krieg: Die Wiedergeburt Europas*, *FRANKFURTER ALLGEMEINE ZEITUNG*, 31 May 2003, at 12; English translation: *February 15, Or What Binds Europeans Together: Plea for a Common Foreign Policy, Beginning in the Core of Europe*, in 10 *CONSTELLATIONS* (SEPTEMBER 2003) 291-297 (2003). Sharp criticism of the U.S. National Security Strategy must, however, not be misinterpreted as anti-Americanism, see, also, J. Derrida, *Une Europe de l'espoir*, 51 *LE MONDE DIPLOMATIQUE*, No. 608 (Novembre 2004).

²⁴ See M. Cremona, *The Union as a Global Actor: Roles, Models and Identity*, 41 *COMMON MARKET LAW REVIEW* 553 – 573 (2004).

accountability).²⁵ Beyond the formal set of provisions laid down in a constitutional text, there was an expectation, "that these 'holy' texts shape some kind of European identity by stimulating 'constitutional patriotism' with some kind of vision and mission for a regional and global role of the Union."²⁶

The reform of the constitutional foundations of Europe's Common Foreign and Security Policy (CFSP) – and of European foreign policy in general, comprising all external activities of the European Union – featured prominently on the Convention Agenda. "The Iraq crisis, that happened in the middle of the Convention's work, brought in sharp relief the traditional gap between rhetoric and reality in EU foreign relations, but after a short phase of perplexity the Convention soldiered on and produced a vast number of both broad and detailed reform proposals in the field of external relations."²⁷ The main objective of those proposals, the improvement of the decision-making capacity of EU institutions in foreign policy, is supported by an increasing majority of the Union citizens: In spring 2004, 72% of the respondents to the Eurobarometer survey (EU15 citizens) expressed the view that Europe should have a common foreign policy.²⁸

Thus, European public opinion dovetails with what we hear so often from Habermas and Fischer and so many others: Europe shall speak with a single voice.²⁹ It seems that a majority of Union citizens is inclined to trust in what Germany's foreign minister recently reassured when contemplating the impact of

²⁵ Laeken Declaration on the Future of the European Union, Annex I to the Presidency Conclusions, Laeken European Council 15 December 2001. (http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/68827.pdf, 26 November 2004)

²⁶ W. Wessels, A 'saut constitutionnel' out of an intergovernmental trap? The Provisions of the Constitutional Treaty for the Common Foreign, Security and Defence Policy, in *ALTNEULAND: THE EU CONSTITUTION IN A CONTEXTUAL PERSPECTIVE* (J.H.H. WEILER / C.L. EISGRUBER, EDS., 2004) www.jeanmonnetprogram.org/papers/04/040501.html, at 6.

²⁷ B. de Witte, *The Constitutional Law of External Relations*, in *A CONSTITUTION FOR THE EUROPEAN UNION: FIRST COMMENTS ON THE 2003-DRAFT OF THE EUROPEAN CONVENTION* 95 – 106 (I. PERNICE / M. POIARES MADURO, EDS., 2003), at 95. Bruno de Witte concentrates on the specifically constitutional dimension of the Convention's work on external relations. For an examination of the concrete policy implications in the field, see D. Thym, *Reforming Europe's Common Foreign and Security Policy*, 10 *EUROPEAN LAW JOURNAL* 5 – 22 (2004); M. Cremona, *supra*, at note 24; S. Duke, *The Convention, the Draft Constitution and External Relations: Effects and Implications for the EU and its International Role*, EIPA Working Paper No. 2003/W/2, available as

<http://www.eipa.nl/Publications/Summaries/03/WorkingPaper/2003w02.pdf>

²⁸ See Eurobarometer 61 of February/March 2004, available at www.europa.eu.int/comm/public_opinion

²⁹ See, on the institutional design providing for that single voice: D. Thym, *supra*, note 27, 18 – 22.

external relations on European identity: “Our importance is greater than we dare to take upon ourselves! (*Wir sind von größerer Bedeutung als wir uns selber zutrauen!*)”³⁰ But: Europe is (only) what it does, as Martii Koskeniemi put it so candidly.³¹

The much deplored absence of a common European response to the war in Iraq did not prevent the Convention from agreeing upon a comprehensive reform package in the foreign-policy field.³² Without going into detail,³³ let me just mention a few keywords about the reforms laid down in the TEC. Most prominently within the institutional framework for a more integrated approach to the EU’s external action figures the new Minister for Foreign Affairs who will both “conduct” the CFSP as a member of the European Council and the Chair of the Foreign Affairs Council, and have responsibility for coordinating the Union’s external action as Vice-President of the Commission.³⁴ The Minister will give a face to European foreign policy and thereby reinforce European identity in the eyes of the international community – and of Union citizens.

Yet, despite extensive reformulation, many provisions of the Constitutional Treaty document a high degree of continuity. As there is a separate title devoted to external relations only in Part III (not as part of the “basics” in Part I), provisions on external policy are spread all over the text of the Treaty, thus failing to provide a concise and comprehensive view of the EU’s external relations. The decisions to establish a single legal personality (Art. I-6 TEC) and a European Foreign Service (Art. III-197[3] TEC) are to be welcomed, but these reforms cannot conceal that, as Wolfgang Wessels observes, “behind a unifying façade and some slogans the traditional pillar structure continues to exist both in terms of the legal foundations

³⁰ J. Fischer, *Europäische und nationale Außenpolitik*, speech given at the conference “Europa eine Seele geben – A Soul for Europe – Une âme pour l’ Europe: Berliner Konferenz für europäische Kulturpolitik”, Berlin, 26 November 2004.

³¹ See M. Goodwin/A. Kemmerer, *supra*, note 22.

³² But see, on the profound impact of the Iraq war on European integration, F.C. Mayer, *Angriffskrieg und europäisches Verfassungsrecht: Zu den rechtlichen Bindungen von Außenpolitik in Europa*, 41 ARCHIV DES VÖLKERRECHTS 394 – 418 (2003).

³³ For detailed analysis, see the studies by Cremona, Duke, Wessels, de Witte and Thym I refer to *supra*, at notes 26 and 27.

³⁴ Art. I-27 TEC. In summer 2004, 64% of the respondents to Eurobarometer answered correctly when they were asked whether the text of the TEC provides for the creation of a position of Minister of Foreign Affairs for the EU. See Flash Eurobarometer 159/2 of June/July 2004, available at www.europa.eu.int/comm/public_opinion Thus, the establishment of the Foreign Minister is the single most popular reform initiated by the Convention. See, also, Thym, *supra*, note 27.

and the procedures applied.”³⁵ Wessels’ overall assessment remains rather sceptical: “All in all, the gap between ambitious goals and allocated capabilities remains wide.”³⁶ The constitutionalization process in this field, he observes, has not come to an end.

The Convention did not pave the way for an overall federalisation of European foreign policy with a single and exclusive competence on the supranational level.³⁷ Member States were apparently not willing and/or able to transfer *real* sovereignty from the traditional *domaine réservé*, even of a limited nature. However, the Convention’s work might nonetheless bring some added value to the Union’s external relations. As Marise Cremona observes, the general provisions in the Title on External Action within Part III establish a single set of values, principles and objectives for the Union’s external action (Art.III-193 TEC). According to Cremona, even where they look familiar, bringing them together has the significant result that a single set of objectives will cover every aspect of external policy – although the lengthy and wide-ranging list, lacking any prioritization, is unlikely to bring about a greater policy focus.³⁸ Yet, as Cremona pointed out elsewhere, the Constitutional Treaty may strengthen “the Union’s obligation to practise what it preaches” and effectively require an enhanced level of solidarity among Member States and the Union.³⁹

Furthermore, before getting too pessimistic, one should remember that the established pillars system and the Union’s “troubled personality” did not impede foreign policy *spill overs* in the past. The principle of horizontal coherence, laid down in Article 3 TEU has not been stripped of effectiveness by the general use of functional duality. “By underlining that the Council and the Commission act ‘each in accordance with its respective powers’, the language in Article 3 has prompted both institutions to each rightly claim competence over all pillars and the Commission may point to its power of initiative in the community pillar and its full involvement in the CFSP.”⁴⁰

³⁵ W. Wessels, *supra*, note 26, at 10.

³⁶ *Ibid*, at 29.

³⁷ Thus being a “building block of the concept of the ‘European constitutional federation’ (*Verfassungsverbund*)” developed by Ingolf Pernice” see D. Thym, *supra*, note 27, at 8.

³⁸ M. Cremona, *supra*, note 24, at 568.

³⁹ See M. Goodwin / A. Kemmerer, *supra*, note 22.

⁴⁰ P. Gauttier, *Horizontal Coherence and the External Competences of the European Union*, 10 EUROPEAN LAW JOURNAL 23 – 41 (2004), at 27.

Moreover, as *Pascal Gauthier* noted, “the Community approach advocated by the Commission, based on the mutually reinforcing nature of the CFSP with the first pillar, argued for strengthening its role in the CSFP; on the contrary, the Council’s intergovernmental approach held the CFSP to cover all aspects of foreign policy and security, and favoured adopting general positions without going into specific details for their implementation.”⁴¹ *In praxi*, the strict pillar structure has thus been blurring for some time: even before the Draft Constitutional Treaty, European Foreign Policy could be defined as just the “capacity to make and implement policies abroad that promote the domestic values, interests and policies of the European Union.”⁴²

The contribution of the European Union to the establishment of the International Criminal Court (ICC) is a striking example for such a multidimensional policy, allowing it “to act flexibly, using a multiplicity of instruments, permutations of institutional actors and levels of governance.”⁴³ Barely noticed even by international criminal law experts, the European Union played a key role during the process, contributing to the establishment of the ICC financially as well as politically. Moreover, one could rightly argue that the Statute of Rome would not have entered into force without the support provided by the EU – or at least significantly later than in July 2002.

But, first of all, why is the Union interested in International Criminal Jurisdiction? As Chris Patten, then Commissioner for External Relations, explained at a Plenary Session of the European Parliament:

*The European Union fully supports the ICC. The Principles of the Rome Statute, as well as those governing the functioning of the Court, are fully in line with the principles and objectives of the Union. The consolidation of the rule of law and respect for human rights, as well as the preservation of peace and the strengthening of international security, in conformity with the Charter of the United Nations and as provided for in Article 11 of the EU Treaty, are of fundamental importance to the Union.*⁴⁴

⁴¹ *Ibid.*, at 27 and 28.

⁴² H. SMITH, EUROPEAN UNION FOREIGN POLICY 8 (2002). See, on cross-pillar-activities, E. DENZA, THE INTERGOVERNMENTAL PILLARS OF THE EUROPEAN UNION 289 – 291 (2002).

⁴³ M. Cremona, *External Relations and External Competence: The Emergence of an Integrated Policy*, in THE EVOLUTION OF EU LAW 173 (P. CRAIG / G. DE BÚRCA, EDS., 1999).

⁴⁴ Statement by Chris Patten, Commissioner for External Relations, on the ICC, at the Plenary Session of the European Parliament (Strasbourg), 25 September 2002, available at www.europa-eu-un.org/article.asp?id=1640 Art. 11 TEU is now mirrored in Art. I-3 (4) TEC and Art. III-193 TEC. On

I could print similar statements for many pages, issued by the Council, the Commission, by various Presidencies, by High Representative Javier Solana and from numerous other sources.⁴⁵

C. An Irish Intermezzo

But, instead, I would like to pause at this point for a short Irish *intermezzo*. No worries, you will not read about a repetition of the Irish Nice saga. Just a poem by Nobel Prize laureate Seamus Heaney, commissioned by the Irish Government to mark the occasion of EU enlargement, first presented in Phoenix Park, Dublin, on May Day 2004.⁴⁶ There hardly could be a better outline of the European Union's motivation to promote international criminal justice than these few lines, reflecting enlargement against the cultural backdrop of the old Celtic spring festival Bealtaine.

SEAMUS HEANEY BEACONS AT BEALTAINE

Phoenix Park, May Day, 2004

Uisce: water. And fionn: the water's clear.
But dip and find this Gaelic water Greek:
A phoenix flames upon fionn uisce here.

Strangers were barbaroi to the Greek ear.
Now let the heirs of all who could not speak
The language, whose ba-babbling was unclear,

external policy objectives, see P. ECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION 141 - 145 (2004).

⁴⁵ For many more EU voices, see A. Kemmerer, *Going Universal: The European Union and the International Criminal Court – A Closer Look on a Chapter of Europe's Foreign Policy* (forthcoming in 6 GERMAN LAW JOURNAL 2005). Detailed examination and analysis is also to be found in A. KEMMERER, DIE EUROPÄISCHE UNION UND DER INTERNATIONALE STRAFGERICHTSHOF. RECHTLICHE GRUNDLAGEN UND POLITISCHE PRAXIS EINES KAPITELS EUROPÄISCHEN AUßENHANDELNS (forthcoming).

⁴⁶ www.eu2004.ie/templates/news.asp?sNavlocator=66&list_id=641

Come with their gift of tongues past each frontier
And find the answering voices that they seek
As fionn and uisce answer phoenix here.

The May Day hills were burning, far and near,
When our land's first footers beached boats in the creek
In uisce, fionn, strange words that soon grew clear;

So on a day when newcomers appear
Let it be a homecoming and let us speak
The unstrange word, as it behoves us here,

Move lips, move minds and make new meanings flare
Like ancient beacons signalling, peak to peak,
From middle sea to north sea, shining clear
As phoenix flame upon fionn uisce here.⁴⁷

All right now, enough of all this Hibernian pathos, you might say. Granted. Maybe this is just a personal thing. Maybe Heaney's poem just touches me because I was taught my first lessons in international law at the National University of Ireland's Irish Centre for Human Rights in Galway. At the far western edge of Europe, one could learn something about the use of human rights as beacons, enabling even a small nation to influence and shape international politics by that subtle drive one might label with a well-known term coined at Galway's neighbouring university on the other side of the pond.⁴⁸

But I dare to say that this is not just a far echo from a sentimental journey in the early days of the ERASMUS program. Heaney's poem is not just another piece of *Eurokitsch* from the shallow reservoir of an "imagined community,"⁴⁹ with no history, no identity, and no individuality. Not just another gruelling example of political consumer aesthetics,⁵⁰ but a lesson on that mysterious narrative of European identity, closely tied to national identities. On an identity that "does not resolve the exclusivity of nationalism, but moderates it."⁵¹

⁴⁷ *Supra*, at note 46.

⁴⁸ J. NYE, *SOFT POWER* (2004).

⁴⁹ B. ANDERSON, *IMAGINED COMMUNITIES* (1990).

⁵⁰ See, for an aesthetic deconstruction of EU icons and symbols, U. Haltern, *supra*, note 12.

⁵¹ F.C. Mayer / J. Palmowski, *supra*, note 21, at 591.

Maybe citizen identity and the Union's *Gestalt* converge not in their shallowness, as Ulrich Haltern would argue, but in their depths. Dip in the waters of your traditions, even your constitutional traditions, of your regional and national culture(s), and you may find the Gaelic waters Greek. Admittedly, "it is altogether more difficult to attain an ever closer Union if the components of that Union preserve their distinct identities, if they retain their 'otherness' *vis-à-vis* each other, if they do not become one flesh, politically speaking."⁵² Here, where Joseph Weiler's classical principle of constitutional tolerance comes into play,⁵³ we find ourselves at the core of our well-worn, but ever salient European identity-values-legitimacy discourse.

Leaving aside the inside of that discourse, the bulks of essays on deliberative democracy, common normative values and network governance, I would like now, finally, to turn to foreign policy. As Richard Youngs points out, much recent debate over the EU's external relations has revolved around notions of normative, value driven external policy.⁵⁴ Yet, as stated, here we are just at the outside of a familiar debate. It has become a commonplace that the fashionable talk about values externally can be seen as a contribution to the strengthening of their vitality internally. "The EU's international identity relates closely to the concept of the EU as a 'normative model', possessing little concrete material means of influence, but with significant 'soft power' deriving from its identity as a beacon for certain distinctive values and norms."⁵⁵ Alas, back to the beacons.

D. Europe, Inside Out: Human Rights and the Rule of Law

The European Union played a key role during the process of the establishment of the International Criminal Court, contributing to the "project" financially as well as politically. From the rich and complex picture of relevant external actions, just a rough and incomprehensive sketch can be presented in this paper.⁵⁶

⁵² J.H.H. Weiler, *In defence of the status quo: Europe's constitutional Sonderweg*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (J.H.H. WEILER / M. WIND, EDS., 2003) 7 - 23, at 20.

⁵³ See, e.g., J.H.H. WEILER, THE CONSTITUTION OF EUROPE (1999) and, most recently, J.H.H. WEILER, EIN CHRISTLICHES EUROPA (2004). On identity, "the self" and "the other" see, also, S. Heaney, *Known World - Vertraute Welt*, FRANKFURTER ALLGEMEINE ZEITUNG, 1 June 1999, at 49.

⁵⁴ R. Youngs, *Normative Dynamics and Strategic Interests in the EU's External Identity*, 42 JOURNAL OF COMMON MARKET STUDIES 415 - 435 (2004).

⁵⁵ *Ibid.*, at 416.

⁵⁶ For details, see the forthcoming publications by A. KEMMERER, *supra*, note 45.

A driving power towards international criminal justice evolved, on the one hand, at the Member State level. Every individual EU Member State, including the new Members which entered on 1 May 2004, have signed and ratified the Statute of Rome.⁵⁷ Their financial contribution to the Budget of the ICC covers, according to a preliminary study, about 78% of the entire ICC budget.⁵⁸ Individually, Member States supported the ICC through political statements in international fora and by diplomatic means; some, among them Germany, were actively involved in the work of the Preparatory Commission.⁵⁹

In the framework of their Common Foreign and Security Policy (CFSP), the Member States succeeded in upholding a uniform “court-friendly” position and promoted actively the Establishment of the ICC – this becomes explicitly clear in a number of Council Conclusions and Common Positions, dating from June 2001 until recently.⁶⁰

Despite the deep European divide in the Iraq question, a common position could be formulated and safeguarded in the conflict with the United States following the entry into force of the ICC Statute. The crisis reached a peak during summer 2002, when the Preparatory Commission for the ICC held its 10th and last session at UN headquarters in New York. During this session, on 1 July 2002, the Statute of Rome entered into force, followed by a twofold reaction from the US:⁶¹ first, the US promoted action within the United States Security Council leading to the adoption of Resolution 1422 (2002), which exempts from the ICC’s jurisdiction the personnel of UN established or authorized missions belonging to States that are not contracting parties to the Rome Statute; second, the US was (and is still) attempting to enter

⁵⁷ Ratification chart at <http://www.iccnw.org/countryinfo/worldsignsandratifications.html>

⁵⁸ PICT (The Project on the International Courts and Tribunals) Discussion Paper on the Financing of the International Criminal Court, Annex III, 2000. The financial contribution of the Europeans is also reflected in the membership of the Committee on Budget and Finance: here, the Group of Western European and Other States (WEOG) is represented by four delegates, whereas all other regional groups have only two seats, cf. PCNICC/2002/2, Annex XI.

⁵⁹ See, e.g., H.-P. Kaul, *Der Internationale Strafgerichtshof: Eine Bestandsaufnahme im Frühjahr 2003*, DIE FRIEDENSWARTE 11 (2003).

⁶⁰ See, for details and references, *supra*, note 45.

⁶¹ See, e.g., S. Zappalà, *The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements*, 1 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 114 – 134 (2003); J. Herbst, *Immunität von Angehörigen der U.S.-Streitkräfte vor der Strafverfolgung durch den IStGH? Zur Resolution 1422 (2002) des UN- Sicherheitsrates vom 12. Juli 2002*, EUROPÄISCHE GRUNDRECHTEZEITSCHRIFT 581 – 588 (2002). Resolution 1422 (2002) has been prolonged, see Resolution 1487 (2003). A second prolongation failed after heated debates in June 2004.

into agreements (so-called Article 98 Agreements) with as many State Parties to the Rome Statute (as well as Third Parties) as possible in order to obtain exemption from the jurisdiction of the Court for all American citizens.

Despite significant internal disagreements on foreign policy matters, the Member States and the Union proved to be faithful to their often pronounced commitment for a timely entering into force of the ICC Statute and a firm establishment of the Court. Their opposition to both of the instruments chosen by the US to limit the ICC's jurisdiction made it impossible to reach smooth diplomatic solutions behind-the-scenes of the "international community." EU foreign policy once more proved to be multifaceted and complex. The European Commission, acting both as a "consultant" and facilitator for the Member States in the framework of the second pillar and, more independently, in the framework of the first pillar gave substantial input, by that influencing and sometimes shaping the Member States' positions. For example, in autumn 2002, an advisory opinion from the Commission's Legal Service stating the non-conformity of bilateral agreements with international law⁶² triggered measures subsequently taken in the Council – and influenced public debate on a global level.⁶³ Commission officials participating in the meetings in New York were involved in a wide range of cross-pillar activities. In fact, the pillar division which now shall be formally abolished by the TEC, turned out to be blurring into multifaceted external actions.

Here, it may have had a great impact that the EU – more precisely the EC – had supported the ICC project from as early as 1995 in the framework of its First Pillar. Under the umbrella of the "European Initiative for Democracy and Human Rights," the European Commission funded projects promoting and facilitating widespread ratification and efficient national implementation of the Rome Statute, as well as related activities such as formation and training of lawyers participating in international criminal procedure. Seven Million Euro were spent between 1995 and 2001 from the EIDHR budget lines. Just peanuts, one might say, thinking about EU expenses in the agricultural field. But where this money was spent, it made a difference.

According to the structure of the EIDHR, most of the financial contributions were spent as funding for projects designed and run by nongovernmental organisations. By that, the European Commission provided a vital contribution to the process leading up to the establishment of the ICC. During that process, NGOs played an enhanced role, participated as actively as never before in international law-making.

⁶² 23 HUMAN RIGHTS LAW JOURNAL 158 (2002).

⁶³ FINANCIAL TIMES, 28 August 2002, at 1.

Although additional funding came from other sources, it can rightly be argued that without the support of the Commission the leading NGO Coalition, the umbrella organisation ICCNOW, would probably not have been in a position to participate actively in all relevant meetings, to take substantial influence on State Delegations and to provide expertise especially to smaller State Delegations. The often acclaimed enhanced role of NGOs on a global level (and in international law) can thus partly be claimed as a European (Commission) success.

And the story is not over. The European Commission shouldered over 60% of the costs for the ICC's Advance Team, established in June 2002 as a planning unit in The Hague.⁶⁴ In March 2003, the ICC took up its work – but EU support continues. In addition to financial and logistic assistance provided to NGOs, universities and other institutions, the Commission provides funding for technical equipment and library resources not covered by the ICC's tight budget.

Currently, the EIDHR is financing 11 on-going ICC projects worldwide with a total EU contribution of 9,681,852 Euro.⁶⁵ A first category of supported projects are projects aiming at assisting Third Countries with the ratification of the Rome Statute. Having been the most important category (in numbers) since 1998, such projects are still high on the agenda as a universality of ratification of the Statute is still a distant goal. Since 2003, the Commission supports also projects aiming at facilitating national implementation of the Rome Statute. Also in 2003, projects providing training for "future ICC users" (judges, lawyers, officials, etc.) were inaugurated.

E. Europe, Inside Out: Democracy and Legitimacy

To accelerate the establishment of international criminal justice structures, the EU has actively contributed to the enhanced role of NGOs on a global level. At first, this comes as no surprise: the Commission's activities in the international field correspond to the often evoked need to strengthen Civil Society. I will not set out at this point to explore the depths and limits of this glittering concept.⁶⁶ The way the EU interacts with NGOs in the international law context mirrors, however, the

⁶⁴ A. KEMMERER, DIE EUROPÄISCHE UNION UND DER ISTGH, *supra*, at note 45, Ms., at 85-86.

⁶⁵ For details, see http://europa.eu.int/comm/europeaid/projects/eidhr/themes-icc_en.htm#projects

⁶⁶ See, for that, the special issue of the E.L.J., 9 EUROPEAN LAW JOURNAL NO. 4 (September 2003). See, also, K.-P. Sommermann, *Verfassungsperspektiven für die Demokratie in der erweiterten Europäischen Union: Gefahr der Entdemokratisierung oder Fortentwicklung im Rahmen europäischer Supranationalität?*, 56 DIE ÖFFENTLICHE VERWALTUNG 1009 – 1017 (2003).

openness of European-level decision-making-processes to NGO influence – a feature that has traditionally be seen as a distinctive characteristics of the increasing “Brusselization” of external relations and the particularly strong influence of transnational NGOs in EU policy-making.⁶⁷

But there is something that bothers me. How do these activities relate to the European Union’s role as “rule generator” and “stabilizer”?⁶⁸ Certainly, contributions to the advancement of international criminal law are an important part of the Union’s role as “stabilizing actor,” promoting international law and multilateral solutions. They can be seen as part of the export of EU values, here in particular the rule of law and respect for fundamental rights. But what about the EU’s commitment to promote “just processes of governance at all levels,” processes which are informed by the principles of inclusiveness, transparency and participation.⁶⁹ And what about the Union’s commitment to democracy and legitimacy?

NGOs have become powerful actors on the international plane. While they still often portray themselves as “truth speaking to power,” they have become, as David Kennedy puts it, “power speaking to power.”⁷⁰ And it is not only that power requires responsibility and a rational cost-benefit-approach, as Kennedy argues, but also that an amorphous global “Multitude” could challenge established structures of participation, outgrowing our familiar models of democracy and even hard to grasp for its theorists.⁷¹

Are NGOs thus endangering the foundations of the very political communities they set out to improve? Whom do they represent ? Only themselves? Their fellow citizens? All citizens of the world? Or – as the founders of the *Institut de Droit International* put it in 1873 – “the moral conscience of the civilised world”?⁷² Questions of legitimacy arise – even more salient in the field of international criminal law, *id est*:

⁶⁷ R. Youngs, *supra*, note 54, at 418.

⁶⁸ M. Cremona, *supra*, at note 24.

⁶⁹ K. Nicolaidis / R. Howse, “This is My EUtopia ...Narrative as Power, 40 JOURNAL OF COMMON MARKET STUDIES 767 - 792, at 785.

⁷⁰ D. Kennedy, *THE DARK SIDES OF VIRTUE* (2004).

⁷¹ M. HARDT / A. NEGRI, *MULTITUDE* (2004).

⁷² See M. KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS* 11 - 97 (2002).

of criminal law, where fundamental human rights of both victims and perpetrators are always at stake.⁷³

F. Promises to Keep

To be clear: The active role taken by the European Union in facilitating the establishment of the International Criminal Court, and particularly in enhancing the participation of NGOs in international law-making, is to be lauded. Once more, the networks of EU external relations have widened their scope beyond the concept of free trade area and customs Union. Once more, it becomes clear that the Union's foreign policy objectives have expanded beyond the market to include the protection of human rights and the promotion of Union values.⁷⁴

Yet, with a widened scope comes an enhanced level of responsibility. A responsibility that, in the case of NGO participation, falls not only on NGOs themselves, but also on the EU as facilitator of NGO projects. A responsibility to address questions of legitimacy which are also part of the Union's legacy to promote democracy, human rights and the rule of law.⁷⁵ A responsibility also to face the dark sides of international criminal law, the challenges and failures.

This legacy brings with it the responsibility to engage in international legal discourse and to address that great theme of the "law going universal" - whether we join Anne-Marie Slaughter in identifying "judicial networks,"⁷⁶ or refer to Richard Posner's more cautious discourse metaphor.⁷⁷ Already, the European Union is an important and influential voice in that universal rights discourse in many more ways than could be described here. As Marise Cremona points out, the notion of the EU as a laboratory or model for integration operates at more than one level. Key

⁷³ See A. Chayes / A.M. Slaughter, *The Future of the Global Legal System*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* 237 - 247 (S.B. SEWALL / C. KAYSEN, EDS., 2000), at 242. See, also, O. Tolmein, *Die Weltanwalte*, FRANKFURTER ALLGEMEINE ZEITUNG, 1 July 2003, at 36.

⁷⁴ See M. Cremona, *supra*, at note 24, at 555.

⁷⁵ European foreign policy itself is bound by international law, see F.C. Mayer, *supra*, note 32.

⁷⁶ A.M. SLAUGHTER, *A NEW WORLD ORDER* 65 - 103 (2004)

⁷⁷ R. Posner, *No thanks, we have already our own laws*, 3 *Legal Affairs*, July/August (2004), available at www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.html

constitutional features of the Union such as the role of its Court of Justice may offer a model for global integration.⁷⁸

In the field of international criminal law, the EU has made substantial contributions to political developments, but also contributed to enhanced reflection. If the EU's export of internal values shall be interpreted as reflecting the basis of its own internal legitimacy, this reflexive turn needs to be further strengthened. Albeit an important tool to react on massive human rights violations, international criminal law is, as Christoph Safferling stresses, not the only answer.⁷⁹

Just as the project of European integration, the evolving project of international criminal law is a great promise. Too much is at stake, too much would be lost if its credibility weakens. To risk its failure would be even worse than to have never made it real.

In European foreign policy, where one could even identify international governance as a new *raison d'état*,⁸⁰ a host of new meanings flare, signalling, peak to peak, from middle sea to north sea, and even to the Atlantic. But beacons are, as we know, not just features of political iconography. They are means of communication, burning from inside.

⁷⁸ M. Cremona, *supra*, at note 24, 554. See, e.g., K. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW (2001).

⁷⁹ See C.J.M. Safferling, *Can Criminal Law Be the Answer to Massive Human Rights Violations?* 5 GERMAN LAW JOURNAL (in this issue).

⁸⁰ M. Koenig-Archibugi, *International Governance as New Raison d'État? The Case of the EU Common and Security Policy*, 10 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 147 – 188 (2004).