

Normative Entrapment and Mutual  
Compromise in EU Foreign Policy:  
Rejecting the US Challenge to the  
International Criminal Court

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## **Normative Entrapment and Mutual Compromise in EU Foreign Policy: Rejecting the US Challenge to the International Criminal Court**

### **Abstract:**

*Achieving EU unity in world affairs is particularly difficult when divergent Member State preferences are reinforced by strong US pressure. This paper explains how the EU maintained unity in its commitment to the International Criminal Court (ICC) despite a concerted American effort in 2002 to exploit intra-EU discord on the issue of agreements to shield certain states from ICC scrutiny. Some Member States were sympathetic to American efforts to shield US personnel from the ICC, while others considered them incompatible with the EU's prior commitment to support the new Court. The lowest common denominator outcome of negotiations among EU Member States in the UN Security Council demonstrates their potential willingness to engage in competitive bargaining, as Intergovernmentalism predicts. In contrast, negotiations on a very similar issue that occurred under CFSP just a few months later demonstrate the ability of various actors (Member States as well as the Commission and NGOs) to frame intra-EU deliberations with prior norms and policy commitments and thus to induce concessions from Member States who are inclined to break ranks. This comparison of two sets of negotiations on the same issue suggests that the likelihood of EU policy outcomes conforming to the expectations of Intergovernmentalism versus Normative Institutionalist depends significantly upon the institutional context in which the Member States negotiate.*

One of the most politically sensitive issues on the European Union's foreign policy agenda in recent years has been the question of how to respond to the United States' campaign for immunity from the International Criminal Court (ICC). When the US government set out in early 2002 to shield its officials, citizens and other employees from the jurisdiction of the new Court, the European Union (EU) and its Member States were forced to weigh their oft-stated commitment to an international order based upon multilateral institutions, the rule of law, and respect for human rights, which underlay their commitment to the ICC, against their commitment to maintaining good

relations with world's only superpower, with which they share many common interests, similar political values, and a long history of cooperation. Given these stakes, it is not surprising that EU Member States did not see eye-to-eye on how to respond to the US effort: some thought it deserved a cooperative response while others considered it an unacceptable assault on the integrity of the Court. These differences were evident in negotiations among Member States in both forums where they encountered the US campaign for ICC immunity -- within the United Nations (UN) and in bilateral relations with Washington.

This paper examines the making of EU policy toward the ICC in the context of transatlantic relations as a test of competing explanations for how Member States negotiate divergent preferences in order to reach agreement on common policies. The conventional wisdom, also known as Intergovernmentalism, asserts that EU foreign policy emerges from the no-holds-barred pursuit of national policy preferences by Member States. Common policies are thus made (or denied) through a process of competitive bargaining that can yield only deadlock or lowest common denominator outcomes. In contrast, Normative Institutionalism asserts that Member States pursue their policy preferences within an institutionalized setting that encourages certain negotiating practices and legitimates certain substantive outcomes while discouraging and delegitimizing others. Accordingly, the theory leads us to expect either rhetorical entrapment resulting in an outcome consistent with prior normative or policy commitments or cooperative bargaining resulting in mutual compromise. The paper also considers the possibility that agreement is achieved when Member State preferences

converge, whether due to normative suasion or the exchange of information (Thomas 2008).

To this end, the paper employs two methodologies. First, in order to determine which theory is more consistent with the character and the outcome of intra-EU negotiations, it utilizes the optimal method for assessing the reasoning and behavior of deliberate actors within socially-constructed settings -- process tracing (Checkel 2006). It also utilizes the method of controlled or structured-focused comparison (George 1979), taking advantage of the fact that Member States encountered the US campaign for ICC immunity on two fronts and thus negotiated among themselves in two distinct settings: beyond the institutions of the Union in the first case but within them in the second case.

Although the two cases are sequential and thus not fully independent, the latter method is justified by similarities in the external challenge faced by the Member States, by similarities in the pre-existing policy and normative commitments at the EU level, and by the fact that Member States ultimately responded in unison to the US campaign in both cases, despite significant differences in their policy preferences. Comparing the two cases thus allows us to assess Normative Institutionalism's claim that the EU's substantive and procedural norms are more likely to shape negotiations among Member States that occur within EU forums than those that occur outside it (see also Puetter and Wiener 2007: 1072).

Comparing evidence of the policy preferences of the various Member States to the common policies that they agreed in both cases, all in the light of considerable evidence regarding the negotiation processes, we can draw

even better informed conclusions about when and how the EU manages to avoid succumbing to the dynamics of the LCD. If the Normative Institutional theory is strong, we would at a minimum expect to observe cooperative bargaining and mutual compromise in the second case, which involved policy-making within the various formal and informal institutions of the Common Foreign and Security Policy (CFSP). If we observe competitive bargaining and a lowest common denominator (LCD) outcome in both cases, then the explanatory power of Normative Institutionalism would be greatly undermined. If we observe competitive bargaining and LCD only in the first case, we could reasonably attribute this to the fact that it involved cooperation among Member States outside the context of EU institutions, where the dynamics and outcomes expected by the Normative Institutional theory are less likely to be found. Significant convergence of Member State preferences during the course of the negotiations would challenge both of these theories.

The remainder of this paper is organized in four parts. Part I outlines the origins of the EU-US dispute over the International Criminal Court. Parts II and III present two case studies of how EU Member States responded to the American campaign for ICC immunity: the first examines decision-making with regard to US initiatives within the UN Security Council, and the second examines the EU's collective response to the US quest for bilateral agreements. Finally, Part IV evaluates the findings of the two case studies in light of the project's theoretical framework.

## **I. Background**

The ICC is the world's first permanent court designed to ensure individual accountability for the most serious crimes under international law: genocide, war crimes, and crimes against humanity. It was established by the Rome Statute of 1998, which entered into force on July 1, 2002. In addition to the list of crimes, the ICC's jurisdiction is limited in a number of ways, including *inter alia*: the ICC may act only when national courts are "unwilling or unable genuinely to carry out the investigation or prosecution" (the principle of complementary jurisdiction); and the UN Security Council, acting under Chapter VII of the Charter, may defer cases for 12 months, renewable indefinitely.

The European Union has long supported the creation and functioning of the ICC, which is widely seen in Europe as a desirable (if limited) solution to the problem of impunity for international crimes. EU Member States played a central role in the "group of like-minded states" that pushed for a strong and effective ICC during the Rome negotiations (Benedetti and Washburn 1999). Since then, every Member State has signed and ratified the Rome Statute, and most have adopted the necessary implementing legislation, generally with strong support from both governing and opposition parties. During the time period covered by this paper, eight of the fifteen Member States contributed funds to the non-governmental Coalition for the ICC (Patten 2002).

Echoing this sentiment, EU Commissioner for External Relations Chris Patten declared in 2002, "In the twenty-first century, potential tyrants and mass murderers will know in advance that the international community is prepared to hold them accountable for massive violations of human life and

dignity. It is our belief and our hope that this awareness will help reduce the frequency and the severity of such crimes. But when it does not, and the relevant national legal authorities are unwilling or unable to act, the international community will have in place a complementary system of criminal justice that is fair, transparent and effective.” Between 1995 and 2003, the European Commission’s European Initiative for Democracy and Human Rights provided approximately € 13 million to the Advance Team setting up the ICC and to the NGO Coalition for the ICC and other non-governmental initiatives promoting the Court (Patten 2002).

In contrast, the United States has never embraced the ICC. Although American negotiators achieved many of their objectives during the Rome negotiations (including the principle of complementary jurisdiction and the right of the Security Council to defer cases), the US was one of seven countries to vote against the Statute in 1998. The following year, the US Congress passed a law prohibiting the use of government funds to support the ICC, denying legal effect to ICC jurisdiction within the United States unless the US becomes a party to the Rome Statute, and barring extraditions of US citizens to third countries unless they agree not to surrender them to the ICC. President Clinton signed the Rome Statute three weeks before leaving office, but told the Senate that he did not recommend ratification until further changes were made (Clinton 2001).

With the transition to the Bush Administration, US ambivalence toward the Court was replaced by rejectionism. In May 2001, Representative Tom Delay introduced in Congress the American Service-members’ Protection Act (ASPA), which would prohibit cooperation with the ICC by any US agency or

official, require the US to pursue ICC exemption for US participants in UN peacekeeping missions, prevent the transfer of US intelligence information to the ICC, and prohibit US military aid to any states party to the ICC. The ASPA was seen in Europe as a legislative assault on the good functioning of the ICC; its authorization of “all necessary means” to obtain the release of any American held by the ICC led European critics to call it the “Hague Invasion Act.”

Faced with such a clear challenge to an institution that it supported, and absent any significant dissension among the Member States, the EU had little trouble achieving a unanimous response. In June 2001, the EU adopted its first Common Position on the ICC, which began, “The principles of the Rome Statute of the International Criminal Court, as well as those governing its functions, are fully in line with the principles and objectives of the Union.” The Common Position also expressed the EU’s full support for the early establishment of the Court, indicated that the EU and its Member States would encourage other states and international organizations to support the ICC, and encouraged the US to cooperate with the ICC as well.<sup>1</sup>

In the spring of 2002, as it became apparent that the sixty ratifications necessary for the Rome Statute to enter into force would soon be achieved, the Bush Administration launched a diplomatic campaign to ensure that the ICC would not affect Americans or the US government. On April 11, the US boycotted a special ceremony at the UN for the ten countries whose

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<sup>1</sup> For all CFSP acts regarding the ICC, see [http://www.consilium.europa.eu/cms3\\_fo/showPage.asp?id=404&lang=EN&mode=g](http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=404&lang=EN&mode=g).

ratification of the Statute would make the ICC a reality.<sup>2</sup> Several weeks later, the US government announced that it did not intend to ratify the Statute and thus did not consider itself bound to comply with its provisions. In addition, senior administration officials expressed a strong commitment to ensuring that US officials and military personnel would never be subject to the new Court.<sup>3</sup>

In response, EU Member States agreed unanimously within CFSP for a declaration that criticized Washington's repudiation of the Rome Statute as unwarranted and damaging to international law and reiterated the EU's commitment to ending impunity for individuals who commit the most serious international crimes.<sup>4</sup> As the ASPA legislation moved through the US Congress, Europeans expressed growing concern about its authorization of "all necessary means" to obtain the release of Americans held by the ICC. A London newspaper asked if Bush would invade England.<sup>5</sup> The Dutch parliament passed a resolution expressing its concern about the ASPA bill, which it considered "detrimental to transatlantic relations."<sup>6</sup>

This concern was soon echoed at the EU level. On June 17, the EU Council adopted Conclusions criticizing the ASPA legislation. Three days later, the EU adopted an Action Plan detailing its initiatives in support of the ICC, as well as a revised version of its Common Position on the ICC emphasizing the diplomatic and technical assistance it would provide to support the Court. On June 23, the EU Presidency and the Commission

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<sup>2</sup> "War Crimes Court Created Over Fierce U.S. Objections," *Washington Post*, April 12, 2002. Compare Javier Solana, "International court signals a new era," *International Herald Tribune*, April 11, 2002.

<sup>3</sup> U.S. Department of Defense News Release No. 233-02, May 6, 2002.

<sup>4</sup> Declaration by the EU on the Position of the US towards the International Criminal Court, Brussels and Madrid, 13 May 2002. Twelve EU candidate countries plus Norway formally aligned themselves with the CFSP declaration.

<sup>5</sup> "Will Bush invade Cambridgeshire?" *The Daily Telegraph*, May 9, 2002.

<sup>6</sup> For text, see <http://www.amicc.org/usinfo/reaction.html>

expressed concern about the APSA in joint letters delivered to the US Senate and House of Representatives. Less than two weeks later, the European Parliament added its voice to this chorus of disapproval.<sup>7</sup>

Up to this point, the course of the EU-US dispute over the ICC reflects the EU's easy adoption of common foreign policies when Member States' preferences are similar or identical. However, the real challenge for EU foreign policy cooperation, and thus the more interesting test for the various theories, is policy-making in the face of clearly divergent Member State preferences. The following analyses of the next two stages in the EU-US dispute over the ICC constitute case studies of this sort.

## **II. ICC Immunity for UN Peacekeepers**

The EU maintained its unity when Washington first took its anti-ICC campaign to the UN in May 2002. Barely a week after renouncing its signature of the Rome Statute, the US threatened to veto renewal of the UN mission to Timor Leste if the Security Council did not grant ICC immunity to international military and civilian personnel serving there. Although the US presence in Timor Leste was only three military observers and about eighty police officers, a veto of the entire UN mission would have jeopardized stability on the newly-independent island. Just as important for this analysis, the US veto threat forced EU Member States to weigh their collective commitment to the ICC against their collective commitment to support the United Nations and multilateral solutions to global problems. As such, the relevant normative framework for the behavior of EU Member States at the UN was not clear.

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<sup>7</sup> For the full text of these documents, see <http://www.amicc.org/usinfo/reaction.html>.

France and the United Kingdom lobbied against the US proposal. After failing for several days to gain the support of any other Security Council member, Washington set aside its threatened veto.<sup>8</sup> Six weeks later, though, on the same day that the Rome Statute entered into force, the US again signaled its opposition to the ICC by simultaneously withdrawing its three soldiers from Timor Leste and vetoing an extension of the mandate for the UN Mission in Bosnia-Herzegovina. In Europe, the American moves were seen as a challenge to the EU's commitment to defend the integrity of the Rome Statute, and to its concrete interest in the security and stability of the Balkans.<sup>9</sup>

The US then proposed two alternative resolutions: one would have extended immunity only to peacekeepers deployed in Bosnia, while the second would have covered all peacekeepers involved in operations authorized or mandated by the UN. France's UN ambassador responded that while the Statute allowed the Security Council to defer ICC investigations on a case-by-case basis when they would interfere with efforts to negotiate a peace agreement, it was never designed to provide sweeping immunity from prosecution.<sup>10</sup> France, the UK, and Ireland (then a rotating member of the Security Council) rejected both American proposals.

Meanwhile, fearing that the Security Council standoff could threaten the continuity of the UN's mission in Bosnia, EU officials began preparing to replace it with EU forces, while Britain's UN ambassador drafted a resolution

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<sup>8</sup> "U.S. Seeks Court Immunity For E. Timor Peacekeepers," *Washington Post*, May 16, 2002.

<sup>9</sup> "Les Etats-Unis Surs de Leurs Bon Droit," *Libération*, 18 juin 2002.

<sup>10</sup> "U.S. Drops Demand for War Court Immunity," *Washington Post*, July 11, 2002.

that would authorize the hand-over.<sup>11</sup> EU Commissioner Chris Patten again pleaded publicly for the US to reconsider its policy, which he said threatened international security and contradicted long-standing American support for human rights.<sup>12</sup> This time, though, the Bush Administration did not relent in its quest for a UN Security Council resolution that would grant ICC immunity to UN peacekeepers.

The difficulty for the EU was that while all its Member States opposed the US campaign, they did not all agree on how to respond. Ireland (whose population had just endorsed the Rome Statute by 2:1 in a national referendum) favored an unequivocal rejection of Washington's demand, which it believed would compromise both the UN Charter and the Rome Statute.<sup>13</sup> On the other hand, while Tony Blair's government had always been a strong supporter of the ICC, it began to reinterpret that position to accommodate its 'special relationship' with Washington. The US initiative also placed France in an awkward position: despite having signed and ratified the Rome Statute, France was the sole EU Member State to have taken advantage of Article 124, which permits signatory states to exempt their nationals from the ICC's jurisdiction over war crimes (but not genocide or crimes against humanity) for a seven-year period beginning with the Statute's entry into force.

Given that this stage of the dispute concerned votes in the Security Council, where no other EU members had seats, consultations between France, Ireland and the UK did not lead to discussion of a common EU policy within CFSP. As a result, supranational actors were marginalized and NGOs

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<sup>11</sup> "EU to Speed Action on Bosnia Police," *Financial Times*, July 4, 2002; "Action on Bosnia Forces Delayed," *Washington Post*, July 4, 2002.

<sup>12</sup> Chris Patten, "Why Does America Fear This Court?" *The Washington Post*, July 9, 2002.

<sup>13</sup> Interview with European official, June 2008.

had little opportunity to mobilize. With the UK expressing sympathy for the US's legal claim that as a non-Party to the ICC it should not be subject to the Court's jurisdiction, its position clearly diverged from that of France and Ireland. (Although not on the Security Council, Germany was outspoken in its opposition to US proposals.<sup>14</sup>) When Denmark's representative addressed an open meeting of the Security Council on behalf of the EU presidency, he could do little more than express regret regarding the risk to UN peacekeeping and echo the EU's general support for the ICC that had been unanimously agreed the previous year.<sup>15</sup>

EU coherence and consensus norms that might have led the three to adopt a policy premised upon those pre-existing EU common positions or at least promoted mutual compromise, were rendered virtually irrelevant by the fact that the UK had special consensus-building responsibilities as president of the Security Council.<sup>16</sup> As a result, the UK tabled an alternative to the US resolution that would limit ICC immunity for UN peacekeepers to one year and to the armed forces of States that were not Party to the Rome Statute.<sup>17</sup> This conceded more to the US than France and Ireland would have preferred, but it fell far short of the broad and permanent immunity sought by Washington.<sup>18</sup>

Anxious to protect UN peacekeeping, France and finally Ireland agreed not to oppose the British proposal, the *de facto* lowest common denominator among the EU 3. Faced with European unity in opposition to its full demands,

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<sup>14</sup> "Germany Steps Up Criticism of US Over International Court," Agence France-Presse, 7 July 2002.

<sup>15</sup> United Nations, Press Release SC/7445/Rev.1, 10 July 2002, Security Council 4568th Meeting.

<sup>16</sup> Interview with European official, June 2008.

<sup>17</sup> "UK Accused of Preparing a Deal with America over Criminal Court," *The Independent*, July 10, 2002; "British back US plan to avoid war crimes court," *The Times* (London), July 11, 2002.

<sup>18</sup> Interview with European official, June 2008.

Washington accepted the British proposal as well. On July 12, the Security Council voted 12-0 in favor of Resolution 1422, giving peacekeepers from non-ICC party states immunity from the Court through June 30, 2003.

### **III: Bilateral Agreements on ICC Immunity**

While the negotiations over the Security Council resolution continued in June 2002, US Secretary of Defense Donald Rumsfeld announced that Washington also intended to pursue bilateral agreements with governments around the world to protect US citizens, government officials, military personnel and other employees from surrender to the ICC.<sup>19</sup> Speaking off the record, members of the administration conceded that their real goal was to protect senior US officials, whom they considered to be most at risk.<sup>20</sup>

Such agreements, US officials argued, would be consistent with Article 98 of the Rome Statute, which addresses potential inconsistencies between obligations created by the Statute and those created by other international agreements. US officials thus typically referred to them as “Article 98 agreements” or “non-surrender agreements.” In contrast, most Europeans and most ICC experts (including David Scheffer, the chief American negotiator of the Rome Statute) argued that Article 98 had been crafted to accommodate Status of Forces agreements and extradition treaties that were already in effect when the Statute entered into force, but not to facilitate new agreements to limit the jurisdiction of the new Court (Scheffer 2002). They began referring to the US pursuit of “immunity agreements” or even “impunity agreements.”

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<sup>19</sup> See [http://www.amicc.org/docs/Rumsfeld6\\_26\\_02.pdf](http://www.amicc.org/docs/Rumsfeld6_26_02.pdf).

<sup>20</sup> “On World Court, US Focus Shifts to Shielding Officials,” *The New York Times*, September 7, 2002.

Most EU leaders saw the proposed bilateral agreements as the latest US challenge to the integrity of the Rome Statute and thus to the good functioning of the ICC itself. Unlike the UN resolution, these agreements fell clearly within the policymaking scope of the CFSP. However, more was at stake than simply the EU's commitment to the ICC. Denying the US request could provoke a further confrontation with Europe's most important ally and the world's only superpower. In addition, there was real tension between the EU's specific commitment to support the ICC and its general commitment to international law, which traditionally limits the jurisdiction of international treaties to states that have accepted them. Finally, the issue engaged the long-standing division between the EU's more "Atlanticist" and "Europeanist" Member States. As the weeks passed, the ICC immunity issue began to overlap with the controversial diplomatic and then military build-up to the invasion of Iraq, over which the EU was increasingly divided. A common EU policy on ICC immunity agreements for the United States in mid-late 2002 was thus no easy matter for CFSP.

In response to direct overtures from Washington, Berlin announced on July 23 that it could not consider US requests for bilateral agreements until the entire EU had deliberated on a common policy. This announcement, which effectively set the CFSP process in motion, was a major setback for the US, which had hoped that a positive response from Germany would set an example across Europe.<sup>21</sup> The EU's Political and Security Committee (PSC) discussed the matter three days later and agreed to inform Washington that the EU remained committed to its Common Position to support the ICC and to

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<sup>21</sup> "Germany Gives Cool Response to U.S. Request for Soldiers' Immunity," *Handelsblaad* (English on-line edition), 23 July 2002.

preserve the integrity of the Rome Statute and that it could not reply further to the US request until it completed an in-depth analysis.<sup>22</sup> This procedural agreement reinforced the salience of the existing Common Position as precedent for the issue of bilateral agreements.

In early August, the European Commission got involved. In its role as the EU's negotiator on enlargement, the Commission had been asked by candidate Member States whether the EU would consider a bilateral agreement with Washington to be consistent with the requirements of the Rome Statute. Upon the request of Commission President Romano Prodi's office, the Commission's Legal Service prepared a written opinion on August 13 stating that such agreements were inconsistent with the Rome Statute and with the commitment to support the effective functioning of the ICC that the EU had repeatedly agreed and expressed: "The Common Position is an expression of the Member States' strong commitment to ensure full effectiveness of the Court. In light of the above analysis it is inconceivable to reconcile that commitment with any attempt to give positive consideration to the U.S. proposal." Based on this opinion, which was welcomed by Prodi's office, the Commission strongly advised candidate states that they should refuse to sign a bilateral agreement with the US.<sup>23</sup>

The Commission opinion was also circulated to the Member States through the EU's confidential Coreu message system. All recognized that the opinion was potentially of great significance. If the EU were to translate its logic directly into a common policy, none of the fifteen Member States -- all of

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<sup>22</sup> Statement by Danish Foreign Minister Per Stig Moller on the International Criminal Court at the European Parliament, Strasbourg, 25 September 2002.

<sup>23</sup> Interviews with European officials and NGO experts, November 2004. The Commission's full opinion was later published in *Human Rights Law Journal* 23 (September 2002), 158-9.

whom had ratified the Statute -- would have been able to reach bilateral agreements with the US. This in turn would have undermined Washington's efforts to convince other states around the world to sign such agreements.

Many of the EU Member States were already sympathetic to the position expressed by the Commission, but others appreciated the clarity of its argument on this emerging issue. Another factor was the automatic sympathy that the smaller Member States have for the Commission's Legal Service, which they tend to regard as protective of their interests through its commitment to European and international law. However, the Member States were not unanimous in this view. Perhaps because some were fearful of the opinion's potential consequences for the issue at hand, or perhaps simply because they resented the Commission's assertiveness on a CFSP issue, they told the Commission in no uncertain terms that it had overstepped its competence. Although the Commission responded by keeping a low profile during the CFSP deliberations over the next six weeks, its Legal Service's opinion remained influential.<sup>24</sup>

The US government also learned of the Commission opinion, which contributed to its growing awareness that opposition to the quest for bilateral agreements was mounting in Europe. Three days after the Commission opinion was released, US Secretary of State Colin Powell wrote to a number of his European counterparts recommending that they not wait for a common EU position and threatening that failure to sign bilateral agreements could have negative consequences for the United States' role in European

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<sup>24</sup> Interviews with European officials and NGO experts, November 2004.

security.<sup>25</sup> Powell's demarche was seen in EU capitals as heavy-handed interference, and stiffened the resolve of some Member States to resist American overtures.<sup>26</sup>

On the other hand, Washington's anti-ICC campaign succeeded in its goal of forcing EU Member States to balance their commitment to support the Rome Statute against their desire to avoid a major trans-Atlantic dispute. As one EU diplomat explained, "We are coming under huge pressure from Washington. All it takes is one Member State to give in and it undermines the credibility of the ICC."<sup>27</sup> Given that the EU had just updated its Common Position on the ICC two months earlier, such a failure of EU unity would undermine the credibility of the CFSP as well.

By late August, only Israel, Romania, East Timor and Tajikistan had signed bilateral agreements with the US. But given the global spread of Washington's campaign on this issue, it seemed to be only a matter of time before other governments signed as well. The formerly Communist states of Central and Eastern Europe, which wanted to become members of both NATO and the EU, found themselves caught between American and European preferences. "I can't remember anything they put so much weight or interest into," Romania's foreign minister said of the US campaign.<sup>28</sup> In an effort to forestall this eventuality, the EU presidency instructed all EU candidate states (including Romania, whose Parliament had not yet ratified

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<sup>25</sup> "US Issues Warning to Europeans in Dispute Over New Court," *The New York Times*, August 26, 2002.

<sup>26</sup> Interviews with European officials and NGO experts, November 2004.

<sup>27</sup> "Bilateral pacts with US a violation, says EU," *Financial Times*, August 28, 2002.

<sup>28</sup> "East Europeans Torn on the Rack by International Court Row," *The Guardian*, August 17, 2002.

the government's signature) that it disapproved of signing bilateral accords in the absence of an agreed EU policy.

The existence and content of the Commission's legal opinion leaked to the press at the end of August, just two days before the EU foreign ministers were scheduled to discuss the issue.<sup>29</sup> With a *Financial Times* headline declaring "Bilateral pacts with US a violation, says EU," the foreign ministers were no longer able to assume that their deliberations would go unnoticed by national parliaments and publics who supported the ICC. The fact that the legal opinion had been drafted by the European Commission, and not the EU Council, would make little difference to most readers. Human rights NGOs stepped up their pressure on the EU for a negative answer to Washington. A flexible EU policy on bilateral agreements was thus framed in public discourse as illegal before the Member States even began to negotiate.

Among the Member States, Germany remained outspoken in its opposition to the US request, and was supported in this position (to varying degrees) by Austria, Belgium, Finland, France, Greece, Ireland, Luxembourg, the Netherlands, and Sweden. Their opposition was motivated both by a principled rejection of American exceptionalism with regard to international law and a practical concern that granting special immunity to the US would defeat the purpose of the ICC by inviting other states around the world whose judicial systems were far less protective of human rights to seek immunity for themselves as well. If EU Member States were to sign immunity agreements with the US, they feared, it would be politically difficult, if not impossible, to

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<sup>29</sup> "Bilateral pacts with US a violation, says EU," *Financial Times*, August 28, 2002; "EU Legal Experts Say Nations Have No Right to Exempt US Military from War Crimes Trials," Associated Press, August 28, 2002.

refuse similar requests from others.<sup>30</sup> On the other side of the debate, Italy and the United Kingdom openly favored a more flexible response to Washington that would permit bilateral agreements, and were supported (to varying degrees) by Denmark, Portugal and Spain. As they saw the issue, American concerns about the ICC had to be addressed because the US plays a unique role in maintaining international peace and security.<sup>31</sup>

As the foreign ministers prepared for their meeting at Elsinore on August 31, the question was whether the minority of Member States that favored a flexible response to Washington could trump the majority of Member States, supported by the European Commission, the European Parliament, and an attentive public, which all favored a negative response. After all, the “flexible” Member States knew that all those favoring a negative response also valued EU unity on the issue. For example, while Swedish Foreign Minister Anna Lindh feared that accommodating the US would undermine the Court, she openly concluded that “the most important thing is that the EU stick together.”<sup>32</sup>

Under these conditions, according to the Competitive Bargaining hypothesis, Italy and the UK should have been able to dominate EU deliberations by threatening to veto any policy that did not meet their preferences. And they certainly seemed willing to try: the Italian and British foreign ministers told their EU colleagues at Elsinore that unless the EU found a way to accommodate US concerns in its common policy, Rome and London

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<sup>30</sup> Interviews with European officials and NGO experts, November 2004.

<sup>31</sup> “UK to back US on war crimes court,” *Financial Times*, August 31, 2002; “UK, Italy eye U.S. court deal,” *CCN.com*, August 31, 2002.

<sup>32</sup> Quoted in “UK, Italy eye U.S. court deal,” *CCN.com*, August 31, 2002.

would break ranks and sign agreements with Washington.<sup>33</sup> In short, the lowest common denominator policy would have been an EU declaration that repeated general support for the ICC while permitting Member States to sign bilateral agreements proposed by Washington if they so wished.

It is unlikely that this exercise in hard bargaining was simply tactical, rather than a reflection of underlying preferences. Both the British and Italian governments had already alienated large segments of their populations, as well as many of their EU counterparts, with their support of US policy on Iraq. Had they not been truly sympathetic to the US requests, they thus had strong incentives to use the high-profile ICC issue to muster domestic support and to comply with the EU's written and unwritten rules that encourage Member States to reach consensus under CFSP. The fact that they didn't do so suggests that Rome and London's threats were driven by real policy preferences and intentions on the issue at hand. But contrary to the logic of the Competitive Bargaining hypothesis, the Italian-British veto threat failed to control the process.

At the end of the Elsinore meeting, the foreign ministers announced that they had agreed to pursue a common response to Washington that would maintain the integrity of the Rome Statute and respond constructively to US concerns within that framework.<sup>34</sup> Amnesty International and other NGOs quickly criticized Italy and the UK for taking positions that threatened the Rome Statute, but the CFSP process had just begun.<sup>35</sup> The Member States began preparing for an upcoming meeting of COJUR, the Council's working

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<sup>33</sup> "Italian premier's stance on international court drops bombshell at EU talks," BBC Monitoring Service, September 1, 2002.

<sup>34</sup> "Brussels Notebook: A battle for the ICC," *Financial Times*, September 1, 2002; "Straw urges war court retreat," *The Guardian*, September 2, 2002.

<sup>35</sup> "US-EU deals over criminal court rapped," *Bahrain Tribune*, 3 September 2002.

group on public international law, which would start the process of translating the awkward Elsinore compromise into a common policy that they all could accept

Although COJUR is normally composed of the foreign ministers' chief legal advisors, this meeting involved COJUR's ICC sub-group, which had been created earlier to handle the growing volume of ICC-related work in CFSP. The members of the sub-group knew each other well and communicated on a regular basis. Many had been their governments' chief negotiator of the Rome Statute, and all were experts on the ICC. As a result, every member was personally committed to the ICC: regardless of their governments' position on bilateral agreements, most considered the US quest for immunity to be an assault on the Court.<sup>36</sup> Yet even if COJUR was ideally conducive to the sort of preference convergence dynamics expected by the theories of Policy Learning and Normative Suasion, there is no evidence that such convergence occurred.

Before COJUR convened, the Danish foreign ministry, which then held the EU's rotating presidency, consulted intensively with its fourteen counterparts regarding what they could and could not support. Despite the Elsinore compromise and the presidency's consultations, the COJUR meeting was contentious, with the UK and Germany leading the arguments for and against a flexible response to Washington's request.<sup>37</sup> In the end, COJUR agreed on the basic elements of a common EU policy that they would recommend to higher levels in the CFSP hierarchy. As Germany was insisting, they agreed that the draft agreement proposed by Washington was

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<sup>36</sup> Interviews with European officials, November 2004.

<sup>37</sup> Interviews with European officials, November 2004.

incompatible with the obligations imposed by the Rome Statute, which would effectively prohibit any EU Member State from signing the text that US officials were circulating. On the other hand, the COJUR framework included four points that were closer to the conditions preferred by the UK: new bilateral agreements were permissible under Article 98; such agreements could not allow impunity for those exempted from ICC jurisdiction; they could only cover military personnel and officials; they could not cover citizens of a State Party to the Statute.<sup>38</sup> But the British government insisted on keeping its options open: less than a week after it had accepted the COJUR text, the UK blocked agreement in the PSC on a proposal that the EU Presidency would speak on the behalf of the Member States on this issue.<sup>39</sup>

While the Council was deliberating, other European actors continued to frame the issue in manner designed to constrain those Member States sympathetic to the US position. The Council of Europe's Parliamentary Assembly passed a resolution declaring that the agreements proposed by Washington were incompatible with the Rome Statute and calling upon Council of Europe members (which included all EU Member States) not to sign such agreements. The following day, the European Parliament adopted a resolution expressing its view that signature of an agreement that undermines the effective implementation of the Rome Statute was incompatible with EU membership.<sup>40</sup> The White House's release of its new National Security

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<sup>38</sup> "Britain reveals plans for compromise on ICC," *Financial Times*, September 3, 2002; "EU nears deal on new court," BBC News Online, September 4, 2002.

<sup>39</sup> See timeline at <http://www.amicc.org/usinfo/reaction.html>

<sup>40</sup> Council of Europe Parliamentary Assembly Resolution 1300, 25 September 2002; European Parliament Resolution P5\_TA-PROV (2002)0449, 26 September 2002.

Strategy, which included an explicit rejection of the ICC, only strengthened the convictions of the anti-flexibility camp.<sup>41</sup>

Even after COJUR, there was a great deal of give-and-take in the Member States' deliberations, led by British and German attempts to shift the emerging compromise in their respective directions. The Danish EU presidency prepared an elaborated version of the COJUR recommendations, which were debated and revised repeatedly at multiple meetings of PSC and COREPER in late September. Although Germany had initiated the process of developing a common EU policy on the bilateral agreements, its government hesitated as the policy took shape: Foreign Minister Joschka Fischer was deeply committed to the ICC and reluctant to endorse a policy that could be seen to authorize actions that he feared would weaken the Court. Germany's representative to COJUR's ICC sub-group, Hans-Peter Kaul, then spoke with Fischer. The draft EU deal was closer to Germany's position than Fischer may have realized, Kaul indicated, and if Fischer insisted on his position, London and/or Rome were likely to refuse any further concessions. Recognizing that the resulting collapse of EU unity in the face of Washington's global campaign would be worse for the ICC than a compromise agreement, Fischer relented and deadlock was avoided.<sup>42</sup>

In its September 30 meeting, the General Affairs Council (GAC) issued the EU's policy on bilateral agreements in the form of Conclusions that reaffirmed the EU's support for the effective functioning of the ICC and expressed its belief that the Rome Statute provided all the necessary safeguards against the use of the Court for politically motivated purposes. In

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<sup>41</sup> *National Security Strategy of the United States of America*, Washington, DC, September 2002, p.31; interviews with European officials, November 2004.

<sup>42</sup> Interviews with European officials and NGO experts, November 2004.

addition, the Conclusions signaled the readiness of EU Member States to discuss with the US how its concerns could be accommodated within existing agreements. Finally, the Conclusions included a set of EU Guiding Principles to guide any State Party to the Rome Statute (including but not necessarily limited to EU Member States) that wishes to reach an arrangement regarding the conditions of surrender of persons to the ICC.<sup>43</sup> The Guiding Principles were drafted to ensure that any bilateral arrangement would be maximally consistent with the obligation of States Parties to cooperate fully with the ICC. In particular, they stipulate that (1) existing international agreements (such as extradition treaties and SOFAs) should be taken into account; (2) the draft agreements proposed by the US are inconsistent with the Statute; (3) any arrangement must ensure that persons who have committed crimes covered by the Statute are investigated and punished; (4) no arrangement for non-surrender can apply to nationals of an ICC State Party; and (5) any such arrangement can only cover government officials or military personnel.

The Council Conclusions were thus clearly filled with compromises, notwithstanding Danish Foreign Minister Per Stig Moller's insistence that there was "no concession... no undermining of the ICC."<sup>44</sup> The real question is who made concessions to whom in order to achieve the compromise. In an opinion piece written for an American audience, Moller referred diplomatically to "a good compromise" between US concerns about the ICC and the EU's commitment to the integrity of Rome Statute.<sup>45</sup>

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<sup>43</sup> The EU Council Conclusions of 30 September 30 2002 are available at <http://ue.eu.int/pesc/ICC/default.asp?lang=en>.

<sup>44</sup> "EU gives US troops immunity," *BBC News Online*, 30 September 2002.

<sup>45</sup> Per Stig Moller, "A Good Compromise on the ICC," *Wall Street Journal*, 2 October 2002.

In fact, the Conclusions were less a compromise between the EU and the US than a compromise between the Member States with most divergent preferences, the UK and Germany, as expected by Normative Institutionalism. In that the Conclusions did not expressly forbid EU Member States from signing a bilateral agreement with the United States under Article 98 of the Rome Statute, they reflect the British and Italian government's insistence on their right (and intent) to do so. As soon as the Conclusions were issued, a British diplomat confirmed that London was considering whether to sign an agreement with Washington.<sup>46</sup> In mid-October, an Under-Secretary from the British Foreign Office told the House of Lords that the government was "beginning discussions with the United States on the possibility of a bilateral agreement."<sup>47</sup>

However, the preferences of the majority of EU Member States are clearly reflected in the rejection of the text proposed by Washington and in the strict requirements that any new agreement would have to meet. In order to comply with the Guiding Principles, the United States would have to stop seeking immunity for US citizens who were not sent abroad on government business, stop seeking immunity for citizens of states party to the Rome Statute who were working for the US government (most likely as private contractors), demonstrate that US courts have jurisdiction over all crimes within the jurisdiction of the ICC as defined in the Statute (which is not presently the case), and commit to investigate in good faith all credible accusations of such crimes. Given the deep suspicions of international law in general and the ICC in particular that prevailed in Washington during this

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<sup>46</sup> "EU deal to exempt US from new world court," *The Scotsman*, 1 October 2002.

<sup>47</sup> Lords Hansard, 14 October 2002, Volume 639, Part 186.

period, it was highly unlikely that the US government would satisfy these conditions.

Emerging from the GAC, Joschka Fischer described the Conclusions as a virtual rejection of bilateral agreements: “We are against the conclusion of special agreements and we will not conclude such an agreement... We would have wished a clear rejection of the agreements. Because of the Principles we are very close to such a position.”<sup>48</sup> By quickly expressing its displeasure with the EU’s guidelines, the US State Department seemed to agree with Fischer’s analysis, thus confirming that the veto threatened by Italy and the UK in order to ensure an agreement satisfactory to Washington had failed to dominate negotiations among the Member States.<sup>49</sup>

Just in case, Germany’s Foreign Office soon released a detailed analysis of the Council Conclusions designed to bolster its view that they constituted a *de facto* (if not *de jure*) prohibition on signing bilateral immunity agreements.<sup>50</sup> The non-governmental Coalition for the ICC agreed with the German memorandum (which it posted on the CICC website), and mobilized its lobbying efforts accordingly. At the next COJUR meeting, the UK expressed its strong displeasure with the German memorandum, which led others to conclude that London was still leaning toward signing an agreement.<sup>51</sup>

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<sup>48</sup> Associated Press, 30 September 2002; “Despite EU Accord, Germany Won’t Exempt U.S. From ICC,” *The Wall Street Journal Europe*, 1 October 2002.

<sup>49</sup> “US rejects EU criminal court guidelines,” *BBC News Online*, 2 October 2002.

<sup>50</sup> “ICC – Supportive Interpretation of and Commentary on the EU General Affairs Conclusions... of 30 September 2002,” 24 October 2002, available at [http://www.iccnw.org/documents/otherissues/impunityart98/GermanonEUConcArt98\\_24Oct02.pdf](http://www.iccnw.org/documents/otherissues/impunityart98/GermanonEUConcArt98_24Oct02.pdf)

<sup>51</sup> Interviews with European officials and NGO experts, November 2004.

Yet despite these multiple indications that the British government intended to sign a bilateral agreement, and that it believed this would be consistent with the Council Conclusions, the strict requirements imposed by the Guiding Principles, combined with pressure from EU and transnational channels, apparently made it difficult for London to do so. A special US ambassador traveled to London, Madrid, Rome and Vienna for discussion of the issue in late 2002, but failed to achieve any agreements. The Foreign Ministry of Portugal, which had tacitly supported the British and Italians during the negotiation of the Council Conclusions, rejected a bilateral agreement proposed by Washington after receiving a negative legal opinion from the General Attorney's office, and decided to "freeze" further discussion of the issue.<sup>52</sup> In the end, no EU Member State signed a bilateral agreement on ICC immunity with the US after the Council Conclusions were agreed, and the US subsequently abandoned its effort to obtain such agreements.

#### **IV: Conclusions**

These two case studies have a number of interesting implications. First, although there is no evidence of preference convergence among Member States during the negotiations, the two cases suggest that both Intergovernmentalism and Normative institutionalism have real explanatory power with regard to EU foreign policy. In the first case, as the Competitive Bargaining hypothesis would expect, the UK made clear to France and Ireland that if they wanted EU unity within the Security Council, they had to accept the UK's proposal. By refusing to compromise, they dominated the process. Two

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<sup>52</sup> "Portugal 'freezes' US immunity deal," *BBC Monitoring Service*, April 12, 2003.

months later, the British-Italian threat to veto any EU prohibition on bilateral immunity agreements forced the majority of EU foreign ministers to make real concessions to the UK and Italy at their Elsinore and COJUR meetings.

However, contrary to the expectations of Intergovernmentalism, the British-Italian threat ultimately failed to dominate the negotiations in the second case. The German government's preference for a firm rejection of American demands regarding ICC immunity, as well as the exercises in public framing and rhetorical pressure by non-state actors, all exerted significant influence on the EU's ultimate position. Although the Commission's Legal Service had little statutory role in CFSP, the distribution and then media leak of its opinion on ICC bilateral agreements shaped public expectations and steered the ensuing debate within the Council. In the end, despite their veto threat, London and Rome made significant concessions in order to achieve an EU policy that was consistent with prior EU commitments and that satisfied Germany as much (or more) as it did them.

Similarly, once a compromise policy was adopted, the UK and Italy found their freedom of maneuver constrained by rhetorical pressure from actors with different preferences, including other Member States, national parliaments, the European Parliament, and NGOs. As a result, while both the UK and Italy insisted on the flexibility to sign bilateral agreements, and even threatened EU unity in order to guarantee this flexibility, neither did so in the end. In sum, while the first case seems to support Intergovernmentalism, the entrapment and mutual compromise in the second case can only be explained by Normative Institutionalism.

Finally, but no less important, the contrast between the LCD outcome in the case of the UN resolution and the compromise outcome in the case of bilateral agreements indicates that the institutional setting in which EU foreign policy cooperation occurs matters a great deal. In particular, it supports Normative Institutionalism's assertion that cooperative bargaining is most likely to emerge where the EU's procedural norms are most salient (that is, when the issue in question is subject to collective deliberation within EU forums) and less likely when Member States negotiate in a forum (most likely outside the EU) that is shielded from the compliance pull of EU norms. The two-case comparison thus provides powerful evidence that while the EU's foreign policymaking process may fall victim to LCD dynamics, it is not condemned to produce such processes or outcomes.

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