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Still Punching below its Weight?  
Actorness and Effectiveness in EU Foreign Policy

Prof. Daniel C. Thomas

Dublin European Institute, School of Politics and International Relations

University College Dublin, Ireland

daniel.thomas@ucd.ie



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Abstract: Now that European Union's treaties have established the legal and institutional basis for concerted foreign policy action, proponents of a greater EU role on global issues tend to argue that the principle obstacle to an effective EU foreign policy is the difficulty of achieving cohesion among the member states. But is this cohesion-effectiveness linkage valid? This paper agrees that cohesion is the most important determinant of EU actorness, and proposes a concise definition and technique for measuring it. However, the paper also demonstrates that actorness is no guarantee of foreign policy effectiveness in a multi-centric world order where many do not share the EU's policy priorities. Both the extent and the limitations of EU foreign policy cohesion are evident in a case study of the trans-Atlantic struggle over the jurisdiction of the international Criminal Court, where the EU's soft power lost out to the US' hard power.

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## Part I: Introduction

Many observers wonder whether the European Union can overcome the obstacles to coherent and effective foreign policy action that are inherent in being a multi-level, semi-supranational, semi-intergovernmental polity encompassing member states and populations with very different foreign policy orientations. The EU's failures to achieve unified positions on the U.S.-led invasion of Iraq in 2003 and the recognition of Kosovo in 2008, to cite just two examples, are hardly encouraging in this regard. Some even argue that the EU cannot have a foreign policy unless it becomes a unified super-state: 'A European foreign policy could only be achieved by creating central institutions within a European Union capable of identifying, selecting, and implementing a coherent set of objectives that could be legitimized as being in the European interest. But this could only be achieved by the establishment of a European state and hence a European government' (Allen 1998:47; see also Hill 1993).

Euro-optimists hoped that the Lisbon Treaty would solve this problem by creating a non-rotating President of the European Council and a newly-empowered High Representative for Foreign Affairs and Security Policy supported by a new External Action Service. But doubts persist. Finnish Foreign Minister Alexander Stubb tells visitors the following joke: "President Obama learns with interest that Europe now has a phone number. He's told that, responding at last to Henry Kissinger's famous jibe, the European Union has appointed a President named Herman Van Rompuy from Belgium and given him a 24/7 phone line. So, Obama decides to try out Europe's phone number. Henry will be tickled. But the president forgets about the time difference and gets an answering machine: 'Good Evening, you've reached the European Union, Herman Van Rompuy speaking. We are

closed for tonight. Please select from the following options. Press one for the French view, two for the German view, three for the British view, four for the Polish view, five for the Italian view, six for the Romanian view...’ Obama hangs up in dismay” (Cohen, 2010).

This paper investigates whether becoming a foreign policy ‘actor’ will enable the EU to play a role in world affairs commensurate with its vast economic and demographic resources. First, the paper reviews various definitions of EU actorness, explains why it makes sense to privilege policy cohesion, and proposes three dimensions by which EU foreign policy cohesion can be measured. The paper then examines the extent and consequences of EU cohesion on a contemporary issue that the EU has highlighted as essential to its foreign policy mission – the promotion of international criminal justice through the good functioning of the International Criminal Court. This case study reveals a moderate level of cohesion (and thus ‘actorness’) in EU policymaking and nonetheless a very limited effectiveness for the resulting EU policies. In conclusion, the paper comments on the implications of these findings for our understanding of the EU’s role in world affairs.

## Part II: Defining and Measuring EU Actorness

In the realm of foreign policy, EU actorness is best understood as the Union’s capacity to aggregate preferences and select policies on international issues, and then to pursue them in relations with other states, non-state actors and international institutions. This definition builds upon Gunnar Sjöstedt’s pioneering definition of international actorness: ‘the capacity to behave actively and deliberately in relation to other actors in the international system’ (1977:16). It is also consistent with Christopher Hill’s (1993) oft-cited observation that EU actorness is plagued by a ‘capabilities-expectations gap.’ But contrary

to some definitions in the literature (e.g., Bretherton and Vogler 2006:211), it explicitly excludes any reference to effectiveness, which should be treated as a distinct variable – perhaps a result of actorness, but perhaps not.

This definition begs the question of what factors determine EU actorness and how they can be measured. The existing literature on this question (e.g., Jupille and Caporaso 1998, Bretherton and Vogler 1999/2006, Groenleer and Van Schaik 2007) includes a mix of rationalist and constructivist perspectives, but some of the determinants mentioned in this literature do not belong in an empirical definition of the requirements for EU actorness. For example, while it is clear that a ‘commitment to shared values and principles’ (Bretherton and Vogler (1999/2006) could help the EU to act in world affairs, it is not at all clear that this is a necessary precondition for such action. After all, the EU might act coherently and even effectively in the pursuit of some material interest despite divergent normative commitments among member states. Likewise, it is not clear why the ‘legitimacy of decision processes’ (Bretherton and Vogler (1999/2006; also Hill 1993) is a necessary requirement for EU actorness, whether we define legitimacy in substantive or procedural terms. In fact, the EU may well adopt and promote a common policy despite widespread public opposition to its content and/or a widespread belief that the decision should have been made differently. A territorial state is no less a foreign policy actor when its actions lack legitimacy, and the same should be true of any empirical definition (as opposed to normative assessment) of EU actorness.

A similar point can be made about Jupille and Caporaso’s (1998) suggestion that EU actorness requires formal provisions that delegate to one actor the authority to represent the Union. Formal delegation may be advantageous, but it is unnecessary for EU actorness

as long as no member state or other internal body interferes with the Union's foreign policy agenda. It is also not clear why 'recognition by others' (Jupille and Caporaso 1998) is a necessary component of actorhood: consider the example of Hamas or Hezbollah, which are clearly international actors despite an almost total absence of international recognition, both formal and behavioural.

Bretherton and Vogler (1999/2006) also include 'the capacity to undertake international negotiation' and 'access to policy instruments' on their list. Both requirements are important, but significantly (if incompletely) satisfied by the consolidation of CFSP practices, the articulation of two European Security Strategy documents, the new legal personality of the Union, the expanded powers of the High Representative, the creation of the External Action Service, and an EU policy repertoire that now includes both soft and hard power instruments. And yet the EU is still often not perceived as a foreign policy actor.

Of the many factors that these authors (and others) propose, one follows most clearly from the definition of actorhood discussed above and is most relevant to the public debate over the EU's role in world affairs -- political cohesion. Jupille and Caporaso (1998) define cohesion as the EU's ability to formulate internally consistent policy preferences and thus to adopt common policies or positions, which may emerge because member states have similar preferences, because member states have negotiated a deal through side-payments or log-rolling, or because formal rules prevented a minority of member states from over-riding the majority's preferences. Similarly, Bretherton and Vogler (2006:211) stress 'the ability to formulate coherent policies' and 'the ability to formulate and implement external policy.' Groenleer and Van Schaik (2007) also place cohesion at the top of their list.

But what does foreign policy cohesion involve? Bretherton and Vogler (2006:211) propose three components: 'shared commitment to a set of overarching values, the ability to provide overall strategic direction for EU external activity, and the everyday requirements of policy-making and implementation, including the availability of policy instruments.' Groenleer and Van Schaik (2007) also emphasize 'shared norms and values' as a critical basis for agreement among member states. The problem with these arguments is that they do not translate easily into measurable variables. For example, the proposal to include 'shared norms and values' as a component of political cohesion is conceptually plausible but ultimately impractical as it forces the analyst seeking to measure cohesion to amalgamate elite beliefs, public opinion, and formal constitutional values, despite the fact that they often conflict with each other.

Instead, EU foreign policy cohesion is best defined as the sharing of policy preferences among EU member states and supranational institutions, the adoption of determinate common policies, and the implementation of those policies by the same member states and supranational institutions. This narrow definition of foreign policy cohesion is consistent with the definition of EU actorness proposed above and it includes three empirically-measurable dimensions – preferences, policies, and behaviours (see Table 1). The first dimension, convergent preferences, reflects the range of preferences among EU actors prior to any collective deliberation over common policy. The second dimension, policy determinacy, reflects how clearly and narrowly an EU common policy defines the limits of acceptable behaviour by member states and supranational institutions. Finally, the third dimension, 'implementation,' reflects how strictly EU actors implement or comply with the terms of whatever common policy has been agreed. Naturally, the EU's

score on these components is likely to vary across time, issue-area (trade, crisis management, human rights, etc.), relationship (EU-US, EU-China, etc.), and even across discrete episodes of policy choice. But taken together, the three components enable one to assess EU actorness on any given issue at any point in time: the higher the EU scores on each component, the closer it is to political cohesion and thus to full actorness.

Table 1: Requirements for EU Actorness

Jupille & Caporaso 1998	Bretherton & Vogler 1999/2006	Thomas 2010
<ul style="list-style-type: none"> <li>• Cohesion</li> <li>• Authority</li> <li>• Autonomy</li> <li>• Recognition by others</li> </ul>	<ul style="list-style-type: none"> <li>• Shared values &amp; principles</li> <li>• Formulation of coherent policies</li> <li>• Capacity to undertake international negotiations</li> <li>• Access to policy instruments</li> <li>• Legitimacy of decision-making process</li> </ul>	<ul style="list-style-type: none"> <li>• Convergent preferences</li> <li>• Determinate common policy</li> <li>• Consistent implementation by member states and EU institutions</li> </ul>

Preferences: Even relatively centralized territorial states sometimes struggle to overcome diverse policy preferences held by their administrative units. Given that the EU is not a centralized territorial state but a multi-level polity composed of semi-sovereign member states and powerful supranational institutions, it is only natural that the range of preferences among these actors will be a major determinant of the Union's political cohesion. The more that EU member states and supranational institutions hold similar views

on what the EU's policy should be, the more cohesive the Union will be, and vice-versa. Greater convergence of preferences reduces opportunities for non-EU actors to exploit intra-EU divisions and increases the likelihood of agreement on strong common policies.

Measuring preferences is never easy, since actors often seek to gain advantage in negotiations by concealing or miscommunicating what they truly wish to achieve (Frieden, 1999), but there are two ways around this obstacle. One is deductive – inferring what the member state's preferences must have been in light of certain observable conditions and clearly-stated assumptions about how actors react to such conditions. The second is inductive – estimating member states' preferences on the issue in question on the basis of diverse empirical sources, which may include policy traditions, formal in camera proposals, public statements, and interviews with experts or participants in the policy-making process. Evidence that governments have paid a political cost when pursuing their declared preferences would also reinforce the plausibility that the government actually meant what it said. Both the deductive and inductive strategies are potentially useful and equally valid, as long as the user of the deductive method avoids overly-heroic assumptions and the user of the inductive method is sensitive to the risk of strategic manipulation. Regardless of which method is used to gather evidence, if EU actors' policy preferences are very similar, we would allocate a high score here, and if their preferences are very different, we would allocate a low score.

Policy: The centrality of common policies to EU actorness cannot be over-stated. However, the simple adoption of a common policy is less important than its determinacy, meaning how clearly articulates the Union's goals and narrowly it specifies the behaviours

incumbent upon EU member states and institutions in order to achieve those goals. Highly determinate policies reduce the likelihood of 'creative misconstruction' by actors (including member states and institutions) with contrary preferences while enabling the reciprocity dynamics that help ensure that the EU speaks and acts as one (Franck 1992:56). In simple terms, greater determinacy delegitimizes EU actors inclined to pursue distinct or even contradictory policy behaviours on the issue at hand and increases the likelihood that whatever policies are adopted by the EU will be taken seriously by other actors in the international system.

Measuring determinacy requires careful attention to the formal wording of the policy adopted by the Union on the issue at hand. This includes both the balance of words and phrases that are highly constraining versus words and phrases that are less constraining within the adopted text, and awareness of the type of words and phrases that could have been used but were not. Words and phrases that are known to have been rejected or abandoned during policy deliberations will also provide valuable clues regarding the determinacy of the final policy. In the end, we would allocate a high score on determinacy if a common policy adopted formally by the EU articulates clear goals and sets tight limits on acceptable behaviour, and a low score if the common policy is vague on goals and allows significant space for member state and institutions to determine their own course of action. The lowest possible score, of course, would be reserved for situations in which the EU fails to adopt a common policy.

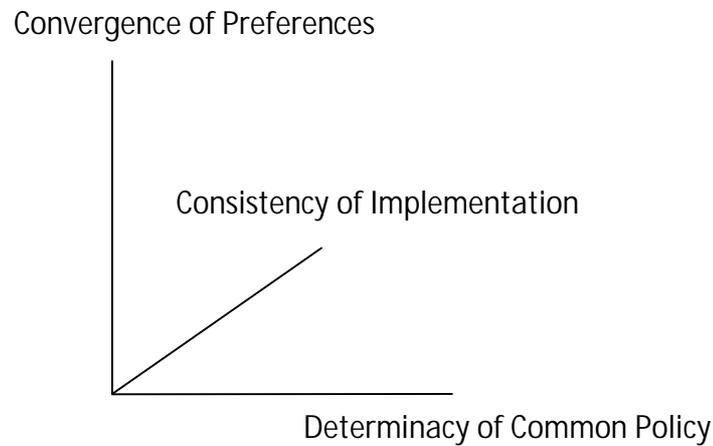
Behaviour: If the purpose of EU foreign policy is to have an impact on world order, then the most determinate common policies matter little if member states and institutions

ignore them and pursue their own agendas. This is a real issue for two reasons. First, notwithstanding recent treaty changes and institutional innovations, most of the resources available to support EU foreign policy lie in the hands of the member states. And second, while the European Commission is formally committed to the principle of coherence and formally subordinate in foreign policy and external relations to Council decisions, its various Directorates General (DGs) sometimes pursue incompatible policy agendas. Similarly, various elements within the EU's new External Action Service may find themselves tempted to depart from whichever common policy they are charged to implement. The faithful implementation of common policies by member states and supranational institutions is thus a critical dimension of EU foreign policy cohesion, no less important than convergent preferences or policy determinacy.

Measuring faithful implementation of EU common policies requires familiarity with the content and nuances of the policy in question and detailed evidence of what member states and supranational institutions actually do, including what threats or reassurances they communicate to others, where they commit resources, and what agreements they accept or reject, to cite just a few examples. However, accurate measurement of behaviour requires independent sources of evidence, since actors whose behaviour diverges from a common policy agreed at the EU level are unlikely to publicize this fact, and the EU itself has an interest in painting a rosy picture of compliance with its policies.

In sum, the EU is most cohesive, and thus exhibits greatest 'actorness,' when it scores high on preference convergence, high on policy determinacy, and high on implementation. The measurement of EU actorness can thus be represented in 3-D space, as shown in Figure 1 below:

Figure 1: Three Dimensions of EU Actorness



But if discussions of how to conceptualize and measure EU actorness are to matter beyond a small circle of academics, we must investigate the relationship between actorness and effectiveness. In other words, we must seek to determine how political cohesion affects the likelihood that the EU can shape international affairs in accordance with its goals. Or, phrased as a simple question, can foreign policy cohesion make the EU an effective actor in the international system – an actor finally able to stop ‘punching below its weight’?

A definitive answer to this question would require analysis of co-variation between EU cohesion and policy effectiveness in a large number of cases paired with analysis of processes and outcomes in a limited number of cases. As an illustrative first step in this direction, the next section of this paper offers a case study of EU cohesion and effectiveness on a signature issue for the Union: the promotion of international criminal justice through support for the Rome Statute and the good functioning of the International Criminal Court.

### Part III: EU Actorness on ICC Immunity

The International Criminal Court is the world's first permanent court designed to ensure individual accountability for genocide, war crimes, and crimes against humanity. It was established in 1998 by the Rome Statute and now has 111 states-party (including all EU member states) while a further 28 states have signed the Statute but not ratified it. The ICC is currently pursuing legal proceedings against fifteen individuals and many other 'situations' are under investigation. As permitted by the Statute, some of these have been initiated by the ICC Prosecutor, some referred by states-party to the Court, and one was referred by the United Nations Security Council. However, the functioning of the Court has not always been smooth: the entry into force of the Rome Statute in 2002 catalyzed a global clash over ICC jurisdiction that posed a real challenge to EU foreign policy.

Although President Clinton had signed the Rome Statute, the Bush Administration was opposed to it and set out in mid-2002 to shield the United States from ICC jurisdiction. Among other initiatives, they launched a global campaign to sign bilateral agreements with governments around the world ensuring that no US citizens, government officials, military personnel and other employees would be transferred to the ICC. Such agreements, US officials argued, were 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, so US officials typically referred to them as "Article 98 agreements" or "non-surrender agreements." Most legal experts argued, however, 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. Believing that Washington's

efforts were contrary to the purposes of the Statute, they began referring to the US pursuit of “immunity agreements” or even “impunity agreements.”

As governments around the world began to receive US overtures to sign such agreements, often accompanied by intimations that doing so was a condition for continued US military and economic aid, two questions arose in Brussels and member states’ capitals: were such agreements permitted under the EU’s formal commitment to support ‘the good functioning’ of the ICC, which had been reaffirmed just a few months earlier, and how should the EU respond to the global reach of the US campaign? It was not long before the issue reached the foreign policy agenda of the European Union, forcing member states 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 desire to maintain good relations with world’s only superpower, with which they shared many common interests, similar political values, and a long history of cooperation.

So how the EU respond? Did it exhibit a high degree of political cohesion (and thus actorness) on this fraught issue or did cohesion prove elusive, as it had in response to the break-up of Yugoslavia in the 1990s and as would soon be the case over the Iraq war? The analysis of this case is informed by the preceding discussion of EU actorness, including the three dimensions of political cohesion. It is based empirically upon evidence from published reports and confidential interviews with key participants, as well as the author’s own observations while working in the European Commission’s Directorate General for External Relations as these events unfolded (see Thomas 2009 for a fuller discussion of the

policymaking process). The extent of EU cohesion with regard to preferences, policy, and implementation behaviour on this matter are presented in turn.

Preferences: Unlike the easy question of whether or not to support the creation of the ICC, on which all EU actors easily agreed, the US campaign for bilateral agreements posed a specific and very difficult choice: whether to accept Washington's argument that its quest for immunity was justified by its special responsibility for international peace and security and the fact that it had never accepted ICC jurisdiction, or to insist that any such immunity would be contrary to the purposes of the Rome Statute, which the EU had committed itself to promote? Given this choice, and the intensity of the US campaign, what were the policy preferences of member states and the EU's supranational institutions?

Among the member states, Germany was 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 refuse similar requests from others. On the other side of the debate, Italy and the United Kingdom openly favoured 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 played a unique role in world affairs. The British and Italian governments were so strongly committed to this view, despite strong domestic support for the ICC, that they threatened to veto any EU policy that would prohibit them from accommodating Washington.<sup>1</sup>

Although the EU's supranational institutions have no voting power on CFSP issues such as this, they can express moral, legal, or utilitarian arguments that shape how issues are framed, both behind closed doors and through public exhortation. So their preferences matter as well. In this case, the 'rejectionist' camp (Germany and others) was supported unambiguously by the European Parliament, which passed resolutions strongly advocating a rejection of the US campaign, and by the European Commission, which distributed to member states an unambiguous legal brief arguing that the agreements proposed by Washington were incompatible with the Rome Statute and thus with a pre-existing EU commitment.<sup>2</sup>

On balance, we see that the preferences of EU actors on this issue were far from convergent, at least when deliberations began in August 2002. Ten member states plus the European Parliament and European Commission favoured a rejection of Washington's demand, while five member states favoured a more accommodationist policy with sufficient intensity that they were willing to sacrifice domestic political capital in pursuit of this outcome. Moreover, members of the 'rejectionist' camp were also concerned about the possibility that dozens of other states around the world would also bow to American

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<sup>1</sup> Author's interviews with European officials and NGO experts, November 2004, plus "UK to back US on war crimes court," *Financial Times*, 31 August 2002; "UK, Italy eye U.S. court deal," *CCN.com*, 31 August 2002; "Italian premier's stance on international court drops bombshell at EU talks," *BBC Monitoring Service*, 1 September 2002.

<sup>2</sup> Author's interviews with European officials and NGO experts, November 2004. See also European Parliament resolution P5\_TA-PROV(2002)0449 and the Commission's legal opinion in *Human Rights Law Journal* 23 (September 2002), 158-9.

pressure. If this happened, they feared, other states might follow the US and launch their own campaign for ICC immunity. As German foreign minister Joschka Fischer put it later, 'People are looking to Europe... What matters is that the Europeans stand together on the basis of a strengthening of the court's statute.'<sup>3</sup> So with regard to preferences, one can only conclude that the EU exhibited a 'low' level of political cohesion on this issue.

Policy Determinacy: On 30 September 2002, after nearly ten weeks of contentious intra-EU discussions on how to respond to the US request for bilateral ICC immunity agreements, the General Affairs Council issued two documents expressing the EU's common policy. In order to assess the determinacy of the policy, we must judge whether the two documents clearly articulate the Union's goals and strictly define the behaviours thus incumbent upon EU member states and institutions.

First, the Council Conclusions clearly articulate the Union's collective goals and beliefs on this matter – namely, support for the effective functioning of the ICC and the belief that the Rome Statute provides all the necessary safeguards against the use of the Court for politically motivated purposes. The Conclusions also signalled the EU's readiness to discuss with the US how existing agreements might accommodate its concerns, as permitted by Article 98 of the Rome Statute. In addition, the Council released a stringent set of principles designed to ensure that any state party to the Rome Statute wishing to reach an arrangement regarding the conditions of surrender of persons to the ICC do so in a manner consistent with its obligation under the Statute. In particular, these principles stipulate that (1) existing international agreements (such as extradition treaties and status

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<sup>3</sup> "EU deal to exempt US from new world court," The Scotsman, 1 October 2002.

of forces agreements) 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 'persons present on the territory of a requested State because they have been sent by a sending State' (such as government officials or military personnel).<sup>4</sup>

In short, the EU's position clearly stated that the terms of the bilateral agreements proposed by the US were incompatible with the obligations incumbent on states party to the Rome Statute and it set strict conditions on any agreement related to the surrender of persons to the ICC that would be difficult for the United States to accept. To satisfy the EU principles, the US 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, and commit to investigate in good faith all credible accusations of such crimes. Emerging from the Council meeting, Joschka Fischer described the Conclusions as a virtual rejection of bilateral agreements: "We would have wished a clear rejection of the agreements. Because of the Principles we are very close to such a

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<sup>4</sup> See: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/gena/72321.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/72321.pdf), accessed 31 July 2010.

position.”<sup>5</sup> By quickly expressing its displeasure with the EU’s guidelines, the US State Department seemed to agree with Fischer’s analysis.<sup>6</sup>

Nonetheless, the determinacy of the policy was undeniably reduced by the fact that the EU did not explicitly declare that as states party to the Rome Statute, EU member states were obligated not to make any new agreement limiting or excluding the surrender of persons to the ICC. Furthermore, there was ambiguity regarding the EU’s intended audience: the Conclusions indicate that the Principles should “serve as guidelines for Member States,” but the Annex containing the principles is titled simply “EU Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions of Surrender of Persons to the Court,” and its contents focus on the obligations of States Party to the Rome Statute, without reference to EU membership.

In response to this apparent flexibility on substance and ambiguity on scope, Germany’s Foreign Office released a detailed memorandum three weeks later detailing its view that the Conclusions and Principles constituted a de facto (if not de jure) prohibition on signing ICC immunity agreements.<sup>7</sup> On balance, with regard to the determinacy of the common policy, the EU exhibited a ‘medium’ degree of political cohesion.

Implementation Behaviour: The third dimension of EU cohesion, implementation, concerns the extent to which the foreign policy behaviour of member states and supranational institutions is consistent with the relevant common policy of the Union. One

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<sup>5</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>6</sup> “US rejects EU criminal court guidelines,” BBC News Online, 2 October 2002.

<sup>7</sup> “ICC – Supportive Interpretation of and Commentary on the EU General Affairs Conclusions on the International Criminal Court of 30 September 2002,” 24 October 2002, at: [http://www.amicc.org/docs/GermanonEUConcArt98\\_24Oct02.pdf](http://www.amicc.org/docs/GermanonEUConcArt98_24Oct02.pdf), accessed 31 July 2010.

piece of evidence of consistent implementation in this case is that fact that the U.S. government issued a strong *démarche* to EU governments in June 2003 threatening that continued European efforts to dissuade third parties from signing BIAs could be “very damaging” to transatlantic relations.<sup>8</sup> Yet given the limited determinacy of the Council Conclusions and Guiding Principles, this is not a reliable indicator of what individual EU governments and institutions were actually doing. Instead, it would be better to examine whether any EU member or candidate state signed a bilateral ICC immunity agreement with the US after 30 September 2002, and if so, whether it conformed to the EU’s Guiding Principles.

As soon as the Council announced the EU’s common policy, press reports indicated that Italy, Spain and the UK intended to go ahead and sign a deal with Washington.<sup>9</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>10</sup> And at the next meeting of the EU Council’s ICC sub-committee, the UK expressed its strong displeasure with the German memorandum, which reinforced speculation that London was leaning toward signing an agreement.<sup>11</sup> Yet despite these indications, a special US ambassador who travelled to London, Madrid, Rome and Vienna in late 2002 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

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<sup>8</sup> “U.S. Confronts EU on War Crimes Court,” *Washington Post*, 10 June 2003.

<sup>9</sup> “EU agrees to ICC immunity deal with US,” *EurActiv*, 1 October 2002; “EU deal to exempt US from new world court,” *The Scotsman*, 1 October 2002.

<sup>10</sup> *Lords Hansard*, 14 October 2002, Volume 639, Part 186.

<sup>11</sup> Author’s interviews with European officials and NGO experts, November 2004.

opinion from the General Attorney's office, and decided to "freeze" further discussion of the issue.<sup>12</sup> In the end, no EU member state signed a bilateral agreement on ICC immunity.

One agreement that is sometimes controversial in this regard is the 2003 UK-US Extradition Treaty, which precludes the surrender to the ICC of any US citizen extradited to the UK. However, this provision was in fact compliant with the EU position of 30 September 2002, as it simply reiterated the prohibition on 'onward extradition' contained in the pre-existing 1972 UK-US Extradition Treaty, which was covered by the EU 'guiding principles' recognition that 'existing agreements' might limit surrender to the ICC.<sup>13</sup> So we see that implementation was for more consistent among member states than one might have expected, given the limited determinacy of the policy agreed on 30 September 2002. On balance, with regard to the implementation of the common policy, the EU exhibited a 'high' degree of political cohesion.

This review of EU actorness on the issue of ICC bilateral immunity agreements has shown a low score on preferences, a medium score on policy determinacy, and a high score on policy implementation. If we weigh these three elements equally, we would conclude that the EU exhibited a medium degree of actorness on the issue of ICC bilateral agreements. But if we adjust the weights to reflect their logical contribution to foreign policy effectiveness, and thus give greater weight to policy determinacy and especially implementation, then we would conclude that the EU exhibited a medium-high degree of actorness on the issue of ICC bilateral agreements.

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

<sup>13</sup> "New U.S./EU and U.S./UK Extradition Treaties," *American Journal of International Law* 98:4 (October 2004), 848-50; Joanne Foakes, "The US/UK Extradition Treaty," at: [http://www.chathamhouse.org.uk/files/3249\\_ilp190505.pdf](http://www.chathamhouse.org.uk/files/3249_ilp190505.pdf), accessed 10 August 2010.

Having defined EU actorness and assessed the extent of EU actorness on the issue of bilateral ICC immunity agreements, we now turn to the question of whether EU actorness makes EU foreign policy more (or less) effective.

#### Part IV: EU Effectiveness on ICC Immunity

In principle, the effectiveness of EU policy in this area is best judged by examining the behaviour of three sets of states in the aftermath of the Council meeting: EU member states, other European states, and other states around the world. If the EU policy were effective, these states would have acted in accordance with the guidelines on ICC immunity agreements adopted by the EU on 30 September 2002. Although these guidelines were not fully determinate, a minimal definition of accordance with the EU guidelines would involve states-party and signatories of the Rome Statute refusing to sign a reciprocal BIA – that is, an agreement that would shield their own citizens (as well as those of the other party) from surrender to the ICC.<sup>14</sup> A moderate definition would require that these states not sign any BIA that fails to comply formally with the full set of guidelines included in the Council Conclusions. A maximal definition would require that these states follow the interpretation of the Council Conclusions and Guiding Principles presented in the German Foreign Office's October 2002 memorandum. Given the US position on these issues, both the moderate and the maximal definitions would effectively preclude signing any bilateral agreement on ICC immunity with the United States.

In order to assess whether or not states have acted in accordance with the EU's guidelines, one needs reliable evidence of which states have signed which kinds of BIAs. The

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<sup>14</sup> Under international law, signing a treaty indicates a state's intent to ratify (i.e., to become a state-party) and thus obligates the state not to act in a manner contrary to the purposes of the treaty.

International Criminal Court's website provides authoritative information on when various states signed and ratified the Rome Statute, while three reputable human rights NGOs (Human Rights Watch, the NGO Coalition for the International Criminal Court, and the American Non-Governmental Coalition for the International Criminal Court) have assembled fairly comprehensive data on the dates and content of BIAs. Unless otherwise indicated, the following analysis relies on data assembled from these four sources.<sup>15</sup>

EU Member States: As discussed above, all EU member states have fulfilled the EU's requirements and none have signed a BIA. But since this record is treated above as a component of EU actorness on this issue, it cannot also be presented as evidence of how EU actorness affects EU policy effectiveness. (This problem would not arise on most issues of EU foreign policy.) Thus we turn to the second and third sets of states targeted by the EU policy on ICC immunity agreements.

Other European States: The behaviour of other European states, including EU candidate, applicant, likely applicant, and closely associated states, is another valuable indicator of the effectiveness of EU policy in this area. Of these, Norway and Switzerland had announced in mid-August 2002 that they would not sign a BIA and they have maintained this position, but neither of these can be attributed to the effect of the EU policy adopted that was not adopted until September. Croatia declared in May 2003 that it would not sign a BIA, but reports attribute this decision principally to the fact that the Croatian government was under strong international pressure to surrender suspects to the

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<sup>15</sup> International Criminal Court, <http://www.icc-cpi.int/>; Human Rights Watch, [www.hrw.org/campaigns/icc/docs/bilateralagreements.pdf](http://www.hrw.org/campaigns/icc/docs/bilateralagreements.pdf); Coalition for the ICC, [www.iccnw.org](http://www.iccnw.org) and <http://www.derechos.org/nizkor/icc/ciccart98.html>; AMICC, <http://www.amicc.org/>.

International Criminal Tribunal on the former Yugoslavia and thus politically unable to accept a US request for ICC immunity. The best example of EU effectiveness is the case of Romania, which had signed a BIA before the EU policy was adopted, but then declared that it would seek to amend the agreement to comply with the EU requirements.

On the other hand, four other candidate or potential candidate states (Albania, Bosnia-Herzegovina, Macedonia and Montenegro) signed BIAs with the US after the EU policy was adopted on 30 September 2002. Although the precise terms of these agreements are not known, all but one (Montenegro) have reportedly been non-reciprocal and thus at least partially compliant with the EU policy. A spokesperson for Chris Patten, then the EU's External Relations Commissioner, was nonetheless critical of Albania, saying that the BIA it had signed did not comply with all EU requirements on the scope of persons covered by such agreements. Several weeks later, when Bosnia-Herzegovina signed a BIA, Patten himself criticized the terms of the agreement as being only slightly better than Albania's and (along with the EU presidency) reportedly sent a letter urging the government in Sarajevo to respect the values and goals of the EU, including its support of the ICC. In sum, four non-EU European states signed BIAs after the Council Conclusions, and we have reason to believe that the EU was dissatisfied with how closely at least three of them had followed the EU guidelines.<sup>16</sup>

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<sup>16</sup> For a careful analysis of how aspirants to EU membership responded to this issue, see: Mieczysław P. Boduszynski and Kristina Balalovska, "Between a Rock and a Hard Place: How the US-EU Battle over Article 98 Played Out in Croatia and Macedonia," Woodrow Wilson Center, East European Studies Occasional Papers No.71, undated, at: <http://www.wilsoncenter.org/topics/pubs/71BalalovskaBoduszynskifinal.doc>

The global campaign: As discussed above, member states and those who hoped to join the Union were not the Council Conclusions' only intended audience: the EU was clearly seeking a global impact on this issue. In fact, the European Commission instructed its missions around the world to encourage all governments to consider the EU guidelines when determining how they would respond to the US campaign. So how effective was this EU effort to exercise soft power on a global scale?

To start, we can observe that 102 states signed bilateral ICC immunity agreements with the United States between August 2002 and April 2007, when the last one was signed. Of these, 90 were signed after the EU guidelines were adopted on 30 September 2002. Although we do not have data on how many states were contacted by the US in its BIA campaign, these figures represent a considerable portion of the 192 states that belong to the United Nations, especially if we consider that nearly 30 of the 192 also belonged to the EU or were candidates for membership during this period. Although it is impossible to know how many agreements would have been signed in the absence of a collective EU response to the US quest for BIAs, this initial measure does not suggest that the EU's efforts were very effective.

The bottom line for EU effectiveness appears somewhat better if we focus on one of the most salient issues in the debate – the reciprocity of the BIAs. This is a good measure of EU effectiveness because the EU Guidelines stated clearly that reciprocal BIAs proposed by the US (i.e., agreements covering citizens and officials of both parties) would violate the legal obligations of any state-party or signatory of the Rome Statute. The data (see Table 2) reveal that states-party and signatories of the Rome Statute were far more likely to insist upon non-reciprocal BIAs than were states with no legal obligation to the Rome Statute.

Table 2: Reciprocity of BIAs signed by Rome Statute signatories and states-party after the EU Guidelines

	Non-reciprocal BIA	Reciprocal BIA	Reciprocity unknown
States-party and Signatories	17 (19%)	36 (40%)	6 (7%)
Neither	2 (2%)	26 (29%)	3 (3%)

Note: This table only includes the 90 BIAs signed after 30 September 2002. All percentages have been rounded to nearest whole number.

More important, there is a significant increase in the proportion of Rome Statute states-party and signatories signing non-reciprocal BIAs after the release of the EU guidelines (see Table 3). If we exclude those BIAs whose reciprocity is unknown, the percentage of reciprocal BIAs rises from 25% (1:4) before 30 September 2002 to 47% (17:36) thereafter. This suggests that the EU's effort to shape the global response to the US campaign for BIAs had some impact, at least on one aspect of the issue.

Table 3: Reciprocity of BIAs signed by Rome Statute signatories and states-party before and after the EU Guidelines

	Non-reciprocal BIA	Reciprocal BIA	Reciprocity unknown
BIAs signed by 30.09.2002	1	4	3
BIAs signed after 30.09.2002	17	36	6

Note: This table only includes the 67 BIAs signed by states-party or signatories of the Rome Statute at the time of the signing.

However, non-reciprocity is only one of the guidelines adopted by the EU, and we do not have comprehensive data on other aspects of the 90 BIAs signed after 30 September 2002. But the cases of EU neighbours Albania and Bosnia-Herzegovina, which we can assume would have been relatively receptive to the guidelines, should caution us against exaggerating the EU's impact on the behaviour of states on other continents. We must therefore conclude that the EU's global effort to resist the US campaign for bilateral immunity agreements, or at least to moderate its impact on respect for the Rome Statute and thus the good functioning of the International Criminal Court, had a very limited effect.

#### Part V: Conclusions

So how should one interpret our observation that that on this issue, fairly strong EU actorness did not translate into policy effectiveness, neither within its immediate neighbourhood nor on a global scale? One might argue, of course, that no general conclusions can be drawn from a single case. But while it is certainly possible that this case is unusual in some way, standard arguments about the significance of actorness provide little basis for making such distinctions.

Alternatively, one might argue that the EU would have been more effective on this issue if it had been more cohesive – that is, if it had exhibited greater actorness. After all, the member states were deeply divided in terms of their policy preferences and the resulting common policy was perceived by some as a weak compromise. So perhaps a greater unity of purpose would have resulted in a more effective policy outcome. The problem with this interpretation is that on the two dimensions of actorness that logically matter most for effectiveness – policy determinacy and especially policy implementation –

the EU exhibited a reasonably high degree of actorness. It is therefore hard to believe that a marginal increase in actorness would have resulted in a significant increase in the EU's ability to shape outcomes at the regional or global levels.

Instead, it appears that the disconnect between actorness and effectiveness in this case was due to the fact the EU was relying principally on moral and legal arguments to persuade third parties to act in a particular way while the US was conditioning its considerable military and economic aid to those same governments on their compliance with its wishes. Within the Caribbean, to cite just one regional example, the US cut military aid to Antigua and Barbuda, Barbados, Belize, Dominica, St Vincent and the Grenadines, and Trinidad and Tobago after those countries indicated that they would not sign a BIA. The President of Guyana apparently had these cases in mind when he explained his decision to sign: "The US has made it clear that they will cut off the aid. I need the military co-operation with the US to continue. It is as clear as that. I can't be more clear."<sup>17</sup> In short, on a global level, the EU lost out in this confrontation between its soft power and the US' hard power.

This tells us that the significance of EU actorness should not be exaggerated. Actorness may well be necessary for the EU to exert its influence abroad, but it clearly is not sufficient in a multi-centric world order where many others do not share the EU's values or collective policy preferences and are ready to deploy vast resources in pursuit of their goals. This in turn raises serious questions about the viability of a 'normative power' conception of the EU's role in world affairs.

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<sup>17</sup> "Guyana seals exemption pact with U.S. over criminal court." Stabroek News, 13 December 2003.

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