EU Governance in an Area of Freedom, Security and Justice

Logics of Decision-making in the Justice and Home Affairs Council

Jonathan P. Aus

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(Summary)



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Working Paper

No. 15, October 2007

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Abstract *

This collection of articles examines some of the legislative cornerstones of the emerging EU Area of Freedom, Security and Justice in light of the research question whether the relevant decision-making processes in the Justice and Home Affairs Council may best be understood from a Rationalist or from an Institutionalist perspective. The empirical focus lies on a handful of important legislative acts adopted by the Justice and Home Affairs Council after the entry into force of the Treaty of Amsterdam, namely the Dublin II Regulation, the Eurodac Regulation, the Biometric Passports Regulation and the cross-pillar Facilitators Package. Based on a comparative analysis of these case studies, the author specifies the conditions under which the members of the Justice and Home Affairs Council adhered to the logic of consequentiality, the logic of appropriateness, or both.

* This paper is the summary of the author's Ph.D. thesis. A draft version was presented at the ARENA Research Seminar on September 4, 2007. I would like to thank Erik O. Eriksen and Pieter de Wilde in particular for their helpful comments. By far the greatest credit, however, belongs to Johan P. Olsen, whose insight and intellectual guidance were invaluable to me throughout this project.

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1. Topic

Who and what governs asylum and immigration, internal security, and criminal justice in contemporary Europe? And how are important decisions in this policy area actually made? This study suggests that an important set of collectively binding rules governing asylum and immigration, internal security, and criminal justice in Europe has been laid down by the Justice and Home Affairs Council of the European Union (EU). It also shows how these decisions by the Council have actually been made.

The basic research question raised in the following articles is whether and, if so, under which conditions, the members of the Justice and Home Affairs (JHA) Council adhered to the logic of consequentiality, the logic of appropriateness, or both while deciding upon some of the legislative cornerstones of the emerging Area of Freedom, Security and Justice. The research objective of the present collection of articles, in other words, is to specify the conditions under which the logics of consequentiality and appropriateness were invoked in this particular setting.

This summary is organized as follows. *Section 2.* briefly reviews the study's qualitative and comparative research design and the author's epistemological stance. *Section 3.* engages in a structured dialogue between theoretical ideas and the case-based empirical evidence. I proceed in three steps. In a first step, I introduce the logic of consequentiality and the logic of appropriateness as analytically distinct logics of action. Not unlike Weber's ideal-typical distinction between instrumentally rational *(zweckrational)* and value-rational *(wertrational)* social action, the logic of consequentiality and the logic of appropriateness represent two broad interpretive frames which may assist us to understand and/or explain some of the building blocks of the emerging EU Area of Freedom, Security and Justice. In an empirically oriented second step, I critically reflect upon my selection criteria and the data sources I draw upon before providing a summary account of the political circumstances under which the members of the JHA Council adhered to one or both of these logics of action while drafting the

Dublin II Regulation, the Eurodac Regulation, the Biometric Passports Regulation, and the cross-pillar Facilitators Package. In a third step, I propose a number of empirically grounded scope conditions of the logics of appropriateness and consequentiality in the JHA Council setting. Against this background, *section 4.* spells out the author's contributions to the research field.

2. Research Design and Epistemology

I have provided a detailed account of the study's research design in the article, "Conjunctural Causation in Comparative Case-Oriented Research" (Aus 2007a). The article advances the claim that the combination of theory-oriented case studies devised in the tradition of Allison's seminal work, "Essence of Decision: Explaining the Cuban Missile Crisis," on the one hand, and comparative qualitative analysis (Charles C. Ragin), on the other, provides a suitable methodological toolkit for delineating the domains of application of the logics of consequentiality and appropriateness in the JHA Council setting. My case-oriented and comparative research design, in other words, is geared towards both accounting for significant legislative developments in the policy area of EU Justice and Home Affairs, as well as examining the relative explanatory power of Rationalist and Institutionalist perspectives on decision-making processes in this field. I shall return to this "dialogue between ideas and evidence" in *section 3.*

My methodology paper places a particular emphasis on the potential of comparative case-oriented research to identify patterns of conjunctural causation. (Variable-oriented studies, by contrast, are usually based on the simplifying assumption of linear causal additivity and thus cannot easily deal with the phenomenon of equifinality, let alone different facets thereof; cf. Ragin 2006.) The disciplinary recognition of causal complexity is vital if we wish to reconcile relatively narrow theoretical perspectives on EU governance with the empirical observation that there are many causal paths and/or sequences of different logics of action leading towards the formal adoption of collectively binding rules by the Council of Ministers (cf. *inter alia* Checkel 2006: 370).

If there is something to be added to this methodological essay, then it is an epistemological footnote. Instead of entering into a philosophical discussion of what we can actually know about decision-making processes in dynamic fields of EU governance resembling anything but a closed, scientifically controlled laboratory, I would simply remind the reader of the historically interpretive (and yet rigorously empirical) character of theory-oriented case study research. Present-day followers of Weber, in short, essentially interpret single cases of decision-making in particular institutional settings like the Council of the EU or small sets of comparable cases against the backdrop of ideal-typical theoretical ones:

> [Historically] oriented interpretive work attempts to account for specific historical outcomes or sets of comparable outcomes or processes chosen for study because of their significance for current institutional arrangements or for [political] life in general. Typically, such work seeks to make sense out of different cases by piecing evidence together in a manner sensitive to chronology and by offering limited historical generalizations.... This definition of interpretive work leans heavily on Weber but makes more allowance for the possibility of historical generalization based on examination of comparable cases (Ragin 1987: 3).

Not unlike the "double interpretations" presented by Jeff Checkel and his collaborators in the context of their attempt to foster a meaningful dialogue between Rationalist and Social Constructivist international relations scholars (2007a), my articles employ two broad frames of interpretation: a Rationalist and an Institutionalist one. To the extent that political science, in contrast to the natural sciences, is "a science concerning itself with the interpretive understanding of social action and thereby with a causal explanation of its course and consequences" (Weber 1978: 4), such an interpretive epistemological stance aiming at an explanatory understanding *(erklärendes Verstehen)* of decision-making processes may be justified (cf. Weber 1973, Williams 2000, Shapiro 2002, Schwartz-Shea 2003).

3. Ideas and Evidence: A Structured Dialogue

3.1 Theoretical Perspectives on Decision-making Above the Nation-State

Students of the former European Economic Community have developed a number of *sui generis* perspectives on supranational governance in a politically integrating Europe, the most prominent of which is perhaps the multi-level governance approach (Hooghe and Marks 2001, Kohler-Koch and Rittberger 2006). The present study, by contrast, applies two general political science perspectives, namely Rationalism and Institutionalism, to the empirical analysis of decision-making processes in the EU.

Rationalist and Institutionalist perspectives are based on different "micro-foundations," i.e. they differ with respect to their explanatory understanding of political action: while Rationalists like Andrew Moravcsik assume that decision-makers carefully evaluate their options and choose the best alternative in terms of their expected utility, Institutionalists like James G. March and Johan P. Olsen tend to believe that political actors follow rules of appropriate behavior as defined by a specific culture. Strategic calculation, then, is the social mechanism underpinning social-scientific narratives of instrumentally rational choice, whereas rule following allegedly drives the value-rational behavior of representatives of formally organized institutions. The basic logic of action emphasized by Rationalists and Institutionalists, in other words, is either the logic of consequentiality or the logic of appropriateness.

3.1.1 Rationalism and the Logic of Consequentiality

The rationality assumption underlying the main bulk of theory-oriented empirical research on decision-making processes in the Council of Ministers and elsewhere in the EU was qualified by Max Weber as the instrumentally rational ideal type:

> Action is instrumentally rational *(zweckrational)* when the end, the means, and the secondary results are all rationally taken into account and weighed. This involves rational consideration of alternative means to the end, of the

> relations of the end to the secondary consequences, and finally of the relative importance of different possible ends (1978: 26; cf. Elster 2000).

Rationalists, in other words, account for policy outcomes by assuming that actors – individuals and composite actors like national governments – adhere to the logic of consequentiality.

Applied to the empirical analysis of intergovernmental decision-making processes in the field of EU Justice and Home Affairs, a Rationalist perspective suggests that the process of European political integration – identified here with the process of laying the legislative cornerstones of the emerging Area of Freedom, Security and Justice – is driven by utility-maximizing and variably resourceful executive actors trying to come to negotiated agreements on matters of common concern. We may assume, then, that individual members of the JHA Council determine their support of, or opposition to, a given legislative draft or package deal on the basis of a calculation of advantage (cf. Thomson *et al.* 2006). We may also assume that processes of intergovernmental negotiation unfold against the backdrop of general "rules of the EU game" like the biannually rotating Council Presidency (Tallberg 2006), and in the context of JHA-specific actor constellations. The latter will, depending on the legislative dossier at hand, *inter alia* reflect the split between Schengen and non-Schengen countries (Gehring 1998), particular "opt-out" and "opt-in" arrangements for individual Member States and the participation of Schengen-affiliated third countries (Kuijper 2000), the special role of the Group of Six (G6) of interior ministers (Aus 2006b), and the comparatively strong involvement of the European Council in Third Pillar matters (Monar 2006a). The negotiated agreements reached by uniquely selfish and utility-maximizing members of the species *homo oeconomicus*, in turn, may best be understood as equilibrium outcomes:

> [The] game-theoretic conceptualization of interactions seems uniquely appropriate for modeling constellations that we typically find in empirical studies of policy processes.... In order to profit from the game-theoretic perspective, [it] is sufficient that the basic notions of interdependent strategic

> action and of equilibrium outcomes be self-consciously and systematically introduced.... If that is the frame of attention and interpretation, then everything else can, in principle, be left to empirical research and the development of empirically grounded theory (Scharpf 1997: 5, 7).

We can only know in retrospect, of course, which "game" the members of the JHA Council were actually "playing" (which does not rule out that we can expect to witness similar patterns of conflict and cooperation in future "games" of the same type or class), and should accordingly resist the novice's temptation to model all kinds of policy interactions above the nation-state as a "Prisoner's Dilemma." We always need to familiarize ourselves with the "structure of the situation" (Zürn 1992) at hand before jumping to game-theoretic conclusions.

3.1.2 Institutionalism and the Logic of Appropriateness

Institutionalists assume that "politics is organized by a logic of appropriateness" (March and Olsen 1989: 160) and that political behavior is first and foremost rule-driven. Institutional analysis typically oscillates between the organizational and micro levels, i.e. it tends to focus both on the political activities of formally organized institutions like the police and on the behavior of a policewoman carrying out her professional duties.[1]

Organizational entities like FRONTEX, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, systematically give precedence to and discriminate against certain courses of action by means of allocating resources, including

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[1] I would like to clarify at this point that the Institutionalist approach I refer to should be held separate from the work of Rational Choice Institutionalists like Kenneth A. Shepsle. See Hall and Taylor 1996, Aspinwall and Schneider 2000 for further reading on the various strands of Institutionalism in political science, all of which build on the seminal article by March and Olsen (1984).

In light of an interesting and yet conceptually misleading contribution by Harald Müller (2004), I would also like to note that rule following and the logic of appropriateness should not be equated with arguing and the logic of justification (Eriksen 1999). The latter social mechanism and behavioral logic figure prominently among deliberative-democratic theorists in general and Jürgen Habermas in particular; see Habermas 2007 for an elaborate discussion.

personnel and money, according to particular organizational objectives such as preventing unlawful border-crossings (cf. Schattschneider 1960, Allison and Zelikow 1999). This is institutional "hardware," so to speak. The organizing principles and standard operating procedures of a European border control agency may be compatible with "hardware" developed for other purposes, say for enabling the free movement of service providers on a global scale, but often they are not or only partly so. Inter-institutional tensions and collisions are thus not unusual in modern and functionally differentiated polities (cf. *inter alia* Orren and Skowronek 2004, Shapiro *et al.* 2006). Some authors even suggest that inter-institutional collisions are the most important source of "war or civil war which may replace one definition of appropriateness with another" (March and Olsen 1989: 167).

With a view to the actor level, Institutionalists assume that political behavior is strongly affected by institutionalized norms and structures of meaning. The normative connotations of the logic of appropriateness (March and Olsen 2006a) are reminiscent of Max Weber's dictum that "value-rational action always involves 'commands' or 'demands' which, in the actor's opinion, are binding on him" (1978: 25). This vision of politics as an interpretation of life, and the corresponding presupposition that political actors have a sense of duty and obligation, respectively, may best be captured by the notion of institutional "software."

The social mechanism of rule following is often mistaken for plain repetition, i.e. for Weber's ideal-typical notion of traditional social action. Institutional actors, however, do not merely "copy and paste" existing behavioral scripts as "a matter of almost automatic reaction to habitual stimuli" (Weber 1978: 25), at least not under all circumstances. The politico-administrative reasoning of an "A grade" official employed by the European Commission, for instance, may also be determined by a relatively complex cognitive process allowing for a partial deviation from standard operating procedures, namely the self-conscious matching of a new situation with his or her professional role. A Commission *fonctionnaire*,

then, will try to do what a Commission *fonctionnaire* is supposed to do while drawing up a legislative proposal on Community asylum policy, for example:

> To describe behavior as driven by rules is to see action as a matching of a situation to the demands of a position. ... What is appropriate for a particular person in a particular situation is defined by political and social institutions and transmitted through socialization. Search involves an inquiry into the characteristics of a particular situation, and choice involves matching a situation with behavior that fits it (March and Olsen 1989: 23).

Institutionalist research on Justice and Home Affairs cooperation in an integrating Europe aims to describe and account for the institutionalization of common European decision-making bodies, rules, and structures of meaning in the areas of asylum and immigration, internal security and criminal justice (cf. Stone Sweet *et al.* 2001, March and Olsen 2006b). Again, the EU analyst is required to examine both the development of institutional "hardware" for the exercise of state-like domination above the nation-state and the emergence of institutional "software" such as "the institution of consensus" (Heisenberg 2005) in the Council of Ministers:

> By providing a structure of routines, roles, forms, and rules, political institutions organize a potentially disorderly political process. By shaping meaning, political institutions create an interpretive order within which political behavior can be understood... (March and Olsen 1989: 52).

It is the stylized notion of perfectly integrated institutional "hardware" and "software," of course, which renders an Institutionalist perspective on political institutions particularly useful for heuristic purposes.

3.2 Case Studies on Decision-making in an Area of Freedom, Security and Justice

3.2.1 Selection Criteria: Significance, Coverage, Comparability

Theory-oriented case study research has its comparative advantages when it comes to generating in-depth knowledge of individual cases and to tracing social

mechanisms (George and Bennett 2005, Checkel 2006, 2007b), but it is also open to statistical criticism.

Researchers adhering to a statistical worldview have a standard recommendation on offer when faced with "small-*N*" studies such as the present collection of articles or, to cite a more prominent example, Andrew Moravcsik's seminal work, "The Choice for Europe" (which offers sweeping generalizations on the basis of five case studies): to increase the number of observations. In light of the fact that there may be only one case of important historical events like the Cuban Missile Crisis, however, this recommendation is not always helpful (cf. McKeown 1999). One could, of course, refrain from studying contingent phenomena such as the establishment of an EC criminal law competence by the European Court of Justice. In this case, however, political scientists would risk losing track of significant political developments in EU-Europe and elsewhere:

> [The] insights that can be obtained by a methodology that requires us to ignore most of what we know, or could know, about the real world will not add much to our understanding of the past (Scharpf 1997: 27).

In a similar and yet somewhat polemic vain, Stanley Hoffmann once reportedly criticized the methodological stance of some of his colleagues at Harvard Government in the following manner:

> [The] ideal study in political science today would be the comparative study of health regulation of noodles in one hundred and fifty countries. In this way you have a sufficiently large mass of material to reach generalizations, and you don't ever have to have eaten a noodle – all you need is that data (Hoffmann, quoted in Cohn 1999).

This study does not deal with noodles. It deals with the imposition of EU criminal law sanctions against human smugglers, with the mandatory fingerprinting of EU citizens for counter-terrorism purposes, and with the legally prescribed redistribution of asylum applicants from north to south and from west to east within the EU. My articles, in other words, focus on a handful of legislative "big bangs" in the area of EU Justice and Home Affairs, i.e. on the

intergovernmental negotiation of a novel set of collectively binding European rules on imprisonment, civil liberties, and protection from political persecution.[2] This evolving layer of JHA-related supranational law affects both EU citizens and third country nationals in a direct and physical manner. Political scientists arguably have a professional duty to describe, analyze or account for such important political phenomena. They illustrate, after all, the transformation of political order in contemporary Europe (Olsen 2007) and, as Weber might have phrased it, the institutionalization of new forms of state-like domination on a regional scale.

My selective focus on important legislative developments in the politically sensitive area of EU Justice and Home Affairs should not conceal, however, that the JHA Council is first and foremost a supranational bureaucracy generating a large and cognitively unintelligible quantity of written material. As a matter of fact, the Council of Ministers formally adopted approximately one hundred JHA-related texts per annum during the nine-year period of 1998 through 2006 (see the annually updated "List of Texts Adopted by the Council in the JHA Area" compiled by the General Secretariat of the Council). The majority of these texts vanish in a post-national executive "black hole," so to speak, as soon as they have been more or less consciously endorsed by the justice and interior ministers: "less than half of these texts – most of which are not formally binding – are published in the Official Journal [of the European Union]" (Monar 2006b: 7). In the rather unlikely event that these texts are made available to a wider audience, the interested observer often finds that they simply deal with administrative routines such as monitoring Member States' implementation of the Schengen *acquis* or with guidelines for carrying out specific law enforcement operations like collecting samples of seized drugs.

[2] One may note in this context that the Justice and Home Affairs domain has probably been the most dynamic and expansive EU policy area since the European Union's establishment in 1993; see *inter alia* Börzel 2005: 222.

Even "hard" JHA-related legislative acts may be of an entirely self-referential administrative nature. (As commonly known, "hard" supranational law essentially consists of EC Regulations, Directives and Decisions. Since these legislative acts take precedence over national rules and generally entail direct effect, they must, in accordance with the rule of law, at least be published in the Official Journal.) A typical example of such a bill is the "Council Decision of 24 July 2006 amending Article 35 of Appendix 6 to the Staff Regulations applicable to Europol employees (2006/519/EC)." For EU citizens and students of the process of European political integration alike, it is necessary to distinguish such legislative measures from the political cornerstones of the emerging Area of Freedom, Security and Justice.

The four cases I have selected for in-depth study and subsequent comparative analysis, namely the Dublin II Regulation, the Eurodac Regulation, the Biometric Passports Regulation and the cross-pillar Facilitators Package, represent – judging by my own experience and by the empirically informed opinions of both policy practitioners and scholarly observers – some of the most important decisions ever made in the field of EU Justice and Home Affairs.[3] At a minimum, the political significance of the four EU measures mentioned above stems from the fact that they have replaced or are about to replace a number of national rules on asylum, policing and imprisonment (which, in turn, illustrates that the half-century old integration process has finally arrived at the heart of nation-state sovereignty, whatever that may entail for the future of representative-democratic government in Europe).

Apart from the selection criterion of political significance, the cases I have selected cover what both the Treaties and legally educated policy-makers in Brussels generally associate with the concepts of freedom, security and justice,

[3] One may disagree with the qualitative assessments made by myself and others, of course. Valuable sources for would-be critics are the annual review section of the *Journal of Common Market Studies* and specialized journals like the *European Journal of Migration and Law;* cf. *inter alia* Monar 2006c, Peers 2007.

namely EU action in the fields of asylum and immigration (including the free movement of persons, visa policy and external border control), counter-terrorism and internal security governance via the transnational exchange of personal data, and criminal justice. We may, of course, observe a considerable overlap between these different categories of "material EU law" in empirical practice, meaning that a case like the Facilitators Package may cover both asylum and immigration issues and matters of criminal justice, that the Biometric Passports Regulation may contain elements of policing and external border control, and so on. As long as these interdependencies manifest themselves within the substantive realm of "freedom, security and justice," however, they do not create conceptual difficulties but rather reinforce the idea of an integrated legal "area."

Last but not least, my cases meet the criterion of comparability since all of the legislative acts I have studied were drafted and politically agreed upon by the Council of the EU meeting in the composition of the justice and interior ministers of the Member States. Depending on the context of the case at hand, I also describe and interpret the activities of other institutional actors like the European Court of Justice. My main emphasis, however, always lies on the relevant decision-making processes in the JHA Council. In this sense, I have "placed all of my eggs in one basket," so to speak. The Council "basket," in turn, is arguably the most important one in the EU setting: no piece of relevant EU legislation can be adopted without the Council's explicit approval, including all First Pillar items governed by the co-decision procedure (and excluding certain implementation measures).

The raison d'être for my case selection, to put it in a nutshell, is typically qualitative in the sense of selecting a small number of politically relevant and comparable cases representing different facets of the EU triumvirate of "freedom, security and justice" instead of trying to provide a statistically representative, random sample of JHA Council-based decision-making processes. Again, I do realize that all of the above does not fit well with a statistical worldview. My first line of defense against such variable-oriented criticism, however, is that

> notions of sampling and sampling distribution are less relevant to [the case-oriented] approach because it is not concerned with the relative distribution of cases with different patterns of causes and effects. More important than relative frequency is the *variety* of meaningful patterns of causes and effects that exist (Ragin 1987: 52; emphasis in the original).

3.2.2 Data Sources: Council Records

Before presenting the main findings of my case studies and providing an update of recent developments in this realm, I would like to comment on the data sources I draw upon. All of my articles are based on "hard" primary sources, i.e. on authentic policy documents written by practitioners for practitioners during the actual decision-making process in Brussels.

Most of my sources are official Council records documenting the proceedings of the Working Party on Substantive Criminal Law, of the Strategic Committee on Immigration, Frontiers and Asylum, etc. from the first reading of the relevant legislative proposal to its formal (and in this case always unanimous) adoption by the Council. Gaining access to detailed information on the course of intergovernmental consultations below the ministerial level is crucial since we may reasonably assume that approximately 85% of Council decisions are *de facto* made on working group or COREPER levels (Hayes-Renshaw and Wallace 2006: 79; this figure is based on insider estimates and should therefore be treated with caution). For purposes of triangulation, however, I also rely on the Council's minutes, on the Council Presidency's press conferences, on policy documents issued by the Commission's services, the European Parliament, national governments and parliaments, etc., and on expert interviews (see below).

The combination of 21st century information technology and post-Amsterdam primary and secondary Community law on "transparency" has allowed me to follow the "paper trail" left behind by the relevant civil servants and politicians. In fact, all of the Union's political institutions (except for the European Council) are now legally obliged to maintain public registers providing online access to a wide range of official documents produced in 1999 or at a later

stage, including individual Member States governments' negotiating positions on preliminary legislative drafts and compromise proposals (cf. article 255 of the EC Treaty as amended by the Treaty of Amsterdam, and Council and Parliament 2001 for the actual Transparency Regulation). This remarkable development may best be understood as a partial success of deliberate attempts on the part of the European Parliament and selected Member States' governments, namely those of Denmark, Finland, the Netherlands and Sweden, to "help EU citizens and the media to monitor and evaluate decision-making processes, thereby increasing public participation and strengthening understanding of EU policy-making and loyalty to the Union" (Bjurulf and Elgström 2004: 252; cf. Naurin 2004, de Leeuw 2007).

Empirically oriented researchers have been quick to make extensive use of the Union's new transparency regime. Three years after the formal adoption of the Transparency Regulation, the Commission's services accordingly noted that

> citizens exercising this right [of access to official documents] mainly belong to very specific groups. Applications for access to the institutions' documents generally come from the academic world (for research purposes) or professional sectors (such as lobbies trying to influence decision-making or lawyers wanting to find information to defend the interests of their clients) (Commission 2004: 10-11).

This pattern also holds for official Council records (see http://register.consilium.eu.int). As a matter of fact, the share of confirmatory applications lodged by researchers, i.e. university-based applications for access to Council documents that are listed in the public register but are not or only partially accessible, increased from 28% in 2002 to 51% in 2006. During the same period of time, the share of confirmatory applications lodged by "civil society" actors decreased from 16% to 8% (Council 2007a: 31).[4]

[4] Thanks to the generous assistance of the Council Secretariat in making formerly inaccessible or only partially accessible documents available to me in the course of my research project, I

The divergent trend mentioned above reflects learning processes relating to the Council's policy of making documents available to the interested public only *after* the Council has reached a political agreement on the relevant legislative dossier. Effectively ignoring the fundamental principle and stated objective of the EU that "decisions are taken as openly as possible and as closely as possible to the citizen" (article 1 of the EU Treaty), the Council routinely draws on article 4 (3) of the Transparency Regulation in order to preserve a so-called "space to think" for the Council Presidency, the Council Secretariat, national governments and the Commission's services while negotiating compromise solutions and package deals behind closed doors:

> Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, *shall be refused* if disclosure of the document would seriously undermine the institution's decision-making process… (emphasis added; cf. Bunyan 2002 for a critical assessment).

The time-lag between a given document's internal dissemination in the Council and its full disclosure to the public (a time-lag, that is, which one should be prepared to measure in years rather than months) has progressively diminished the register's "added value" for ordinary EU citizens, journalists, and non-governmental organizations. (For further reading on the lack of civil society involvement in international politics due to professional secrecy, see Nanz and Steffek 2007: 99.) The opposite conclusion has been reached by policy researchers who have learned that all preparatory Council documents in general and their highly informative footnotes in particular can in principle be identified and accessed in their original form once the legislative "file" has been "closed."[5]

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have not personally contributed to these figures, at least not with respect to official Council documents.

[5] EU researchers whose working language is English certainly benefit from the fact that the vast majority of policy-relevant documents produced by the Council Secretariat are nowadays written in British English rather than French, at least in the domain of Justice and Home Affairs – unless the Council Presidency happens to be France. In the latter case, it is highly

I firmly believe that official Council records constitute by far the most reliable and inter-subjectively verifiable source of information with respect to the Council's legislative proceedings. (If preparatory Council documents were not as relevant as they are in the eyes of practitioners, it would also not make much sense to withhold them from public scrutiny during the actual decision-making process; cf. *inter alia* Curtin 2000: 19, Laver and Garry 2000.) Compared to the pre-Amsterdam era during which policy researchers often had to rest their case on potentially biased and inter-subjectively non-falsifiable interview data with a handful of government officials, this is a huge step forward for empirical research on decision-making processes in the Council. In order to enable a critical evaluation of my interpretation of the historical record, I have made all of my primary sources electronically available to the research community by means of so-called hyperlinks.[6]

I could have, of course, additionally carried out several rounds of semi-structured interviews with dozens of actors in each and every case in order to control the authenticity of the documentary record.[7] In light of the fact that expert interviews with busy civil servants and politicians in Brussels and elsewhere are comparatively costly, potentially unrewarding and difficult to arrange in practice, especially if one is tracing a decision-making process that has been

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recommendable to check the English translation against the original language version of the document since "the devil often lies in the detail."

[6] Even if the relevant article has been published in a traditional outlet not allowing for the inclusion of hyperlinks, the interested reader can still access my sources either by resorting to the appropriate ARENA pre-print or by manually navigating through a designated section of the ARENA website; see either www.arena.uio.no/publications/ or www.arena.uio.no/sources/jpa/.

[7] Since the production of official documents by the Council Secretariat is a practical necessity for hammering out collectively binding rules in Brussels, any apparent mismatch in this context would indicate that several or all delegations were legislating on the basis of erroneous information. A theoretically plausible explanation for the internal dissemination of deliberately misleading Council documents would be the active involvement of corrupt Council Secretariat officials. Even under these circumstances, however, it is very hard to imagine that such

concluded more than a year ago (cf. Lilleker 2003), I pragmatically decided to resort to such interviews only if the otherwise long and detailed "paper trail" had suddenly ceased to provide theoretically intelligible information. (This was notably the case with respect to the final round of intergovernmental consultations relating to the Dublin II Regulation.)

In retrospect, I would maintain that my principal reliance on Council records was an empirically satisfactory solution to the research problem at hand:

> The chances of arriving at a true belief increasing with the amount of evidence, it might appear that the search for truth is self-defeating, since a [political] scientist committed to it would have to go on collecting evidence forever, always postponing the formation of a belief. … [The] rational response is to restate it as one of finding 'satisfactory' levels of [empirical evidence] (Elster 1983: 17).

3.2.3 The Dublin II Regulation

The negotiation of the Dublin II Regulation analyzed in the article, "The Mechanisms of Consensus: Coming to Agreement on Asylum Policy" (Aus 2007b) reveals a sequential ordering of the logic of consequentiality and the logic of appropriateness in the JHA Council. The intergovernmental decision-making process leading towards the formal adoption of this legislative act was characterized by a phase of instrumentally rational bargaining within the relevant Council working groups followed by a phase of value-rational adherence to informal rules and standards of appropriate behavior.

Delegations' unanimous approval and subsequent enforcement of the Commission's legislative proposal would have had strong redistributive effects on the number of refugees received and asylum applications processed by individual Member States. National representatives' awareness of the likely redistributive impact of the draft Regulation, in turn, set the stage for a non-cooperative "zero-sum game" unfolding in the shadow of the unanimity requirement. Under the

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unlawful practices by Council Secretariat officials would go unnoticed by Member States' governments.

assumption that all delegations acted solely on the basis of a calculation of national advantage, and that the issue at hand could not be connected with substantively unrelated issues, intergovernmental negotiations would have resulted in political deadlock: at least one national government would have preferred non-agreement over agreement.

The actual negotiations preceding the formal adoption of the Dublin II Regulation largely match the game-theoretically sensible dynamics of non-cooperative distributive bargaining. For a relatively long period of time, delegations simply could not agree on the hierarchy of criteria for considering asylum claims, i.e. on the substantive core of the proposed Regulation. Whereas asylum transit countries wanted to assign the formal responsibility for considering asylum applications to the Member State in which the application is actually lodged, asylum destination countries advocated the "principle of first contact" with EU soil as the procedural core of the Common European Asylum System. During the final round of the decision-making process, however, delegations unanimously endorsed a hierarchy of criteria which effectively shifted the burden of refugee protection to selected Southern European countries and to future EU Member States in Central and Eastern Europe. The rules laid down by the Dublin II Regulation now constitute "the core element" or "the heart of the EU asylum system" (Lavenex 2006: 1294, 1296).

This legislative outcome represents a Rationalist "puzzle." A possible, albeit not entirely convincing, way to account for this outcome within a Rationalist framework is to draw on the notion of "diffuse reciprocity." As a matter of fact, we do find some empirical evidence for delegations' attempts to connect the (immediate) issue of peripheral Member State responsibility for considering asylum claims with (future) EU action on illegal immigration and external border control. Alternatively, one may reasonably conclude that individual Member States' governments were acting in accordance with the concept of "strategic non-compliance." The most recent figures made available by the Commission's services strongly support my earlier finding that the Greek authorities in particular

were, and still are, systematically undermining the Dublin II Regulation in administrative practice. In light of the extremely unfavorable Greek ratio of 58:1 with respect to incoming vs. outgoing "transfers" of asylum seekers in 2005, however, this non-cooperative behavioral pattern is hardly surprising. The equivalent Icelandic ratio, by contrast, stood at 1:19 (Commission 2007: 50).

From an Institutionalist point of view, on the other hand, the Dublin II case suggests that delegations were (at least during the final and politically decisive phase of the decision-making process) following Council-specific informal rules and procedures. The important role of the so-called informal written procedure for coming to agreement in the Council is a case in point. Such Council-specific procedural devices employed by the Presidency and the Council Secretariat, and the standards of appropriate behavior associated with them, respectively, apparently constitute "a counter-weight to specific and more egotistic preferences," to borrow the words of Fiona Hayes-Renshaw and Helen Wallace (1997: 257). Institutionalized consensus norms and informal decision-making procedures designed to foster unanimous political agreements, in other words, seem to explain why "some dogs do not appear to bark" (Hayes-Renshaw and Wallace 2006: 286). Individual and politically isolated members of the Council arguably decided not to exercise their formal right to veto simply because they were trying to do what they were supposed to do as ordinary members of the Council, namely to keep the Council's legislative agenda moving forward.

One may reasonably conclude that a strong reluctance on the part of Council members to exercise their right to veto, informal decision-making procedures, and indirect issue-linkage were jointly sufficient conditions for coming to agreement on the Dublin II Regulation. Furthermore, one may conclude that the European Council's practice of fixing a deadline for the formal adoption of the Regulation facilitated the process of reaching an early agreement in the JHA Council. The domain of application of the logic of consequentiality, then, seems to be confined to the first stage of the decision-making process, whereas the logic of appropriateness seems to have prevailed during the second and final stage.

3.2.4 The Eurodac Regulation

The article, "Eurodac: A Solution Looking for a Problem?" (Aus 2006a) accounts for the institutionalization of the first Automated Fingerprint Identification System (AFIS) operated by the European Community. As of 2003, the Eurodac system has processed the fingerprint data of all registered asylum applicants and apprehended irregular border-crossers in the EU and Schengen-affiliated third countries. From a legal point of view, Eurodac represents a Community instrument for the effective enforcement of the Dublin II Regulation analyzed in section 3.2.3 above.

The negotiation of the Eurodac Regulation – initially in the framework of the Schengen Executive Committee and later in the JHA Council – was primarily driven by a police-specific line of reasoning: relatively resourceful executive actors within the Schengen group viewed the collection, storage and comparison of fingerprints for identification purposes, i.e. the application of a police-specific standard operating procedure, as an appropriate legislative and operational response to organized illegal immigration and "asylum shopping" in an area of free movement of persons. However, the decision-making process also reflected national governments' variable ability to shape the substantive profile of the Schengen *acquis* shortly before the entry into force of the Treaty of Amsterdam.

The Eurodac Regulation was formally adopted by the Council of the EU in December 2000. Even though the Eurodac database was thus brought about by an EU institution legislating on behalf of the European Community (the Eurodac Regulation was, in fact, the first EC Regulation ever adopted in the field of Justice and Home Affairs), its political origins lay in the intergovernmental Schengen regime. The Schengen regime and its legislative *acquis,* in turn, were formally incorporated into the EU on May 1, 1999. (In organizational terms, the institutional changes described above implied that the Schengen Executive Committee was replaced by the JHA Council, and that the staff of the Schengen Secretariat became employed by the Council Secretariat.)

A closer look at the dynamics of intergovernmental decision-making during the Maastricht era shows that delegations' work on the technical feasibility of the supranational database preceded a thorough discussion of Eurodac's political objectives and personal scope. Once the technical viability of establishing a transnational AFIS had been confirmed by a group of undisclosed experts (a positive assessment, that is, which was presumably recommended by commercial AFIS providers like the Steria Group), the Eurodac-related legislative proceedings were decisively influenced by the Schengen group's *ad hoc* response to the refugee crisis of 1997-98. During this humanitarian crisis, thousands of ethnic Kurds from war-torn northern Iraq and south-eastern Turkey crossed the external borders of the EU in an irregular fashion.

It soon emerged that selected members of a hastily convened Schengen Task Force suspected that the Kurdish refugees and their helpers were planning subsequent "secondary movements" within the Schengen area. An important enabling factor for such "secondary movements" to occur in practice was that the internal border controls between the Benelux countries, Germany, Portugal and Spain had been lifted in the summer of 1995. (France, however, still upheld its internal border checks vis-à-vis Belgium and Luxembourg by invoking a Schengen-specific "safeguard clause.") The prospect of "secondary movements" from Italy to Germany via Austria etc. on the part of undocumented migrants and would-be asylum applicants was also evaluated in the context of the planned elimination of internal border controls between the "hard core" Schengen countries, on the one hand, and Austria and Italy, on the other, envisioned for April of 1998.

The "old" Schengen members in general and Germany in particular essentially adopted a "carrot and stick" approach vis-à-vis Austria, Italy and Greece. In spite of a two-year delay for Greece, the latter countries' full accession to the Schengen space was achieved by securing their explicit political support for the Schengen Executive Committee's decision of April 1998 "[to fingerprint] every foreign national entering the Schengen area illegally whose identity cannot

be established with certainty" (Aus 2006a: 8) and to exchange these biometric data with other Schengen governments. The asylum-related parts of the draft Eurodac Regulation were drawn up in this spirit and subsequently "frozen in" by the German Presidency of the Schengen group in December of 1998. Likewise, a supplementary protocol on extending the personal scope of Eurodac to irregular border-crossers and illegal residents was "locked in" by the German Presidency of the JHA Council in March 1999. The Commission's proposal of May 1999 for an ordinary EC Regulation merely reproduced the outcomes of these German-led substantive discussions.

All of the above illustrates the empirical validity of yet another type of sequential ordering with respect to the logics of appropriateness and consequentiality: while the Institutionalist notion of a police-specific "solution looking for a problem" (cf. *inter alia* Cyert and March 1992: 170) seems to capture the initial phase of the decision-making process, the subsequent and largely successful use of Schengen-related "carrots and sticks" vis-à-vis Italy and other Schengen accession countries appears to reflect the self-interested "moves" of strategically calculating "players."

Since it can help us to gain a clearer picture of this case, I would like to highlight a number of important Eurodac-related developments during the German EU Presidency in the first half of 2007. These recent events suggest a radical departure from Eurodac's current legal framing as an exclusively asylum-related instrument which does *not*, in spite of the participation of Norway and Iceland, constitute a further development of the Schengen *acquis* in general and of Schengen's provisions on policing in particular. (The official denial of the "Schengen-relevance" of Eurodac cannot conceal the fact, however, that the establishment of the biometric database was closely connected with the Schengen-based fight against transnational organized crime in an area without internal frontiers.)

During the last formal JHA Council meeting under the German EU Presidency in June 2007, the German Ministry of the Interior reached an

intergovernmental consensus on what it had demanded for many years (cf. Aus 2003a: 20), namely to open up Eurodac for general police and counter-terrorism purposes. While these plans had already received the political blessing of the G6 group of interior ministers in March 2006 (cf. Aus 2006b: 34), a formal proposal promoting this idea in the framework of the JHA Council was tabled by the incoming German Presidency in December of 2006. The German delegation to the Police Cooperation Working Party justified its stance by arguing that "the biometric information contained in Eurodac may be the only information available to identify a person suspected to have committed a crime or an act of terrorism" (Council 2006: 1). Even though the possibility of generating a crime-related "hit" by searching the Eurodac database cannot be ruled out, of course, it had also been critically noted that

> the claiming of asylum [does not indicate] in any way that a hitherto innocent individual will commit [or has committed] a criminal or terrorist act. [Whilst] the storage of personal data in criminal databases is justified due to past and real or suspected behaviour of the individual (which must be substantiated), this is not the case for EURODAC ... (Commission 2005: 10).

In spite of such political ambiguities, the JHA Council as a whole ultimately supported the German government's initiative. In effect, the Council of Ministers formally called upon the Commission's services

> to present as soon as possible a proposal ... to amend Council Regulation (EC) No. 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' to enable Member States' police and law enforcement authorities as well as Europol to have ... access to Eurodac ... in the course of their duties in relation to the prevention, detection and investigation of terrorist offences and other serious criminal offences (Council 2007b: 2).

Unless the European Parliament should be willing and able to reject the Commission's forthcoming proposal, the Eurodac saga will continue along the police-specific lines of reasoning summarized above.

3.2.5 The Biometric Passports Regulation

If the Eurodac Regulation of 2000 prescribes the biometric enrollment of asylum applicants and apprehended irregular border-crossers, the Biometric Passports Regulation of 2004 demands a similar treatment for ordinary EU citizens: by July 2009 at the latest, newly issued EU citizens' passports must contain a machine-readable digital photograph of the passport holder and two of his or her fingerprints. The article, "Decision-making under Pressure: The Negotiation of the Biometric Passports Regulation in the Council" (Aus 2006b) traces the largely JHA Council-based decision-making process by which this legislative state of affairs was brought about.

The introduction of biometric passports in Europe and elsewhere is essentially a byproduct of the Bush Administration's response to the terrorist attacks of September 11, 2001 in the United States. In light of the shocking events of "9/11," the newly established Department of Homeland Security (DHS) came to view biometrics as a socio-technological means "to identify and find individual terrorists" (Aus 2006b: 11; cf. *inter alia* Aus 2003b). By 2004, the DHS was operating U.S. VISIT, a border control and domestic surveillance system for the automated comparison of foreign nationals' biometric data against terrorist watch lists and criminal databases. Beyond that, the Republican-dominated U.S. Congress had passed legislation requiring all nationals of so-called visa waiver countries (including most of the "old" EU Member States) either to acquire a biometric passport by October 26, 2004 or to apply for a biometric visa in order to gain lawful access to the United States.

As it turned out, the European Community would fully comply with the (ultimately globalized) U.S. requirement to store at least a digital photograph of the passport holder in Schengen-made biometric passports. This was the most important signal sent out by the interior ministers and Commissioner Vitorino at the last JHA Council meeting under the Irish Presidency on June 8, 2004. The timing of the Union's message was vital since the U.S. Congress was simultaneously discussing a possible extension of the October 26, 2004 deadline

for visa waiver countries. (While pushing hard for the introduction of biometric passports in Europe and elsewhere, the Americans also showed some flexibility by granting two one-year extensions to their friends and more or less reliable European allies in the global "war on terror.") The JHA Council's timely decision of June 2004, in short, ensured the continuation (or, with respect to the "new" EU Member States, at least the long-term prospect) of visa-free travel from the EU to the U.S. and vice versa.

At the JHA Council meeting of October 26th, however, the interior ministers broke with the political agreement reached on June 8th. As indicated above, the Council of Ministers now also called for the mandatory collection of EU citizens' fingerprints. How did this sudden policy shift come about, and what was its underlying rationale?

The JHA Council's political U-turn (signed into law by the General Affairs Council in December following the substantively immaterial consultation of the European Parliament) cannot solely or even primarily be attributed to American pressure. After all, the world's singular military "superpower" and U.S.-dominated international organizations like the International Civil Aviation Organization had merely demanded the introduction of biometric passports containing a digital photograph of the passport holder. Instead, the Council's decision of October 26th originated in the JHA Council's Visa Working Party and higher-ranking intergovernmental bodies, including the Permanent Representatives Committee (COREPER).

The Visa Working Party had already paved the way for the mandatory incorporation of fingerprints into Schengen-made biometric visa and residence permits for third country nationals. During the drafting phase of the subsequently discussed Biometric Passports Regulation, relatively influential members of this working group, namely the representatives of France, Germany, Italy, Spain and the UK, advocated that Community rules on passport applicants should not deviate from Community rules on visa applicants (and asylum applicants, one may add with respect to the Eurodac Regulation). The relevant government officials,

in other words, simply reasoned by analogy. This line of administrative reasoning was, to be sure, a viable way to deal with the Commission's logically inconsistent legislative proposal. The Commission had, in fact, refrained from suggesting the mandatory collection of EU citizens' fingerprints while also recommending the establishment of a "centralized, biometrics-based 'EU passport register' which would contain the fingerprint(s) of passport applicants, ... enable background searches (one-to-many) [and thus] create the beginning of true 'end-to-end' security" (Aus 2006b: 21).

Even though the "hawkish" demands voiced by the British, French, German, Italian and Spanish delegations as of March 11th did not find the immediate approval of the Council in general and of the Nordic delegations in particular (which was also not necessary for sending out a timely signal of EU compliance to the U.S. Congress on June 8th), they were ultimately unanimously endorsed by the interior ministers of the Schengen group. (In contrast to the full participation of the non-EU Schengen members Iceland and Norway, both Ireland and the UK were not even allowed to "opt-in" to the Biometric Passports Regulation.) The seemingly decisive factor in this somewhat messy intergovernmental context was the active involvement of the G5 group of interior ministers of France, Germany, Italy, Spain and the UK. The coordinated policy stance of the "big five" (or rather of the "big four" steering the Schengen group) explains both the unconventional re-opening of negotiations as of September 28th and the substantive profile of COREPER's "general approach" of October 14th. Lending support to the package deal struck by the Mixed Committee at Senior Officials level (a negotiated compromise, that is, which essentially entailed a three-year delay for the administrative enforcement of the fingerprinting requirement), the G5 leaders publicly declared that they had "decided upon" the mandatory inclusion of fingerprints on October 18th. The JHA Council presided over by the Netherlands, in turn, more or less consciously approved of the G5's decision and/or COREPER's compromise solution on October 26th.

All of the above suggests the empirical validity of a theoretically highly demanding "both/and" argument, namely that the negotiation of the Biometric Passports Regulation in the Council was at times simultaneously driven by strategic calculation and rule following.

With respect to the domains of application of the latter, March and Olsen generally claim that "tight deadlines [are] likely to promote rule following rather than the more time- and resource-demanding calculation of expected utility." They also argue that "rules of appropriateness are likely to evolve as a result of accumulated experience." Last but not least, they believe that "protracted conflicts [tend] to generate demands for compromises and constitutive rules that can dampen the level of conflict" (March and Olsen 2006a: 704). All of the scope conditions discussed by March and Olsen in general terms were also present in the case at hand: the tight deadline imposed by the Americans resulted in comparatively ill-conceived EU action on biometric passports in general and in the JHA Council's subsequently reversed decision of June 8th in particular. Secondly, the Visa Working Party's accumulated experience with designing biometric visa for third country nationals led to a similar design for EU citizens' biometric passports. (The underlying rationale for the mandatory incorporation of fingerprint biometrics into visa and passports, in turn, was a police-specific one, since only fingerprints can be used for "one-to-many" checks in criminal databases, i.e. for identification rather than verification purposes.) Thirdly and lastly, the permanent representatives had once again done what they were supposed to do by hammering out a compromise which prevented a breakdown of negotiations and/or an open confrontation between the ministers at the decisive JHA Council meeting on October 26th.

As to biometric passports and strategic calculation, one may reasonably concur with former German interior minister Schily's assessment that Germany (alongside France, Italy and Spain) was "the pacemaker of EU policy with respect to biometric passports and thus also in relation to security" (Schily 2005: 9; translation JPA). The Germans and other Schengen-affiliated "pacemakers" within

the G5 effectively "moved first" in regard to the choice of mandatory biometric identifiers in EU citizens' passports. "First mover" strategies and "bandwagon" effects on other "players" are not unusual in "Battle-of-the-Sexes" games above the nation-state concerning the harmonization of technical standards. The documented fact, however, that the G5 "heavyweights" rather than Estonia, for example, managed to achieve their preferred legislative outcome suggests that the JHA Council can be a bit "like 'Animal Farm', in which 'some are more equal than others,'" to borrow the words of Dutch finance minister Wouter Bos (quoted in *The Economist* of July 14, 2007, p. 34). However one may feel about the exercise of coalitional bargaining power by comparatively large states, the practice itself can evidently determine a collective choice between multiple equilibria.

3.2.6 The Facilitators Package

Fourthly and finally, the essay, "Crime and Punishment in the EU: The Case of Human Smuggling" (Aus 2007c) traces the parallel negotiation of Framework Decision 2002/946/JHA and Directive 2002/90/EC on criminal law sanctions against human smugglers. The intergovernmental decision-making process leading towards the formal adoption of the Facilitators Package in November 2002 was characterized by a sequential ordering of the logics of appropriateness and consequentiality.

The Council's initial adherence to the logic of appropriateness unfolded under the following circumstances.

On June 18, 2000, border control officials in Dover detected a group of around sixty undocumented migrants in the back of a sealed truck. Nearly all of them were dead. The Chinese migrants had died in a failed attempt to smuggle them from the Netherlands via Belgium to England, i.e. out of the Schengen area and into the UK.

The Dover incident motivated numerous European politicians to express their "deep shock" in press releases and elsewhere – and to call for "severe sanctions" against the perpetrators of this "despicable crime." The members of the

European Council in particular wished to "defeat" the criminals responsible for the Dover tragedy (*ibid.*, p. 26).

The European Council's passionate reaction to the "deaths in Dover" was immediately translated into a legislative proposal by the incoming French Presidency. The political purpose of this (subsequently thoroughly revised) French initiative of June 19th was to "demonstrate a common political will" of the EU, namely that the united executives of Europe were willing and able to

> combat the facilitation of illegal immigration, whether this is merely assistance provided in crossing borders or whether it is connected to other forms of exploitation of human beings such as prostitution, exploitation of children or undeclared work (*ibid.*, p. 29).

The logic of appropriateness gradually gave way to the logic of consequentiality once the hastily drawn up French proposal had become the subject of detailed scrutiny by the JHA Council's Working Party on Substantive Criminal Law and other preparatory intergovernmental bodies. Reflecting the cooperative dynamics of a "weakest-link Stag Hunt game," national delegations were generally willing to work on both the precise legal definition of human smugglers and on the level of more or less harmonized penal sanctions against them for the sake of ensuring "a high level of safety" (article 29 of the EU Treaty) throughout the Union. The substantive problem giving rise to the non-cooperative dynamics of this "Stag Hunt," however, was that the Member States had variably strong interests in harsh criminal law sanctions against human smugglers, and apparently no interest whatsoever in a single First Pillar instrument instead of a cross-pillar legislative package. (The Council's preference for a Third Pillar instrument for the enforcement of First Pillar rules was fiercely criticized by the Commission's services who actively participated in the Council's legislative proceedings, indicating that the "Stag Hunt game" within the Council became increasingly intertwined with an "institutional power game" between the Council and the Commission.) Apart from the "legal basis" issue raised by the Commission, these intergovernmental tensions reflected the variable extent to

which individual Member States were actually affected by organized illegal border-crossings and/or irregular secondary movements on the part of would-be asylum applicants. The problem of human smuggling was evidently much more pressing and politically salient in Britain and France than in Finland and Iceland, for example, and the relevant government officials accordingly promoted either a "hawkish" or a "dovish" approach.

By the end of May 2001, the JHA Council had reached a political agreement, meaning that the ministers formally endorsed a compromise solution hammered out by the JHA Counselors group and the Permanent Representatives Committee. This intergovernmental compromise allowed for divergent interpretations of, and national derogations from, the new rule of imposing a maximum sentence of not less than eight years of imprisonment against particularly ruthless human smugglers. The Council's political agreement, in other words, made room for downward national adjustments to the eight-year "minimum maximum sentence" and for the optional exemption of asylum seekers and their helpers from criminal prosecution.

All of this had been made possible by the Swedish Presidency. Sweden had, in fact, worked very hard to reach a political agreement on the facilitators package during its tenure. The political agreement reached at the last JHA Council meeting under the Swedish Presidency may not have contributed much to strengthening the "weakest links" in the emerging internal security architecture of EU-Europe. However, the Swedish government had at least managed to finalize the (inherited) legislative dossier in compliance with the European Council's political wishes and in accordance with the Council-specific consensus-gathering approach.

The case of the Facilitators Package also sheds light on the willingness and ability of national parliaments to considerably delay the formal adoption of legislative measures by the JHA Council. As a matter of fact, selected national parliaments sensed a flagrant violation of the institutionalized rule of appropriate parliamentary scrutiny in this case. They therefore temporarily denied their

executive counterparts in the Council the right to formally approve of the relevant legislative items. Certain delegations' inability to quickly withdraw their "parliamentary scrutiny reservations" effectively prevented the formal adoption of the Facilitators Package by the Council for nearly one and a half years, i.e. until November of 2002.

Last but not least, the Commission employed all means at its disposal to drum up support for its self-interested and initially counterfactual legal assessment that the EC (rather than the EU) was competent to impose criminal law sanctions *inter alia* against facilitators of illegal immigration. To the Council's surprise and predicament, the European Court of Justice ultimately sided with the Commission for reasons of legal coherence and consistency. The Court's judgment in the "Commission vs. Council" case of September 2005, in turn, implied at least a partial transfer of criminal law competencies from the Third to the First Pillar. Unless the Court should decide to back off from its own jurisprudence (which would be rather unusual), the Framework Decision on Human Smuggling is legally "null and void," meaning that the cross-pillar Facilitators Package will almost certainly be replaced by a single Community Directive in the near future.

3.3 Scope Conditions of the Logics of Appropriateness and Consequentiality in the JHA Council

In section 3.2 above, I summarized the relative importance of the logics of appropriateness and consequentiality in the specific context of the Dublin II Regulation, the Eurodac Regulation, the Biometric Passports Regulation and the Facilitators Package, respectively. A shorthand for my case-based findings is that I observed three different sequences of the logic of appropriateness (A) and the logic of consequentiality (C) in the Council: $C \rightarrow A$ (in case of the Dublin II Regulation); $A \rightarrow C$ (in case of the Eurodac Regulation); and $A \rightarrow C \rightarrow A$ (in case of the Facilitators Package). The causal configuration of the Biometric Passports Regulation does not match with the sequencing pattern, however. The relatively complex causal mix of this case may be noted as $A \cap C$, meaning that

the negotiation of this Regulation was marked by an intersection of the two logics of action, i.e. by a unique causal conjuncture of rule following and strategic calculation.

All of these observations are arguably interesting in themselves for theoretically oriented students of decision-making processes in the JHA Council – not only because they allow us to understand an important set of rules governing the emerging Area of Freedom, Security and Justice, but also because they lend empirical support to March and Olsen's conjecture that "[political] action generally cannot be explained exclusively in terms of a logic of either consequences or appropriateness" (1998: 952). If my case studies should prove to be sufficiently robust in empirical terms, then I have, at a minimum, successfully demonstrated that March and Olsen's presupposition cited above tends to hold true in regard to politically significant, Council-based legislative action in the domain of EU Justice and Home Affairs.

Of perhaps even greater interest to the reader of this summary, however, are the conditions under which the logics of consequentiality and appropriateness were (either sequentially or simultaneously, but never exclusively) invoked in the JHA Council setting. Empirically grounded knowledge of such conditions should be of particular interest to model-builders attempting to bridge the Rationalist-Institutionalist divide in political science and contemporary European Studies.[8]

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[8] Methodologically speaking, the identification of *particular* conditions triggering the social mechanism of rule following or strategic calculation must, of course, logically precede an optional comparative analysis of empirically relevant *combinations* of causal conditions. Carrying out this supplementary exercise by means of Boolean methods and the like would go beyond the research objectives of this summary. I would like to emphasize at this point, however, that I fully subscribe to Charles C. Ragin's methodologically conservative assessment that "what makes a certain feature [or condition] causally relevant in one setting and not in another is the fact that its causal significance is altered by the presence of other features – that is, its effect is altered by context" (1987: 48). The scope conditions mentioned below, in other words, may not necessarily be sufficient but only jointly sufficient in combination with other conditions in order to trigger the social mechanism of rule following or strategic calculation; cf. Zürn and Checkel 2005: 1055 for a deterministic stance largely ignorant of possible interaction effects.

Let me begin this discussion with an empirically grounded synopsis of the scope conditions of the logic of appropriateness in the JHA Council.

3.3.1 Scope Conditions of the Logic of Appropriateness

Internal Security Crises. Monica den Boer once noted that "the impact of internal security crises (the Dutroux-case in Belgium, the 11th of September attacks, and lately the bombings in Madrid) on the EU is very strong" (2004: 2). Den Boer did not describe in any detail how internal security crises influence the EU agenda, nor did she explain this politically remarkable phenomenon. In order to push this JHA-specific research frontier a step forward, the following paragraphs will suggest that internal security crises tend to invoke the logic of appropriateness. Furthermore, I will argue that the logic of appropriateness tends to be invoked during the early stages of such crises because of the professional inclination of top politicians like former interior minister Nicolas Sarkozy to publicly display their willingness and ability to exercise strong political leadership in the face of heightened media attention and perceived or real threats to homeland security.

Internal security crises may be understood as performance crises for the police and judicial authorities, i.e. as instances of negative feedback indicating that existing policies and administrative routines in the domains of counter-terrorism, organized crime and so forth have spectacularly failed. A theoretically viable political response to a performance crisis is to analyze what went wrong and why it went wrong, and to introduce legislative and/or administrative changes that are likely to fix the problem at hand or the system at large. In short-lived political practice, however, internal security crises are also opportunities to demonstrate that no wheel shall go unreinvented. On the political level, in other words, internal security crises tend to trigger symbolic affirmations of existing rules, standard operating procedures and structures of meaning:

> Core values and proven methods become anchors in stormy seas; crisis is not a time for exploring new options that pay off in the long run only. ... Successful crisis leaders restore political confidence in the effectiveness of pre-existing policies and institutions (Boin and 't Hart 2003: 549-50).

When an interior or justice minister tries to meet the demands of his professional role in times of crisis, he instinctively subscribes to March and Olsen's dictum that "confessions of impotence are not acceptable; leaders are expected to act" (1989: 90). Political leaders who successfully demonstrate their willingness and ability to act resolutely and rapidly in the face of "threats to the basic values they [have] sworn to uphold" (Stern 2003: 2) can potentially increase their charismatic appeal in relation to other politicians (see Pillai 1996 for laboratory confirmations of this effect). What an interior or justice minister is *not* supposed to do in a situation like this, on the other hand, is to publicly declare that the rules he had authorized, and/or avoidable mistakes on the part of the security forces under his control, were responsible for the tragic death of dozens or hundreds of people. According to the empirically informed opinion of the crisis researchers Arjen Boin and Paul 't Hart, the latter type of self-criticism "amounts to political hara-kiri" (2003: 548). Citizens and the mass media expect political leaders to rise to the occasion – or to give up their public office.

This variant of rule following manifested itself very clearly in the Facilitators case: the Dover tragedy of June 18, 2000 triggered a passionate and ad hoc reaction *inter alia* on the part of the heads of state or government. Symbolic affirmations of the Union's willingness and ability to exercise effective control over its borders by any means necessary were more important in this context than a careful review of EU policies in the domains of asylum and immigration as suggested by the Commission. (The Commission's services, to be sure, fully understood but did not necessarily share the electoral concerns of selected national governments.) Elements of shock and zeal invoking the logic of appropriateness on the highest political level were also present in the Passports case, at least with respect to the Bush Administration's reaction to the devastating terrorist attacks of September 11, 2001 and in regard to the European Council's response to the Madrid bombings of March 11, 2004. With a view to the Eurodac case, the Schengen Executive Committee's ad hoc reaction to the refugee crisis of 1997-98 displayed similar traits.

All of the above does not rule out that another team adhering to the logic of consequentiality may take over once politically significant decisions have been made in accordance with the logic of appropriateness. In fact, this is precisely what we observe in the Facilitators case (cf. section 3.2.6 above). If it is indeed possible to empirically associate (all other things being equal) the logic of appropriateness with important decisions on the political level and the logic of consequentiality with minor refinements on the administrative level, then one may reasonably stipulate the following:

> [In the event of an internal security crisis in the EU calling for an immediate political impetus by the European Council and/or the JHA Council,] rules are seen as the precondition of calculation and the unfolding of consequential rationality. Only after important sources of contingency have been resolved by rules are the remaining (relatively minor) contingencies susceptible to resolution by deliberate rational calculation of alternatives (March and Olsen 1998: 953).

Tight Deadlines. As Gary Klein (1993) and others have demonstrated, tight deadlines tend to promote rule following, and decision-making under time pressure is essentially a non-analytic pattern-matching process.

The recognitional nature of decision-making under pressure was particularly evident in regard to the Irish Presidency's (successful) efforts to meet the U.S. deadline in the Biometric Passports case. In case of Eurodac, the forthcoming accession of Austria and Italy to the Schengen space facilitated the reproduction of Schengen-specific operational blueprints vis-à-vis irregular border-crossers and would-be asylum applicants. Likewise, the European Council's deadlines or political interventions in the Dublin II and Facilitators cases motivated the JHA Council to order its subordinate bodies to speed up the process of reaching early agreements on the two legislative files – with all that that entailed for the careful weighing of policy alternatives.

Paradoxically, all of this hurry caused a considerable delay in the Facilitators case (at least with respect to the formal adoption of the legislative package) due to selected national parliaments' value-rational defense of the principle that legislative measures in the domain of EU criminal law must live up to appropriate parliamentary scrutiny. (This inter-institutional interaction effect, one may note in passing, is probably not well understood by the members of the JHA Council and European Council.)

Accumulated Experience and Competency Traps. March and Simon (1993) once remarked that law enforcement agencies may regard criminalizing an activity as the obvious way of eliminating it. This police-specific line of reasoning is a variant of the popular saying, "If the only tool you have is a hammer, you tend to see every problem as a nail."

A standard and technologically more and more refined police tool is, of course, the collection, storage and comparison of fingerprints. The idea of applying this police-specific solution to a new set of political problems strongly influenced both the Eurodac and Biometric Passports cases. The dynamics of experience-based social action also manifested themselves in the Facilitators case, at least with respect to the path-dependent development of the Schengen *acquis* on human smuggling.[9]

Inadequate Resources. On July 30, 2007, Lorenzo Cesa, the leader of the Union of Christian Democrats in Italy, reportedly responded to the resignation of one of his deputies over a scandalous liaison with a prostitute in Rome by demanding a "family reunion stipend" for Italian members of parliament since "loneliness is a very serious thing" (quoted in *TIME* magazine of August 13, 2007, p. 37). Mr. Cesa's political demand might seem preposterous to the non-Latin observer, but it is rather typical of the way that civil servants tend to deal with a perceived or real

[9] For further reading on accumulated experience and the logic of appropriateness, see *inter alia* Börzel 2002: 230.

lack of resources. The standard administrative response to a lack of money, personnel or equipment for the effective enforcement of national or supranational rules is not to question the rules as such, but to request additional resources.

I have documented this line of reasoning in the Dublin II, Eurodac and Facilitators cases, i.e. with respect to the demand for additional resources in the fields of asylum, immigration and external border control. These demands, in turn, reflected the execution of selective enforcement and regularization programs *inter alia* in Greece, Italy and Spain. (My cases do not cover the JHA-related enforcement record of Romania, for example, but we may reasonably assume similar practices in this particular country and other newly acceded Member States.) The Passports case may also be subsumed under this category, since the "general approach" hammered out by COREPER was essentially geared towards extending the timeframe for the administrative enforcement of the fingerprinting requirement. The Biometric Passports case, in other words, sheds light on an alternative way to deal with administrative overload, namely to simply postpone the relevant task.

Contradictory Rules and Institutional Collisions. The logic of appropriateness may also be invoked in a typically legal fashion if the rule in question turns out to contradict or collide with other rules and thus seems to call for legal systematization efforts.

The Facilitators case has shown that overlapping, inconsistent or contradictory sets of EU rules can, subject to the active involvement of legal professionals like the members of the Council Legal Service, trigger fateful legal battles between EU institutions. The spectacular judicial resolution of the "Commission vs. Council" dispute should not conceal, however, that the Eurodac case displayed similar dynamics, at least with respect to the struggle between the Council and the Commission over implementing power.

We have also learned that the negotiation of both the Dublin II Regulation and the Facilitators Package was accompanied by serious clashes between the

Council of the EU and the UNHCR over the potential violation of the human right to seek and to enjoy asylum from persecution. The human rights relevance of the JHA Council's legislative proceedings was also demonstrated by the apparent infringement of the UN Convention on the Rights of the Child in the Eurodac case, and by the violation of the human right to privacy in both the Eurodac and Passports cases. Again, such contradictions may be resolved by elaborating a hierarchy of rules (which, in the JHA Council context, tends to give precedence to the EU rule simply because an EU rule is clearer than a non-EU rule. For further reading on prescriptive clarity, see March and Olsen 1998: 952; 2006a: 703).

Last but not least, the incorporation of the Schengen *acquis* into the legal order of the EU in 1999 resulted in a geographically diverse patchwork of EU rules relating to the free movement of persons in Europe. The Council Legal Service might have a clearer picture of the geographical confines of the Area of Freedom, Security and Justice, but I suggest that many EU citizens will find it rather confusing that the Biometric Passports Regulation cannot apply in the UK and Ireland but must be enforced in Norway and Iceland, for example. The European Court of Justice will probably clean up this Schengen-related legal mess in due course. Individual Member States' governments, however, might not feel very comfortable with the end result of this judicial process.

Institutionalized Consensus Norms and Horizontal Coordination. Sixthly and finally, I observed empirical manifestations of "the institution of consensus" (Dorothee Heisenberg) in the JHA Council. The Dublin II case, for example, lends support to the idea that the JHA Council's legislative proceedings in general and their final stages in particular are strongly influenced by a Council-specific consensus-gathering approach. The (cooperative) effects of institutionalized consensus norms were also present in the Facilitators and Passports cases.

The Eurodac case clearly deviates from this pattern. Since the main bulk of the draft Eurodac Regulation was "frozen in" by the Schengen regime, however,

this deviant case does not contradict but rather supports the notion of a "consensus reflex" in the JHA Council and/or its preparatory bodies.

From an organizational perspective, it is important to note in this context that relatively high-ranking committees like the Article 36 Committee are supposed to ensure the horizontal coordination of a wide range of legislative items scrutinized in more detail by the JHA Council's working groups. It should thus not come as a surprise that the members of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), for example, have learned to evaluate asylum-related files in conjunction with illegal immigration dossiers. The relevant practices of SCIFA and/or the JHA Counselors in the Dublin II, Passports and Facilitators contexts are cases in point. The foreign ministry affiliated ambassadors reporting directly to the justice and interior ministers are probably even more "horizontally" oriented than their (lower-ranking) colleagues from the justice and interior ministries participating in SCIFA and the Article 36 Committee. In all of these instances, however, a precondition for the politically "creative" horizontal coordination of different files is the relevant committee's insulation from domestic politics and public scrutiny.[10]

3.3.2 Scope Conditions of the Logic of Consequentiality

Redistributive Problems. The heated debate over changing the voting weight of Member State X vis-à-vis Member State Y in the Council, which nearly crippled the European Council's ability to formulate a cautious mandate for the (at the time of writing ongoing) Intergovernmental Conference on the so-called Reform Treaty, illustrates that some of the most protracted conflicts in the EU revolve around redistributive issues. The "zero sum" character of redistributive "games" (interpreted by Scharpf and others as constellations of "pure conflict") potentially leads to negotiation failure and thus to the continuation of the status quo – unless

[10] Cf. section 3.2.2 above, and Lewis 2005 on standards of appropriate behavior within COREPER. Lewis prefers the label "high issue density/intensity" to horizontal coordination. The difference between Lewis and myself may be marginal, but I would suggest that "high issue density/intensity" essentially flows from an organizing principle; cf. Egeberg 2004.

the contracting parties can strike a comprehensive "package deal." (The "package deal" on postponing the entry into force of the "double majority" voting system until 2017 in combination with a new Treaty provision on EU energy policy "in a spirit of solidarity" is a case in point.) The perhaps most obvious scope condition for the invocation of the logic of consequentiality in the Council, in short, is that the issue at hand displays redistributive properties.

The negotiation of the Dublin II Regulation on Member States' mutually exclusive responsibilities for considering asylum claims has documented the non-cooperative dynamics of such "zero sum games" played out in the JHA Council setting (cf. section 3.2.3 above). On a higher level of abstraction, the Dublin II case points to the emergence of a center-periphery cleavage in the domain of Community asylum policy. Even though the routes of irregular border-crossers and would-be asylum applicants generally lead from south to north and from east to west (an overall trend, that is, which is probably not going to change much in the foreseeable future), the advocates of the Dublin II Regulation boldly claimed that the European Community could and should reverse the direction of these flows.

The strategic objective of the government representatives of asylum destination countries like Germany was, of course, to reduce the (comparatively large) number of asylum seekers residing in their own country by shifting the burden of refugee protection elsewhere, i.e. to countries of "first contact" with the Area of Freedom, Security and Justice. Government officials of European asylum transit countries like Italy, on the other hand, naturally showed no interest in such a redistributive scheme – even though they could, of course, themselves try to shift the processing burden to third countries located further south or east via Community readmission agreements and the like. (The latter option is not always a viable one in administrative practice, however, since it obviously depends on the cooperation of third countries like Morocco and/or may encroach upon non-derogatable principles of international refugee law in general and the principle of *non-refoulement* in particular.) The active pursuit of these mutually

exclusive strategies led to prolonged legislative deadlock on the Dublin II dossier, i.e. to a situation in which at least one delegation preferred non-agreement over agreement. Delegations accordingly entered reservations on different versions of the draft Regulation from October 2001 through November 2002. The Rationalist deadlock hypothesis, in short, carries us a long way in the Dublin II case.[11]

As a Community instrument for the effective enforcement of the Dublin II Regulation, the Eurodac Regulation unsurprisingly displayed a similar pattern of executive interaction (see, however, the part on membership incentives below). While destination countries like Germany, France and the UK were and still are eager to "feed" the Central Unit with biometric data because it increases their chances of generating "foreign hits," the opposite holds true for transit countries like Greece, Italy and Spain. The Commission's services now responsible for "managing" the fingerprint database inherited this not easily "manageable" problem from the Council, and the only legislative amendments in sight relate to opening up Eurodac for police and counter-terrorism purposes.

Coordination Problems. For heuristic purposes, the constellation of "pure conflict" sketched out above in connection with redistributive problems *par excellence* may usefully be contrasted to a constellation of "pure coordination." In empirical practice, the latter constellation usually gives way to "bargaining games over the precise terms of mutually beneficial cooperation" (Moravcsik 1998: 51). Instead of expecting to witness pure coordination games to be played out in the JHA Council setting, in other words, we should be prepared to encounter so-called mixed-motive games that entail both cooperative and non-cooperative elements.

[11] I would like to emphasize at this point that redistributive "games" or processes of burden shifting above the nation-state may also give rise to calls for fairness and interstate solidarity. In light of the fact that previous intergovernmental discussions on burden sharing had not produced any concrete results, however, I refrain from elaborating any further on this line of reasoning.

The Battle-of-the-Sexes metaphor I have employed to represent the dynamics of executive interaction in the Passports case belongs to "the large class of 'games of coordination with conflict over distribution'" (Scharpf 1997: 74; see my discussion in section 3.2.5 above on facial images vs. facial images plus fingerprint biometrics as alternative, equally viable and yet politically disputed technical solutions to the coordination problem at hand). Likewise, my game-theoretical interpretation of the Facilitators case as a Stag Hunt game has much in common with a game of pure coordination – except for the fact that individual players in a Stag Hunt may, for whatever reason, also have an incentive to defect. (In this particular case, the incentive to defect or to derogate from the envisioned scheme to impose harsh penal sanctions against human smugglers and/or helpers of would-be asylum applicants stemmed from the variable degree to which individual Member States were actually affected by the substantive problem; cf. section 3.2.6 above.) Both Battle-of-the-Sexes and the Stag Hunt, at any rate, have a strong cooperative flavor since all parties involved can potentially benefit from common European rules on harmonized technical standards for interoperable biometric passports, for example. It is the perceived or real prospect of mutually beneficial policy coordination in fields like illegal immigration and criminal law in an area without internal frontiers, in other words, which can provide the members of the JHA Council with a strong incentive to choose an EU solution rather than unilateral or coalitional alternatives.

Membership Incentives and Conditionality. Frank Schimmelfennig (2005) has suggested that the social mechanism of strategic calculation may also be triggered in the context of a candidate country's accession negotiations with the EU. Schimmelfennig's argument is relatively straightforward: full EU membership will only be granted if all EU conditions have been met by the candidate country. Prospective members try to figure out whether the benefits associated with EU membership weigh heavier than the costs of adapting to the *acquis communautaire.*

As of May 1999 the EU *acquis* has included the Schengen *acquis*. That does not necessarily imply, however, that all EU Member States enjoy the benefits of unconstrained mobility and a relatively high level of safety within the Schengen area. Before being allowed to join the Schengen space, a given Member State government has to demonstrate that it has fully transposed and effectively enforced the Schengen rules on external border management, visa policy, police cooperation, and so forth. If these conditions have not been met, its nationals might be subjected to extensive border checks not unlike those applicable to third country nationals.

The Eurodac case is a good example of the impact of membership incentives and conditionality on prospective Schengen members. The Schengen group's "carrot and stick" approach towards Austria, Italy and Greece at first seemed to yield concrete results, including the collectively endorsed fingerprinting requirement vis-à-vis irregular border-crossers and would-be asylum applicants. After Austria, Italy and Greece had joined the Schengen area and the Council had formally adopted the Eurodac Regulation, however, it turned out that some of these newly acceded Schengen governments had "talked the talk," but not "walked the walk." The Greek authorities' non-cooperative practice of not sending any fingerprint data to the Eurodac Central Unit or of deliberately delaying the transmission of such data for an average period of four weeks is a case in point. The combination of pre-accession compliance and post-accession non-compliance with the Schengen *acquis*, at any rate, is strongly indicative of strategic executive behavior.

Membership incentives and conditionality also played prominent roles in the Passports case. All Member States' governments had strong interests either in maintaining their privileges under the U.S. visa waiver program or in joining this scheme at a later stage. A disruption of transatlantic travel, on the other hand, would have been very costly both in political and economic terms.

The Dublin II case may also be subsumed under this category. In this case, however, the strategic objective of the majority of "old" Member States was to

reach a political agreement on Dublin II before the ten "new" Member States would be able to participate in the relevant decision-making process in the JHA Council.

Relative Bargaining Power. Does it strengthen a government's relative bargaining power in the JHA Council if it represents Germany rather than Malta? Many people would intuitively answer this question in the affirmative. The reason why this intuitive answer is arguably the correct one even under the condition of the unanimity requirement in the JHA Council is that the relative bargaining power of a given delegation may be measured in terms of its ability to make "*credible* threats to veto, exit, and exclude other governments" (Moravcsik 1998: 52; emphasis added). Without doing injustice to Moravcsik's theoretical underpinnings, one may reformulate his argument by simply stating that some governments have access to certain political opportunity structures, while others do not (and that everyone is aware of this pattern of asymmetric interdependence in Europe).

The Passports case provides a good illustration of the impact of relative bargaining power on legislative outcomes in the field of EU Justice and Home Affairs. This not only holds true for the credible U.S. threat to exclude non-compliant EU Member States from the visa waiver program. More importantly for the JHA Council-specific topic of this study, it also holds for the very strong coalitional bargaining power of the G5 vis-à-vis Estonia and other EU countries (cf. section 3.2.5 above).

Apart from the former G5's (today's G6) successful demands to open up Eurodac for police and counter-terrorism purposes, the negotiation of the Eurodac Regulation also fits into this category. What we are looking at in this Schengen-related intergovernmental context is the relatively strong influence of Germany and France in connection with the credible German-French threat to exclude Austria and other accession countries from the Schengen space.

Likewise, the coalition *inter alia* of Germany, France and the UK in both the Dublin II and Facilitators cases lends empirical support to Moravcsik's claim that

"coalitional dynamics tend to favor large states, whose participation is necessary to [form] more viable coalitions" (1998: 64).

4. Contributions to the Research Field

Empirical Contributions. This collection of articles contributes four original case studies to the literature on decision-making in an Area of Freedom, Security and Justice. The "added value" of these case studies in empirical terms is to show how a handful of important Council decisions in the areas of asylum and immigration, police cooperation and criminal justice were actually made. Each case study draws on an extensive amount of previously non-utilized primary sources documenting the relevant legislative proceedings of the JHA Council.

Subsequent cross-case comparison has allowed the author to specify a number of empirically grounded conditions under which the social mechanisms of rule following and strategic calculation tend to be invoked in the JHA Council setting. These limited historical generalizations may be usefully employed for the purposes of theory elaboration and development (see below). At the same time, these findings provide reference points for future process-tracing exercises in this policy area.

Empirically informed knowledge of the conditions under which the members of the JHA Council tend to adhere to the logics of appropriateness and consequentiality while legislating on behalf of the EU and its citizens is important for a number of reasons. One reason is that such knowledge allows us to make sense of a substantial part of the dynamics of European political integration in the post-Amsterdam era.[12] A second reason of a more prospective nature is that the

[12] I would like to reiterate at this point that the JHA domain has probably been the most dynamic and expansive EU policy area since 1999 at the latest. This is particularly evident with a comparative view to the second EU policy area one may closely associate with the process of European political integration, namely the Union's common foreign and security policy (CFSP). The widening "gap" (Tanja Börzel) between these two policy areas manifests itself *inter alia* in the increasingly frequent use of "hard" Community measures like the Biometric Passports Regulation in the JHA area, on the one hand, and in the noteworthy absence of such instruments in the CFSP domain, on the other.

ambitious attempt to develop the vast EU territory (and the territories of Schengen-affiliated third countries like Norway) into an integrated Area of Freedom, Security and Justice seems to be gathering political momentum. The Reform Treaty of October 2007, for example, proposes that the establishment of an Area of Freedom, Security and Justice should become the regional polity's second most important political objective. In the rather likely event that all EU Member States will have ratified the Reform Treaty before the next elections to the European Parliament in June 2009, we will be looking at a new political landscape in which only the Union's all-encompassing objective "to promote peace, its values and the well-being of its peoples" will rank higher than the EU objective to "offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime" (article 3 of the Reform Treaty). These prospective amendments to the Treaties strongly suggest the increasing empirical relevance of JHA-related EU action for ordinary Union citizens and students of the process of European political integration alike.

Methodological Contributions. While I do not wish to overstate my contribution to the methodological literature, I would nevertheless like to mention that one of my articles explicitly addresses the question how one may organize the empirical analysis of a handful of important decision-making processes in the Council of Ministers with a view to delineating the domain of application of competing theoretical perspectives. What this paper potentially adds to the methodological discussion in contemporary European Studies, then, is the straightforward claim that the combination of theory-oriented case studies and comparative analysis provides a suitable toolkit for specifying the scope conditions of the logics of appropriateness and consequentiality in the JHA Council setting.

The structured dialogue between theoretical ideas and the empirical evidence which the comparative case study approach is able to foster is, in

principle, not confined to the JHA domain. Nor is it necessarily linked to Rationalist and Institutionalist perspectives. The point is rather that this methodological approach may be usefully employed in a variety of theoretical and empirical contexts.

Theoretical Contributions. The research objective of the present collection of articles has been to specify the conditions under which the members of the Justice and Home Affairs Council tend to adhere to the logic of appropriateness, the logic of consequentiality, or both while drafting important legislative acts. Apart from the general observations that JHA Council-based legislative action generally cannot be explained exclusively in terms of either a logic of consequentiality or a logic of appropriateness, on the one hand, and that the two logics of action tend to be invoked sequentially, on the other, this study suggests the following conditions under which the logic of appropriateness may be activated in the JHA Council setting: internal security crises; tight deadlines; accumulated experience; inadequate resources; contradictory rules; and institutionalized consensus norms. Likewise, my case studies suggest the following scope conditions of the logic of consequentiality: redistributive problems; coordination problems; membership incentives; and relative bargaining power.

The scope conditions mentioned above do not constitute a full-fledged theory of decision-making in the JHA Council. They do, however, shed some light on the circumstances under which the logics of appropriateness and consequentiality tend to be invoked in the JHA Council setting. This may possibly provide some guidance for those who attempt to integrate analytically distinct perspectives on Council-based decision-making in an Area of Freedom, Security and Justice into a single and presumably more powerful explanatory model.

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2

Conjunctural Causation in Comparative Case-oriented Research

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ORIGINAL PAPER

Conjunctural causation in comparative case-oriented research

Jonathan P. Aus

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Abstract This article highlights one of the major benefits of qualitative comparative methodology as applied within a "small-*N*" research design, namely its potential use for specifying the scope conditions of (theoretically competing) causal mechanisms. It is argued that the identification of set-theoretic relationships, multiple paths, and analytic efforts in typological mapping can make valuable contributions to the elaboration and further development of middle-range theory.

Keywords Comparative methodology · Causal complexity · Theory development · Political science · Social mechanisms · Decision-making · European Union

1 Introduction

Political scientists analyzing decision-making processes in the European Union (EU) are currently attempting to delineate the domains of application of different behavioral logics. In light of the fact that the scope conditions and interaction of different logics of action are not well understood, Johan P. Olsen suggests that "the way ahead lies in integrating perspectives on institutional dynamics, rather than choosing among them" (Olsen 2002: 944).

The theoretical challenge sketched out above has triggered a debate between Rationalists, on the one hand, and Institutionalists and Constructivists, on the other (see Scharpf 2000; Checkel and Moravcsik 2001; Jupille et al. 2003; Zuern and Checkel 2005; March and Olsen 2006). How can this unfolding debate be structured in a methodologically sound manner? Simply merging old labels ("Rational Choice Institutionalism" is a case in point) without relaxing, contextualizing, or synthesizing seemingly mutually exclusive assumptions will not suffice: relabeling as such does not

J. P. Aus (✉)
ARENA—Centre for European Studies, University of Oslo, P.O. Box 1143,
Blindern, 0317 Oslo, Norway
e-mail: j.p.aus@arena.uio.no

explain why and under which conditions analytically distinct behavioral logics stand in a *complementary* or *set-theoretic* relationship toward each other.

The set-theoretic relationship between different logics of action will vary according to institutional circumstances. Yet *how* should empirically oriented researchers—as opposed to "those who are forever packing their bags for a journey they do not intend to take" (Andersen 2003: 20)—face the challenge of delineating domains of application? This article advances the claim that *qualitative comparative analysis (QCA)*, initially presented by Charles C. Ragin in *The Comparative Method* (Ragin 1987), can make a valuable contribution to the abovementioned debate. Applications of QCA in comparative case-oriented political research hold the potential for specifying the *scope conditions* of theoretically competing causal mechanisms.[1] At the end of the road lies empirically grounded middle-range theory which has been made conditional via the specification of its scope.[2] Scope statements merely delineate or constrain the domain of application of theoretical ones. However, the ability of answering questions like "Under which conditions does a logic of consequentiality take precedence over a logic of appropriateness in EU decision-making?" will ultimately feed back into processes of theory elaboration and refinement.

The promise of QCA is to improve case-oriented comparative research designs. The need of such improvement is captured by Frank Schimmelfennig's concluding remarks on *The EU, NATO and the Integration of Europe*: "Although rationalism explains ... much of the initial bargaining process, it fails to account for the collective decision... Sociological institutionalism, in turn, explains the outcome but not the input" (Schimmelfennig 2003a: 283). This observation points at a historically specific *conjuncture of causal mechanisms* not yet explicable by existing theory, and to a *set-theoretic relationship* between different logics of action (cf. Ragin 2000: 313).

Generalizable statements about the scope conditions or domains of application of different behavioral logics cannot be induced from single-case, $N = 1$ research projects (against Schimmelfennig 2003b). The historical interpretation of singular developments limited in time and space (e.g., the relatively recent decision to enlarge the EU to the East) is one thing, causal inference quite another (see Skocpol and Somers 1980). This does not imply that one should refrain from studying extraordinary processes like the popular rejection of the Constitutional Treaty in France and the Netherlands. The point is rather that political scientists are often faced with *too many variables and not enough cases* for causal inference (Lijphart 1971: 685; see Sigelman and Gadbois 1983 on the frequent use of single-case research designs).

"Large-*N*" research designs involving hundreds of cases, on the other hand, are equally ill-suited for meeting the theoretical challenge at hand: Researchers lack the cognitive ability to handle the empirical depth of hundreds of cases at a time, and in particular the non-linear growth of logically possible paired comparisons between cases (cf. Nissen 1998: 404). Furthermore, quantitative models (based on the simplifying assumption of linear causal additivity and aimed at a controlled assessment

[1] The term "scope conditions" as employed in this article shall refer to the *circumstances* or a *set of institutional and political conditions* under which a causal mechanism or set-theoretic relationship between causal mechanisms empirically holds; see Ragin 2000: 61; Walker and Cohen 1985: 291 for formalized logical statements. On "causal mechanisms" as intermediates between laws and descriptions, see Elster 1998; Checkel 2004; Mayntz 2004.

[2] Cf. Glaser and Strauss (1967) on the notion of *grounded theory;* and Merton (1949) on *middle-range theory* as developed in variable-oriented sociology.

of the independent or net effect of each causal variable) are incapable of capturing set-theoretic relationships and causal conjunctures (cf. Ragin 2000: 314).

A feasible compromise between complexity and parsimony rests in "small-*N*" comparative research designs (cf. Mahoney 2000; Lieberson 1992 for a critical appraisal). The potential benefits of the latter for mapping set-theoretic relationships and identifying multiple paths will be presented in Sect. 2. This section will also sketch out an application of QCA[3] to a particular local research frontier in political science, namely to the study of decision-making dynamics in the field of EU Justice and Home Affairs. The usefulness of QCA for specifying the scope conditions of different behavioral logics will be assessed in Sect. 3.

2 Conjunctural causation and qualitative comparative analysis

2.1 The logic of comparative case-oriented research

A legitimate goal of social-scientific research is the *interpretation* of politically relevant phenomena. There can be no doubt that "thick descriptions," as for instance employed in anthropology, may contribute to a better understanding of human behavior in specific social contexts.[4] Yet the interpretation of data gathered in a theoretical vacuum remains largely intuitive (Eckstein 1975; Weber 1978). Nevertheless, most case studies conducted in geographically and substantially confined fields of research such as European Studies could maliciously be qualified as atheoretical "data dumps."

One of the methodological reasons for this rather unfortunate state-of-the-art is that single case studies can hardly be employed for explanatory purposes (see, however, Allison and Zelikow 1999). Comparative research designs, on the other hand, hold a potential for *causal inference*. Increasing the number of cases from one to five, for example, opens up alleys for contextualized induction. Comparative research projects with an explanatory ambition tend to rely on the inductive logic of John Stuart Mill's *Method of Agreement* and *Method of Difference*, respectively (Mill 1868: 425–448; White 2000; Aickin 2004). Unfortunately, both methods are not suitable for dealing with causal conjunctures, e.g. with combinations of causal conditions that are jointly sufficient for producing a given outcome (cf. Ragin 1987: 36–42; Marini and Singer 1988). In spite of these limitations, "soft" versions of Mill's quasi-experimental methods can be fruitfully employed in qualitative comparative analysis for assessing the empirical relevance of theoretical models, and for developing new Weberian ideal-types.

Assume that our underlying *research objectives* shall be two-fold, namely (a) to empirically delineate the domains of application of two analytically distinct logics of action in the policy area of EU Justice and Home Affairs (JHA); and (b) to map the

[3] More recent developments and refinements of this approach, in particular the concept of "fuzzy sets" (Ragin 2000; Pennings 2005), are disregarded for heuristic purposes.

[4] The anthropologist Clifford Geertz once noted the following regarding the theoretical contributions of his discipline—one that he, in marked contrast to logical positivism and natural-scientific ideals, classified as an *interpretive science*: "Ethnographic findings are not privileged, just particular: another country heard from. To regard them as anything more (*or anything less*) than that distorts both them and their implications, which are far profounder than mere primitivity, for social theory. . . . The important thing about the anthropologist's findings is their complex specificness, their circumstantiality" (Geertz 1973: 23; emphasis in the original).

set-theoretic relationship between rule following and strategic calculation in this particular setting. In order to meet these objectives, we may, for example, compare *five cases of Community legislation* unanimously adopted by the JHA Council. All cases share the same institutional environment ("First Pillar" of the EU, JHA Council) and legal category of outcome (Y = Community Regulation, Directive or Decision). In other words, all cases display the same type of outcome yet may differ in their respective causal configuration. This suggests applying the *Method of Agreement* which aims at identifying causes that are "constant" and eliminating causes that "vary" across all cases.

2.1.1 Ideal-typical cases

Out of our total population of five cases, *two* shall be designed as *ideal-typical cases*. Theoretically pure cases serve a heuristic purpose: they assist us in learning about and/or interpreting empirical cases on the basis of theoretical knowledge. The selection of ideal-typical cases is determined by our respective research objectives. For example, Max Weber advocated using a *Rationalist ideal-type* in light of his overall objective of explaining the rise of rational Capitalism in the West: "[In] analysing a political or military campaign it is convenient to determine in the first place what would have been a rational course, given the ends of the participants and adequate knowledge of all the circumstances. Only in this way is it possible to assess the causal significance of irrational factors as accounting for the deviations from this type" (Weber 1978: 6; see Scharpf 2000 for a similar pledge; and Elster 1983). Although we may doubt the empirical validity of decision-making models entirely based on Rationalist assumptions from the very outset, we nonetheless define our first ideal-typical case as an instance of Y being purely driven by a *logic of consequentiality* (case 1/logic A). However, we are equally interested in instances of Y such as the ultimately value-rational decision to enlarge the EU to the East. We thus also construct an *Institutionalist ideal-type* (case 2/logic B) entirely based on a *logic of appropriateness* (March and Olsen 1989, 1995, 2006).

Theoretically consistent yet hypothetical cases serve as "conceptual maps" guiding our journey through an enormously complex and empirically rich terrain (cf. Rokkan 1999; Mjøset 2000 on using conceptual maps in comparative research). The danger of getting caught up in the particularities of individual cases can hardly be overstated. As comparative historians often painfully observe, "there remains a strong tension between the demands of doing justice to the explanation of a particular case and the search for generalizations, mainly because it is impossible to know just how important a particular problem may be until one has finished examining all of them" (Moore 1967: xvii; see also Skocpol 1979). The strategic use of ideal-typical cases alleviates comparative political scientists from the historians' duty of having to examine as many dimensions of a given phenomenon as possible.[5] Yet in contrast to the inevitable ignorance of variable-oriented researchers conducting "large-N" studies towards the causal complexity of individual cases, we are still in the position to examine cases *as wholes* (cf. Abbott 2001: 123). Max Weber eloquently summarized the advantages of a structured dialogue between abstract social-scientific theory and context-sensitive

[5] Lars Mjøset summarizes the particular methodology of historical science as follows: "History is the specifying science of singular events, tracing complex causal chains involving both intentions and social structural forces. These chains are reconstructed as narrative sequences, unpredictable in advance but understandable in retrospect. . .." (Mjøset 2001: 97).

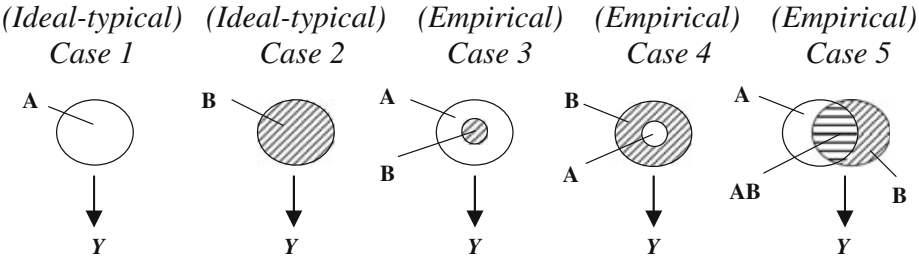


Fig. 1 Hypothetical set-theoretic findings of a comparative case-study (five cases, two causal mechanisms)

case-based knowledge as follows: "[Sociological] analysis both abstracts from reality and at the same time helps us to understand it, in that it shows with what degree of approximation a concrete historical phenomenon can be subsumed under one or more of these concepts" (Weber 1978: 20).

2.1.2 Empirical cases and set-theoretic relationships

We may now proceed to carefully selecting *three empirical cases* in addition to the ideal-typical cases 1 and 2. For example, we might choose to conduct in-depth studies of the decision-making processes leading towards the formal adoption of the "Dublin II" Regulation *(case 3)*, the "Eurodac" Regulation *(case 4)*, and the "European Refugee Fund" Decision *(case 5)*, respectively, by the Council of the European Union (Council 2000a, 2000b, 2003).

Let us assume that we have already completed our fact-finding mission, and that the empirical cases 3, 4, and 5 reveal *three different set-theoretic relationships* between logics A and B. Our hypothetical empirical findings could be illustrated by creating so-called *Venn diagrams*.

Figure 1 above shows that all empirical instances of *Y* (cases 3–5) were triggered by *causal conjunctures* between logics A and B *differing in their composition*. For the time being, we shall merely focus on the causal configurations of cases 3 and 4.

In case of the JHA Council-based negotiation of the "Dublin II" Regulation *(case 3)*, intergovernmental negotiations over which EU country should be held responsible for processing asylum applications were primarily driven by a logic of consequentiality (logic A), even though compliance with Community norms and procedures (logic B) explains the final phase of negotiations (Aus 2006a). Set-theoretically speaking, causal mechanism B appears as a subset of A. The fairly abstract set-theoretic notion of a "proper subset" allows us to keep the logics of consequentiality and appropriateness analytically separate: Even though every element of set B is an element of set A, set B by definition does not equal set A (Halmos 1960: 3).

With a view to the "Eurodac" Regulation *(case 4)*, the set-theoretic relationship observed in case 3 is occurring in inverted order: the reproduction of police-specific standard operating procedures (logic B) explains most of the decision-making dynamic, yet the actors nevertheless conducted instrumental means-ends calculations (logic A) over the distribution of asylum applicants and "illegal" immigrants across the EU (Aus 2006b). In the Venn diagram of case 4 shown in Fig. 1 above, set A is therefore contained in set B.

By comparing the two set-theoretic relationships observed in legislative case-studies 3 and 4 with the theoretically "pure" cases 1 and 2, we may draw the following

conclusion: Under fairly context-specific yet constantly held institutional conditions ("First Pillar" of the EU; Justice and Home Affairs Council decides unanimously after consulting the European Parliament, etc.), we are able to identify *multiple causal paths* leading toward a positive outcome (Y = formal adoption of secondary Community law by the Council). All empirical instances of Y analyzed so far occur as a result of diverse conjunctures between logics A and B.

2.2 Multiple causal paths

As illustrated above, the relatively high degree of causal complexity revealed by the in-depth study of cases 3 and 4 deviates from the comparatively simple causal composition of our ideal-typical cases 1 and 2. Yet what are the methodological implications of the (hypothetical) fact that our outcomes were brought about by diverse and theoretically not yet explicable causal conjunctures? Perhaps the most important *negative* implication is that statistical techniques based on the assumption of linear causal additivity are incapable of capturing that the mere presence or absence of a particular "independent" variable may level out the impact of another (Braumoeller 2003: 211). I restate this critique of conventional variable-oriented methodology for the sake of clarity: If we adopt a correlational approach, we aim at identifying which independent or "explanatory" variable increases the probability of a higher value on the dependent or "outcome" variable. Yet the idea that causes are additive in their effects is counter-intuitive and not very convincing from a configurational point of view (cf. Becker 1992: 208; Ragin 1999; Verschuren, 2001: 403). It is against the background of frequently encountered causal complexity in case-study research that Charles C. Ragin pledges "simply to abandon the idea that variables should be seen as independent, separable aspects of cases. Instead, variables should be seen as the components of configurations" (Ragin 2000: 74).

Likewise, one may argue that the concept of *mechanisms* is irreconcilable with the correlational approach (cf. Newsome 2003; Steel 2004). Once set in motion, a mechanism or conjuncture of mechanisms will *always* produce outcome Y. Its quasi-deterministic nature distinguishes a causal mechanism or conjuncture of mechanisms from variably contributing factors.[6] Statements about mechanisms resemble causal generalizations about recurrent processes. Social mechanisms can thus be read as *pathways* or *recurrent processes* operating in specific social contexts. Explaining what makes a given social system "tick" may arguably be regarded as the essence of social-scientific explanation (Bunge 2004: 183). Simply introducing the concept of mechanisms, however, will not suffice; generating the explanatory power of mechanisms requires in-depth empirical illustrations of *how* recurrent processes or pathways are linked to outcomes and context-specific conditions (cf. Mayntz 2004: 241).

Against this background, let us reconsider the causal configurations of legislative case-studies 3 and 4. Recall that we have identified *multiple causal paths* towards Y:

[6] The argument whereby mechanism A will *always* produce outcome B is subject to a great deal of controversy and should therefore be treated with caution. Jon Elster, who has traveled a long way from promoting "hard" Rational Choice theory to a considerably "softer" Rationalist approach, spelled out his understanding of mechanisms as follows (Elster 1998: 49): "In my earlier terminology, going from a black-box regularity to a mechanism is to go from 'If A, then always B' to 'If A, then always C,D, and B.' ⋯ On the view set out here, the move from theory to mechanism is from 'If A, then always B' to 'If A, then sometimes B.' (Because fine grain is desirable in itself, I also urge the further move to 'If A, then sometimes C, D, and B.')" See Bunge (2004: 196) for a deterministic defense.

Under the given institutional conditions, different set-theoretic relationships between mechanisms A and B explain the formal adoption of legislative acts by the JHA Council (cf. Braumoeller 2003: 220 for a graphical illustration of the idea of multiple paths toward a positive outcome).

As illustrated above, *case 3* is characterized by a relatively strong presence of logic A and a relatively weak presence of logic B. Even though nothing has been said so far about the possibility of sequential ordering between mechanisms A and B (cf. Bennett and George 2005), one observes that this particular causal configuration results in a positive outcome. The same holds true for *case 4*, only that its *Y* reflects a different causal "mix."

We may logically conclude that the causal compositions of cases 3 and 4 are *substitutable* for explaining *Y*. Not all roads lead to Rome, but some of them actually do—depending on your location in social space. Firmly anchored in empirical case-studies, the identification of multiple paths supports and further specifies the idea that analytically distinct logics of action are reconcilable in political practice (March and Olsen 2006). In light of the fact that none of our existing explanatory models alone can account for the complexity of supranational governance in the European Community setting, the identification of multiple paths is a necessary first step for exploring the scope conditions of Rationalist and Institutionalist causal mechanisms. Faced with similar causal conjunctures in a very different social context (concerning the relationship between religion and politics in modern society), Jon Elster accordingly underlines that "there is no need to see these analyses as contradicting each other. In fact, their conjunction may provide a better explanation . . . than either does separately" (Elster 1998: 62; cf. also Etzioni 2000).

Translated into a *formal logical expression*, the idea of multiple paths is compatible with the seemingly erroneous Boolean equation $1+1=1$. Outcome *Y* is triggered by the presence of mechanism A *or* mechanism B. In Boolean algebra, addition is thus equivalent to the logical operator OR. Charles C. Ragin summarizes the methodological implications of applying this logic to the causal analysis of cases as follows: "Satisfy any one of the additive conditions and the expected outcome follows" (Ragin 1987: 89). The rationale of substituting conventional addition of causal conditions with the logical operator OR can arguably also be applied to the study of mechanisms.

Again, it is helpful for heuristic purposes to contrast this logic with research practices inspired by natural-scientific ideals (cf. Hacking 1983): If A and B "vary" across cases, we would logically need to eliminate both A and B as necessary causes of *Y* (strict application of Mill's *Method of Agreement*; cf. Mahoney 2000: 392). True enough, it is perfectly reasonable to argue that a causal condition or mechanism which is *not* shared by all cases cannot be qualified as a *necessary* causal condition or mechanism. However, the practical "added value" of this quasi-experimental line of reasoning for political research is debatable: As far as complex political phenomena are concerned, it is more than likely that "causes may be neither necessary nor sufficient. In fact, this type of causation may be the most common form of social causation" (Ragin 2000: 93). Under these circumstances, the best we can arguably do is to identify and delineate multiple causal paths in specific social settings.

Due to a lack of space, I can only briefly mention that Boolean algebra not only holds the potential of representing, but also of reducing causal complexity via *Boolean minimization* (see Ragin 1987: 93–95; Chan 2003; Varone et al. 2006). Successful efforts in specifying the conditions under which certain causal patterns repeatedly occur will eventually depend upon suitable techniques for data reduction.

A complementary procedure relating to the dynamic constitution of populations will be sketched out below.

2.3 "Chemical" conjunctures

Even modest variation in the mix of ingredients can significantly alter the taste of an otherwise appetizing meal. A similar idea may have inspired John Stuart Mill's notion of "chemical causation," relating to those combinations of causes which bring about qualitatively distinct outcomes. Mill drew on phenomena observed in the emerging and initially inductively proceeding field of chemistry in order to illustrate causal processes where the "combination of two substances produces, as is well known, a third substance with properties entirely different from those of either of the two substances separately, or both of them taken together" (Mill 1868: 406).

"Chemical" causation is a special form of conjunctural causation. Let me illustrate the special features of "chemical" conjunctures against the backdrop of *case 5*. In case of the JHA Council's "European Refugee Fund" Decision, we are faced with a set of phenomena contained both in sets A and B (see Fig. 1 above). The area where sets A and B intersect is noted as AB.[7] From a mechanism-oriented perspective, the existence of area AB is analytically far more problematic than the possibility of a sequential ordering between mechanisms A and B referred to above. Even though we are not in the position to explain why the two mechanisms partially intersect, we are capable of describing this puzzling phenomenon. For example, we may be able to identify emerging patterns of interstate solidarity partially motivated by the Rationalist pursuit of credible commitments. In fact, this pattern seems to have shaped the actual decision-making process on JHA Council level. Eiko R. Thielemann notes in this context that "the attempt to find a common approach ... appears to have been driven by both a 'cost-benefit' as well as a 'norm-based' logic" (Thielemann 2003: 270).

The special causal composition of *case 5* may, by means of conclusion, lead us to differentiate our outcomes into two different types. Once we have reached this advanced stage of our research project, we are, in variable-oriented speak, permitted to *select on the dependent variable*. Whereas this practice should be avoided under all circumstances according to conventional social-science methodology (cf. King et al. 1994: 129; McKeown 1999), the empirically informed development of novel typologies is one of the main goals of qualitative comparative analysis. The link between typological innovation and efforts in delineating domains of application will be clarified below.

3 Conclusion: QCA and the delineation of causal conjunctures

Qualitative comparative analysis systematically favors causal complexity over parsimony. While case-oriented and context-sensitive researchers will appreciate this methodological bias, variable-oriented scholars tend to criticize QCA for its wanting potential for theory testing (King et al. 1994: 87). Studies reflecting a statistical worldview, however, do not necessarily yield more adequate results. As far as the study of decision-making dynamics in the Council of the EU is concerned, for example,

[7] In accordance with established mathematical conventions, this area should properly be noted as $A \cap B$.

variable-oriented inquiries into alleged behavioral patterns may even be conceptually misleading (cf. Mattilla 2004; Lewis 2003 for a more accurate, case-based assessment).

As sketched out above, QCA *can* make a valuable contribution to specifying the scope conditions of (theoretically competing) causal mechanisms. This article has focused on two potentially fruitful lines of case-based comparative inquiry, namely the identification of *multiple causal paths* and *typological mapping*. While the idea of multiple paths seems to be receiving increased disciplinary recognition, attempts at "selecting on the dependent variable" still tend to trigger harsh criticism. This is truly regrettable since a discussion about scope conditions is essentially a discussion about constituting populations. To the extent that populations need to be constructed and reconstructed in a qualitatively sensible manner, populations function as scope conditions. Charles C. Ragin accordingly notes that "one researcher's scope condition is another's causal condition" (Ragin 2000: 62). By means of typological mapping, comparative case-oriented research may very well contribute to delineating domains of application.

An open question is whether we will be able to develop middle-range theories in the field of European Studies. If so, such theories would require firm grounding in accumulated case-based knowledge. The potential "added value" of such a collective endeavor was highlighted by Andrew Abbott as follows: "[Middle range theories] don't predict what will happen, indeed they suggest that interactional fields are probably too complex for us to predict. But they do show various internal patterns; they do sketch the 'rules of the game;' they do portray the limits and possibilities of action in such systems" (Abbott 2001: 74). Considering the current state of political science, Voltaire's maxim that the best is the enemy of the good may provide sound counsel.

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3

The Mechanisms of Consensus: Coming to Agreement on Community Asylum Policy

The Mechanisms of Consensus: Coming to Agreement on Community Asylum Policy

Jonathan P. Aus

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Abstract

This case study of the negotiation of the so-called Dublin II Regulation on asylum demonstrates the role of Council-specific informal rules and procedures in facilitating intergovernmental agreement. The chapter addresses a Rationalist 'puzzle', namely the question why the Justice and Home Affairs Council reached political agreement on Dublin II in spite of the Regulation's likely redistributive effects on the number of asylum applications processed by individual Member States. The empirical material – primary sources from the official records of the Council – suggests that a strong reluctance on the part of Council members to exercise their right to veto, informal decision-making procedures, and issue-linkage are jointly sufficient conditions for reaching political agreement.

1. Introduction: Dublin II as a Rationalist 'Puzzle'

This chapter addresses a Rationalist 'puzzle', namely the question why the Justice and Home Affairs Council reached political agreement on the so-called Dublin II Regulation (Council 2003a) in spite of the Regulation's likely redistributive effects on the number of asylum applications processed by individual Member States. Given the expected consequences of this legislative act, intergovernmental negotiations conducted on the basis of calculated national interests alone would have ended in political deadlock.

The empirical material presented below suggests that the Dublin II Regulation was not adopted by purely self-interested, strategically calculating actors. Instead, intergovernmental political agreement on Dublin II was made possible by activating Council-specific informal rules and procedures. National delegations's adherence to an informal supranational code of conduct explains why instances of 'positive integration' (Fritz W. Scharpf) do occur in spite of seemingly irreconcilable differences between Member States' governments.

2. Images of the Council: Arena or Institution?

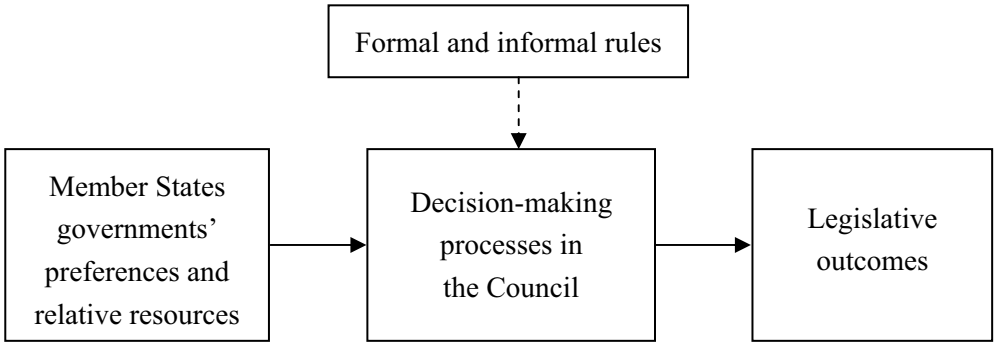
The principal legislative body of the European Community (EC), the Council of Ministers, is often portrayed as an *arena* where Member States' governments gather, negotiate, and occasionally reach joint decisions on Community policy (see *inter alia* Thomson *et al.* 2006, König and Junge's chapter in this volume). The Council of the European Union: An unpretentious venue for purposive-rational actors bargaining over the substantive profile of Community Regulations, Directives and Decisions?

Empirically informed studies of decision-making processes in the Council are hardly reconcilable with this image. While drafting and ultimately deciding upon secondary Community law, national civil servants and politicians frequently adhere to supranational principles, norms and procedures. Avoiding isolation, accommodating difference and reaching agreement along the lines proposed by the permanently involved Commission and rotating Council Presidency are dominant features of the Council's political culture. National delegations's behaviour is apparently influenced by a Council-specific consensus-gathering approach. Viewed from a Rationalist perspective, this may result in rather puzzling policy outcomes.

How can we address such Rationalist puzzles? In line with an *Institutionalist* perspective on political institutions (March and Olsen 1989, 2006a, Olsen 2007), one may argue that the Council constrains and channels the behaviour of its members in more or less

predictable ways. National government representatives may not necessarily shift their primary allegiance to Brussels, yet they, in their secondary role as ordinary Council members, may nevertheless voluntarily comply with established rules and standard operating procedures. Over time, both formal and informal Community rules take on a life of their own. Once learned, internalized and creatively applied by the actors, these rules become, methodologically speaking, intervening variables in the decision-making process. Figure 1. below illustrates this point.

Figure 1: Council-specific Rules as Intervening Variables



The basic idea is that decision-making processes and legislative outcomes in the European Community are, to a variable extent and under certain conditions, influenced by Council-specific 'ways of doing things'. National preferences and the administrative resources at the disposal of Member States' governments certainly matter. Yet intergovernmental negotiations are also affected by Council-specific rules and procedures for arriving at collectively binding decisions.

2.1 Informal Rules and Procedures in the Council

The main bulk of Council meetings are conducted behind closed doors and thus hidden from the public's (and researcher's) eye. Article 6 of the Council's *Rules of Procedure* accordingly states that '[the] deliberations of the Council shall be covered by the obligation of professional secrecy, except in so far as the Council decides otherwise' (Council 2004: 26). As the habit of convening unofficial Council meetings in chateau-like surroundings amply demonstrates, members of this institution apparently value the intimacy of informal consultations (Puetter 2003).

Beyond its relevance for the democratic accountability of supranational legislators (Naurin 2004), this organizational peculiarity has severe methodological implications. Certain

types of official records accessible via the public register, for instance the Council's voting records contained in the *Monthly Summary of Council Acts* issued by the Council Secretariat, tend to disclose more than they reveal. Why so? Since recourse to formal voting under qualified or double majority rule, and to formal vetoing under unanimity, respectively, is systematically avoided in intergovernmental practice (Heisenberg 2005, Hayes-Renshaw *et al.* 2006). Under normal circumstances, Member States governments' efforts 'are aimed at either building consensus as far as possible about eventual decisions, or else at preventing measures from getting to the ministerial level of negotiation until and unless there is more or less a consensus' (Hayes-Renshaw and Wallace 2006: 295). From what we know from the statistical analyses carried out by Heisenberg, Wallace and others, the first pattern holds true for roughly 70-80 per cent of all decisions made by the Council since the mid-1990s, including those formally subject to qualified majority voting. In spite of this important empirical observation, the mechanisms of consensus are not well understood.

The origins of consensus-seeking behaviour in the Council can be traced back to the inner workings of the Council of Ministers of the European Coal and Steel Community (ECSC). With a view to the *modus operandi* of this political institution, Ernst B. Haas accordingly noted that 'the essence of the Council's conception of its own role [is] the attainment and maintenance of consensus among its own members. Consequently, it does *not* regard itself as a continuing diplomatic conference, whose members are free to dissent and to block joint action' (1958: 490; emphasis in the original; cf. Jaipal 1978 for a comparative view to the UN Security Council). The Council of the European Economic Community (EEC) inherited and continued to adhere to this informal set of rules.

In the mid-1960s, however, a temporary unilateral blockade of Community decision-making gave rise to Member States' efforts to preserve the consensus-gathering approach. The so-called 'empty chair crisis' (triggered by French President de Gaulle against the background of nonnegotiable demands over the financing of the Common Agricultural Policy) was thus followed up on Council level by the 'Luxembourg compromise' (Palayret *et al.* 2006), a political commitment reading as follows:

> Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community… (Council 2000: 24).

The ‘Luxembourg compromise’ of 1966, in other words, codified that the embarrassing practice of isolating and outvoting individual governments must be avoided under all circumstances. In effect, unilateral attempts to ‘push for a vote’ are considered as inappropriate behaviour (see Lewis 1998, 2005). Not unlike the situation in ‘consensus democracies’ like Sweden, then, the Council’s political culture is ‘a culture of consensus [rather than] a culture of competition’ (Lijphart 1998: 104; cf. Almond and Verba 1963, George 1969).

The European Court of Justice would later argue that ‘the rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves’ (Case 68/86, ‘UK vs Council’, par. 38), but such legalistic reasoning was apparently not shared by everyone. A different and certainly more political rationale would determine the future style of decision-making in the Council. According to the *Council Guide* drawn up by the Council Secretariat, it is the duty of the Presidency to ‘postpone the vote if it observes that the conditions have not been met’ (Council 2000: 21). In this case, the members of the Council will typically settle for a face-saving ‘agreement not to agree’ and delegate the relevant dossier back to the Permanent Representatives Committee (COREPER). While this ‘consensus-reflex’ among participants in supranational decision-making processes might surprise the outside observer and ordinary citizen alike, it nevertheless captures a core feature of the Council’s negotiating culture. As Edwards reminds us with reference to Nuttall’s work on the General Affairs Council, it is ‘the predisposition of diplomats to regard a failure to agree as the worst of outcomes’ (1996: 133). In a similar vain, Bostock, a former member of COREPER I, describes the ‘dominant objective’ of the latter committee as ‘maximizing agreement at its level and maximizing the chances of agreement in meetings of the Council’ (2002: 225).

For better or worse, a certain lack of appreciation for the informal institutional dynamics of the Council seems to be commonplace among so-called *national experts*, that is specialized national civil servants occasionally attending Council meetings on working group level or seconded to the Council Secretariat for a couple of years. National experts’ political horizon rarely exceeds the more or less narrow confines of their respective national ministry and portfolio (Egeberg 1999). In regard to the Justice and Home Affairs (JHA) domain, for example, these ‘national experts’ comprise of senior policemen and women, border control experts, prosecutors, and so on. In case of an intra-executive conflict between national experts and ‘permanent reps’, the Council’s hierarchical administrative machinery, and COREPER’s central role therein, facilitates a more conciliatory policy-style. One of the Brussels-based

attachés interviewed by Fouilleux *et al.* described her (rather typical) approach towards national experts as follows: 'When national experts are present, I never let them have the microphone. If I let the experts take the microphone, they would just say what we want from the negotiation and the meeting would be over' (2007: 104). Likewise, the Member States' ambassadors interviewed by Lewis referred to national experts as 'spies' and 'watchdogs' (2005: 947).

As previously mentioned, Council-specific rules of appropriate behaviour should be kept in mind while evaluating quantitative studies of decision-making in the Council drawing on voting statistics compiled by the Council Secretariat (Matilla and Lane 2001, Matilla 2004, Hagemann's chapter in this volume). With the partial exception of agriculture and fisheries, these studies are conceptually misleading insofar as they reproduce the arena or 'hard bargaining' image of the Council on the basis of systematically biased data (see Hayes-Renshaw *et al.* 2006: 177 and 183, Hayes-Renshaw and Wallace 2006: 282, and Hosli's chapter in this volume). The reader less familiar with the internal dynamics of the Council will effectively be drawn away from one of the most challenging research questions identified by case-oriented scholars, namely 'the question of how far one can identify common norms, values or beliefs in the Council as a counterweight to specific and more egotistic preferences' (Hayes-Renshaw and Wallace 1997: 257).

The Council's *Code of Conduct* provides insights into an array of such common norms and standard operating procedures either ignored or systematically downplayed by Rationalist scholars. Among them we find the convention that 'delegations shall refrain from taking the floor when in agreement with a particular proposal; in this case silence will be taken as agreement' (Council 2003b: 7). How do we control for the embarrassment caused by being the single 'hold-out' to an otherwise collectively endorsed solution? Perhaps even more remarkable is the routine of conducting bilateral 'confessionals' between the Presidency and the Council Secretariat, on the one hand, and particularly reluctant delegations, on the other. The Council's sense of appropriateness goes so far as to define its differentiated code of conduct as 'legally binding' (Council 2004: 22). Whether such instances of rule-driven behaviour can find an adequate representation within an analytical framework based on the behavioural 'micro-foundation' of strategic calculation is at least debatable (see Tallberg 2006 and Heisenberg's chapter in this volume for affirmative answers).

2.2 Rational Choices in Zero-sum Games

A former practitioner once remarked that members of the Council in general and COREPER in particular have chosen 'the Roman god Janus, facing in two directions, [as their] patron saint, mascot or role model' (Bostock 2002: 217). Member States' representatives in the Council perceive it as their *duty* to reach agreement. Membership in the supranational European Community apparently brings with it certain *obligations*, including to ensure the proper functioning of the Council as a collective decision-making body. Yet at the same time, national governments (in their own views quite legitimately) pursue national interests. The EU institution where Hungarians strategically calculate the interests of Hungary and Swedes try to maximize the utility of Sweden is clearly the Council. Against this background, decision-making processes within this political institution may usefully be analyzed not only from an Institutionalist, but also from a *Rationalist* perspective.

The game-theoretical variant of the latter perspective offers stylized representations of different kinds of policy interactions between self-interested, strategically calculating actors (Morrow 1994, Scharpf 1997). When it comes to politically divisive issues like national contributions to the EU budget, for example, intergovernmental negotiations in the Council (and European Council) can be modelled as non-cooperative constant-sum or *zero-sum games*. Game theorists conceptualize this modus of interaction as a game of pure conflict: 'In a constant-sum game there is a given total to be divided among the agents, so that a gain to one will necessarily mean losses for others' (Elster 1986: 8).

The intergovernmental negotiations leading up to the formal adoption of the Dublin II Regulation described in detail below can be modelled as a non-cooperative zero-sum game. From a Rationalist perspective, one could have expected that interstate negotiations over the substantive profile of a Community Regulation affecting the distribution of asylum applicants among the Member States would have ended in *deadlock*, with each Member State trying to shift the costly burden of refugee protection to other Member States. The underlying rationale for the deadlock hypothesis is that at least one national government would have preferred non-agreement over agreement.

Reaching international agreement becomes even more difficult if the benefits that Member State X can expect from a given legislative outcome entirely depend on the *implementation* of contractual obligations by Member State Y in administrative practice. In the *de facto* absence of own law enforcement capabilities by the European Community in the JHA domain, the national authorities in charge may simply ignore a given Council Regulation

(cf. Scharpf 1997: 117-18). For the purpose of illustration, one may think of utility-maximizing Member State practices such as the non-transposition of Single Market Directives into national law (Falkner *et al.* 2005). With a view to inadequate refugee protection capacities in Central and Eastern Europe, one may alternatively point to the possibility of *involuntary* defection of Community rules *inter alia* due to administrative inexperience in dealing with a sudden influx of asylum seekers (Zürn 1997: 56, Byrne 2003: 343). Both options will trigger the same reaction among the agents: supplementary mechanisms for monitoring the effective enforcement of the agreement (a task that will typically be delegated to the Commission which may ultimately refer the case to the European Court of Justice) must be incorporated into the agreement itself – which leads to more complex negotiations on Council level (Gehring 1994: 231-35).

Drawing on Fritz Scharpf's reflections on the lack of social policy harmonization in the EU, one may specify the Rationalist hypothesis on *the limits of positive integration* in EU Justice and Home Affairs as follows: 'European policy processes will often encounter constellations where no solution is available that would be preferred over the status quo by all, or most, member governments. In such constellations of conflicting interests, in which only win-lose solutions are possible, … negotiating systems and systems depending on qualified majorities requiring a high level of consensus will … be blocked' (1999: 76). In regard to the prospect of successful issue-linkage, Scharpf maintains that 'if package deals can be reached at all, they will typically have to involve two or more distinct policy areas with complementary asymmetries in their interest constellations' (1997: 129). The following analysis documents to what extent these Rationalist hypotheses empirically hold in regard to the negotiation of the Dublin II Regulation.

2.3 Methodological Notes

Like any other modern bureaucracy, the *General Secretariat of the Council* keeps written records of any given procedure it administers – even if it was an oral exchange. If the Council acts as a supranational legislative body, as in case of Council Regulations like Dublin II, these records must be made available in the Council's Public Register (http://register.consilium.eu.int) once the legislative act has been adopted (Council 2001a). This is good news for researchers, since it allows for identifying national delegations's negotiating positions with the help of 'hard' primary sources (cf. Moravcsik 1998: 80-85). Sources of this kind provide direct and reliable evidence of national governments' volitions while drafting supranational legislation. The following 'process tracing' exercise (George and Bennett 2005:

205-32) is first and foremost based on official records, supplemented, where necessary or deemed useful for the purpose of empirical triangulation, by expert interviews and 'soft' sources like newspaper reports (cf. Beach's chapter in this volume).

The majority of official records I will refer to were drawn up by an EU civil servant in the General Secretariat of the Council (Directorate-General H, Directorate I) temporarily assigned to the Asylum Working Party. The subsequently declassified reports compiled by this *fonctionnaire* can be qualified as the observations of a neutral participant – of a participant, that is, who has professionally been trained for monitoring decision-making processes in the Council and has no interest in the political substance of the negotiations other than assisting the rotating Presidency in pursuing its respective work program.

Council Secretariat personnel assisted at least the following organizational units of the JHA Council in drafting the Dublin II Regulation: the Asylum Working Party, the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), the informal group of JHA Counsellors, the Committee of Permanent Representatives, Part Two (COREPER II), and, last but not least, the Justice and Home Affairs Council itself. In order to help the reader in tracing the negotiations, the working structures of the JHA Council during the so-called transitional period (1999-2004) are presented in Annex 1. The symbols indicate whether a given organizational unit of the Council primarily dealt with Schengen-related issues, whether legislative acts could be based on the EC Treaty, and how this affected the position of Denmark, Ireland, the United Kingdom, Norway, and Iceland, respectively. Denmark, for example, cannot formally participate in asylum-specific measures like Dublin II due to its categorical 'opt-out' of Title IV of the EC Treaty. As we shall see in due course, this did not prevent the Danish government from presiding over the JHA Council during the second half of 2002 and to lead the Dublin II negotiations to a successful conclusion.

3. The Negotiation of the Dublin II Regulation in the JHA Council

3.1 The Commission's Proposal

On 26 July 2001, the Commission formally presented its legislative proposal on Dublin II to the Council (European Commission 2001a). In addition to consultations with the United Nations High Commissioner for Refugees (UNHCR) and international non-governmental organizations (INGOs), the Commission held discussions with national experts in order to weigh the chances of getting its draft Regulation through the Council. Fulfilling a request by

the Council, the Commission's services also studied the malfunctioning Dublin Convention or 'Dublin I' mechanism (European Commission 2000, 2001b). The latter accord had been negotiated on an intergovernmental basis between the Member States during the late 1980s (Hurwitz 2000). With its entry into force on 1 September 1997, the Dublin Convention replaced Schengen's asylum chapter (Hailbronner and Thiery 1997).

As regards the hierarchy of criteria laid out in the draft Regulation, the Commission did not deviate significantly from the Dublin Convention. The Commission thus actively promoted the *authorization principle* and the *principle of first contact*, respectively, as the procedural core of the emerging Common European Asylum System. The Commission, in other words, *inter alia* proposed that Member States with external borders, rather than Member States surrounded by other EU countries, shall bear the processing burden. For the purpose of illustration, let us assume that an asylum seeker has managed to cross the external Schengen border in Italy in an irregular fashion and subsequently travels on to Germany via Austria where he or she lodges his or her asylum application. According to the *principle of first contact*, then, Germany is definitely not responsible for considering the claim. Neither is Austria. Instead, the applicant will be physically 'transferred' back to Italy where his or her asylum application will ideal-typically be processed. If applied effectively, this scheme leads to a redistribution of asylum seekers 'by default' (Lavenex 2001: 863) from north to south, and from west to east. The Commission justified its proposition by arguing that 'the Member States are responsible to all the others for their actions regarding control of the entry and residence of third-country nationals' (European Commission 2001a: 14).

The Commission's staff knew that its legislative proposal would need to find the unanimous approval of twelve to fourteen Member States' governments (EU 15 minus Denmark and *possibly* minus Ireland and the UK). They would ultimately need to subscribe to the supranationalist slogan 'All for one and one for all!' – the latter part of which would be particularly hard to sell to external border countries such as Spain. The Commission's services were also aware of the fact that 'discussions [within the JHA Council] on physical burden sharing according to factors such as each state's population, population density or GDP have not produced any concrete results' (European Commission 2000: no. 49). This outcome had been sharply criticized by principal receiving countries like Germany and the Netherlands for quite some time, the former unsuccessfully attempting to introduce an effective burden-sharing regime in the EU since 1994 (Thielemann 2005). The initial absence of common European rules and the subsequent ineffectiveness of Schengen II and Dublin I, respectively, resulted in a highly unequal distribution of asylum applications between the

Member States. The relative share of each Member State during the ten-year period preceding the negotiation of the Dublin II Regulation is reproduced in Annex 2.

Beyond the search for a text acceptable to at least the majority of Member States' governments, one may point to the Commission's institutional self-interest in any kind of legal instrument consolidating and deepening the Community's involvement in the JHA domain. In fact, the Commission was only one step short of gaining the sole power of proposing Community legislation on asylum, subject to qualified majority voting in the Council and co-decision with the European Parliament, provided that the Council had unanimously adopted 'first stage' Community legislation on asylum. On 1 December 2005, the Commission had, in spite of a considerable delay not foreseen by the Treaty of Amsterdam, met its integrationist objective of applying the 'Community method' to the governance of asylum in Europe (European Commission 2005a).

3.2 Intergovernmental Negotiations in the Council, October 2001 – December 2002

3.2.1 Initial Scrutiny under the Belgian Presidency

Selected southern Member States' governments, first and foremost the Italian administration, supported the institutionalization of an alternative hierarchy of criteria for processing asylum applications in the European Community. The Italian representative to the Council's *Asylum Working Party* expressed its discontent with the Commission's proposal at the very first reading of the draft Regulation on 2 October 2001. Both Italy and Greece formally entered substantive reservations (read: objection or veto) on article 10 of the draft bill on this occasion. The Italian delegation justified its position as follows: 'Member States' duty to guard their borders should not be confused with determining the Member State responsible for examining an asylum application' (Council 2001b: 13).

In voicing its opposition to the Commission's legislative proposal, the Italian government found a weak ally in UNHCR, recommending an allegedly simple and more humane solution according to which 'the responsibility for considering an asylum claim [shall lie] with the Member State with which and in whose jurisdiction the claim is lodged' (UNHCR 2001: 7). The same position was promoted by INGOs such as Amnesty International (2002) and the multifaceted NGO community represented on EU level by the European Council on Refugees and Exiles.

Occupied with coordinating the EU's response to the terrorist attacks in America, the Belgian Presidency could not resolve these substantive issues. However, it managed to arrange for the formal 'opt-in' of both Ireland and the UK (Council 2001c, 2001d).

3.2.2 Intergovernmental Deadlock and Issue-linkage under the Spanish Presidency

Precisely at a time when the politically marginalized European Parliament and its Committee on Citizens' Freedoms and Rights, Justice and Home Affairs had in principle approved of the Commission's draft 'not least because of the absence of viable alternatives' (European Parliament 2002: 15), the incoming Spanish Presidency (first half of 2002) broke with the Commission's approach. Framed as a 'compromise text', the Spanish Presidency suggested that the responsibility for processing asylum applications from third country nationals not subject to visa requirements should lie with the Member State in which the application is lodged (Council 2002a: 12). As mentioned above, this had also been the preferred solution of UNHCR and the NGO community. Whereas the Spanish Presidency's new draft received a warm welcome from the Greek and Italian delegations, it triggered a negative response *inter alia* from Germany, the Netherlands, Sweden and the UK. During the *Asylum Working Party's* meeting on 16 April 2002, for example, the latter countries called on the Spanish Presidency to 'put the criteria back in the order proposed by the Commission' (Council 2002b: 15).

Since intergovernmental negotiations on Asylum Working Party level had so far resulted in deadlock, the Spanish Presidency referred the entire dossier to a higher and politically more sensitive level, that is to the *Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)*. Instead of moving closer towards agreement, however, discussions on SCIFA level merely made the conflict of interest between the Member States more visible. In fact, the Greek and Italian delegates to the SCIFA meeting on 23-24 May 2002 supported the Spanish Presidency's position by arguing that the EU should 'avoid penalising Member States due to their geographical situation' (Council 2002c: 13). On the other hand, the German and Austrian delegations called for the introduction of data transmission equipment compatible with the fingerprint database EURODAC in order to enforce the principle of first contact in administrative practice (cf. European Commission 2003a). The gap between the promoters and opponents of the Commission's initial draft was increasing.

By June 2002, the Spanish Presidency had to report to the *Permanent Representatives Committee (COREPER)* that 'the proposal … has been discussed in depth in the Council

Working Parties, without any agreement being reached'. Furthermore, the Spanish government openly questioned whether 'irregular border crossing and unlawful presence in the territory [should] be maintained as criteria for defining the Member State responsible for examining the asylum application' (Council 2002d: 2-3). The most straightforward answer to this question was again provided by Italy, still vehemently opposed to any Community Regulation that would create a substantive link between external border control and Member States' responsibilities for processing asylum applications. In a formal letter dated 17 June 2002, the Italian government argued as follows:

> If the criterion is maintained whereby responsibility rests with the country of first entry, we will find ourselves in the plainly absurd situation where, on the one hand, there is integrated management of border controls by all Member States and, on the other hand, border States alone are responsible for any avoidance of the controls, which, it should be noted, are not usually carried out at crossing points in the Schengen area. … We are thus convinced that the responsibility criterion relating to unlawful border crossing should not be included among the criteria or, failing that, should be of an entirely residual nature, insofar as there has been a clear failure to comply with the Common provisions (Council 2002e: 2).

The letter by the Italian delegation had been drawn up in response to the *JHA Council's* failure to reach an agreement on Dublin II at its meeting on 13 June 2002 in Luxembourg. During this Council meeting, however, the ministers of the interior and justice had cleared the way for a new framing of the issue at hand. In what one might describe as an effort to transcend the conflict by means of issue-linkage, the ministers 'emphasised the close link between this question [the Dublin II Regulation] and the issue of combating illegal immigration, both of which will be discussed by the European Council meeting in Seville…' (Council 2002f: 13).

As the JHA Council had envisioned, both issues *were* discussed by the heads of state or government during their meeting in Seville, Spain. In conclusion, the *European Council* asked the JHA Council and the Commission to attach top priority to implementing practical measures for curbing illegal immigration. In an unusual display of political power, the EU leaders even threatened to sanction third countries that would not comply with EU demands (cf. Aus 2007a: 56). Furthermore and 'in parallel with closer cooperation in combating illegal immigration', the European Council urged the JHA Council 'to adopt, by December 2002, the Dublin II Regulation' (European Council 2002: 12). From now on, the draft Dublin II Regulation on asylum, legally solely based on article 63 (1) (a) of the EC Treaty, was

politically associated with EU efforts at preventing irregular border-crossings and punishing human smugglers.

3.2.3 Continued Stalemate under the Danish Presidency

Reaching an 'early agreement' on Dublin II would presumably not have been possible if Greece would have presided over the relevant meetings of the JHA Council during the second half of 2002. The main reason why Denmark, the only EU country with a categorical 'opt-out' of Title IV of the EC Treaty (covering *inter alia* 'First Pillar' measures on asylum), presided instead was not so much a lack of political will, but rather a lack of resources on the part of the Greek administration. One of my interviewees recalled the deliberations on this subject matter as follows: 'There was some talk before [the start of the Danish Presidency in July 2002] whether they will chair or not. Should they not chair, it would have meant a whole year for the Greek, as it happened with the [informal] Euro 12 [or Eurogroup] for the Euro. But the Greek officials were terrified to have to check for ideas on all these things on JHA' (author's interview, 11 May 2004).

Having a strong national interest in the adoption of a Community Regulation which, subject to a parallel agreement between the EC and Denmark, would allow the Danish government to remove as many asylum seekers to neighbouring Germany as possible, the incoming Danish Presidency (July – December 2002) declared that it would 'make a special effort to reach agreement on the Commission's proposal' (Danish Presidency 2002: 13). Before returning to the Commission's initial draft and doing away with the Spanish Presidency's amendments, however, the Danish government proposed inserting a so-called safety clause into the Regulation. This typically Danish 'opt-out' idea was presented to the *SCIFA* members on 22-23 July 2002 and found the following legal expression:

> A Member State can request for suspension of the relevant provisions of this regulation relating to the obligation for it to take back or take charge of asylum seekers if this Member State during the preceding 3 years has received more asylum seekers than what is equivalent to its share of the total number of asylum seekers received in the EU during the same period, with an addition of 35%. … A Member State's share of asylum seekers is equivalent to its share in percent of the total Gross Domestic Product of all Member States (Council 2002g: 3).

The Danish Presidency also used this SCIFA meeting to set up an *Informal Drafting Group* – presided over by Denmark and comprising national officials, a Commission representative, and a member of the Council Secretariat. However, the informalization of the decision-

making process did not yield any concrete results. After having met twice on September 11th and 19th, the Informal Drafting Group merely decided to *delete* the rather complicated and potentially dysfunctional safety clause proposed by the Danish government (Council 2002h).

A few days later, the Danish Presidency tabled yet another innovative amendment to the Commission's draft. On September 20th, the Presidency proposed 'to merge Articles 10, 12 and 13 into one single provision thereby not giving precedence to any of the three responsibility criteria set out in these articles' (Council 2002h: 2). Yet this did not satisfy Member States' governments either. After all, the whole point about adopting a new Community Regulation was to establish clear criteria for determining Member State responsibility. At the SCIFA meeting of September 25th-26th, the French delegation thus dryly noted that 'the new drafting blurs the hierarchy of criteria, irregular entry should take precedence', whereas Greece, Italy, Finland, Ireland, the Netherlands and the UK entered general scrutiny reservations (Council 2002i).

In spite of all confusion, the Danish Presidency delegated the unfinished dossier to *COREPER* in light of the forthcoming JHA Council meeting on 14-15 October 2002 (Council 2002j). The *Council of Ministers* therefore ended up holding a fruitless 'debate focused on the hierarchy of criteria…. Following the discussion, the Council charged the Permanent Representatives Committee to pursue work in order to allow an agreement at the next JHA Council on 28/29 November' (Council 2002k: 21). With approximately six weeks left for the Danish Presidency to hammer out an agreement as requested by the European Council, the subject matter had been delegated back to the Council's working parties.

3.2.4 The End Game or The Art of Reaching Political Agreement in the Council

Refusing to give in to strong political pressure, the Greek and Italian delegations upheld their general reservations on the envisioned hierarchy of criteria. They would maintain this position until the decisive Council meeting.

The informal group of *JHA Counsellors* was well aware of these unresolved problems. Nevertheless, the 'mini-COREPER' of the JHA domain tried to revitalize the negotiations by drawing up a supplementary political declaration. This declaration, agreed upon by October 29th and formulated in the spirit of the Seville European Council conclusions, would later appear as an attachment to the JHA Council's minutes. According to the draft declaration, the Council was supposed to state that it would '[take] into account the concerns of certain Member States, whose geographical position exposes them to illegal immigration, that an

effective application of the Dublin II Regulation, in particular Article 10 of the Regulation, may lead to an overburdening of their asylum systems'. This, of course, was precisely the outcome that peripheral countries like Greece and Italy were trying to avoid. Against this background, the JHA Counsellors suggested that the JHA Council should 'express its solidarity with Member States particularly exposed to irregular crossing of the external borders'. How precisely the concept of interstate solidarity could manifest itself in financial terms remained unclear, however. The draft declaration merely promised that a number of pilot projects aimed at 'combating and deterring illegal immigration' would be launched in the near future 'in addition to the adoption of the Dublin II Regulation' (Council 2002l: 34-36).

Much to the chagrin of the Danish Presidency, the Greek and Italian delegations remained unconvinced. They would simply not 'buy' the Dublin II Regulation in its current form in exchange for a legally non-binding declaration on interstate solidarity attached to the Council minutes. After all, every single delegation knew that the Member States, rather than the EU as such, were spending a total of approximately € 3 billion annually on border control measures – a lot of money in comparison with the 'structural inadequacy of the resources currently available for immigration and asylum policies in the Community budget' (European Commission 2003b: 18). The Greek and Italian representatives consequently upheld their general reservations on the hierarchy of criteria at the *SCIFA* meeting of November 5th and at the *COREPER II* meetings of November 7th, 14th and 21st, respectively (Council 2002m, 2002n, 2002o). Just days before the last Council meeting on ministerial level under the Danish Presidency, the JHA Council's working structures had failed to produce a common draft.

In spite of the prolonged deadlock among national delegations, the Danish Presidency decided to present both the disputed draft Dublin II Regulation and the supplementary political declaration to the JHA Council at its meeting on 28 November 2002 (Council 2002p). The minutes of this meeting reveal that the Danish Presidency activated a rather unusual procedure, namely that 'the Presidency decided to launch a silent procedure in order to reach a political agreement on its compromise proposal...' (Council 2002q: 5; cf. also Council 2002r: 7). The so-called silent procedure, a variant of the written procedure, originated in the domain of foreign and security policy. According to this procedure, 'a decision is deemed to be adopted at the end of the period laid down by the Presidency depending on the urgency of the matter, except where a member of the Council objects' (Council 2000: 28). The official records document that the silent procedure ended on

6 December 2002, resulting in the administrative recognition of a political agreement among Member States' governments (Council 2003c: 2).

A participant of the Council meeting on November 28th recalls: 'With the help of the [Council] Legal Service, and also the Danish ambassador, someone asked at one moment: "Can we not do a written procedure?" And the answer was: "Well, no, because the written procedure is a *formal* thing for adoption. But we can do a parallel thing: an *informal* one – the same thing, but informally, for a political agreement, that can always be done!", and that's what we did'.

One day after the Council meeting, the Council Secretariat sent out a FAX to all Permanent Representations. It *inter alia* contained the following passage:

> Following the report from the Presidency on the JHA Council of 28 November 2002, the text of the above mentioned proposal for a Council Regulation and the draft minutes to the Council minutes … shall be deemed agreed in the absence of comments by delegations by noon, Friday, 6 December 2002.

The interviewee explains the political purpose of this FAX: 'So we gave them a week, but it was a silent procedure. Politically, if someone opposed, he had to say so. That was the key! If we would have had a formal written procedure, the outcome would have been to the contrary! First of all, it would have been for [formal] adoption, and [in this case] they are obliged to answer Yes, No, or Abstention. But here, being *informal*, because it was used to *confirm a political agreement*, the genius thing was to say: "If you oppose, say so!"' (author's interview, 11 May 2004). As the Danish Presidency had intended, no one ever replied to this FAX.

The aftermath of this successfully concluded informal silent procedure is of merely legal significance and provides no further insights into the politics of Dublin II. Having confirmed the political agreement, *COREPER* advised the Council as such to adopt the Dublin II Regulation as a so-called A item, that is as a supranational legislative act to be approved of without further debate. The Regulation was formally adopted by the *Economic and Financial Affairs (ECOFIN) Council* on 18 February 2003 (Council 2003d). Following its publication in the Official Journal and in line with article 29 Dublin II, the Regulation entered into force in March 2003 and has applied to asylum applications lodged in the European Community as of September 2003.

4. Conclusion: Strategic Calculation and Rule Following in the Council

What are the social mechanisms underlying national delegations's negotiating behavior? Does the history of the negotiation of the Dublin II Regulation shed light on the conditions under which *strategic calculation* and *rule following* come to the fore? And what, if anything, does this case tell us about the *interaction* between the logic of consequentiality and the logic of appropriateness in the Council? By means of interpreting the empirical material presented above from both a Rationalist and Institutionalist perspective, this section seeks answers to these questions.

4.1 Dublin II and the Logic of Consequentiality

Until the informal silent procedure was launched by the Danish Presidency, at least one delegation preferred non-agreement over agreement. Numerous delegations entered 'general reservations' on different versions of the draft Regulation, especially in regard to the hierarchy of criteria contained in article 10 Dublin II, in accordance with their mutually exclusive strategic interests. Given the unanimity requirement in the Council and in light of the 'win or lose' character of the negotiations, this resulted in prolonged legislative deadlock. The course of intergovernmental negotiations from October 2001 through November 2002 thus largely meets Rationalist expectations.

The Rationalist 'deadlock hypothesis' presented in section 2.2 above was based on the assumption that the negotiation of secondary Community law within particular Council formations generally does not allow for trading concessions across issue-areas. Whereas this assumption must not be entirely discarded, it nevertheless needs to be relaxed (see König and Junge's chapter in this volume). In the end, reaching intergovernmental agreement on Dublin II was made possible by reaching simultaneous agreement on future EU measures concerning illegal immigration and external border control. The wide range of items on the agenda of the JHA Council allowed certain delegations to employ their initial 'reservations' on Dublin II as bargaining chips in a complex game involving current and future Community measures on asylum and immigration. The notion of 'diffuse reciprocity', then, may account for the fact that individual governments do not exercise their right to veto even in politically divisive cases like the Dublin II Regulation (cf. Heisenberg's chapter in this volume).

Alternatively, the final legislative outcome may, from a Rationalist perspective, be interpreted in light of the concept of *strategic non-compliance*. The latter involves formally

subscribing to a given set of supranational rules and procedures while planning to ignore or circumvent them in administrative practice (cf. Hayes-Renshaw *et al.* 2006: 172 on the hypothesized positive relationship between anticipated non-compliance and contested voting). Within a strategic non-compliance game, actors agree to things they will never carry out in order to appease their partners on the other side of the negotiating table. If skilfully employed, no one will notice that 'the devil is quoting the scripture'. One's benefits of premeditated non-compliance must be weighed, however, against the costs of losing one's reputation for being a reliable contracting party (Chayes and Chayes 1993: 177). In effect, deliberate cheating is a more reasonable course of action for *homo oeconomicus* in one-off encounters than in repeated games.

Lending empirical support to the notion of strategic non-compliance, one can observe that certain national authorities are apparently not applying the Dublin II Regulation in 'good faith' (Papadimitriou and Papageorgiou 2005). It may raise some eyebrows that those authorities who were once vehemently opposed to the draft Dublin II Regulation are now the slowest throughout Europe when it comes to sending the fingerprints of asylum seekers and apprehended irregular border-crossers to the EURODAC central unit (Aus 2006) – a practice that, in the eyes of the Commission, 'may lead to results contrary to the underlying principles of the [Dublin II] Regulation' (European Commission 2005b: 11). The Commission, well aware of the unfavourable Dublin Convention legacy, has tried to quell such 'opposition through the backdoor' by issuing the Dublin III Regulation (European Commission 2003c). The main aim of this Commission Regulation is to facilitate the effective enforcement of 'transferring' asylum seekers across the Member States of the EU and associated third countries like Norway. Only time can tell whether or not the Dublin II Regulation and subsequent Commission Regulations will be remembered in history books as supranational legal science fiction.

4.2 Dublin II and the Logic of Appropriateness

Not unlike other political institutions, the Council has, over time, developed its own rules of procedure and code of conduct. The Council Secretariat functions as the institutional memory of these rules and routines. Paradoxically, the Secretariat's political influence increases the more it manages to create the erroneous impression that *'le Secrétariat du Conseil n'existe pas'* (see Beach's chapter in this volume). Yet the Council as such, dedicated as it is to facilitating intergovernmental agreement, does not determine specific policy outcomes (cf. March and Olsen 2006a: 8).

In accordance with the *logic of appropriateness*, however, the initial opponents of Dublin II exercised an institutionally expected degree of self-restraint during the silent procedure. They did not 'rock the boat' – even though they did not applaud the compromise proposal presented by the Danish Presidency either. Nevertheless, both the proponents and increasingly isolated critics of Dublin II were, to borrow a term coined by Ernst B. Haas half a century ago, fully 'engaged' with the Council and adhered to its informal code of conduct (1958: 522). Speaking up during the silent procedure would have been perceived as inappropriate behaviour. The appropriate thing to do, on the other hand, was to gracefully accept the unavoidable and to silently drop all remaining reservations (cf. Lewis's chapter in this volume, and especially his interview data on negotiating instructions that read, 'oppose as long as not isolated'). Compliance with Council-specific informal rules and procedures, to put it in a nutshell, explains why 'some dogs do not appear to bark' (Hayes-Renshaw and Wallace 2006: 286).

4.3 The Janus Face of the Council Revisited

Helen Wallace once described the Council as a 'complex and chameleon-like beast' (Wallace 2002: 342). In this chapter, I have argued that the complexity of Council proceedings can be reduced by resorting to two stylized images, arena and institution, suggesting that political behaviour in the Council is driven by strategic calculation and rule following, respectively. Each image helps us to describe particular facets of this chameleon-like creature, but only Rationalist and Institutionalist perspectives combined can grasp the true 'nature of the beast' (Thomas Risse). Unfortunately, we are not yet in a position to study decision-making processes in the Council within an integrated framework. For the time being, the best we can arguably do is to provide a 'double interpretation' of the empirical material and to delineate the domain of application under which the two perspectives empirically hold (Zürn and Checkel 2005, Aus 2007b).

The in-depth analysis of the negotiation of the Dublin II Regulation suggests a typical choreography of decision-making processes in the JHA Council. Potentially redistributive legislative dossiers relating to the establishment of an Area of Freedom, Security and Justice in the EU apparently go through a phase of purposive-rational intergovernmental exchange followed by a phase of value-rational adherence to institutionalized rules. From a theoretical point of view, this signals the *sequential ordering* of different logics of action (cf. Jupille *et al.* 2003, Schimmelfennig 2003, Checkel 2006, Aus 2007a). If we could generate more knowledge about this form of interaction between the logic of consequentiality and the logic

of appropriateness, it would allow us to provide an empirical foundation for March and Olsen's conjecture that 'different phases follow different logics and the basis of action changes over time in a predictable way' (2006b: 704). More comparative case studies are needed to validate such claims.

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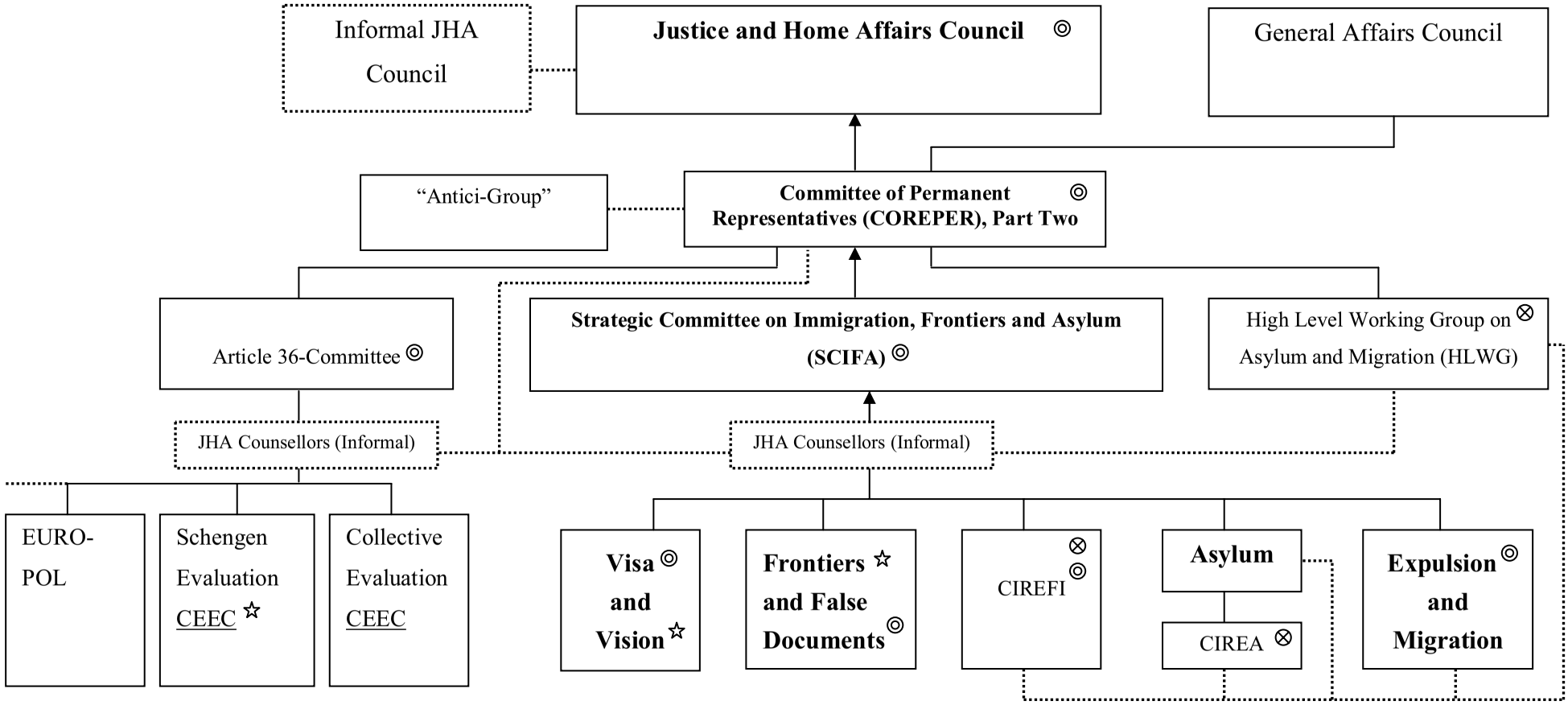
Zürn, M. (1997): '"Positives Regieren" jenseits des Nationalstaates: Zur Implementation internationaler Umweltregime'. *Zeitschrift für Internationale Beziehungen* 4(1): 41-68.

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Annex 1: Working Structures of the JHA Council, 1999-2004

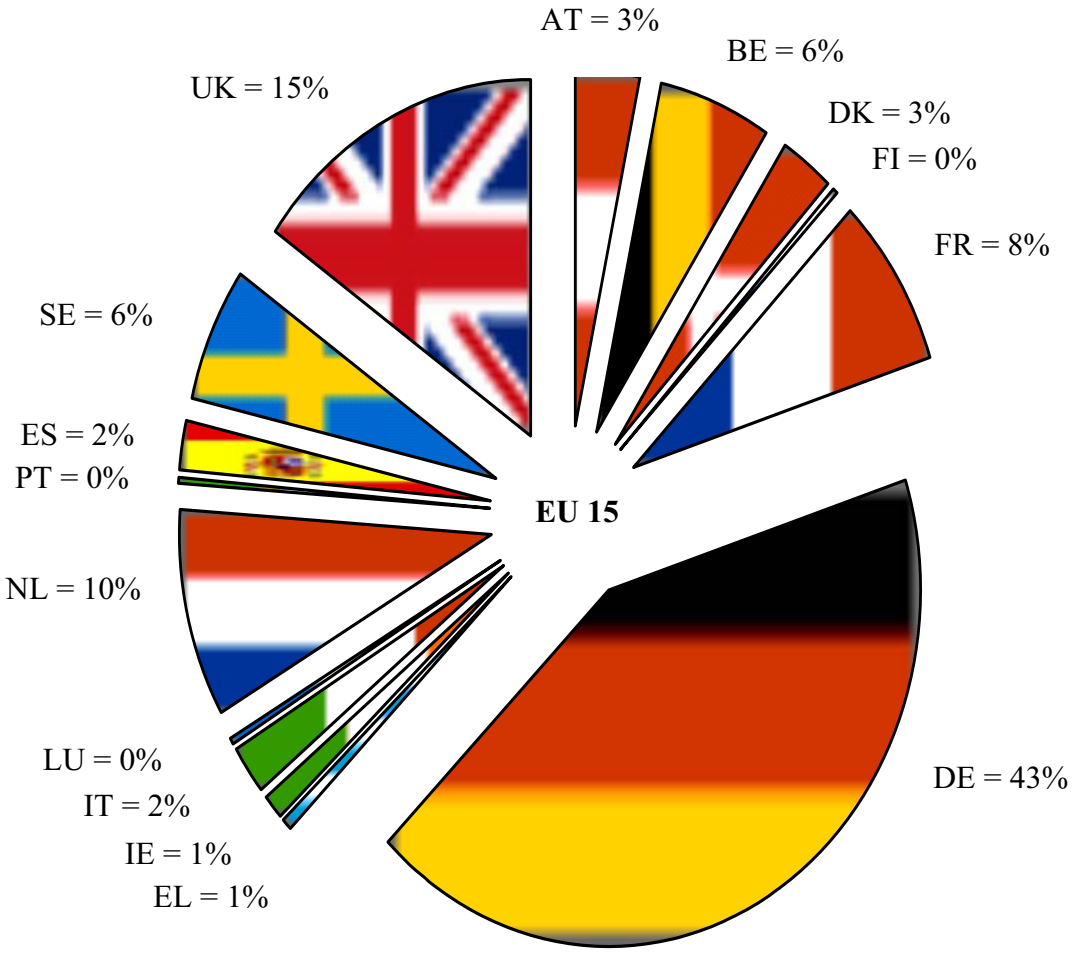
☆	*Always* related to the development of the *Schengen*-acquis →	United Kingdom and Ireland may 'opt-in,' Denmark needs legal transformation, Working Party *must* also meet as 'Mixed Committee' with Iceland and Norway
◎	*Sometimes* related to the development of the *Schengen*-acquis →	Positions of United Kingdom, Ireland and Denmark dependent on legal basis, Working Party *may* also meet as 'Mixed Committee' with Iceland and Norway
⊗	Working Party may hold joint meetings with the Candidate Countries and/or with the U.S.A. and Canada	
BOLD	Legislation under Title IV EC: Council acts on the basis of a Commission proposal or on a Member State's initiative; unanimity in the Council and EP consultation (exception: visa policy) →	Denmark: categorical 'opt-out,' United Kingdom and Ireland: possible 'opt-in'

Formal Working Party
Formal Communication
Informal Working Party
Informal Communication



Annex 2:

Distribution of Asylum Applications Between the Member States, 1992-2001 (UNHCR 2002)



4

Eurodac: A Solution Looking for a Problem?

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Eurodac: A Solution Looking for a Problem?

Aus, Jonathan P.

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Abstract
This study accounts for the emergence of a supranational biometric control regime in Europe. The empirical focus lies on the institutionalization of Eurodac, an automated fingerprint identification system covering asylum seekers and "illegal" immigrants. Who promoted the idea of setting up an automated biometric system in the European Community? Which behavioral logics were underlying the negotiation of the Eurodac Regulations in the Justice and Home Affairs Council? And how did the European Commission get involved in policing the so-called "Area of Freedom, Security and Justice"?

Full Text: HTML PDF

Jonathan P. Aus is a research fellow at ARENA - Centre for European Studies, University of Oslo, Norway.
e-mail: j.p.aus@arena.uio.no

Eurodac: A Solution Looking for a Problem?(*)

Jonathan P. Aus

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| Abstract | PDF |

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1. Introduction

The Eurodac Regulations adopted by the *Council of the European Union* on December 11, 2000 and February 28, 2002, respectively (Council 2000a, 2002), provided the legal basis for the establishment of an automated *Euro*pean *dac*tylographic system (hence the acronym *Eurodac*) in the European Community. Automated biometric identification systems like Eurodac allow for the instant and exact comparison of unique physiological features such as an individual's iris, face, or fingerprints for law enforcement purposes.

Eurodac represents the first application of biometric identification technology within a supranational political entity. For the time being, we do not know by which social mechanisms this development was brought about. Nor can we be sure of Eurodac's impact on the relationship between EU citizens and third country nationals, on the one hand, and supranational political institutions, on the other. In spite of the democratic and human rights relevance of this project, Eurodac has received only scant attention outside practitioners' circles. (The Eurodac-related secondary literature is accordingly limited; see Aus 2003, Brouwer 2002, and van der Ploeg 1999. For legal commentary from a practitioner's perspective, see *inter alia* Schmid 2003.) In order to ameliorate this situation, this paper addresses the following questions: How can we account for the institutionalization of biometric control procedures in the *European Community*? Which actors successfully promoted the idea of setting up an automated European dactylographic system? And what were the logics of action

underlying the negotiation of the Eurodac Regulations both in the *Justice and Home Affairs (JHA) Council of the European Union* and within the intergovernmental *Schengen* framework?

I seek answers to these questions in the following manner: Section 2 introduces two theoretical perspectives, Rationalism and Institutionalism, which, by focusing our attention on different logics of action, may serve as ideal-typical representations of the willful political construction of a supranational biometric control regime in Europe. Section 3 provides empirical insights into the stepwise institutionalization of Eurodac, with a particular emphasis being placed on the negotiation of the Eurodac Regulations in the JHA Council and the variable enforcement of Eurodac across the Member States and associated third countries. Section 4 reviews the empirical findings of the case study in light of the crucial theoretical question of how analytically distinct behavioral logics interact with one another in political practice. I shall close with a discussion of the scope conditions of strategic calculation and rule following in EU Justice and Home Affairs.(1)

2. Rationalist and Institutionalist Perspectives on Intergovernmental Decision-making

2.1 Problems Looking for Solutions

Rationalists adhering to a *logic of consequentiality* tend to believe that political outcomes, including supranational legislative acts, are brought about by strategically calculating actors seeking to maximize given interests. Within a Rationalist analytic framework, we expect purposive-rational actors to perform means-end and ends-ends calculations culminating in utility-maximizing choices: "Action is instrumentally rational *(zweckrational)* when the end, the means, and the secondary results are all rationally taken into account and weighed. This involves rational consideration of alternative means to the end, of the relations of the end to the secondary consequences, and finally of the relative importance of different possible ends" (Weber 1978: 26; cf. Elster 2000).

The stylized image of instrumentally rational, strategically calculating actors, formulated in an ideal-typical manner by Max Weber, has been succeeded by formal models of both cooperative and non-cooperative interactions among several "players." The contemporary policy analyst will thus most likely draw on "the basic [game-theoretic] notions of interdependent strategic action and of equilibrium outcomes" (Scharpf 1997: 7). In line with this interaction-oriented variant of rational-choice theory, Thomas Gehring has argued that the intergovernmental Schengen regime was brought about by a group of Member States' governments looking for innovative solutions to a set of collective action problems. According to Gehring, the members of the "Schengen club" were aiming at identifying the most efficient and effective means of collectively dealing with the consequences of the elimination of internal border controls in Europe. Schengen's common provisions concerning external border control, visa, asylum, and police and judicial cooperation, incorporated into the EU in May of 1999, have thus been interpreted as functionally adequate re-regulatory measures willfully designed by strategists of "differentiated integration" (Gehring 1998).

The Rationalist notion of efficient and effective problem solving may also be applied to Eurodac. The *problem* that Eurodac is allegedly attempting to resolve is that of "secondary movements" among asylum applicants deliberately concealing their identity. A Commission official accordingly recollected that "the main problem we addressed with the Eurodac Regulation was that you simply couldn't identify persons. At first, people arrived and said that they had lost their identity cards or their travel documents while traveling – that was the case with more than 80% of all asylum applicants. … So although there was a theoretical legal possibility of transferring people back to another country, and, by doing so, to arrive at a certain [level of] burden-sharing [between the Member States], this was made impossible in practice by the asylum seekers themselves, who successfully managed to hide their true identity" (author's interview, May 17, 2004).

A viable *solution* to this problem is arguably the establishment of an automated fingerprint identification system on Community level in combination with the compulsory fingerprinting of certain categories of third country nationals. The effective *enforcement* of the supranational biometric identification regime, in turn, may require delegating implementing powers to the European Commission. A game-theoretic caveat is in order at this point, however. Fritz Scharpf rightly reminds us that the "'benevolent-dictator perspective' of most substantive policy analyses whose job is done when the causes of a problem have been correctly identified and a technically effective and cost-efficient solution proposed" is not satisfactory for the interaction-oriented political scientist. A comprehensive Rationalist account of any given legislative outcome in the field of EU Justice and Home Affairs must also provide empirical insights into actual modes of interaction between executive actors, "each with its own understanding of the nature of the problem and the feasibility of particular solutions…." (Scharpf 1997: 11). We shall see in due course whether the empirical material presented in *section 3.* below allows for the conceptualization of Eurodac as an equilibrium solution collectively endorsed by the members of the JHA Council.

2.2 Solutions Looking for Problems

Rationalist accounts of intergovernmental decision-making as efficient and effective problem solving may be challenged by a Sociological Institutionalist perspective based on the assumption that institutional actors adhere to a *logic of appropriateness* (see March and Olsen 2006). The latter involves the self-conscious matching of rules to situations. At first sight, this logic of action appears to explain only the behavior of institutionally embedded actors striving for the "common good." At closer inspection, however, it becomes readily apparent that this logic also accounts for the political mindset and behavioral traits of members of organizations pursuing "evil" objectives (cf. Arendt 1994).(2) The *logic of appropriateness,* in other words, is a useful yet normatively colorblind explanatory device.

Institutionalist analysts of organizational decision-making and administrative reform processes have come to observe that "changes often seem to be driven less by problems than by solutions" (March and Olsen 1989: 62; cf. also Aberbach and Christensen 2000). The dynamics of solution-driven problem solving can be studied in a variety of policy areas, including policing and criminal justice. "A law enforcement agency, [for example], may regard criminalizing an activity as the obvious way of eliminating it" (March and Simon 1993: 15; cf. also Crank and Langworthy 1992, Crank 2003). Policemen and women devoting their time and energy to the maintenance of law and order are doing what they are supposed to do. The value-rational social action of a policeman, to borrow once more the words of Max Weber, is ideal-typically motivated by "'commands' or 'demands' which, in the actor's opinion, are binding on him" (1978: 25). The matching of rules and roles to situations is a fairly complex cognitive process. By actively searching for the most efficient and effective means of preventing and combating crime, law enforcement officials and their political representatives are fulfilling a professional duty.(3)

Institutional actors like the police have every reason to believe that the efficiency and effectiveness of their operations can be improved by making use of cutting-edge technologies of political control (cf. Nogala 1989, Rappert 1999). The potential "added value" of biometric identification technology for "securing the homeland" from perceived threats such as bogus asylum seekers, illegal immigrants, and foreign-born terrorists is a case in point (cf. *inter alia* Woodward 2005, O'Neil 2005, Lodge 2005). And yet it would be foolish to think that political problems can be solved by technological means alone. This especially holds true if the political question to which a given technology is seemingly the answer is notoriously hard to determine, not least for its corporate suppliers solely interested in profit maximization. The *Steria Group*, for example, promotes its fingerprint image transmission (FIT) devices as follows: "The FIT solution, which is part of Steria's global 'biometrics' offer, can also be applied in fields such as electronic voting, authentication and verification in sensitive areas such as airports (passengers and personnel), nuclear power stations, research laboratories or e-commerce, internet kiosks, etc." (Steria Group 2002). Interestingly, the

Steria Group perceives Eurodac, whose Central Processing Unit (CPU) it developed itself, as being concerned with "immigration applicants." Aware of the lucrative prospect of selling Eurodac technology to customers other than asylum and immigration authorities, *Steria* representatives have (evidently quite successfully) suggested that "this solution may prove useful in combating organised crime and terrorist networks" (Steria Group 2003).(4) Commercially distributed automated fingerprint identification technology is a textbook example of a solution looking for a problem.

An organization's stance or "solution" towards a given problem at time *t* 0 may be approximated by identifying its position at *t* – 1 (cf. Allison and Zelikow 1999: 175). While such an exercise might prove useful for heuristic purposes, it is conceptually misleading to equate the social mechanism of rule following with unconscious repetition.(5) Traditional behavior, as Max Weber reminds us, is qualitatively distinct from value-rational social action. The Sociological Institutionalist task rather consists of empirically illustrating "the [social] process by which routines come to encode the novelties they encounter into new routines" (March and Olsen 1989: 34). Actors whose interests and perceptions are institutionally shaped arguably live up to the challenge of novelty by searching for a set of standard operating procedures that they can creatively "upgrade" and apply to a new set of problems. Fingerprinting as a police-specific standard operating procedure and its application to the refugee problem is a case in point.

The Institutionalist concept of solution-driven problem solving sketched out above fits well with Virginie Guiraudon's account of decision-making processes in the field of EU migration policy. As commonly known, Community legislation relating to asylum, immigration, and external border control has mainly been drawn up by national executives, i.e. by the members of the *Justice and Home Affairs Council* and the civil servants assisting them. Guiraudon accordingly observed that "interior, justice and police personnel ensured that they were the most well equipped to provide solutions to the problems that they themselves had identified" (2000: 260). Furthermore, she found that "they emphasized technical solutions that required their expertise" (2001: 10), and, most notably from a theoretical point of view, that "'solutions' had been devised before 'problems' had been identified" (2003: 268). Empirical observations of this kind should not come as a surprise to the organizational theorist trying to make sense of decision-making processes in an "Area of Freedom, Security and Justice." We shall see in due course whether similar patterns can be identified with a view to the negotiation of the Eurodac Regulations in the JHA Council.

3. Eurodac and the Emergence of a Supranational Biometric Control Regime, 1990–2005

3.1 Predecessors of Eurodac on National Level: Police Demand and Corporate Supply

One of the principal tasks of members of police records departments is to collect fingerprints. The latter can be achieved by investigating crime scenes and via fingerprinting actual or potential offenders. Fingerprint data can assist the police in *identifying probable perpetrators*. Forensic evidence and corresponding fingerprint matches of accused individuals may also be *admissible in court*. No wonder, therefore, that the manual collection and storage of fingerprints for police and criminal justice purposes was already in use by the late 19th century (Cole 2001).

Automated Fingerprint Identification Systems (AFIS), on the other hand, only began to spread across the Western world a century later. Thanks to new technological devices such as fingerprint scanners and computer hard drives, it became administratively feasible to retrieve and store vast amounts of *digitalized biometric data.* By 1983, automated searches in dactylographic databases had become commonplace among employees of the U.S. *"Federal Bureau of Investigation" (FBI)* (cf. Cole 2004: 18). Today's largest biometric database in the world, the "Integrated Automated Fingerprint Identification System" (IAFIS) maintained by the FBI, contains the fingerprint templates of more

than 47 million individuals (cf. FBI 2006).

The "added value" of such systems for the police stems from three features: AFIS operate with unprecedented speed, deliver scientifically exact comparative results, and offer the possibility of producing "cold hits" via random searches or automated "one-to-many checks." The latter do not require the physical presence of the victim or criminal suspect in question, but merely their virtual digital representation. It is important to note, however, that the chance of obtaining a "hit" positively correlates with the number of entries stored in the database. The more crime scene evidence and biometric data of criminal suspects and convicted criminals can be collected, stored, and continuously compared with each other, the better for the police. In the best of all police worlds, *everyone's* fingerprints would be stored in a central database accessible to law enforcement officials "24/7."

Following the U.S. lead, the majority of *Western European countries* had, by the early 1990's, installed AFIS targeted not only at ordinary criminals, but also at asylum seekers and "illegal" immigrants (see Busch 1995: 115-117; for a comparative view to the *Republic of South Africa*, see Breckenridge 2005). The *German* AFIS, for example, began its highly efficient operations in December of 1992. In addition to the system's principal use for police and criminal justice purposes, federal German asylum authorities like the former *"Bundesamt für die Anerkennung ausländischer Flüchtlinge"* could now quickly determine whether or not a would-be refugee had filed asylum applications in more than one of the Federal Republic's partially autonomous states, the "Länder" (cf. Weichert 1993: 36). A similar political objective, namely the detection and suppression of "asylum shopping" across national jurisdictions, would be stated by politicians and civil servants promoting the establishment of Eurodac in the European Community.

Governments and administrations interested in setting up large-scale biometric identification systems operating on a national or even supranational scale were, and still are, chiefly dependent on the resources and expertise of *private corporations*. The dependence of public administrations on corporate capabilities and know-how in the biometric realm can be illustrated by highlighting the comparatively vast resources at the disposal of *Sagem Morpho,* the corporation which in practice established the AFIS's *inter alia* of Austria, France, and Germany. Sagem Morpho's parent company, *Sagem Défense Sécurité*, belongs to the *Safran Group*. The latter employs approximately 55,000 people. (The European Commission, by comparison, employs merely 22,000 people; Egeberg 2003: 141.) *Sagem* is an arms producer which, faced with reduced public defense expenditures after the end of the "Cold War," diversified into the law enforcement market.(6) With a global market share of nearly 50%, *Sagem* is currently the world's leader in the AFIS business.(7)

The multi-national corporation which rightly claims to be a "major player in the Eurodac system" (Sagem Group 2003) has managed to expand its profitable biometrics business *inter alia* into the emerging African market for *election and population control*. Possibly the world's first biometrically secured election was held in *Mauritania* between October 19-26, 2001. Every Mauritanian citizen had to submit his or her fingerprints to authorized business representatives and was later provided with a biometric *smart card* – allegedly in order to prevent "voter fraud" and thus to guarantee for fair and equal elections. Indicating that this large-scale operation not only served the purpose of strengthening democracy in Mauritania, a spokesperson of *Sagem* concluded that "Mauritania now has two advantages. First, it has a complete and coherent national database of the population. Second, all the adult citizens now have an ID card secured via a fingerprint" (Biometric Technology Today 2002: 1). At the time of writing, Mauritania's AFIS is under the control of a military junta which took over power in August of 2005. With the signing of a contract with *Colombian* authorities in February of 2006, *Sagem* enlarged its pool of biometric customers to a total of 56 countries (Safran Group 2006). AFIS of the French, Mauritanian and Colombian type have few corporate parents but many brothers and sisters all around the world.

3.2 Intergovernmental Negotiations within Maastricht's "Third Pillar"

Inter-executive deliberations on the technical feasibility of establishing an automated fingerprint identification system for asylum applicants in the EU range back as far as December of 1991. By November of 1992, the Council's *Ad Hoc Group on Immigration* had drawn up a confidential Eurodac progress report according to which a group of independent technical experts was supposed to elaborate the "user requirements" of such a system (see Council 1992). Following the short-term engagement of a consultancy firm, the *JHA Council*, now formally established under Maastricht's "Third Pillar," expectedly declared that "it is technically feasible to install a system for exchanging asylum seeker's fingerprints at European level" at its meeting on November 23, 1995 (Council 1995).

This course of events suggests that the evaluation of the *technical* feasibility of Eurodac preceded a *political* assessment of the project's desirability and appropriateness. In fact, intergovernmental discussions concerning the political objectives of Eurodac only began in 1996 (see Council 1996). At that time, it was still an open question whose fingerprint templates should be included in the database, which authorities should be granted access to the data, and whether the *Central Unit* should be managed by the *Commission* or a *Member State.* As we shall see in due course, some of these politically sensitive issues were still not resolved by the year 2000.

3.2.1 The Impact of Schengen on Intergovernmental Negotiations under the UK Presidency

In line with the political rationale of the Dublin Convention on asylum of 1990, the personal scope of Eurodac was initially conceived to be limited to potential *refugees* in the meaning of the Geneva Refugee Convention. (In regard to the Dublin Convention and its successor instrument on Community level, see Aus 2006.) In the end, however, Eurodac would also cover *"illegal" immigrants,* i.e. every third country national apprehended while trying to cross the external borders in an irregular fashion, and third country nationals residing in the territory of a Member State without proper authorization. How did this development come about?

The extension of the scope *ratione personae* of Eurodac cannot be understood without taking Member States governments' reactions to the refugee crisis of mid-1997 into account. The latter originated in war-torn Northern Iraq and quickly spread to Europe via Turkey. At the height of the crisis on November 2, 1997, a rusty ship with 769 would-be refugees of predominantly Kurdish ethnic origin on board stranded at the Southern coast of Italy. Most of the "boat people" were evidently heading for Germany, France, the Netherlands, and Scandinavia, and the Italian authorities initially did not prevent these people from traveling further to Central, Western and Northern Europe (cf. Frankfurter Allgemeine Zeitung 1997: 4, The New York Times 1998: 9, Tomei 2001: 88-94, and Puggioni 2005: 327).

In light of these irregular international migratory movements which seemed to undermine the effective application of the Dublin Convention from the very outset, the *Schengen Executive Committee* decided to create a *Task Force* responsible for coordinating practical measures for curbing "illegal immigration" in December of 1997. The first meeting of the *Schengen Task Force* was held on January 13-14, 1998, involving officials from France, Germany, the Netherlands, and Sweden, on the one hand, and Italy and Greece, on the other (Deutscher Bundestag 1998a: 15). Both transit and destination countries, in other words, were represented in the *Schengen Task Force.* According to Kurt Schelter, a former "Staatssekretär" in the German *Ministry of the Interior*, the German government exerted "massive pressure on Greece and Italy" during these meetings (Schelter 1998: 24. Schelter was acting in concert with his political superior, Manfred Kanther; cf. *Süddeutsche Zeitung* 1998: 6). What was interpreted as an asylum and refugee protection issue by the Italians and the Greek was read as a problem of "illegal immigration" and human trafficking connected with organized crime syndicates by the Germans, the French, and the Dutch.

It did not take long before the *Council of the EU*, now presided over by the British, decided to take collective action along the lines discussed within the *Schengen Group*. By January 26, 1998, the

General Affairs Council had formally adopted a cross-pillar *action plan* concerning the "influx of migrants from Iraq and the neighboring region" (cf. Council 1998a).(8) The plan had been drawn up by an *Ad Hoc Working Group* comprised of national asylum and migration experts, *Europol* personnel, and "Second Pillar" officials (cf. Deutscher Bundestag 1998b: 3). In spite of this cross-pillar EU initiative, the *Schengen Task Force* continued to convene parallel meetings on this subject matter (cf. Deutscher Bundestag 1998a: 15).

Epitomizing the intra-European political tensions prevailing at the time, the Austrian government unilaterally decided to *reinforce its border controls vis-à-vis Italy*. From a strictly *legal* point of view, the government in Vienna was entitled to do so since the *Schengen Executive Committee* had not yet declared that the conditions for the lifting of internal border controls vis-à-vis Italy, envisioned for April 1, 1998, had been met (cf. Der Tagesspiegel 1998: 4; Busch 1998). *Politically*, however, the strengthening of Austrian border controls vis-à-vis Italy was linked to (for the time being unfulfilled) Franco-German demands for extending the scope *ratione personae* of Eurodac to "illegal immigrants." This political rationale manifested itself at the meeting of the *JHA Council* on March 19, 1998. During this meeting, the German delegation formally entered a "general reservation on the Eurodac Convention, pending concrete progress on [the] issue [of] fingerprinting illegal immigrants" (Council 1998b). In other words, Germany was threatening to veto Eurodac unless German demands for extending the system to "illegal immigrants" would be met.

The *Schengen Group*, rather than the *JHA Council* as such presided over by a non-Schengen Member State, the United Kingdom, shaped the EU policy agenda during this phase of intergovernmental consultations. On April 21, 1998, the *Schengen Executive Committee* formally agreed upon *inter alia* the "fingerprinting of every foreign national entering the Schengen area illegally whose identity cannot be established with certainty on the basis of valid documents." In line with the ongoing technical preparations for launching the Eurodac database, the *Schengen Group* also called for the "retention of fingerprints for the purpose of informing the authorities in other Schengen States." The principal decision-making body of the *Schengen Group* justified these permanent measures as a collective response to "the increase in the number of foreign nationals immigrating into the Schengen States, in particular nationals of Iraq and other States" (Schengen Executive Committee 1998a; see also Schengen Executive Committee 1998b).

In effect, the *Schengen Group* had presented the UK Presidency with a *fait accompli* against which, in light of the forthcoming incorporation of the evolving *Schengen acquis* into the EU, no unilateral British remedies could be found. (In regard to the politics of incorporating Schengen into the EU, agreed upon during the 1996/97 Intergovernmental Conference, see McDonagh 1998: 165-182, den Boer and Corrado 1999.) At the last Council meeting under the UK Presidency in May of 1998, the *JHA Council* thus formally decided that "it will draw up a Protocol to the Eurodac Convention extending the Eurodac system to include the fingerprints of 'illegal immigrants' for adoption by the end of 1998" (see Council 1998c). In Bonn, this development was celebrated as a political victory for the German federal government under chancellor Kohl (Bundesministerium des Innern 1998a).

3.2.2 "Freezing" the Eurodac Convention under the Austrian Presidency

During the second half of 1998, the policy agenda concerning Eurodac was not only *de facto*, but also *de jure* shaped by the *Austrian Presidency of the Council* and the *German Presidency of the Schengen Group*. High-ranking German officials now made it publicly known that "Germany has demanded not only collecting the fingerprints of asylum seekers, but also those of aliens who have entered illegally" (Bundesministerium des Innern 1998b; translation JPA). The German delegation maintained this position throughout 1998 in spite of a change in federal government from the "center-right" towards the "center-left" (see Bundesministerium des Innern 1998c).(9)

Intergovernmental discussions now revolved around the question of how one could possibly define an "illegal immigrant." While the majority of national government representatives were apparently

willing to accept that the category of "illegal immigrants" should cover third country nationals apprehended while attempting to cross the external borders in an irregular fashion, the German delegation wanted to go further than that. It therefore suggested to "include all persons who had crossed the borders illegally and were caught in a Member State" (Council 1998d). The problem with such a wide definition was that a connection with irregular border-crossing was, for all practical purposes, very hard to establish for national police forces dealing with so-called *sans-papiers* or illegally resident third country nationals lacking any sort of documentation. Beyond that, extending the personal scope of Eurodac in such a manner might have signaled a departure from article 63 (1) (a) of the forthcoming EC Treaty, Eurodac's envisioned legal basis. The Austrian Presidency could not resolve this intricate problem during its tenure.

What the Austrian Presidency did achieve, however, was to identify a means of taking collective action before the partial "Communitization" of Justice and Home Affairs cooperation could manifest itself in procedural terms. The Austrian Presidency thus decided to "freeze" those asylum-related parts of Eurodac which had already found intergovernmental approval. The *"frozen" Eurodac Convention* could then, according to the Austrian Presidency's plan, reappear on the Council's agenda in the form of a *draft Community Regulation* presented by the Commission immediately after the entry into force of the Treaty of Amsterdam. This technique allowed the JHA ministers to partially "lock in" their policy agenda while *de facto* stripping the European Commission of its (shared) right of legislative initiative under the "First Pillar." In December of 1998, the *Council* thus formally decided, subject to parliamentary scrutiny reservations entered by Denmark, Italy, and the UK, that "the draft Eurodac Regulation … will be 'frozen' until the entry into force of the Amsterdam Treaty" (Council 1998e).(10)

3.2.3 "Freezing" the Eurodac Protocol under the German Presidency

The incoming German Presidency of the Council devoted a considerable amount of time and energy to drawing up a "Protocol extending the scope *ratione personae* of [Eurodac]" (cf. *inter alia* Council 1999a). By February 17, 1999, the *Eurodac Working Party* had reached "broad agreement" on the draft Protocol. About a week later, the *K4 Committee,* the "Third Pillar" predecessor of the *Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)*, confirmed the "broad agreement" reached on working group level. The basic consensus among national civil servants paved the way for *COREPER's* politically decisive involvement. The Member States' ambassadors settled the remaining intergovernmental differences by drawing up a *Statement for the Council Minutes* on March 4, 1999. This legally non-binding yet politically important statement underlined Member States authorities' obligation under Community law to systematically fingerprint not only every "alien [who] is apprehended at or close to the external border itself," but also every "alien [who] is apprehended beyond the external border, where he/she is still on route" (Council 1999b, 1999c).(11) The *JHA Council* would rubberstamp this inter-administrative settlement a few days later (cf. Council 1999d).

In the end, the German Presidency had not only achieved that every Member State *must* systematically fingerprint *irregular border-crossers* (in addition to *asylum applicants*). It had also accomplished that national authorities *may* take the fingerprints of *illegally resident* third country nationals in order to check whether the templates of this person might match with an entry in the Eurodac database. Mimicking its Austrian predecessor, the German Presidency, headed by Otto Schily, the newly appointed *Minister of the Interior*, decided to *"freeze" the Eurodac Protocol* in March of 1999 (cf. Council 1999e). Having found a common position on the entire Eurodac agenda in due time, i.e. just weeks before the fundamental restructuring of both the "First" and "Third Pillar" of the EU, the *Council* asked the *Commission* to present an agreeable proposal for a Community Regulation immediately after the entry into force of the Treaty of Amsterdam. The *European Parliament's* outright rejection of the Protocol, on the other hand, came far too late to affect the decision-making process in the Council (cf. European Parliament 1999b).

3.3 Incorporating Eurodac into Amsterdam's "First Pillar"

3.3.1 The Inter-institutional Struggle over Implementing Power

In the following weeks, legally trained Commission officials like Jean-Louis De Brouwer, at the time head of the "immigration and asylum unit" in the newly established Directorate-General "Justice and Home Affairs," managed to merge the two "frozen" texts into a single document.(12) On the basis of this preparatory work, JHA Commissioner Anita Gradin was able to present a *Commission proposal* for the establishment of Eurodac via EC Regulation to the members of the JHA Council on May 27, 1999 (see European Commission 1999, Council 1999f).

Having participated in all "Third Pillar" meetings of the Council, the Commission obviously knew what the Member States' governments were expecting from its first legislative proposal in the domain of Community asylum policy, namely to "ensure continuity in the results of the negotiations" on Council level (European Commission 1999: 8). In spite of some bickering about "[the unorthodox] technique of negotiating a draft Convention and a draft Protocol in parallel" (1999: 9), the Commission's services loyally adhered to the "frozen" Eurodac Convention and its equally "frozen" Protocol on irregular border-crossing and illegal residence, respectively. In one important respect, however, the Commission deviated significantly from the "frozen" texts. Whereas the *Council* had unambiguously expressed its intention of reserving implementing powers to itself, the *Commission* had drawn up a draft Regulation which "confers on the Commission powers of implementation to adopt provisions to give effect to it…." (1999: 8).

The reluctance of Member States' governments to accept the power-sharing arrangement envisioned by the Commission already surfaced at the very first meeting of the Council's *Working Party on Asylum (Eurodac)* under the "First Pillar" in July of 1999. During this meeting, numerous delegations formally entered "scrutiny reservations" in regard to the proposed "comitology" procedure (cf. Council 1999g). A few weeks later, an apparently irritated French delegation submitted in writing that "there is no reason to think that the authors [of the Eurodac Convention] wished to limit the power of the Council to adopt implementing rules...," while an equally concerned German delegation expressed the opinion that "the Council should … reserve the right to exercise the implementing powers for EURODAC [to] itself" (Council 1999h: 2, and Council 1999i: 3, respectively; cf. Peers 2001: 236, Brouwer 2002: 234).

In spite of the Commission's warnings that "the type of changes being envisaged by the French and German delegations would require the reconsultation of the European Parliament" (Council 1999j), the JHA Council stuck to its line of reserving the main implementing powers concerning Eurodac to itself (cf. Council 1999k). Being confronted with unexpectedly fierce intergovernmental resistance, the Commission backed off from its first legislative draft and grudgingly drew up an amended and considerably "watered down" proposal (European Commission 2000).(13)

The revised Commission proposal was presented to the Council in March of 2000. COREPER quickly cleared the Commission's amended legislative draft (cf. Council 2000b). In line with established legislative practice, the Council now had to re-consult the *European Parliament*. It would be the fourth and last time that the European Parliament would deal with the Eurodac dossier. As had happened before, however, the *European Parliament's* formal involvement in legislative proceedings had little impact on Eurodac's substantive profile. The latter may be illustrated by recalling the Council's response to the European Parliament's proposal to *raise the age limit* for the compulsory collection of fingerprints *from 14 to 18*. The Euro-parliamentarians justified their position by arguing that "the threshold of 14 is contrary to the existing international instruments on children's rights," including the *United Nations Convention on the Rights of the Child,* and that "it would be excessive to take fingerprint data as a routine practice from the age of 14" (European Parliament 2000: 5-8). The Council, however, simply *rejected* the European Parliament's amendment.(14)

The obligatory re-consultation of the European Parliament, at any rate, paved the way for the formal adoption of the Eurodac Regulation by the Council in December of 2000 (cf. Council 2000c, 2000a). There would be no ceremony on this occasion. Instead, the Regulation was adopted by means of the *written procedure* by the Health Council (cf. Council 2000d). In a similarly routine fashion, specific rules for the implementation of Eurodac were laid down via Council Regulation in February of 2002 (Council 2002).

3.3.2 Geographical "Spill-over" to Britain, Ireland, and European Third Countries

Eurodac was a test case for how national governments would deal with the peculiar "opt in" and "opt out" arrangements under Title IV of the EC Treaty agreed upon during the 1996/97 Intergovernmental Conference (cf. Monar 1998, Peers 2000).

Both the *Irish* and *UK governments* notified their intention of "opting in" to the Eurodac Regulation in October of 1999 (cf. Council 1999l). The geographic extension of Eurodac to Ireland and the UK is politically remarkable insofar as both countries uphold strict border controls vis-à-vis other Member States. This does not fit well with Eurodac's official justification as a "directly related flanking measure" (article 61 EC) to the elimination of internal border checks within an "Area of Freedom" (cf. Geddes 2005).

The relationship between the European Community and *Denmark* is more complex due to Denmark's unconditional participation in Schengen, on the one hand, and Denmark's categorical "opt out" of Title IV of the EC Treaty, on the other. Since Denmark's rights of influencing Community measures in the fields of asylum and immigration entirely depend on whether a given legislative dossier is deemed to be "Schengen-relevant" or not, the Danish delegation requested a written opinion from the *Council Legal Service* on the possible Schengen-relevance of Eurodac (cf. Council 1999m). The *Council Legal Service* apparently followed the *Commission's* official line according to which Eurodac could *not* be considered to build on the *Schengen acquis* (Council 1999g: 4). In response to this politically ambiguous assessment, the Danish government announced its intention of taking part in the Eurodac project on an *intergovernmental* basis (cf. Council 1999n: 6).

The EU institutions now had to find ways and means to *associate* Denmark with Eurodac. The organizational solution to this problem was to treat *Denmark* in the same way as *Norway* and *Iceland*, the two Nordic countries participating in Schengen but falling short of membership in the European Union (cf. Council 1999g). Norway and Iceland were associated with the Eurodac regime in 2001 (cf. European Community and Iceland and Norway 2001). Against this background, the Council began to hammer out a legal arrangement which would create reciprocal obligations under international law between the European Community, Denmark, Iceland, and Norway. Both Ireland and the UK would need to "opt-in" to this regime, of course. In May of 2003, the *Council* provided the *Commission* with a mandate for *parallel negotiations with Denmark, Norway, and Iceland* on extending the geographical scope of the Eurodac and Dublin II Regulations (see Council 2003). The association agreement with Denmark and a protocol to the existing agreements with Norway and Iceland were formally endorsed by the JHA Council in February of 2006 (see Council 2006a: 19; in regard to the protocol concerning Iceland and Norway, see Council 2006b).

At the time of writing, Eurodac spans 27 European countries, with implementing measures in the acceding states (*Bulgaria* and *Romania*) under way and association agreements with additional European third countries (*Switzerland* and *Liechtenstein*) in the making.(15) In geographical terms, Eurodac has developed into a truly pan-European biometric identification regime.

3.3.3 The Central Unit in Operation

The Eurodac database went "live" on January 15, 2003 (see European Commission 2003). From this

date onwards, designated Member States' authorities and those of associated third countries have been transmitting the fingerprint templates of asylum seekers, irregular border-crossers, and "illegal" residents as of the age of fourteen to the *Eurodac Central Unit* managed by the European Commission.

During the first year of operations, the *Eurodac Central Unit* received a total of around 272,000 fingerprint data sets (European Commission 2004: 10). Reflecting the start of Eurodac activities in the ten new Member States in mid-2004, the volume of biometric data sent to Luxembourg slightly increased during the second year of operations, with a total of about 288,000 digitalized fingerprint sets being transmitted to the *Central Unit* (European Commission 2005: 6). The *"top five" countries "feeding" the Central Unit* in 2003 and 2004 were, in declining order of magnitude, *Germany, France,* the *UK, Sweden,* and *Austria*. These five Member States combined contributed more than two thirds (68%) of the biometric data transmitted to the Central Unit. The states listed above are currently the Union's principal asylum destination countries (cf. UNHCR 2005: 5).(16)

Eurodac has been performing as efficiently as expected in regard to *asylum applicants*, i.e. the category of third country nationals covered by the former Eurodac Convention. The number of "hits" registered by the Central Unit relating to "asylum shoppers," i.e. people who have evidently lodged asylum applications in more than one Member State, increased in a more or less linear fashion from 0 in January of 2003 to around 3,100 in December of 2004. Unsurprisingly, the greatest number of foreign "hits" were recorded in *Germany*, *Sweden*, *France*, the *UK*, and *Austria*. We will continue to see "hit" growth rates of around 4% per month on European level unless Eurodac has a deterring effect on potential "asylum shoppers" *or* Member States' asylum authorities stop "feeding" Eurodac with new data. (As previously mentioned, the number of "hits" generated by AFIS like Eurodac tends to increase in proportion to the size of the database.)

Eurodac's performance in regard to *irregular border-crossers*, on the other hand, i.e. the category of people covered by the former Eurodac Protocol, is *a near complete failure*. At closer inspection of the data released to the public by the European Commission, one is struck by the *very small amount of Eurodac entries* relating to irregular border-crossers. The Commission had estimated to receive approximately 400,000 fingerprint templates of apprehended irregular border-crossers per year from the Member States. In actual fact, however, it merely received an average of about 12,000 fingerprint sets per annum. The overwhelming majority (82%) of fingerprint data in this category were transmitted by *Greece, Italy,* and *Spain*. What is interesting about these figures is not the relatively *high share,* but the *very low volume* of data transmitted to the Central Unit by Greece, Italy, and Spain. The patterns of intergovernmental conflict highlighted in section 3.2 above have evidently been resurfacing in the form of deliberate non-compliance with Community law.(17)

Underpinning the sense of premeditated non-compliance with EC law on the part of external border countries in Southern Europe, both the Greek and Italian authorities made sure that the few data they *did* transmit to the Central Unit were sent *so late* that other Member States' queries in the database would yield negative results. In 2004, for example, the Greek authorities waited on average more than 29 days before actually transmitting the fingerprints of an apprehended irregular border-crosser to the Central Unit. This gave the would-be refugee in question approximately four weeks to lodge a potentially successful application for asylum in another Member State – *after* having been fingerprinted for illegal border-crossing in Greece. (For insights into other practices aimed at undermining the Dublin II and Eurodac regime in Greece, see Papadimitriou and Papageorgiou 2005.) On the basis of the available data, we may infer that a large proportion of third country nationals illegally entering EU territory in *Greece* and *Italy* subsequently lodge asylum applications in the *UK*, *Sweden*, *Norway*, and *Germany*, whereas third country nationals transiting *Spain* typically request political asylum in *France*.

Optional searches in Eurodac based on fingerprint data collected from *illegally resident* third country nationals have mainly been carried out by *Germany*, the *UK*, the *Czech Republic*, *Norway*, and the

Netherlands. The relatively strong and partially successful use of this facility by the Czech Republic, a Central European country entirely surrounded by other Member States, illustrates the political and administrative rationale behind such queries. As one may have expected, Czech "hits" in this category paved the way for "removing" illegally resident third country nationals to Poland and Slovakia. Likewise, the majority of "hits" recorded by Germany pointed to Austria, while the greatest number of "hits" registered in Norway related back to Sweden.

Last but not least, one may inquire into *the reaction of would-be refugees* to the European Community's newly established biometric identification regime. The immediate reaction to Eurodac on the part of an apparently increasing number of asylum applicants seeking protection in the *Nordic countries* has been to deliberately *cut or burn their fingertips*. This has evidently been practiced by several hundreds of asylum seekers in *Sweden* during the first year of Eurodac operations. A member of the *Swedish Migration Board* reported "scars from knives and razors, or entire [fingerprint] patterns that are entirely destroyed because they've used acid or some other kind of product to destroy their hands." (BBC News 2004). *Norwegian* law enforcement authorities have tried to contain the problem by resorting to a strategy of deterrence, including outright imprisonment (see Norwegian Police 2005a, 2005b).(18) While we lack systematic cross-country evidence of such practices, they do suggest a new quality of Eurodac-related social interaction.

4. Conclusions

4.1 Eurodac and the Logic of Consequentiality

The past and present actor constellation and mode of executive interaction concerning Eurodac represent, game-theoretically speaking, a *Rambo-situation*. The political dynamics of such a situation may best be illustrated by shedding light on the patterns of inter-state conflict over the Rhine River.

By the mid-1970's, the Rhine River was so polluted that it was commonly referred to as "the sewer of Europe." The Rhine's water quality had progressively deteriorated due to its utilization *inter alia* by chemical producers such as *Sandoz*, *Ciba-Geigy*, and *BASF*. After having passed through Switzerland, France, and Germany, the water ending up in the Netherlands had to be qualified as toxic waste (see Bernauer and Moser 1997, Haftendorn 2000: 55).(19)

The water conflict between upper- and lower-lying riparian states of the Rhine River is a textbook example of an asymmetrical *Rambo game*. Cooperative solutions are very hard to achieve under such circumstances. After all, "Rambo" (in this case an upper-lying riparian state) benefits most from maintaining the status quo. The "underdog" (in this case the lower-lying riparian state), on the other hand, has a hard time convincing "Rambo" of the need to participate in a cooperative regime. Against this background, the disadvantaged country's government will try to improve its lot by making "threats (decreasing for the other the utility of defection) or promises (increasing for the other the utility of cooperation)" (Hasenclever *et al.* 1997: 51). If an intergovernmental settlement can be achieved at all in a situation like this, it will typically involve issue-linkages and/or side-payments (see Zürn 1992: 209-218; cf. also Scharpf 1997: 78-79, Holzinger 2003: 196).

The empirical material presented in *section 3.2* above suggests that the Member States' governments were engaged in a similar "game" while dealing with the problem of "secondary movements" among third country nationals in the EU. During the Iraqi refugee crisis of 1997-98, *transit countries* such as Italy and Greece found themselves in the position of the "Rambo" vis-à-vis *destination countries* like Germany and the Netherlands. As one may have expected, the "Rambos" at first showed no interest in a solution like Eurodac and were subsequently subjected to a strategy of Schengen-related "carrots" and "sticks." The latter involved the temporary reinforcement of internal border controls, while the former entailed the prospect of their complete removal – provided that the entire *Schengen acquis*, including the systematic fingerprinting of irregular border-crossers, had been fully complied with. The success of this strategy allowed the Austrian and German Presidencies of the *JHA Council*

to “freeze in” the draft Eurodac Regulation shortly before the entry into force of the Treaty of Amsterdam.

From the point of view of the *JHA Council*, the process of incorporating Eurodac into the “First Pillar” involved an unexpectedly fierce yet ultimately victorious power struggle with the *Commission* over implementing rules. In spite of the Council’s success in retaining maximum control over the Eurodac project, the effective enforcement of the Regulation would continue to pose practical problems for its political masters. Eurodac’s *ongoing operational problems* stem from the fact that cross-national compliance with new rules and procedures is very unlikely in Rambo-situations. This game-theoretic insight explains why *Eurodac is a near complete failure in regard to irregular border-crossers* (see *section 3.3* above). The unilateral political and administrative benefits of not being held responsible for processing the asylum requests of tens or even hundreds of thousands of irregular border-crossers each year are apparently valued higher than the costs of sustained non-compliance with Community law.

We have also learned that Eurodac is performing as efficiently as promised by its corporate suppliers in regard to *ordinary asylum applicants*. The Rationalist explanation for *Eurodac’s partial success* is that *all* Member States and associated third countries potentially *benefit* from conducting “one-to-many checks” in this category. What is at stake here is not the redistribution of asylum applicants from north to south or west to east, but rather the combating of “asylum abuse” in an integrating Europe striving for a full-fledged harmonization of substantive and procedural refugee law. Diverse national reactions to asylum applicants’ attempts to circumvent the system *inter alia* via deliberate self-mutilation may, however, create new interstate tensions. As recent practices in the Nordic countries have amply demonstrated, one would be mistaken to believe that Member States’ governments and administrations are the only “players” in the Eurodac game.

4.2 Eurodac and the Logic of Appropriateness

For the Institutionalist observer, organizations like the police are resourceful “carriers” of certain principles and worldviews. Police-specific worldviews stem from the internalization of a particular organizational *mission*, namely the *prevention and combating of crime*. How, then, does the police pursue its mission? How does the police know which practices are more suitable than others for the maintenance and enforcement of law and order?

The police knows because it is *experienced*. Its organizational memory is able to recall *standard solutions to repeatedly encountered problems* (cf. Luhmann 2000: 277). The police routine of collecting, storing, and comparing fingerprints for identification purposes is a case in point. Fingerprint experts doing what they are supposed to do adhere to a *logic of appropriateness* and “[deal] with calculation mainly as a means of retrieving experience preserved in the organization’s files or individual memories” (March and Simon 1993: 8).(20)

Dactyloscopy is the science of fingerprinting. Automated fingerprint identification systems like Eurodac are technologically advanced law enforcement tools. In contrast to human beings, these machines are able to compare hundreds of thousands of biometric datasets in a matter of seconds and achieve conviction rates of nearly 100%. But what, one may ask, does all of this have to do with the European Union in general and Community asylum policy in particular? The empirical answer to this question is that the operational success of automated fingerprint identification systems in the Member States motivated their establishment on European level. As documented in *section 3.* above, national governments and administrations experienced in operating large-scale biometric databases successfully managed to “upload” domestic standard operating procedures to the supranational level. The “bottom-up” process of applying ready-made national solutions to a new set of European problems involved a particular “framing” of the political challenge at hand. The empirical evidence accordingly suggests that resourceful actors like the German *Ministry of the Interior* perceived the refugee crisis of 1997-98 as *a problem of organized crime.*(21) The appropriate thing to do in a

situation like this was to call for the compulsory fingerprinting of "illegal" immigrants and for the storage of their biometric data in a central European database. Against this empirical background, one may conclude that Eurodac is first and foremost an expression of a police-specific behavioral logic.(22)

What is surprising about Eurodac from an Institutionalist perspective is not its particular conception of appropriateness, but rather the remarkable absence of empirically observable collisions with competing and contradictory sets of institutionalized rules. After all, "major political conflicts are focused on which set of rules should prevail when and where" (March and Olsen 1989: 37). The only political conflicts we have witnessed in the context of the negotiation of the Eurodac Regulations, namely the intergovernmental conflict over the redistribution of asylum applicants "through the backdoor," on the one hand, and the power struggle between the *Council* and the *Commission* over implementing rules, on the other, did not fundamentally challenge Eurodac's police-specific rationale. The apparent lack of concern *inter alia* for the privacy rights of third country nationals may be accounted for, however, by the particular institutional design of the intergovernmental Schengen regime, the so-called "Third Pillar" of the European Union during the "Maastricht" era, and the Community governance of external borders, asylum, and international migration following the entry into force of the Treaty of Amsterdam.

The Institutionalist explanation for Eurodac's weak performance in southern Europe is that law enforcement agencies tend to execute *selective enforcement programs* if inadequate resources do not allow otherwise (cf. LaFave 1962: 203). Members of the Greek, Italian, and Spanish border police are responsible for controlling thousands of kilometers of sea and mountainous land borders, crossed, in a more or less regular fashion, by several hundred million people a year. Greek, Italian, and Spanish officials know that "the [available] resources in men and equipment cannot keep up with the rhetoric of systematic control" (Bigo 1998: 158). Frontier security professionals need to set *enforcement priorities* under such circumstances. Carrying out stringent measures against illicit arms trade, human trafficking, and other forms of organized cross-border crime may then become prioritized courses of action. Subjecting irregular border-crossers and potential victims of political persecution to biometric identification procedures in conformity with Community law, however, may not.(23)

It is important to note in this context that the governments of Greece, Italy, Portugal, and Spain have repeatedly tried to close the gap between immigration control objectives and actual immigration outcomes by retroactively pardoning hundreds of thousands of "illegal" immigrants in the course of so-called *regularization programs*. (For a comparative analysis of regularization data for Greece, Italy, Portugal, and Spain, see Cavounidis 2002; cf. also Apap *et al.* 2000.) Such programs not only reflect the porous nature of selected external Schengen borders resembling anything but an "iron curtain." They also indicate that irregular border-crossers are frequently not "deportable" even if detected by the police.(24) Time and again, labor-intensive administrative efforts in detaining apprehended *sans-papiers* and identifying their nationality for the purpose of removal have been frustrated by the unwillingness of countries of origin and transit to cooperate in issuing the necessary documents. The standard operating procedure in cases like these is to eventually release the "illegal" immigrant in question into the so-called "Area of Freedom, Security and Justice."

4.3 The Politics of Supranational Biometric Control Revisited

James G. March and Johan P. Olsen hold that "[political] action generally cannot be explained exclusively in terms of a logic of either consequences or appropriate_ness. Any particular action probably involves elements of each" (March and Olsen 1998: 952). How, then, did analytically distinct behavioral logics *interact* with one another in the specific case of Eurodac? When and *under which conditions* were the Eurodac-related politics of biometric control driven by strategic calculation, rule following, or both?

The empirical material presented above strongly suggests that *accumulated organizational experience* with operating automated fingerprint identification systems lends support to social action based on a *logic of appropriateness*. If standard biometric control procedures are already in place, the *matching of established rules to new situations* tends to take precedence over comprehensive analyses of the expected consequences of alternative courses of action. The notion of *self-referential organizational memories* allows us to conceptualize an organization's typical response to changes in its environment, namely by applying ready-made solutions to any given societal problem. Experience-based processes of solution-driven problem solving are characterized by *cognitive recognition of precedents* rather than calculation of costs and benefits. Lawyers, judges, and other members of the legal profession are more familiar with this line of reasoning than businesspeople and economists.

The matching of rules to situations may give way to strategic calculation if particular organizational objectives cannot be achieved satisfactorily without obtaining the explicit *consent or cooperation of other actors*. Even the most resourceful executive actors in the Council are dependent on the support of other Member States for reaching intergovernmental agreement, especially if the supranational legislative act at hand needs to be endorsed unanimously. In the event of deviating or contradictory organizational experiences and standard operating procedures, inter-executive decision-making processes in the EU tend to reflect the self-interested "moves" of instrumentally rational "players." Accordingly, selected national governments and administrations' *strategic use of Schengen-related "carrots and sticks"* during the negotiation phase of Eurodac may best be accounted for from a game-theoretic perspective.

In conjunction with Eurodac's "hard" Community law characteristics (direct applicability without "transposition," precedence over national law), the system's formal incorporation into the "First Pillar" of the EU could have signaled a renewed shift toward rule-based action. This transition has been constrained, however, both by a lack of political will and a lack of administrative capacity in southern Europe to enforce the Eurodac *acquis* in its entirety. These tensions could theoretically be resolved by dedicating a greater share of the EU budget to border control and refugee protection in southern Europe. Alternatively, the members of the JHA Council may decide to abandon Eurodac in light of its unsatisfactory performance. The most likely outcome, however, is an enduring tension between the two logics of action.

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Endnotes

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(1) For an extensive account of the methodological approach of this study, see Aus 2005.

(2) Standing accused of carrying out the so-called "Final Solution of the Jewish Question," Adolf Eichmann stated that "I consider oath-breaking to be the worst possible crime and offence a person can be guilty of." The man who had thoroughly internalized the motto of the *SS*, "My honor is called loyalty!", was sentenced to death by an Israeli court.

(3) I would like to emphasize at this point that neither solution-driven nor problem-driven social action should be associated with the idea of temporal sorting. The latter figures prominently in the so-called "garbage can model" of organizational decision-making, a model suggesting that problems and solutions are linked by their simultaneity (see Cohen *et al.* 1972, Cohen *et al.* 2007).

(4) At the time of writing, *Steria* is developing the second-generation Schengen Information System (SIS II) and the Visa Information System (VIS) (see Steria Group 2004).

(5) This would constitute a shift towards *Historical Institutionalism*. The latter perspective's emphasis on dynamics of lock-in and increasing returns is undoubtedly of vital importance for understanding path-dependent developments. However, the micro-foundations of this approach are ambiguous and arguably do not depart from the logic of consequentiality (cf. Pierson 2000).

(6) The so-called "Sagem Mistral Seeker," currently employed *inter alia* by the French army, provides an illustrative example of *Sagem*'s military production line [arena-web]. In regard to the involvement of *Thales*, the French defense and electronics group, in issuing genetically enhanced identity cards to all Chinese citizens, see Amnesty International 2004: 58.

(7) The sale of fingerprint identification technology, in turn, accounts for almost 50% of the global biometrics market (cf. Institute for Prospective Technological Studies 2005: 133, *Biometric Technology Today* 2006: 9).

(8) The *action plan* as such was never published. Neither did the Council consult the European Parliament before adopting the measure. Against this background, the *European Parliament*, in a resolution passed more than a year after the *action plan* had been adopted by the Council, held that "the action plan was not established lawfully [and that] the Member States may not base any legislative action on it…." (European Parliament 1999a: 54).

(9) To be sure, this stance also reflected the domestic constraints placed upon the new "Red-Green" coalition government in Bonn by a Conservative majority in the "Länder" chamber, the *Bundesrat.* For a typical example of political pressure exerted upon an otherwise "center-left" federal government by the CDU/CSU-dominated "Länder" chamber, see Deutscher Bundesrat 2000.

(10) Several years later, the Greek Presidency of the Council employed the "freezing technique" for securing partial political agreement on the heavily disputed Council Directive on minimum standards

on procedures in Member States for granting and withdrawing refugee status (see Ackers 2005: 16).

(11) In regard to the technique of fostering intergovernmental agreement via attaching legally non-binding statements to the *Council Minutes*, see Aus 2006: 28.

(12) The organizational structure of the Commission's *DG "Justice and Home Affairs"* as it stood in late 1999 can be viewed on the [arena-web]. The new *DG* succeeded the Commission's *"JHA Task Force"* and was later renamed into the *DG "Justice, Freedom and Security."* A more recent organigram of the *DG*, referred to by its civil libertarian critics as the DG "Law, Order and Security," is also stored on the [arena-web].

(13) The Commission's services could not resist, however, from stating that "the Commission considers that the justification given by the Council [for reserving the main implementing powers under the Eurodac Regulation to itself] is totally inadequate" (European Commission 2000: 8). This normative assessment is at least debatable considering the circumstances. After all, the French government had justified its position by resorting to the argument that "it is not compatible with the rules of proper administrative management for an administration which applies legislation to determine its own operational rules where they go beyond the framework of strict internal management." The German government, for its part, had justified its stance by arguing that Eurodac "touches on a very sensitive area of state activity, which in Germany, for example, is covered … by the constitutionally protected right of an individual in respect of personal data" (Council 1999j: 5, and Council 1999i: 2, respectively).

(14) The *Commission's* reluctance to spare children from compulsory fingerprinting was apparently motivated by the consideration that "within the Council, the pressure has been for a lower rather than a higher minimum age limit" (Commission 2000: 2). This may very well hold true. According to Evelien Brouwer, the Dutch delegation suggested an age limit of only 12 years (Brouwer 2002: 237).

(15) In regard to *Switzerland* and *Liechtenstein*, see Council 2004: 3. Official records relating to this ongoing negotiation are classified. Information concerning the design of a Eurodac-related "twinning project" with *Bulgaria*, on the other hand, can be found on the [arena-web].

(16) The composition of this list may change in the long run as a result of EU enlargement. One may note in this context that the 15 "old" Member States experienced a 21% drop in asylum requests in 2004 compared to 2003, while the 10 "new" Member States simultaneously recorded a 4% increase.

(17) In the near future, we are probably going to witness similar tensions between selected "old" and "new" Member States. A first account of the impact of Dublin II and Eurodac on German-Polish relations was given by a group of German non-governmental actors visiting Poland in November of 2004. According to their report, Polish asylum authorities are already calling for a new "burden-sharing" mechanism taking some of the Eurodac-related pressure off of Poland [arena-web].

(18) It goes without saying that these people are typically so-called *sans-papiers*. In 2004, around 94% of asylum applicants in Norway could not be identified on the basis of ordinary papers (Norwegian Police 2005c: 14).

(19) I would like to clarify at this point that the comparison between Eurodac and the Rhine River merely serves a heuristic purpose.

(20) James G. March and Herbert A. Simon already noted in the first edition of their seminal work that "problem-solving [may consist] primarily in searching the memory in a relatively systematic fashion for solutions that are present there in nearly finished form…" (p. 198).

(21) UNHCR-affiliated policy analysts subsequently challenged this institutionally biased view by

demonstrating that “many of these individuals were clearly [Geneva] Convention status refugees, even by the standards of Member States own recognition rates” (Morrison and Crosland 2001: 34). For an earlier case study on the German Ministry of the Interior’s “lead in representing German positions at the European level,” see Lavenex 2001: 192.

(22) Manifestations of this police-specific rationale can be found in numerous polities. For a comparative view to the United States, see Manning 1992, 2001.

(23) Enforcement priorities of this kind are particularly likely to emerge if *irregular entry* as such is not regarded as a *crime,* but merely as an *administrative infringement.* The latter is evidently the case in Italy (cf. McCreight 2006: 122).

(24) Official figures analyzed by Stefan Alscher, for example, show that Spanish authorities ordered around 23,500 *expulsiones incoadas* in 2001 but executed less than 4,000 *expulsiones materializadas* (Alscher 2005: 17).

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5

Decision-making under Pressure: The Negotiation of the Biometric Passports Regulation in the Council



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Jonathan P. Aus

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Abstract

This paper accounts for the so-called Biometric Passports Regulation of the European Community. Formally adopted by the Council of the European Union (EU) in December of 2004, the Biometric Passports Regulation prescribes the compulsory biometric "enrollment" of all EU citizens applying for a new passport or passport renewal. Member States fully participating in the Schengen regime and Schengen-affiliated third countries like Norway are obliged to include two biometric identifiers into their citizens' passports by the end of June 2009. Schengen-made "*e*-Passports" will contain a chip storing a facial scan of the passport holder and two of his or her fingerprints.

The author employs both Rationalist and Institutionalist perspectives in order to explain why the Council of the EU unanimously endorsed a bill which, as far as the mandatory incorporation of fingerprints into EU citizens' passports is concerned, goes beyond what was necessary for meeting U.S. and international requirements. Rationalists may interpret the final legislative outcome as a reflection of the political success of "first mover" strategies on the part of relatively powerful executive actors engaged in a Battle-of-the-Sexes game. From an Institutionalist point of view, on the other hand, the substantive profile of the Biometric Passports Regulation stems from the reproduction of police-specific standard operating procedures, the "consensus reflex" among the members of the Council's Permanent Representatives Committee (COREPER), and the recognitional character of decision-making processes under time pressure.

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1. Introduction

This article accounts for the adoption of the so-called Biometric Passports Regulation by the Council of the EU.[1] In combination with two follow-up decisions by the European Commission, Regulation (EC) 2252/2004 calls for the compulsory biometric "enrollment" of all EU citizens applying for a new passport or passport renewal by August 28, 2006 (facial images) and June 28, 2009 (fingerprints), respectively. The theoretically informed research question of this study is whether, to what extent, and under which conditions the authors of the Biometric Passports Regulation adhered to a *logic of consequentiality* or a *logic of appropriateness* while drafting this supranational legislative act.

The paper is organized as follows. *Section 2.* introduces two perspectives on decision-making beyond the nation-state, Rationalism and Institutionalism, which focus our attention on two social mechanisms, *strategic calculation* and *rule following*, respectively. *Section 3.* provides background information on the *U.S. Visa Waiver Program*. Following legislative amendments in 2002, this program required the inclusion of biometric identifiers into selected countries' passports by October 26, 2004 in order to allow for the continuation of visa-free travel to the United States. *Section 4.* traces the negotiation of the Biometric Passports Regulation in the *Council of the EU*. The process under consideration commences with the European Council's broad policy mandate of June 2003, culminates in the political agreement reached within the Justice and Home Affairs (JHA) Council on October 26, 2004, and terminates with the formal adoption of the Regulation by the General Affairs Council in December of 2004. *Section 5.* reviews the empirical insights of this case study of decision-making processes in an "Area of Freedom, Security and Justice" in light of the theoretical perspectives presented above.

[1] Council of the EU (2004a): "Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States," in: *Official Journal of the EU* of Dec. 29, 2004, Vol. L 385, pp. 1-6 [arena-web]. I would like to thank Johan Olsen for helpful comments on earlier drafts.

I close with a discussion of the relative importance of strategic calculation and rule following in the Council.

2. Logics of Action in the Council of the European Union

2.1 Decision-making in the Council: A Rationalist Perspective

Rationalists assume that legislative outcomes like the Biometric Passports Regulation are brought about by *strategically calculating* actors seeking to maximize given interests. According to Fritz Scharpf, "the ideal individual actor of rational-choice models is assumed to have the capacity for strategic action – which is to say that on the basis of accurate perceptions and adequate information-processing capacity, he or she is able to respond to the risks and opportunities inherent in a given actor constellation by selecting the strategies that will maximize his or her expected total utility."[2] The theoretical assumptions underlying the instrumentally rational ideal type of social action developed by Max Weber are apparently quite demanding. Herbert Simon thus repeatedly argued that "people are, at best, rational in terms of what they are aware of, and they can be aware of only tiny, disjointed facets of reality."[3]

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[2] Scharpf, F. W. (1997): *Games Real Actors Play. Actor-Centered Institutionalism in Policy Research,* Boulder, CO: Westview Press, p. 58. Actors engaged in multilateral negotiations behave *strategically,* in other words, if, "in choosing their actions, they take into account the capabilities, preferences and strategies of other actors." Schimmelfennig, F. (2003): *The EU, NATO and the Integration of Europe,* Cambridge University Press, p. 26. In regard to the game-theoretically assumed ability of individual "players" to anticipate and respond to other actors' "moves," see also Fearon, J. / A. Wendt (2002): "Rationalism v. Constructivism: A Skeptical View," in: Carlsnaes, W. *et al.* (eds.), *Handbook of International Relations,* London: Sage, pp. 52-72, here: p. 55; and Checkel, J. T. (2005): "International Institutions and Socialization in Europe: Introduction and Framework," in: *International Organization,* Vol. 59, pp. 801-26, here: p. 809.

[3] Simon, H. A. (1985): "Human Nature in Politics: The Dialogue of Psychology with Political Science," in: *American Political Science Review,* Vol. 79, No. 2, pp. 293-304, here: p. 302. Jon Elster responded to Herbert Simon's notion of *bounded rationality* and the latter's emphasis on the cognitive constraints to objective (and thus scientifically predictable) purposive-rational behavior by arguing that "[people] with severely limited cognitive capacities may not be able to understand their limits and hence are not, subjectively, constrained by them." Elster, J. (1989): *Solomonic Judgements. Studies in the Limitations of Rationality,* Cambridge University Press, p. 29.

In spite of these different ontological starting points, scholars adhering to a *logic of consequentiality* and devoting their time and attention to analyzing legislative decision-making processes in the framework of the European Union unanimously claim that the collectively binding decisions taken by the members of the *Council of the EU*, i.e. the principal legislative body of the European Community, may be theorized as processes of purposive-rational choice involving the weighing and selection of alternative courses of action. With a view to integration theory development, Rationalists argue that the dynamics of regional political integration – identified here with the process of laying the legislative cornerstones of the emerging "Area of Freedom, Security and Justice" – can be conceptualized as the consequences of interactions between utility-maximizing *national governments*. Andrew Moravcsik's (Liberal) Intergovernmentalist account of the integration process accordingly maintains that "the EC has developed through a series of celebrated intergovernmental bargains, each of which set the agenda for an intervening period of consolidation. The most fundamental task facing a theoretical account of European integration is to explain these bargains."[4] Rationalist accounts of decision-making processes both in the European Council and Council of the EU may thus be understood as attempts to develop a *theory of strategic integration*.[5]

One of the greatest challenges for Rationalist analysts of any given legislative decision-making process in the Council is to provide an empirically informed answer to the following question: "How do member states reach an equilibrium solution?"[6] Balanced and allegedly stable legislative outcomes are associated with a

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[4] Moravcsik, A. (1994): "Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach," in: Bulmer, S. / A. Scott (eds.), *Economic and Political Integration in Europe,* Oxford and Cambridge: Blackwell, pp. 29-80, here: p. 29. See also Moravcsik, A. (1998): *The Choice for Europe,* Cornell University Press.

[5] Cf. Aspinwall, M. D. / G. Schneider (2000): "Same Menu, Separate Tables: The Institutionalist Turn in Political Science and the Study of European Integration," in: *European Journal of Political Research,* Vol. 38, pp. 1-36, here: p. 30.

[6] König, T. / S.-O. Proksch (2006): "Exchanging and Voting in the Council: Endogenizing the Spatial Model of Legislative Politics," in: *Journal of European Public Policy,* Vol. 13, No. 5,

concept developed by the economist John Nash in 1951: "[The] single most important idea that game theory has contributed to the social sciences is the concept of 'Nash equilibrium,' which is defined as a constellation of individual strategies in which no player could still improve his or her own outcome by unilaterally switching to another available option."[7] Furthermore, political bargains struck within the Council are assumed to reflect efficient and functionally adequate adjustments to exogenous changes, for instance to changes in the EU's security environment. We shall see in due course whether the Biometric Passports Regulation of 2004 can be conceptualized as an outcome unanimously endorsed by a group of utility-maximizing, strategically calculating executive actors realizing that this bill was the best they could achieve under the given circumstances in the fight against international terrorism.

2.2 Decision-making in the Council: An Institutionalist Perspective

According to the Institutionalist approach, political actors allegedly adhere to a *logic of appropriateness*.[8] Actor orientations are assumed to be informed by a sense of belonging and duty. Acting out professional roles, in turn, involves the self-conscious matching of rules to situations. A policewoman, for example, arguably

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pp. 647-69, here: p. 656. König and Proksch's work is based on the market-oriented "exchange model" developed by James Coleman. Unsurprisingly, their terminology is one of "winsets," "trading," and "optimization."

[7] Scharpf (1997): *Games Real Actors Play* [cf. footnote 2], p. 100. In a similar vain, Douglass North recalled the behavioral assumptions of neoclassical economic theory as follows: "The economic world is reasonably viewed as being in equilibrium. … Given repeated exposure, any individual actor could identify and would seize any available opportunity for improving outcomes and, in the case of business firms, would do so on the pain of being eliminated by competition. Hence no equilibrium can arise in which individual actors fail to maximize their preferences. Because the world is in approximate equilibrium, it exhibits at least approximately the patterns employed by the assumptions that the actors are maximizing." North, D. C. (1990): *Institutions, Institutional Change and Economic Performance,* Cambridge University Press, p. 19.

[8] See March, J. G. / J. P. Olsen (2006a): "The Logic of Appropriateness," in: Moran, M. / M. Rein / R. E. Goodin (eds.), *The Oxford Handbook of Public Policy*, Oxford University Press, pp. 689-708.

does not spend much time on calculating the consequences of her actions but rather asks: What does a policewoman do in a situation like this? The terminology of a policewoman, so the argument unfolds, "is one of duties and obligations rather than anticipatory, consequential decision-making."[9] Viewed from the perspective of instrumentally rational choice, a value rational policeman thus appears to be acting *irrationally*: "[The] more unconditionally the actor devotes himself to [the value to which the action is oriented] for its own sake, to pure sentiment or beauty, to absolute goodness or devotion to duty, the less is he influenced by considerations of the consequences of his action."[10]

Students of organizational behavior frequently observe routine patterns of action in line with *standard operating procedures*. Beyond prescribing in more or less great detail how professionals should execute particular programs under certain conditions, organizational routines and ready-made solutions to a given set of societal problems also shed light on standardized *codes of meaning* and the manner in which *resources,* including people and money, have been allocated to particular values and worldviews. Morton Halperin, a former member of the National Security Council staff, for example, described the bureaucratic character of U.S. foreign and security policy development during the Cold War as follows: "Participants who look to organizational interests to define national security interests seldom feel the need to engage in a full-scale analysis of a particular issue. Rather,

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[9] March, J. G. / J. P. Olsen (1989): *Rediscovering Institutions. The Organizational Basis of Politics,* New York: The Free Press, p. 23. For Institutionalists like March and Olsen, in other words, "the axiomatics for political action begin not with subjective consequences and preferences but with rules, identities, and roles." March, J. G. / J. P. Olsen (1995): *Democratic Governance,* New York: The Free Press, p. 30. Cf. also March, J. G. / J. P. Olsen (1984): "The New Institutionalism: Organizational Factors in Political Life," in: *American Political Science Review,* Vol. 78, No. 3, pp. 734-49; March, J. G. / J. P. Olsen (1996): "Institutional Perspectives on Political Institutions," in: *Governance,* Vol. 9, No. 3, pp. 247-64; March, J. G. / J. P. Olsen (1998): "The Institutional Dynamics of International Political Orders," in: *International Organization,* Vol. 52, No. 4, pp. 943-69; and March, J. G. / J. P. Olsen (2006b): "Elaborating the 'New Institutionalism,'" in: Rhodes, R. A. / S. A. Binder / B. A. Rockman (eds.), *The Oxford Handbook of Political Institutions,* Oxford University Press, pp. 3-20.

[10] Weber, M. (1978) [1922]: *Economy and Society. An Outline of Interpretive Sociology,* edited by G. Roth and C. Wittich, Berkeley: University of California Press, p. 26.

their reactions reflect 'grooved thinking' – responding to a particular stimulus in a set way."[11] Likewise, James March and Johan Olsen noted that "much of the behavior we observe in political institutions reflects the routine way in which people do what they are supposed to do. Simple stimuli trigger complex, standardized patterns of action without extensive analysis, problem solving, or use of discretionary power."[12]

In regard to regional integration theory development, political scientists subscribing to a *logic of appropriateness* are particularly interested in the institutionalization, (re-)interpretation, and administrative enforcement of supranational rules governing politically sensitive issue areas like EU Justice and Home Affairs.[13] Furthermore, Institutionalists assume that political processes leading towards the establishment of an "Area of Freedom, Security and Justice" in the European Union, for example, may not necessarily be efficient in the functional sense of matching EU policies to the demands of the environment. Instead, such processes allegedly tend to display historically inefficient institutional dynamics, competency traps, and a struggle for legislative expression between different organizational solutions actively looking for a problem. The following two sections document if and to what extent the Biometric Passports Regulation reflects the interests, worldviews, and resources of particular organizations.

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[11] Halperin, M. H. (1974): *Bureaucratic Politics and Foreign Policy,* Washington, D.C.: The Brookings Institution, p. 58. For a general overview of the treatment of standard operating procedures and organizational routines in political science and international relations theory, see Allison, G. / P. Zelikow (1999): *Essence of Decision: Explaining the Cuban Missile Crisis,* 2nd edition, New York: Longman, pp. 143-96.

[12] March and Olsen (1989): *Rediscovering Institutions* [cf. footnote 9], p. 21.

[13] For further reflections on the concept of political integration as institutionalization, see Stone Sweet, A. / W. Sandholtz (1998): "Integration, Supranational Governance, and the Institutionalization of the European Polity," in: Sandholtz and Stone Sweet (eds.), *European Integration and Supranational Governance*, Oxford University Press, pp. 1-26; Caporaso, J. A. / A. Stone Sweet (2001): "Conclusion: Institutional Logics of European Integration," in: Stone Sweet, A. / W. Sandholtz / N. Fligstein (eds.), *The Institutionalization of Europe,* Oxford University Press, pp. 221-36; and Olsen, J. P. (2002): "The Many Faces of Europeanization," in: *Journal of Common Market Studies,* Vol. 40, No. 5, pp. 921-52.

3. American Homeland Insecurity after September 11th and the New Requirements of the Visa Waiver Program

One of the Bush administration's reactions to the terrorist attacks of September 11, 2001 in New York City and Washington, D.C. was the establishment of the Department of Homeland Security (DHS). Since its inception in 2002, the DHS's principal organizational mission has been to "prevent terrorist attacks within the United States."[14] The new emphasis placed on the *prevention* of terrorist attacks signaled a departure from the traditional concept of policing based on the presumption of innocence and the logical sequence: "if action A, then reaction B." U.S. law enforcement operations after September 11th would be informed by the *intelligence* concept and the presumption of guilt. Intelligence-led policing aimed at preventing possible terrorist attacks or criminal offences in the future requires *inter alia* the preemptive collection, storage, and comparison of vast amounts of personal data.[15]

In cooperation with their colleagues from the Department of Defense, some of the internal security experts among the roughly 180,000 DHS staff members singled out *biometric identification technology* as a potentially useful tool for preventing terrorist attacks in the U.S.[16] The DHS's reliance on biometrics would be-

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[14] United States of America, 107th Congress (2002a): "Act to establish the Department of Homeland Security, and for other purposes (Homeland Security Act of 2002)," *Public Law 107-296*, Washington, D.C., Nov. 25, 2002 [arena-web], sec. 101 (b). Cf. Wise, C. R. (2002): "Organizing for Homeland Security," in: *Public Administration Review,* Vol. 62, No. 2, pp. 131-44.

[15] The "preventive repression" of potentially unlawful or aggressive behavior may, of course, also be achieved by military means. The U.S. *National Security Strategy* of Sept. 2002 and the subsequent "preemptive strikes" against Iraq are cases in point. The Bush administration's willingness to "act preemptively in exercising our inherent right of self-defense" vis-à-vis alleged enemies of freedom such as Iran and North Korea was reaffirmed in 2006. See United States of America, The President (2006): *The National Security Strategy of the United States of America*, Washington, D.C.: The White House, March 2006 [arena-web], p. 18.

[16] Cf. Woodward, J. D. (2001): *Biometrics – Facing Up to Terrorism*, United States Army: RAND Arroyo Center, Army Research Division (Oct. 2001). Likewise, *stock markets* responded to the

come an integral part of the *National Strategy for Homeland Security* adopted by U.S. President George W. Bush in July of 2002. The President's homeland security strategy conceived of biometrics as a way "to identify and find individual terrorists."[17]

In line with this counter-terrorist objective, the DHS began implementing a new border control and domestic surveillance program now known under the name of *U.S. VISIT (United States Visitor and Immigrant Status Indicator Technology)*. The program envisioned that every foreign national entering and/or exiting U.S. territory as of January 1, 2004 would systematically be fingerprinted and subjected to a facial scan. These forcibly collected biometric data would then be checked against possible entries in criminal databases and terrorist watch lists. Furthermore, the foreign national's fingerprints and facial image would be retained for decades by the U.S. government in order to "manage" the alien's current and future stays in America.

As far as U.S. air and seaports are concerned, these plans were put into practice on January 5, 2004. Since then, millions of travelers have been subjected to biometric "enrollment" procedures and routine "one-to-many" checks against the inter-agency *Terrorist Screening Database (TSDB)* and the Federal Bureau of Investigation's *Integrated Automated Fingerprint Identification System (IAFIS)*.[18] By mid-2005, *U.S. VISIT* had developed into "a database of more than 16 million fingerprint scans" and the DHS's "primary program for watch list checking."[19]

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terrorist attacks of Sept. 11, 2001 by revaluing the biometric industry. See *Biometric Technology Today* (2001): "Biometrics stock rises following US attacks," Nov./Dec. 2001, p. 6.

[17] United States of America, The President (2002): *National Strategy for Homeland Security*, Washington, D.C.: The White House, July 2002 [arena-web], p. 53.

[18] See Dezenski, E. (2005): "Testimony of Elaine Dezenski, Acting Assistant Secretary for Policy and Planning, Border and Transportation Security Directorate, U.S. Department of Homeland Security," in: U.S. House of Representatives, Committee on the Judiciary, Sub-committee on Immigration, Border Control, and Claims, *Hearing on the October 2005 Statutory Deadline for Visa Waiver Program Countries to Produce Secure Passports: Why it Matters to Homeland Security,* Washington, D.C., April 21, 2005 [arena-web], pp. 11-16, here: p. 13.

[19] Koslowski, R. (2005): *Real Challenges for Virtual Borders: The Implementation of US-VISIT*, Washington, D.C.: Migration Policy Institute (July 2005), pp. 50-51. Rey Koslowski reasons

EU citizens and travelers from *visa waiver countries* (see below) were initially not targeted by *U.S. VISIT*. Following a period of transatlantic quarrel over the war in Iraq and a policy shift announced by former Homeland Security Secretary Tom Ridge in April 2004, however, the systematic biometric "enrollment" of all EU nationals visiting the United States was launched on September 30, 2004. Reciprocal measures against U.S. citizens visiting or doing business within the so-called "Area of Freedom, Security and Justice" have not been taken by the EU or its Member States.[20]

Complementing the U.S. VISIT program, both the *USA Patriot Act* and the *Enhanced Border Security and Visa Entry Reform Act* stipulated that visitors from so-called *visa waiver countries* possessing new or newly issued travel documents must be able to present *machine-readable* and, more importantly, *biometric passports* to U.S. border control authorities by October 26, 2004. (This would be the exact date on which the JHA Council would ultimately agree on the Biometric Passports Regulation; see *section 4.4.4* below). Non-compliance with these unilaterally determined requirements would be sanctioned by losing all privileges under the *Visa Waiver Program (VWP)*. In this case, the alien in question would need to apply for an ordinary non-immigrant visa at a U.S. consulate abroad (a rather lengthy process involving *inter alia* a personal interview) in order to gain lawful

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that the U.S. VISIT "databases will soon be filled with hundreds of millions of digitized fingerprints" (p. 52). Cf. also Aus, J. P. (2003): "Biometrische Kontrollen nach dem 11. September," in: *Bürgerrechte und Polizei*, Vol. 76, No. 3, pp. 36-42; Seghetti, L. M. / S. R. Vina (2004): *U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT),* Library of Congress: Congressional Research Service, RL 32234 (Feb. 18, 2004); and Redpath, J. (2005): *Biometrics and International Migration*, Geneva: International Organization for Migration (IOM).

[20] For the time being, the only country in the world daring to fingerprint and photograph U.S. citizens at ports of entry has been Brazil. The Brazilian foreign minister, Celso Amorim, reportedly justified these retaliatory measures as follows: "We respect and understand the security problems of the US but we need to find dignified treatment based on reciprocity for citizens of all countries." *Financial Times Europe* of Jan. 13, 2004: "Brazil Stands Firm on Fingerprinting of US Visitors." For further reading on the "non-reciprocity problem" in the context of EU enlargement, see European Commission (2006a): "Report from the Commission to the Council on visa waiver reciprocity with certain third countries…," Commission doc. *COM (2006) 3 final* [arena-web].

temporary access to U.S. territory.[21] Two of the fifteen EU Member States participating in the *VWP*, namely France and Italy, did not manage to issue biometric passports to their citizens by the prescribed deadline. In effect, French and Italian holders of newly issued passports are currently subject to U.S. visa requirements. The same holds true for Greek citizens and nationals of the ten new Member States except for Slovenia.

The American *Enhanced Border Security and Visa Entry Reform Act* of 2002 was drafted by F. James Sensenbrenner, a Republican from Wisconsin and Chairman of the *House Judiciary Committee*. Three years after the bill was signed into law, Sensenbrenner explained the counter-terrorist rationale of his successful legislative initiative in the following manner:

> On September 11, 2001, the United States was attacked by 19 terrorists who flew planes into American landmarks, resulting in the largest single terrorist-related loss of American life in our history. The leaders of that terrorist attack either lived in Europe as resident aliens prior to the attack or traveled directly from Europe en route to the execution of this awful assault. Subsequent arrests in Spain, combined with examination of the terrorists' travel, have confirmed that the attacks were planned in Europe, in countries enjoying Visa Waiver Program status. Zacarias Moussaiou, the '20th terrorist' who has just this week announced he wants to plead guilty to the terrorist charges against him, came to the U.S. from France with a French passport

[21] See United States of America, 107th Congress (2001): "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act) of 2001," *Public Law 107-56*, Washington, D.C., Oct. 26, 2001 [arena-web], sec. 417; and United States of America, 107th Congress (2002b): "Enhanced Border Security and Visa Entry Reform Act of 2002," *Public Law 107-173*, Washington, D.C., May 14, 2002 [arena-web], sec. 303. See also United States General Accounting Office (2002): *Border Security: Implications of Eliminating the Visa Waiver Program,* Nov. 2002 [arena-web]; and Guiraudon, V. (2005): "La coopération transatlantique après le 11 septembre : l'enjeu de la sécurité intérieure," in: *Critique internationale* (Paris: Presses de Sciences Po), No. 28, pp. 21-35.

> under the Visa Waiver Program. These sobering facts are no less relevant today than they were three years ago.[22]

Sensenbrenner's straightforward views reflected the so-called *9/11 Commission's* conclusion that "for terrorists, travel documents are as important as weapons."[23] Equating passports with weapons of mass destruction signaled the opening of a new front in the U.S.-led war on terror. The European Community's Biometric Passports Regulation of December 2004 analyzed below was drawn up in this spirit.

4. The Negotiation of the Biometric Passports Regulation in the Council

4.1 International Determinants of the European Council's Biometric Policy Mandate

In June 2003, i.e. about a year after the adoption of the Enhanced Border Security and Visa Entry Reform Act in the United States, the *European Council* called for "a coherent approach [in the EU] on biometric identifiers or biometric data, which would result in harmonised solutions for documents for third country nationals, EU citizens' passports and information systems (VIS and SIS II)."[24] The European Council's wish for the equal biometric treatment of EU citizens and third country nationals had emerged in the framework of the *Group of Eight (G8)*. The G8 is an international regime dealing with the global governance of trade, terrorism, and various other issues. In addition to the heads of state or government of Britain, France, Germany, and Italy, the EU is represented in the G8 by the President of the European Council and the President of the European Com-

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[22] Sensenbrenner, F. J. (2005a): "Prepared Statement of the Honorable F. James Sensenbrenner, Jr.," in: U.S. House of Representatives, *Hearing on the October 2005 Statutory Deadline* [cf. footnote 18], pp. 46-47, here: p. 46.

[23] National Commission on Terrorist Attacks upon the United States (2004): *The 9/11 Commission Report,* Washington, D.C., July 22, 2004 [arena-web], p. 384.

[24] European Council (2003): "Presidency Conclusions – Thessaloniki European Council, 19 and 20 June 2003" [arena-web], no. 11. In regard to the VIS and SIS II, see *section 4.2* below.

mission. The *primus inter pares* among the G8 countries, however, is the U.S.A. This section illustrates how the U.S. government managed to influence the policy agenda of the European Council via the G8 and the International Civil Aviation Organization (ICAO).

Responding to U.S. requests acknowledged by the Canadian G8 Presidency, the *G8 Migration Experts* held a series of meetings in 2002 dedicated to facilitating the introduction of biometric passports on a *global scale*. By October 2002, the G8 Migration Experts had agreed upon a number of biometric policy principles, including the *principle of universality*. In splendid isolation from national parliaments or any other kind of democratic scrutiny, the world's most industrialized nations collectively decided that "a full and complete common interoperable technical standard [shall] be recommended to all nations of the world as the basis for interoperable biometric authentication of machine readable travel documents."[25]

In order to achieve the ambitious goal of establishing global biometric standards, the G8 Migration Experts organized joint meetings with the relevant working parties of the ICAO, including the *Technical Advisory Group on Machine Readable Travel Documents*. Participation in the latter group was restricted to the G8 states (with the exception of Italy) and six other countries. According to Maura Harty, Assistant Secretary of State for Consular Affairs, the U.S. government "strongly advocated support for ICAO leadership in biometrics [within the framework] of the G8." Furthermore, the Americans "played a leadership role in ICAO working groups to advocate the successful inclusion of biometrics in travel

[25] G8 (2002): *Statement of Principles by G8 Migration Experts regarding Biometrics,* Oct. 25, 2002 [arena-web], p. 1. A few months later, the G8 countries signaled their willingness to support "capacity building for border security and interoperable travel document systems in developing nations." G8 (2003a): *G8 Migration Experts Statement Regarding Development of Biometric Technologies in Travel Documents and Procedures,* Feb. 13, 2003 [arena-web], p. 2. Some authors have responded to these proposals by calling for "capacity building for NGOs" and "educating NGOs regarding the structure and form of international policy dynamics." Hosein, I. (2004): "The Sources of Laws: Policy Dynamics in a Digital and Terrorized World," in: *The Information Society*, Vol. 20, pp. 187-99, here: p. 197.

documents."[26] By March 2003, the ICAO had drawn up a draft report recommending *facial recognition* as "the globally interoperable biometric for machine-assisted identity confirmation." Furthermore, the draft ICAO text suggested that "member states may elect to use fingerprint and/or iris recognition as additional biometrics."[27]

The ICAO's draft received a warm welcome at the *G8 Justice and Home Affairs* ministerial summit of May 5, 2003 in Paris. During this meeting, the G8 states reiterated their determination "to work on developing a common framework and standards within the competent international bodies."[28] Three weeks later, the ICAO formally endorsed *facial images* as the globally interoperable passport biometric.[29] The Thessaloniki European Council's policy guidelines of June 2003 were formulated in response to this outcome.

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[26] Harty, M. (2004): *Statement by Assistant Secretary of State for Consular Affairs Maura Harty before the House Select Committee on Homeland Security, Subcommittee on Infrastructure and Border Security,* Washington, D.C., Jan. 28, 2004 [arena-web], p. 4. Several Commission officials disapproved of the Bush administration's seemingly selective engagement in international institutions and regimes like the ICAO and G8. The former head of the Political and Academic Affairs Section of the European Commission's Delegation to the U.S., for example, openly expressed his discontent with a situation in which "the United States views itself as the key player but is not prepared to seek compromises with other global players, particularly when it considers that important national interests are at stake." Cameron, F. (2002): "Utilitarian Multilateralism: The Implications of 11 September 2001 for US Foreign Policy," in: *Politics,* Vol. 22, No. 2, pp. 68-75, here: p. 68.

[27] International Civil Aviation Organization (2003a): *Biometrics Deployment in Machine Readable Travel Documents,* New Technologies Working Group, draft technical report of March 6, 2003 [arena-web], p. 1.

[28] G8 (2003b): *Justice and Home Affairs Ministerial Meeting – Paris, 5 May 2003: Final Official Statement* [arena-web], p. 2. Cf. *BBC News* of May 5, 2003: "Franco-US thaw on security."

[29] Cf. International Civil Aviation Organization (2003b): *Biometric Identification to Provide Enhanced Security and Speedier Border Clearance for Travelling Public,* Press Release, May 28, 2003 [arena-web]. One may note in this context that the ICAO also recommended the use of so-called *contactless integrated circuit chips* for storing the biometric data in the passport or travel document. The ICAO's recommendations were incorporated into the *G8 Action Plan to Enhance Transport Security and Control of Man-portable Air Defense Systems (MANPADS)* endorsed by the G8 leaders at the Evian Summit of June 1-3, 2003 [arena-web].

4.2 The Commission's Proposals on Biometric Visa and Residence Permits

By September 2003, the Commission's services had, as requested by the European Council, drawn up two draft EC Regulations requiring Member States' authorities to integrate biometric identifiers into *visa and residence permits*. The European Commission justified its proposal of including both *facial images and fingerprints* into third country nationals' travel documents by resorting to the police-specific argument that "the fingerprint [provides] the best solution for so-called 'background checks', the identification (one-to-many searches) in databases." Such checks in *Automated Fingerprint Identification Systems (AFIS),* in turn, would allegedly "contribute towards internal security and combating terrorism."[30] In order to meet the EU's counter-terrorist policy objectives, both the second generation *Schengen Information System (SIS II)* and the new *Visa Information System (VIS)* were equipped with a capacity to process biometric data, i.e. fingerprints and digital photographs.[31] In the end, however, the Commission was forced to *withdraw* one

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[30] European Commission (2003): "[Combined] Proposal for a Council Regulation amending Regulation (EC) 1683/95 laying down a uniform format for visas / Proposal for a Council Regulation amending Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country nationals," Brussels, Sept. 24, 2003, Commission doc. *COM (2003) 558 final* [arena-web], pp. 3-4. On national level, the fingerprinting of visa applicants had been framed as a measure for fighting *illegal immigration*. Nicolas Sarkozy, the French Minister of the Interior, for example, reportedly justified closely related legislative initiatives in the French Republic as follows: "Nearly 80% of people without papers came to France on a three-month tourist visa. Once on our territory they tear up their papers, or lose them, and thus become impossible to expel because no one can tell where they are from. … If you have your papers you are welcome in France. If you have false papers, or if you have no papers, you will be accompanied to your country of origin." *BBC News* of April 30, 2004: "France to fingerprint tourist visa applicants."

[31] See Council of the EU (2004b): "Council Decision of 8 June 2004 establishing the Visa Information System (VIS) (2004/512/EC)," in: *Official Journal of the EU* of June 15, 2004, Vol. L 213, pp. 5-7 [arena-web]; and European Commission (2005a): "Proposal for a Regulation of the European Parliament and of the Council on the establishment, operation and use of the second generation Schengen information system (SIS II)," Brussels, May 31, 2005, Commission doc. *COM (2005) 236 final* [arena-web]. The establishment of the *VIS* had initially been proposed by Germany. Cf. Bundesministerium des Innern (2004): "Schily: Grünes Licht für EU-Grenzschutzagentur und biometrische Merkmale in Visa und Aufenthaltstiteln," Press

of its hastily drawn up legislative proposals (namely the one calling for biometric visa) due to the unforeseen and apparently insurmountable technical problem of "interference between several chips in one passport."[32] In effect, the biometric data of visa applicants will only be stored in the *VIS*.[33]

In the eyes of some political actors, the European Commission's legislative proposal on biometric visa and residence permits served as a blueprint for subsequent legislative action in regard to EU citizens' passports. After all, the European Council had explicitly called for a *coherent* approach towards third country nationals and EU citizens (see *section 4.1* above). Following a bilateral meeting with U.S. Homeland Security Secretary Tom Ridge on October 29, 2003 in Berlin, the former Federal Minister of the Interior of Germany, Otto Schily, thus announced a transatlantic "consensus" according to which *two* mandatory biometric identifiers, i.e. *facial images and fingerprints*, should be included in future European-made passports and travel documents. Secretary Ridge supplemented Schily's statement by underlining the principle that "transatlantic agreement, U.S.-EU agreement, leads the international discussion."[34] Shortly before stepping down as Homeland Security Secretary, Tom Ridge explained why he had supported the

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Release of Nov. 27, 2003, in: Bundesministerium des Innern, *Maßnahmen gegen den Terror nach dem 11. September 2001* [arena-web], pp. 199-200.

[32] European Commission (2006b): "Modified proposal for a Council Regulation amending Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country nationals," Brussels, Mar. 10, 2006, Commission doc. *COM (2006) 110 final* [arena-web], p. 2. One may note in passing that the Commission's right of *withdrawing* its legislative proposals is rarely evoked in practice due to the politically embarrassing connotations of such a move.

[33] The newly installed and hopelessly understaffed *European Data Protection Supervisor* assumes that "the VIS will contain (and allow exchange of) biometric data on an unprecedented scale (20 million entries on visa applications a year) reaching a potential 100 million entries after the maximum retention period of five years." European Data Protection Supervisor (2006): *Annual Report 2005*, Luxembourg: Office for Official Publications of the European Communities [arena-web], p. 38.

[34] *Financial Times Deutschland* of Oct. 30, 2003: "Pässe mit Fingerabdruck-Chip geplant"; and *Financial Times Europe* of Oct. 30, 2003: "US and EU move closer on anti-terror plan for passports."

German interior minister's plans for the so-called layered biometric identification of both third country nationals and EU citizens back in 2003:

> I, for one, believe if we're going to ask the rest of the world to put fingerprints on their passports, we ought to put our fingerprints on our passports. I mean you can go out to the rest of the world and say we'd like to engage you in this discussion. We'd like you to consider doing these things. I think you're in a much better position to discuss issues if you have made the commitment to getting them done yourself. … One of my recommendations to Mike [Chertoff, Ridge's successor as Homeland Security Secretary,] is be aggressive. Go after 10 fingerprints on the passport. It's a lot easier to negotiate with your allies if you've already done what you're asking them to do.[35]

4.3 The Commission's Proposal on Biometric Passports

By February 2004, the Commission's Directorate-General "Justice, Freedom and Security" had produced its legislative proposal for a Biometric Passports Regulation.[36] JHA Commissioner Vitorino personally briefed the members of the Justice and Home Affairs Council about "his" legislative initiative on February 19th.[37]

The EC Treaty as amended by the Treaty of Nice, i.e. the legal foundation of the supranational "First Pillar" of the EU, did not provide a mandate for the

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[35] U.S. Department of Homeland Security (2005): *Transcript of the Secretary of Homeland Security Tom Ridge at the Center for Strategic and International Studies,* Washington, D.C., Jan. 12, 2005 [arena-web], p. 7. For the time being, the Bush administration has not introduced a bill calling for the inclusion of fingerprints into U.S. citizens' passports. However, former DHS officials have suggested that "the U.S. [should] match the bold step of the European Union to include fingerprints in passports [and] should advocate for fingerprints as a mandatory biometric in passports at ICAO." Verdery, C. S. (2005): *Prepared Testimony by C. Stewart Verdery, Jr.,* Washington, D.C.: U.S. House of Representatives, Committee on Homeland Security, Subcommittee on Economic Security, Infrastructure Protection, and Cybersecurity, June 22, 2005 [arena-web], p. 5. Mr. Verdery served as Assistant Secretary for Border and Transportation Security and Planning at the Department of Homeland Security.

[36] European Commission (2004): "Proposal for a Council Regulation on standards for security features and biometrics in EU citizens' passports," Brussels, Feb. 18, 2004, Commission doc. *COM (2004) 116 final* [arena-web].

[37] Cf. Council of the EU (2004c): 2561st Council meeting – Justice and Home Affairs, Press Release, Council doc. *5831/04 (Presse 37)* [arena-web].

compulsory biometric "enrollment" of all EU citizens in order to identify terrorist suspects among them. As a matter of fact, the heads of state or government had not even been able to agree upon the introduction of a common European passport during the Nice intergovernmental conference.[38] The Commission had thus decided to frame its draft Biometric Passports Regulation as a legal act developing the Schengen *acquis* on external border control in general and article 62 par. 2 a) of the EC Treaty in particular.[39] Schengen-related measures create different sets of rights and obligations for the UK, Ireland, Denmark, Norway, and Iceland, respectively. While Norway, a non-EU country, is *de facto* bound by Schengen-related Community law, for example, the UK, an EU Member State, is frequently not allowed to take part in such schemes.[40] Against this background, the legality of the Biometric Passports Regulation would later be challenged by the UK before the *European Court of Justice*.[41]

In regard to the choice of biometric identifiers to be included in EU citizens' future "*e*-Passports," the European Commission suggested the *mandatory*

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[38] See article 18 par. 3 of the amended EC Treaty. Cf. *European Voice* of June 26, 2003: "National passports to stay despite US security rules."

[39] This treaty provision authorized the Council, i.e. the former *Schengen Executive Committee*, to adopt "measures on the crossing of the external borders of the Member States which shall establish standards and procedures to be followed by Member States in carrying out checks on persons at such borders." Large parts of the Schengen *acquis* as it stood when it was incorporated into the EU on May 1, 1999 were published in the *Official Journal*. See Council of the EU (2000): "The Schengen acquis as referred to in Article 1 (2) of Council Decision 1999/435/EC of 20 May 1999," in: *Official Journal of the European Communities* of Sept. 22, 2000, pp. 1-473 [arena-web]. Detailed rules and standard operating procedures for conducting border checks in the Schengen area are contained in the so-called *Common Manual*. Parts of this constantly evolving document have also been made publicly available. See initially Council of the EU (2002): "Common Manual," in: *Official Journal of the European Communities* of Dec. 16, 2002, Vol. C 313, pp. 97-335 [arena-web].

[40] Cf. Wichmann, N. (2006): "The Participation of the Schengen Associates: Inside or Outside?" in: *European Foreign Affairs Review,* Vol. 11, pp. 87-107, esp. pp. 98-103.

[41] Cf. Council of the EU (2005a): Council doc. *7865/05 JUR 154 VISA 80 FRONT 47* [arena-web]. In regard to the *Council Legal Service's* assessment that "Ireland and the United Kingdom cannot participate in the adoption [of the Biometric Passports Regulation]," see Council of the EU (2004d): Council doc. *6963/04 JUR 99 JAI 63 VISA 43 MI 65 COMIX 150* [arena-web], p. 13. For further details, see *section 4.5* below.

inclusion of a *facial image* and, in noteworthy contrast to its legislative proposals on biometric visa and residence permits for third country nationals, the *optional* incorporation of *fingerprints*. Logically inconsistent with the latter suggestion, however, the Commission also called for the establishment of a "centralized, biometrics-based 'EU passport register' which would contain the fingerprint(s) of passport applicants." According to the Commission's services, the political purpose of such a central database of EU citizens' fingerprint biometrics (presumably managed by the European Commission in the same way as the fingerprint database EURODAC)[42] would be "to enable background searches (one-to-many)."

The Commission's long-term objective of creating a centralized AFIS covering all EU citizens was apparently inspired by the concept of *end-to-end security:*

> From a security point of view, in order to create the beginning of true 'end-to-end' security, a centralised European register of issued passports (and possibly other documents used for travel purposes) could be created in a long term perspective.[43]

The political objective of generating a "true end-to-end capability for analysts and decision-makers" had initially been formulated in the framework of the American *Total Information Awareness* program. According to Pete Aldridge, U.S. Undersecretary of Defense, the latter initiative aimed at "searching vast quantities of data to determine links and patterns indicative of terrorist activities."[44] The *Total Information Awareness* program was terminated in July 2003 after the U.S. Congress decided to cut off funding for the seemingly totalitarian scheme. The concepts of

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[42] In regard to EURODAC, an all-European AFIS performing random background checks on asylum applicants and "illegal" immigrants, see Aus, J. P. (2006a): "Eurodac: A Solution Looking for a Problem?" in: *European Integration online Papers (EIoP),* Vol. 10, No. 6 (http://eiop.or.at/eiop/texte/2006-006a.htm).

[43] Commission (2004): *Proposal* [cf. footnote 36], pp. 4, 7, and 8, respectively.

[44] Quotations reproduced from Hosein, G. (2005): *Threatening the Open Society: Comparing Anti-terror Policies and Strategies in the U.S. and Europe*, London: Privacy International, p. 10.

"end-to-end security" and "total information awareness," however, would evidently continue to inspire policymakers in the European Union.[45]

4.4 Intergovernmental Negotiations in the Justice and Home Affairs Council, March – October 2004 [46]

4.4.1 Initial Scrutiny by the Visa Working Party

As previously mentioned, the draft Biometric Passports Regulation was framed as a Schengen-related measure on external border control. That alone, however, would not yet answer the question of which of the JHA Council's various working groups should deal with the legislative dossier.[47] What, then, motivated the decision to assign this delicate task to the *Visa Working Party*? The *administrative expertise* of the members of this particular working group apparently played a decisive role in this context. To borrow the words of an Irish civil servant temporarily presiding over the intergovernmental negotiations in the Council, "the reason why this matter was dealt with in the Visa Working Party was that it could be assumed that this group possessed the necessary experience to

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[45] The European Community's *Data Retention Directive* of March 2006, framed as a response to the terrorist attacks of July 2005 in London and covering *inter alia* the complete e-mail and phone call records of ordinary EU citizens, is the most recent supranational legislative expression of the *total information awareness* approach to internal security. See Council of the EU / European Parliament (2006): "Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC," in: *Official Journal of the EU* of April 13, 2006, Vol. L 105, pp. 54-63 [arena-web].

[46] In this section I draw on a number of previously unreleased or only partially accessible primary sources. I would like to thank the General Secretariat of the Council for granting me full access to documents *10648/04, 11489/04, 11489/1/04 REV 1, 11489/1/04 REV 1 ADD 1*, and *12867/04*. Except for the opinions of the *Council Legal Service*, I have also been granted full access to documents *7372/04, 7372/1/04 REV 1,* and *10070/04*. The documents cited below may therefore deviate from those stored in the Council's *public register* (http://register.consilium.eu.int).

[47] An organigram of the JHA Council's working structures since the entry into force of the Treaty of Amsterdam can be found in Aus, J. P. (2006b): *Logics of Decision-making on Community Asylum Policy. A Case Study of the Evolvement of the Dublin II Regulation,* University of Oslo: ARENA – Centre for European Studies, Working Paper No. 03/2006 [arena-web], Annex 1.

deal with this matter as it had dealt with the draft regulations on introducing biometrics into visas and residence permits."[48] As we shall see in due course, the *effect* of activating the Visa Working Party was that a number of its members would *reason by analogy* and call for the introduction of both facial images and fingerprints into EU citizens' passports.

The *Visa Working Party* initially scrutinized the draft Biometric Passports Regulation on March 11, 2004. The first reading of the European Commission's proposal in the Council thus fatefully coincided with the *train bombings in Madrid*. The latter terrorist attack, evidently carried out by Islamist *jihadists* rather than Basque separatists, left nearly two hundred citizens dead and more than two thousand wounded.

Two weeks after the Madrid bombings, a tragic event frequently referred to as "3/11" or "Europe's 9/11," the *European Council* adopted a *Declaration on Combating Terrorism* which, beyond expressing the European heads of state or governments' solidarity with the victims of the terrorist attacks, contained the following passages:

> [The] Member States and the acceding States shall … mobilise all the instruments at their disposal, including military resources, to prevent the terrorist threat in the territory of one of them.… Improved border controls and document security play an important role in combating terrorism. … The European Council instructs the Council to adopt by the end of 2004 the Commission's proposals for the incorporation of biometric features into passports and visas….[49]

In effect, Europe's political leaders had reaffirmed the counter-terrorist nature of the draft Biometric Passports Regulation. How precisely the biometric "enrollment" of all EU citizens would contribute to preventing future terrorist attacks by

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[48] Council of the EU (2004e): Council doc. *10070/04 VISA 104 COMIX 375* [arena-web], p. 2.

[49] European Council (2004): *Declaration on Combating Terrorism* of March 25, 2004 [arena-web], pp. 7-8 and 18, respectively.

third country nationals on European soil, however, had not been laid out by the heads of state or government.[50] At any rate, the European Council's *Declaration on Combating Terrorism* reinforced the sense of urgency with which this legislative dossier was supposed to be dealt with by the *JHA Council*. As I will document in *section 4.5* below, the European Council's *deadline* for the adoption of the Biometric Passports Regulation by the Council of Ministers would barely be met.

Let me return to the very first reading of the draft Regulation in the *Visa Working Party*. Only a few hours after the Madrid bombings, the German delegation, supported by France and Italy, expressed its discontent with the Commission's seemingly too modest proposal. Acting upon instructions from Berlin, the German *Visa Working Party* representative was "of the opinion that fingerprints should be mandatory." This "hawkish" stance was justified by recognition of *legal precedence* rather than comprehensive analysis. Germany, France, and Italy thus openly questioned "[why] the draft proposal did not follow the two recently adopted texts, integrating both [a] facial image and fingerprints into the uniform formats for visa and residence permits." Sweden and Finland, on the other hand, expressed that they "would have difficulty in accepting a possible centralised [fingerprint] register [of EU citizens] as mentioned in the [Commission's] explanatory memorandum." Furthermore, the Finnish delegation drew attention to the fact that it would be "inconsistent to suggest the storage of fingerprints in the register, when fingerprints were not contained [on an] obligatory [basis] in the passport." Responding to these critical remarks by the Nordic countries, the Commission representative noted that "the idea [of a central fingerprint register] had been launched as a long-term perspective" and that there was arguably "no

[50] Against this background, Carlos Coelho, the EP's *rapporteur* for the Biometric Passports Regulation, claimed that "the European Council made a political decision to introduce biometric identifiers in EU passports without any input from practitioners and without knowing the magnitude of the problem, if indeed there is a problem." European Parliament (2004a): "Report on the Commission proposal for a Council regulation on standards for security features and biometrics in EU citizens' passports," Committee on Civil Liberties, Justice and Home Affairs, Oct. 28, 2004, EP doc. *A6-0028/2004 final* [arena-web], p. 6.

need to discuss it in detail at this stage."[51] The latter subject was never brought up again in the working group.

During the *Visa Working Party*'s second reading of the draft bill on April 7, 2004, "France reiterated its request for the fingerprints being a mandatory biometric identifier. Italy, Spain, the UK, and Germany supported this point of view." This would be the first empirical manifestation of a coordinated policy stance by the members of the *Group of Five (G5),* the informal group of interior ministers and government officials of France, Germany, Italy, Spain, and the UK (see *section 4.4.4* below). It would also be the first time that one of the political heavyweights participating in the *G5*, namely Germany, would, "in the interest of a timely adoption of the measure," suggest that "fingerprints could become mandatory only at a later stage." The Irish Presidency, on the other hand, was fully aware of the political sensitivity of amending the draft Regulation in such a manner. It therefore "concluded that, as suggested by the Commission, the question of whether the second biometric identifier being mandatory or not should be decided upon by Ministers."[52] The civil servants' need for "urgent political guidance" was reiterated during the *Visa Working Party*'s third meeting on May 11th.[53]

Meanwhile, the French, German, Italian, and British interior ministry representatives were negotiating directly with their American counterparts in the framework of the *G8*. Even though little is publicly known about decision-making processes at the G8 Sea Island summit of May 2004, we do know that these inter-executive exchanges led to the following policy statement by the *G8 Justice and Home Affairs Ministers*: "Work towards introducing passports with biometric identifiers will be accelerated. States will take the necessary steps to intro-

[51] Council of the EU (2004f): Council doc. *7372/04 VISA 46 COMIX 183* [arena-web], pp. 2 and 4, respectively.

[52] Council of the EU (2004g): Council doc. *7372/1/04 REV 1 VISA 46 COMIX 183* [arena-web], p. 6.

[53] Council (2004e): doc. *10070/04* [cf. footnote 48], p. 3.

duce such documents on the basis of global interoperability."[54] At the press conference succeeding the G8 JHA summit, the acting G8 President, U.S. Homeland Security Secretary Tom Ridge, underlined the G8's leadership role in establishing globally interoperable biometric standards:

> [It] is generally agreed that as we reach for biometric standards, as we look for ways to authenticate the identity of people, or to verify the authenticity of documents, that the G-8 take a leadership role in identifying what those biometric parameters would be and the technology that we would … encourage our colleagues from around the world to use.[55]

4.4.2 Towards a Political Agreement under the Irish Presidency

Back in Brussels and Dublin, the civil servants of a "medium-sized" Member State kept busy with preparing the *JHA Council* in June, i.e. the last meeting of the Justice and Home Affairs ministers under the Irish Presidency. Since intergovernmental negotiations on *Visa Working Party* level had effectively stalled, the outgoing Presidency activated the *Strategic Committee on Immigration, Frontiers and Asylum / Mixed Committee (SCIFA/COMIX)* in order to move the biometric passports agenda forward.[56] *SCIFA/COMIX* was charged with answering two politically decisive questions, namely "1) Should the passport contain one or two mandatory biometric identifiers?" and "2) Should the second biometric identifier,

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[54] G8 (2004a): *Meeting of G8 Justice and Home Affairs Ministers, Washington, May 11, 2004: Communiqué* [arena-web], p. 2. Cf. Kirton, J. J. (2005): "America at the G8: From Vulnerability to Victory at the Sea Island Summit," in: Fratianni, M. *et al.* (eds.), *New Perspectives on Global Governance: Why America Needs the G8,* Aldershot: Ashgate, pp. 31-49.

[55] G8 (2004b): *Transcript of the G8 Justice and Home Affairs Ministerial Press Conference,* Washington, May 11, 2004 [arena-web], p. 3.

[56] The designation *Mixed Committee (COMIX)* indicates the formal involvement of third countries associated with the Schengen regime. While the representatives of Norway, Iceland, and now also Switzerland may use the *Mixed Committee* procedure for discussing particular problems with their EU counterparts, formal decisions on Schengen-related legislative measures have to be taken by the *JHA Council* as such (cf. *section 4.3* above).

either mandatory or optional, be fingerprints or iris recognition?"[57] Having met twice on May 19th and June 1st, *SCIFA/COMIX* concluded that "most delegations were in favour of having fingerprints as the second biometric identifier, but were divided on whether the identifier should be mandatory or optional."[58] Except for definitely ruling out iris recognition, *SCIFA/COMIX* had not been able to solve the political problem at hand.

In light of this deadlocked situation, the Presidency placed the draft Biometric Passports Regulation as a so-called *"B" item*, i.e. as an issue requiring further political discussion, on the agenda of the *Mixed Committee on Ministerial level*.[59] Ironically, this Schengen-related meeting of the EU plus Norway and Iceland would be chaired by Minister McDowell of Ireland, i.e. by the political representative of a Member State not fully participating in the Schengen scheme.[60] During its working session on June 8, 2004, the Mixed Committee on Ministerial level "broadly agreed that the EU citizens' passports should contain a first mandatory biometric identifier, a facial image, and an optional one, in principle fingerprints."[61] At last, a *political agreement* had been reached. Against this background, "the Mixed Committee [on Ministerial level] instructed the competent bodies to continue their examination of the proposal in the light of these guidelines."[62]

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[57] Council of the EU (2004h): Council doc. *9510/04 VISA 91 COMIX 336* [arena-web], pp. 1-2. The use of *iris recognition* instead of fingerprints had initially been promoted by the UK and Finland, with Germany suggesting the iris as yet another optional biometric identifier. In light of the overall lack of intergovernmental support for iris recognition and the Council's ultimate choice of fingerprints, I shall spare the reader with further details on these largely technical discussions.

[58] Council of the EU (2004i): Council doc. *9767/04 JAI 162 ASIM 22 COMIX 360* [arena-web], p. 2.

[59] Cf. Council of the EU (2004j): Council doc. *10118/04 OJ/CONS 34 JAI 194* [arena-web].

[60] During the first six months of the year, *Mixed Committee* meetings are chaired by the rotating Council Presidency. During the second half of the year, the chair is occupied by a Schengen-affiliated third country.

[61] Council of the EU (2004k): 2588th Council meeting – Justice and Home Affairs, Press Release, Council doc. *9782/04 (Presse 173)* [arena-web], p. 26.

[62] Council of the EU (2004l): Council doc. *10968/04 JAI 249 COMIX 442* [arena-web], p. 1.

During the press conference after the Council meeting, former JHA Commissioner Vitorino praised the ministers' collective decision which, it may be recalled, was fully in line with the Commission's proposal. The Commissioner also underlined the close link between reaching an early agreement on the biometric passports issue in the JHA Council, on the one hand, and the possible extension of the U.S. deadline for the Visa Waiver Program, on the other:

> [We] will [now] be in a condition to do our best to guarantee that the new model of European passports will start being issued by the end of 2005. As you know, this is relevant to guarantee the Visa Waiver Program, especially with the United States of America, and I hope that today, at the precise hour I am talking to you now, the Congress of the United States of America will be adopting a bill that will postpone the requirement of biometric features in the passports for those countries who benefit from the Visa Waiver Program for an extra year, this means until October of 2005. So, I hope that the decisions taken today here in Luxembourg and the decisions that are being taken in Washington, D.C. will converge in order to keep a free area of travel in the transatlantic relationship.[63]

Supplementing the Commissioner's statement, Minister McDowell, acting President of the JHA Council, justified the ministers' collective political decision by emphasizing the practical hazard of going *beyond* internationally agreed upon technical standards for biometric passports:

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[63] Council of the EU (2004m): 2588th Council meeting – Justice and Home Affairs, *Press Conference*, audio record [arena-web], at 10:41 min.; transcription JPA. The U.S. Congress would indeed approve of extending this deadline until October 2005. See United States of America, 108th Congress (2004): "Act to modify certain deadlines pertaining to machine-readable, tamper-resistant entry and exit documents," *Public Law 108-299*, Washington, D.C., Aug. 9, 2004 [arena-web]. One year later, the Department of Homeland Security accordingly announced that newly issued passports lacking a digital photograph printed on the data page of the travel document would not suffice any more for gaining visa-free access to the United States. The DHS used this opportunity to determine Oct. 26, 2006 as the new deadline for introducing so-called "*e*-Passports" equipped with an integrated circuit chip. Cf. Sensenbrenner, F. J. (2005b): *Sensenbrenner Praises Enforcement of Today's Visa Waiver Program Deadline for More Secure Passports,* Washington, D.C.: U.S. House of Representatives, Press Release of Oct. 26, 2005 [arena-web]. The DHS statement is attached to the latter press release.

> [We] have to realize that we live in an international world, that we have bilateral relations on these matters with countries such as Australia, Canada, New Zealand, United States, and other countries, and you can't simply live in a vacuum. And, you know, what becomes standard internationally is likely to be the norm in Europe as well. But we don't want to be in a position that we are ahead of the world, and then be in a position that our technology and our passports are effectively not useable by other countries, or not recognizable by their machines and all the rest of it. [64]

Such practical concerns had also been raised in the framework of the G8 and ICAO (cf. *section 4.1* above). The following statement by Joel F. Shaw, a former U.S. liaison officer with the ICAO, may illustrate this line of reasoning. Asked about "what can go wrong if visa waiver countries are rushed to meet the deadline?", Mr. Shaw responded verbatim:

> Well, I think the biggest problem will be they'll all show up with a passport that won't work.... You'll have chaos at Homeland Security because they'll show up, and it says I can't read the data from the chip, I can't identify the person, then immediately the person is suspect.[65]

While acknowledging these practical difficulties, both the DHS and State Department continued exerting massive political pressure on VWP countries' governments. A testimony by Catherine Barry, Managing Director of the Office of Visa Services at the U.S. State Department, sheds light on these diplomatic efforts:

> On the diplomatic front, we will continue to pursue vigorous efforts at the highest levels to ensure that the VWP countries remain committed to introducing biometric passports as quickly as possible. Senior [State] Department officials have and will continue to use every opportunity in regularly scheduled meetings with officials from the European Union, the G-8 and the Asia-Pacific Economic Commission to challenge other governments to act

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[64] Council (2004m): 2588th Council meeting, audio record [cf. footnote 63], at 18:15 min.; transcription JPA.

[65] Shaw, J. F. (2005): "Testimony of Joel F. Shaw," in: U.S. House of Representatives, *Hearing* [cf. footnote 18], p. 38.

> aggressively. This issue will be a top priority at all VWP Embassy sections, not just the consular section.[66]

The political agreement reached within the *JHA Council of the EU* in June 2004 was administratively acknowledged during a subsequent meeting of the *Visa Working Party*. In effect, article 1 par. 2 of the draft Biometric Passports Regulation took the following shape at the end of the Irish Presidency:

> The passport and travel documents shall include a storage medium with sufficient capacity, which shall be highly secured and shall contain a facial image. Member States may also include fingerprints in interoperable formats.[67]

4.4.3 Re-opening the Negotiations under the Dutch Presidency

The incoming Dutch Presidency of the Council focused its attention on resolving the remaining *technical* problems connected with the draft Biometric Passports Regulation. Some of these problems stemmed from the challenge of meeting the technical requirements for globally interoperable contactless chips and passport readers laid down by the ICAO in May 2004.[68] After three consecutive meetings presided over by the Netherlands, the *Visa Working Party* had completed the "technical examination" of the draft bill.[69]

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[66] Barry, C. (2004): "Prepared Statement of Catherine Barry," in: U.S. House of Representatives, Committee on International Relations, Subcommittee on International Terrorism, Nonproliferation and Human Rights, *Hearing on the Visa Waiver Program and the Screening of Potential Terrorists,* Washington, D.C., June 16, 2004 [arena-web], pp. 8-13, here: p. 12.

[67] Council of the EU (2004n): Council doc. *10648/04 VISA 117 COMIX 406* [arena-web], p. 6.

[68] Cf. International Civil Aviation Organization (2004): *Biometrics Deployment of Machine Readable Travel Documents: Technical Report, Version 2.0,* New Technologies Working Group, May 21, 2004 [arena-web].

[69] Cf. *inter alia* Council of the EU (2004o): Council doc. *11489/04 VISA 140 COMIX 474* [arena-web]; and Council of the EU (2004p): Council doc. *11489/1/04 REV 1 VISA 140 COMIX 474* [arena-web]. Inter-administrative coordination processes of this kind illustrate the well-known fact that the Justice and Home Affairs Council of the EU is not an ordinary legislative organ but rather a *hybrid* between legislative and executive body. The latter, of course, also holds true for the European Commission's DG "Justice, Freedom and Security" and the legislative and executive functions assigned to it.

Much to the chagrin of the Commission's political leadership, several governments now suddenly declared that they wished to *re-open* the negotiations on ministerial level in regard to the future legal status of fingerprint biometrics. These demands were voiced during the *Visa Working Party's* meeting on September 28, 2004. On this occasion, the German, French, Italian, and Greek delegations stated "that they were still of the opinion that the second identifier should become mandatory … and wished to address this question again at political level."[70] Four weeks later, the JHA Council formally *reversed* its initial political decision and called for the *mandatory* inclusion of fingerprints into EU citizens' passports. How did this remarkable policy shift come about?

Responding to the requests *inter alia* of Germany, France, and Italy, the Dutch Presidency, assisted by the Council Secretariat, arranged for yet another meeting of *SCIFA/COMIX* on October 6th.[71] Even though the Council Presidency had "[invited] the Strategic Committee on Immigration, Frontiers and Asylum [to] address [the] outstanding questions in order for the text to be submitted to Coreper as soon as possible,"[72] the meeting did not yield any concrete results. *SCIFA/COMIX* simply could not agree on a new wording of article 1 par. 2 of the draft Regulation. However, the meeting of the *Strategic Committee* revealed that the German, French, Italian, and Greek demands for the mandatory inclusion of fingerprints would be supported by the governments of Spain, Slovenia, Malta, and Lithuania. Poland and Slovakia, on the other hand, responded by formally entering scrutiny reservations, while Estonia argued that "changing the draft proposal at this stage would compromise the timetable for applying the measure."[73] The Estonian position was representative of the stance of several other new Member States who had indicated that they would not manage to produce technologically

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[70] Council of the EU (2004q): Council doc. *12867/04 VISA 171 COMIX 580* [arena-web], p. 2.

[71] Cf. Council of the EU (2004r): Council doc. *CM 3363/04 JAI ASIM COMIX* [arena-web].

[72] Council (2004q): doc. *12867/04* [cf. footnote 70], p. 2.

highly demanding "*e*-Passports" within a timeframe of less than two years. The final round of intergovernmental negotiations in the Justice and Home Affairs Council was about to commence.

4.4.4 Rushing Towards a "General Approach"

With *only twelve working days left* before the JHA Council meeting scheduled for October 26, 2004, i.e. the initial date of expiry of the U.S. deadline for legislative action concerning biometric passports, the unfinished dossier now moved up from *SCIFA* to *COREPER (Part Two)*. In order to accommodate the views of the Norwegian and Icelandic ambassadors, the issue was dealt with "in the margins of COREPER" by the *Mixed Committee at Senior Officials level* on October 14th. Before discussing the biometric passports dossier at around 3 pm that Thursday afternoon in Brussels, *COREPER* had worked through an impressive agenda of 43 other items. Among the numerous policy issues scrutinized more or less thoroughly that day by the *Permanent Representatives* were the possible provision of macro-financial assistance to Serbia and Montenegro and the administration of Community tariff quotas for Icelandic fishery products.[74]

The *Permanent Representatives'* meeting resulted in a so-called *general approach* which would be formally endorsed by the politically responsible ministers on October 26th. The ambiguous aspect of this *general approach* was that the ambassadors of Sweden, Finland, Estonia, and Latvia had clearly stated that "they could not accept this re-opening of discussions on the second biometric identifier to become mandatory." Given the unanimity requirement in the Council, deliberate non-acceptance on the part of a single delegation, let alone numerous delegations, would have resulted in legislative deadlock. In the end, however, none of the national representatives mentioned above nor any other EU government explicitly

[73] Council of the EU (2004s): Council doc. *13186/04 VISA 181 COMIX 599* [arena-web], p. 3.

[74] Cf. Council of the EU (2004t): Council doc. *13198/04 OJ/CRP2 36* [arena-web].

"vetoed" the compulsory fingerprinting of the entire EU population of approximately 450 million people.

The *general approach* hammered out by COREPER consisted of connecting two analytically separate issues with one another, namely the question of *whether EU citizens should be fingerprinted on a mandatory basis*, on the one hand, and the *timeframe for the enforcement of the Regulation in administrative practice*, on the other. COREPER, in other words, addressed the politically salient issue of EU citizens' possible multiple biometric "enrollment" by scrutinizing the administrative feasibility of such a procedure. A Council Secretariat official recalled the emergence of the *general approach* within COREPER as follows:

> [The] discussions showed that the two outstanding issues are closely linked, as delegations indicated that the introduction of even one biometric identifier could not be accomplished within the timeframe of 12 months set out in the original Commission proposal.

Against this background, the *Permanent Representatives* settled for the following package deal:

> On the basis of the above, there seemed to be a basis for an agreement among delegations to the following solution:
> - the first mandatory biometric identifier, i.e. facial image, should apply at the latest 18 months after the adoption of the technical specifications,
> - the second mandatory biometric identifier, i.e. fingerprints, should apply at the latest 36 months after the adoption of the technical specifications. This time frame would be in line with the one set for the visa stickers and residence permits.

Having found an apparently feasible administrative solution to the political problem of EU citizens' compulsory and multiple biometric "enrollment," i.e. a solution which would meet the European Council's request for "harmonized solutions for documents for third country nationals [and] EU citizens' passports" (cf. *section 4.1* above), COREPER suggested the following course of action to the members of the Justice and Home Affairs Council:

> The Permanent Representatives' Committee / Mixed Committee at the level of Senior Officials invites the Justice and Home Affairs Council / Mixed Committee at Ministerial Level to endorse the general approach set out above at its session on 26 October 2004, pending the opinion of the European Parliament.[75]

The JHA Council, in other words, was "asked to confirm the agreement already reached at technical level."[76] The justice and interior ministers of the EU would indeed approve of the *general approach* developed by COREPER. The Justice and Home Affairs Council's decision, in turn, was formally endorsed by the Mixed Committee (EU + Norway and Iceland).[77]

The consent of the Council had been "nailed down," so to speak, by the *Group of Five (G5),* i.e. by the interior ministers of France, Germany, Italy, Spain, and the UK, during their meeting of October 18th in Florence. In a blunt display of political power, the privileged members of this European "homeland security directorate" and self-declared "policy laboratory" announced that they had collectively agreed upon the mandatory inclusion of fingerprint biometrics into EU citizens' passports.[78] The *G5* governments expected the other JHA Council mem-

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[75] Council of the EU (2004u): Council doc. *13490/04 VISA 188 COMIX 613* [arena-web], pp. 2-3.

[76] Council of the EU (2004v): *Background Note: Justice and Home Affairs Council, Luxembourg, 25-26 October 2004,* General Secretariat of the Council: Press Service, Oct. 20, 2004 [arena-web], p. 5.

[77] Cf. Council of the EU (2004w): Council doc. *13991/04 JAI 407 COMIX 647* [arena-web], p. 2.

[78] Cf. *Corriere Della Sera* of Oct. 18, 2004: "Impronte digitali sul passaporto Ue"; *eGovernment News* of Oct. 19, 2004: "G5 Countries Agree to Include Fingerprint Scans in Passports"; and *European Voice* of Oct. 21, 2004: "Biometric ID set for backing from ministers." The G5 meeting in Florence brought together Dominique de Villepin (Minister for the Interior, France), Otto Schily (Federal Minister for the Interior, Germany), Giuseppe Pisanu (Minister for the Interior, Italy), José Antonio Alonso Suárez (Minister for the Interior, Spain), and David Blunkett (Secretary of State for the Home Department and Home Secretary, United Kingdom). Poland joined this group in March 2006, transforming the former G5 into the G6. The first meeting of the G6 in Heiligendamm, Germany, *inter alia* resulted in calls for "police access to EURODAC and full access of authorities responsible for internal security to the VIS" and for the intergovernmental exchange of DNA and fingerprint biometrics according to the "principle of availability." The latter had already been agreed upon by Austria, Belgium,

bers to give their blessing to these proposals on October 26th, i.e. to formally confirm a policy position lending support to the *general approach* hammered out by COREPER on October 14th.

The political demonstration of the G5 had the desired effect. The Justice and Home Affairs ministers of the EU basically "waved through" the legislative item. This course of action was only reasonable considering the impressive agenda of the Justice and Home Affairs Council meeting of October 26th in Luxembourg. At the press conference after the actual Council meeting, the head of the European Commission's Directorate-General "Justice, Freedom and Security," Jonathan Faull, accordingly underlined

> [the] extraordinary range of importance of the subjects that we are dealing with here, which shows how important the work of the Justice and Home Affairs Council is. We've talked about biometrics in passports, we've talked about terrorism, we've talked about drugs, we've talked about pollution disasters, we've talked about police records for pedophiles and other criminals, we've talked about durable solutions for refugee crises, we've talked about readmission agreements this afternoon, we will see the adoption, the creation of the European Borders Agency … This is a remarkable agenda, and I thank very much the Dutch Presidency for having shepparded our work to this stage on these important topics in such a smooth and consensual way. … The agenda for Justice and Home Affairs is frankly a dizzying one, it's enormous![79]

France, Germany, Luxembourg, the Netherlands and Spain in the framework of the so-called *Schengen III* accord signed in Prüm, Germany, on May 27, 2005. Cf. G6 (2006): *Treffen der Innenminister von Frankreich, Deutschland, Italien, Polen, Spanien und dem Vereinigten Königreich in Heiligendamm, 22. und 23. März 2006: Schlussfolgerungen,* Berlin: Bundesministerium des Innern, Press Release [arena-web]; and Council of the EU (2005b): Council doc. *10900/05 CRIMORG 65 ENFOPOL 85 MIGR 30* [arena-web].

[79] Council of the EU (2004x): 2613rd Council meeting – Justice and Home Affairs, *Press Conference,* audio record [arena-web], at 13:45 min.; transcription JPA. Jonathan Faull was substituting for António Vitorino who had given his last press conference as JHA Commissioner one day earlier. In his last oral statement to the press, Vitorino tried to strike a balance between European engagement in the U.S.-led war on terror, on the one hand, and upholding basic democratic freedoms and fundamental rights, on the other: "[The] events that might occur, especially in the fight against terrorism, will require from us ambition, determination, and politi-

Director-General Faull was apparently not the only one feeling a bit "dizzy" after having worked his way through the "Multi-annual Programme for the Area of Freedom, Security and Justice" (the so-called "Hague Programme" succeeding the "Tampere Programme"), four Commission Communications on "Prevention, Preparedness and Response to Terrorist Attacks," an "orientation debate" on the integration of third country nationals, and numerous other items. In light of this "dizzying" policy agenda, the Minister of the Interior and Kingdom Relations of the Netherlands and acting President of the JHA Council, Johan Remkes, could not even recall what the Council had actually agreed upon a few hours earlier in regard to the Biometric Passports Regulation. The Dutch Minister of the Interior thus told the journalists that

> [it] has been decided in principle to include one mandatory identifier [into the passport], namely the facial scan, and one optional identifier which the Member States would be free to include. And that would be the iris scan – eh, sorry, it has to be the fingerprint.[80]

The Council's official press release was a bit clearer than Minister Remkes in this respect. However, the document fell short of explaining why the Justice and Home Affairs ministers had ultimately decided to include fingerprints into EU citizens' passports on a mandatory basis. The press release merely informed the interested public that "the integration of biometric identifiers is an important step towards the use of new elements in the perspective of future developments at Eu-

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cal leadership. The way some of our most close partners, third countries, deal with these issues will oblige us to move ahead. Finally, I do believe that the expectation of our citizens is that we need to have a highly demanding agenda in the Area of Freedom, Security and Justice. I sometimes even have the impression that citizens are rather aware of decision-making … of those who have the possibility to take the political decisions." Council of the EU (2004y): 2613rd Council meeting – Justice and Home Affairs, *Intermediate Press Conference,* audio record [arena-web], at 17:12 min.; transcription JPA.

[80] Council (2004x): 2613rd Council meeting, *Press Conference,* audio record [cf. footnote 79], at 11:00 min. I would like to thank Pieter de Wilde for assisting me in translating Remkes' apparently confused statement from the Dutch original into English.

ropean level."[81] As documented in *section 4.3* above, the "long-term perspective" envisioned by the European Commission in this context was the establishment of a "centralized, biometrics-based 'EU passports register' which would contain the fingerprint(s) of passport applicants [and would] enable background searches (one-to-many)." With the JHA Council's political decision of October 26, 2004, the European Community had moved a decisive step closer to realizing the Commission's long-term biometric control objectives.

4.5 Supranational Parliamentary Critique and Formal Adoption by the Council

By November 23, 2004, the Council Secretariat, drawing on its professional expertise in redrafting legal texts, had produced a revised and consolidated version of the Biometric Passports Regulation. Article 1 par. 2 of the draft Regulation now read as follows:

> The passports and travel documents shall include a storage medium which shall contain a facial image. The Member States shall also include fingerprints in interoperable formats.[82]

One day later, the head of the Council Legal Service forwarded the draft legislative act as endorsed by the JHA Council to the President of the *European Parliament (EP)*. The Council Secretariat used this opportunity to remind the EP of the European Council's *deadline* for the adoption of the Biometric Passports Regulation by the end of 2004.[83]

The EP met the (European) Council's request for immediate parliamentary endorsement. In spite of the Council's latest amendments to the Commission's proposal, however, the EP decided to base its legislative resolution of December

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[81] Council of the EU (2004z): 2613rd Council meeting – Justice and Home Affairs, Press Release, Council doc. *13759/1/04 REV1 (Presse 302)* [arena-web], p. 11.

[82] Council of the EU (2004α): Council doc. *15139/04 VISA 208 COMIX 714* [arena-web], p. 6.

[83] Council of the EU (2004β): *Letter from Jean-Claude Piris to Josep Borrell Fontelles*, Brussels, Nov. 24, 2004 [arena-web].

2nd exclusively on the Commission's politically outdated draft.[84] Symptomatic of the EP's political marginalization under the *consultation procedure*, the Euro-parliamentarians' legislative resolution therefore suggested amendments to a draft bill calling for the *optional* inclusion of fingerprint biometrics.

In regard to article 1 par. 2 of the draft Regulation as proposed by the Commission in February 2004 (cf. *section 4.3* above), the EP wished to add the following sentence to this decisive passage of the legal act: "No central database of European Union passports and travel documents containing all EU passport holders' biometric and other data shall be set up."[85] The EP's disapproval of the Commission's long-term objective of establishing a central biometric register had initially been voiced by the EP's *Committee on Civil Liberties, Justice and Home Affairs*. In fact, the Committee's report of October 25, 2004 had concluded that

> [the] setting up of a centralised database would violate the purpose [of the Biometric Passports Regulation] and the principle of proportionality. It would also increase the risk of abuse and function creep. Finally, it would increase the risk of using biometric identifiers as 'access keys' to various databases, thereby interconnecting data sets.

The committee's report largely reflected the views of Carlos Coelho, the EP's *rapporteur* on the dossier. Coelho, a Portuguese MEP affiliated with the *European People's Party (Christian Democrats) and European Democrats*, the EP's largest political group at the time, had demanded that "it has to be made absolutely clear that the

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[84] In an open letter to the EP of Nov. 30th, an alliance of non-governmental organizations (NGOs) fiercely criticized the EP's acceptance of the Council's claim that "the change was not sufficient grounds for the report to be sent back to the Committee [on Civil Liberties, Justice and Home Affairs] for further consideration." Among other things, the NGOs were "[urging] the Parliament to oppose mandatory fingerprinting as an unnecessary and disproportionate act." Privacy International / Statewatch / European Digital Rights (2004): *An Open Letter to the European Parliament on Biometric Registration of All EU Citizens and Residents,* Nov. 30, 2004 [arena-web], p. 1.

[85] European Parliament (2004b): "European Parliament legislative resolution on the proposal for a Council regulation on standards for security features and biometrics in EU citizens' passports," in: *Official Journal of the EU* of Aug. 25, 2005, Vol. C 208 E, pp. 50-54 [arena-web], here: p. 52. The resolution was adopted with 471 votes in favor, 118 votes against, and 6 abstentions.

data can only be used for verification and under no circumstances for other purposes, in particular hidden surveillance." An ultimately outvoted minority of left-leaning parliamentarians even went beyond the *rapporteur's* critique. Several members of the *Committee on Civil Liberties, Justice and Home Affairs* thus rejected the Commission's idea of introducing biometric passports altogether:

> [The] proposal violates all common standards of appropriateness and subsidiarity. Until now, neither the Commission nor the Council have adequately explained the necessity, functionality, efficiency and probable side-effects of including biometric identifiers in identity documents. They have not even provided detailed figures of the expected costs nor proposed a clear budget! [86]

Regardless of their political party origin, all amendments suggested by the EP were completely ignored by the Council since intergovernmental negotiations had already been concluded.

A few days after the European Parliament had passed its resolution of December 2nd, the *Council Secretariat* paved the way for formally adopting the Biometric Passports Regulation as a so-called *"A" item*, i.e. as an issue requiring no further discussion.[87] The final version of the bill, cleared by the *Council Legal Service* and the *linguistic experts*,[88] was formally adopted by the *General Affairs and External Relations Council* on December 13, 2004.[89] Most likely not aware of what they were agreeing to, the foreign ministers unanimously endorsed the legislative act.

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[86] European Parliament (2004a): "Report on the Commission proposal" [cf. footnote 50], pp. 8, 16, and 19, respectively. The Committee's report was adopted with 26 votes in favor, 9 votes against, and no abstentions.

[87] Council of the EU (2004γ): Council doc. *15918/04 VISA 223 COMIX 753* [arena-web].

[88] Cf. Council of the EU (2004δ): Council doc. *15152/04 VISA 209 COMIX 716* [arena-web].

[89] Cf. Council of the EU (2004ε): 2630th Council meeting – General Affairs and External Relations, Press Release, Council doc. *15460/04 (Presse 343)* [arena-web].

The British government's frustration with not being allowed to participate in the European Community's new Schengen-related biometric passports regime was dealt with by attaching a "unilateral United Kingdom statement" to the Council minutes.[90] This statement read as follows:

> The United Kingdom recalls that, under the Protocols on the position of the United Kingdom and Ireland and on integrating the Schengen acquis into the framework of the European Union, it has the right to take part in the adoption of this measure. It regrets that it has been denied that right.
>
> The adoption of this measure is without prejudice to the United Kingdom's legal position, and its right to take such legal steps in accordance with that position as it considers necessary.[91]

In March 2005, the Blair government brought a case before the *European Court of Justice (ECJ),* suing the *Council of the EU* as such for adopting the Biometric Passports Regulation as a Schengen-related measure.[92] These ongoing legal proceedings could result in the annulment of the Regulation if the ECJ should find that article 62 par. 2 a) of the EC Treaty does *not* provide an adequate legal basis for excluding Ireland and the UK while including Iceland, Norway, and Switzerland.

In this case, the Biometric Passports Regulation would suffer the same fate as the so-called *Passenger Name Records (PNR) Agreement* of May 2004. The latter accord between the European Community and the United States, retroactively annulled by the ECJ in May 2006, required European airlines operating flights to, from, or across U.S. territory to provide the Department of Homeland Security

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[90] Council of the EU (2004ζ): Council doc. *15918/04 ADD 1 VISA 223 COMIX 753* [arena-web].

[91] Council of the EU (2004η): Council doc. *16273/04 ADD 1 REV 1 PV/CONS 79* [arena-web], p. 3. The UK Permanent Representative to the EU, ambassador John Grant, had formally notified the Council Secretariat on May 19, 2004 of the UK's intention to participate in the adoption of the Biometric Passports Regulation; see Council of the EU (2004θ): Council doc. *10649/04 VISA 118 COMIX 407* [arena-web].

[92] European Court of Justice (2005): "Action brought on 24 March 2005 by United Kingdom of Great Britain and Northern Ireland against Council of the European Union (Case C-137/05)," in: *Official Journal of the EU* of May 28, 2005, Vol. C 132, pp. 16-17 [arena-web].

with advanced access to passenger name records. The DHS systematically checks airlines' passenger records against terrorist watch lists. In fact, U.S. government officials regard such private-sector databases as "extremely useful to a government's effort to locate and eliminate terrorist threats."[93] EU officials, on the other hand, had framed the PNR Agreement as an *internal market*-related measure based on article 95 of the EC Treaty. This line of reasoning did not hold water in the eyes of the Court.[94]

4.6 Commission Follow-up and Administrative Enforcement in the Member States

Additional supranational measures were needed in order to guarantee a full-fledged harmonization of security standards throughout the so-called "Area of Freedom, Security and Justice." On February 28, 2005, the European Commission, following consultations with national experts, adopted the first set of *technical specifications* for the Biometric Passports Regulation. The Commission Decision entailed precise technical instructions on how to incorporate *facial images* into EU citizens' passports.[95] Sixteen months later, the Commission also adopted the technical specifications for *fingerprint* biometrics, i.e. for storing the plain impressions

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[93] Falkenrath, R. (2006): "A privacy fiasco that needlessly undermines our security," in: *Financial Times Europe* of June 1, 2006, p. 13. Richard Falkenrath served as Deputy Homeland Security Adviser to the U.S. President until May 2004.

[94] See European Court of Justice (2006): "Judgment of the Court of Justice in Joined Cases C-317/04 and C-318/04," Luxembourg, *Press Release No. 46/06* of May 30, 2006 [arena-web]. The case was brought before the Court by the European Parliament. For an overview of EU and EC competencies for concluding JHA- rather than internal market-related agreements with third countries, see Monar, J. (2004): "The EU as an International Actor in the Domain of Justice and Home Affairs," in: *European Foreign Affairs Review,* Vol. 9, pp. 395-415.

[95] European Commission (2005b): "Entscheidung der Kommission vom 28/II/2005 über die technischen Spezifikationen zu Normen für Sicherheitsmerkmale und biometrische Daten in von den Mitgliedstaaten ausgestellten Pässen und Reisedokumenten," Commission doc. *K (2005) 409 endg.* [arena-web]. An official English language version of this Commission Decision has not been released in light of the Schengen-related issues affecting the UK and Ireland discussed in *sections 4.3* and *4.5* above.

of the left and right index finger of individual EU citizens in the passport.[96] In combination with article 6 of the Regulation, the two Commission Decisions mentioned above triggered specific *deadlines* for introducing biometric passports on national level. These deadlines apply to all twenty-five EU Member States except for Ireland and the UK, plus the acceding states (Bulgaria and Romania), plus Norway, Iceland and Switzerland. Administrative authorities of the thirty European countries listed above are obliged to start issuing biometric passports containing a digital photograph by August 28, 2006 and passports incorporating both a facial scan and fingerprint biometrics by June 28, 2009 at the latest.

Following in the footsteps of *Belgium*, the first European country to begin issuing biometric passports to its own citizens, *Sweden* began to roll out its national "*e*-Passports" program on October 1, 2005. Newly issued Swedish passports contain a facial scan of the Swedish national in question performed in the secure environment of a Swedish police office. Ironically, "the facial expression [of the Swedish citizen] must be neutral, no smiling."[97] In order to compensate for the additional administrative costs of mass biometric enrollment, the price for a Swedish passport has increased from approximately 29 to 43 Euros. *Norway* and *Germany* followed in third and fourth place, respectively.[98] National administrations

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[96] European Commission (2006c): "Entscheidung der Kommission vom 28/VI/2006 über die technischen Spezifikationen der Normen für Sicherheitsmerkmale und biometrische Daten in von den Mitgliedstaaten ausgestellten Pässen und Reisedokumenten," Commission doc. *K (2006) 2909 endg.* [arena-web]. Once again, an official English version has not been published.

[97] ICAO (2006): "Country Update: Sweden Introduces ePassports," in: *MRTD Report*, inaugural issue, Montréal [arena-web], pp. 33-34, here: p. 33. Cf. also *eGovernment News* of Oct. 7, 2005: "Biometric passports introduced in Sweden and Norway."

[98] The Norwegian ambassador to the EU, Bjørn T. Grydeland, had formally notified his government's acceptance of the content of the Biometric Passports Regulation on April 21, 2005. See Council of the EU (2005c): Council doc. *8685/05 VISA 102 COMIX 287* [arena-web]. The introduction of biometric passports in *Norway* on Oct. 3, 2005 was met with criticism on the part of the Norwegian Data Inspectorate. See Datatilsynet (2005): *Elektronisk lagring av biometrisk personinformasjon – forslag til endring i passloven,* Oslo, Oct. 4, 2005 [arena-web]. Similar issues were raised in *Germany* after the introduction of biometric passports on Nov. 1, 2005. Cf. Busch, H. (2006): "Kontrollwahn ohne Sinn und Verstand: Jedermann wird erkennungsdienstlich behandelt!" in: Müller-Heidelberg, T. *et al.* (eds.), *Grundrechte-Report 2006,* Frankfurt am Main: Fischer, pp. 29-32.

throughout Europe are continuing to enforce the directly applicable Biometric Passports Regulation of the European Community in spite of the so-called *Article 29 Data Protection Working Party's* opinion that "before implementing biometric features in passports, other travel documents or ID-cards, there must be an exhaustive discussion in society." The chairman of the latter working party, Peter Schaar, qualified his remarks by stating that "collecting biometric features means collecting data of the *body* of a person" and that "up to now biometric features, like fingerprints, have mostly been collected in criminal cases."[99] Such privacy issues will probably be raised again once Member States' authorities start to fingerprint their citizens in a systematic fashion.

5. Interpretation and Conclusions

5.1 Biometric Passports and the Logic of Consequentiality

Member States governments' behavior during the negotiation of the Biometric Passports Regulation in the JHA Council from March through October 2004 may be interpreted as reflecting the strategic "moves" of utility-maximizing "players" engaged in a so-called Battle-of-the-Sexes game.

From an analytical point of view, *Battle-of-the-Sexes* is a "positive-sum" game with both cooperative and conflictual elements. Applied to decision-making processes in the Council, the game abstracts from a situation in which Member States' governments disagree over the substance of a given legislative proposal and yet prefer a common solution over the status quo. The structure of the latter situation may be illustrated by a well-known narrative according to which

> both members of a couple prefer to do something together, but they disagree on their preferred outcome, vacationing in the mountains or at the ocean. … Both parties are averse to an absence of coordination in which they take different vacations, but the payoff matrix itself provides no in-

[99] Article 29 Data Protection Working Party (2005): *Opinion on Implementing the Council Regulation (EC) No 2252/2004…,* Sept. 30, 2005 [arena-web], pp. 8 and 11, respectively (emphasis in the original).

> formation about which of the two equilibrium points will be chosen. The problem is not how to get to the Pareto frontier but which point along the frontier will be chosen.[100]

The ideal-typical situation sketched out above differs from a pure coordination game, i.e. from a situation in which motorists have to agree on driving either on the left or right side of the road, for example. In contrast to a pure coordination game, the game Battle-of-the-Sexes also entails a *conflict over distribution.* After all, climbing in the mountains is the collective outcome favored by party A, whereas lying on the beach is the preferred joint solution of party B. This game, in other words, has two mutually exclusive Nash equilibria. Failure to agree on one of them is clearly the worst outcome for all parties involved. Utility-maximizing "players" will thus ultimately endorse a collectively binding solution. But which one should they select?

Even though game theory can *not* predict which of the two equilibria will be chosen without introducing auxiliary assumptions (see below), we do know that an outcome blatantly favoring one side over another is likely to stir up heated controversy. If both parties insist that solution A or B is simply "not fair" and therefore "unacceptable," a negotiated settlement may not be reached. A possible way for *homo oeconomicus* to avoid the complete breakdown of negotiations and mutually ensured "low payoffs" in a situation like this is to *move first.* The strategic calculation of the player who moves first is that the second player is going to adjust his or her move to the previous one:

> Whichever player moves first is able to select its most preferred solution, while later players (assuming perfect information on others' past moves) will find it in their interest to converge on the coordinated solution so defined, even though it is by no means their most preferred outcome.

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[100] Krasner, S. D. (1991): "Global Communications and National Power: Life on the Pareto Frontier," in: *World Politics,* Vol. 43 (April 1991), pp. 336-66, here: p. 339.

> Given the fact that they still prefer coordination to noncoordination, they have no rational alternative.[101]

In regard to the "vacation" example mentioned above, a reasonable "first move" would be to restrict the other player's alternatives via unilaterally purchasing two non-refundable airline tickets to destination A. Under these circumstances, the couple in question is most likely going to spend its vacation in A. Exploiting the first-mover advantage, in other words, is crucial for winning a Battle-of-the-Sexes game. "First mover" strategies and "bandwagon" effects of this kind have been empirically observed in numerous policy areas, including the international standardization of telecommunication technologies.[102] Intergovernmental negotiations in the JHA Council concerning the development of common European standards for interoperable biometric passports evidently displayed similar dynamics.

In the case at hand, the G5 countries (led by Germany, France, and Italy) demanded the mandatory inclusion of both facial scans and fingerprint biometrics in EU citizens' passports. Several of the newly acceded and Nordic governments, on the other hand, preferred to avoid the compulsory fingerprinting of all EU citizens via Community Regulation. Even the latter group of countries, however, favored Community legislation on biometric passports over legislative deadlock. After all, the continuation of the *status quo,* i.e. the absence of directly applicable and unambiguous common European rules for biometric passports, might have resulted in the introduction of technically incompatible travel documents within the

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[101] Scharpf (1997): *Games Real Actors Play* [cf. footnote 2], p. 250. One may note in passing that the two players could, of course, also flip a coin or draw straws in order to coordinate their actions. I intentionally refrain from elaborating further on this theoretically viable option in light of the practical irrelevance of using randomizing devices for deciding politically salient issues in the context of the EU.

[102] See Mattli, W. / T. Büthe (2003): "Setting International Standards: Technological Rationality or Primacy of Power?" in: *World Politics,* Vol. 56 (Oct. 2003), pp. 1-42; and Schmidt, S. K. / R. Werle (1998): *Coordinating Technology: Studies in the International Standardization of Telecommunications,* Cambridge, MA: The MIT Press. The latter book contains case studies *inter alia* on standardization processes for facsimile transmission (fax) and electronic mail (e-mail). Cf. also Zürn, M. (1992): *Interessen und Institutionen in der internationalen Politik: Grundlegung und Anwendungen des situationsstrukturellen Ansatzes,* Opladen: Leske und Budrich, p. 185.

"Area of Freedom, Security and Justice" and a disruption of transatlantic travel – the worst-case scenario for every government involved. During the final phase of intergovernmental negotiations and under strong political pressure emanating from the Bush administration in the U.S., the G8, and the European Council, the interior ministers of the G5 regime managed to break the emerging deadlock in the JHA Council's working groups. By prematurely "deciding upon" the mandatory fingerprinting of all EU citizens on October 18, 2004 in Florence, the G5 effectively "moved first." The twenty other participants of the ordinary Justice and Home Affairs Council meeting of October 26th in Luxembourg, in turn, now found it in their own interest to settle for the version of the Biometric Passports Regulation favored by the "big five."

The course of events summarized above sheds light on the practical difficulties that utility-maximizing actors may have in choosing among multiple equilibria in the framework of the Council. In a situation resembling a Battle-of-the-Sexes game, the "first mover" advantage of strategically calculating executive actors participating in "policy laboratories" like today's G6 can evidently make a decisive political difference. This finding not only illustrates that the "Schengen spirit" is still alive in the field of EU Justice and Home Affairs cooperation.[103] It also points to the relevance of variables that play a less prominent role in game-theoretical models, namely to the impact of unequally distributed material resources and relative power on Council-based decision-making processes.[104]

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[103] Cf. Gehring, T. (1998): "Die Politik des koordinierten Alleingangs: Schengen und die Abschaffung der Personenkontrollen an den Binnengrenzen der Europäischen Union," in: *Zeitschrift für Internationale Beziehungen,* Vol. 5, No. 1, pp. 43-78; and den Boer, M. (2000) (ed.): *Schengen Still Going Strong: Evaluation and Update,* Maastricht: European Institute of Public Administration.

[104] In a similar vain, Andrew Moravcsik has argued that "coalitional bargaining power may result either from the threat to cooperate with non-EC countries or, more common today, from cooperation among subgroups – a 'multi-speed' or 'variable geometry' Europe. Such coalitional dynamics tend to favor *large* states, whose participation is necessary to more viable coalitions…." Moravcsik (1998): *The Choice for Europe* [cf. footnote 4], p. 64 (emphasis added). For further reading on the impact of relative state power on intergovernmental decision-making processes resembling a Battle-of-the-Sexes game, see Krasner (1991): "Global Communications and National Power" [cf. footnote 100], p. 363.

5.2 Biometric Passports and the Logic of Appropriateness

From an Institutionalist point of view, the substantive profile of the Biometric Passports Regulation, i.e. the "dependent variable" of this study, reflects the cumulative impact of three "independent variables," namely the professional interest of the police in strengthening their informational resource base in the fight against terrorism, the recognitional rather than analytical nature of decision-making processes under time pressure, and the informal "culture of consensus" in COREPER. These three causal factors were, methodologically speaking, jointly sufficient to trigger the social mechanism of rule following in the JHA Council.

The *professional interest of law enforcement officials* and their political representatives in national ministries of the interior and the European Commission's Directorate-General "Justice, Freedom and Security" in gaining access not only to the digital photographs, but also to the fingerprint biometrics of all EU citizens, stems from the prospect of being able to conduct both "one-to-one" checks for verification purposes and "one-to-many" checks in criminal databases and terrorist watch lists. The technique employed by police and border control authorities in this context is, as John Torpey rightly observed, "roughly the same that underlies ju-jitsu: the person's body is used *against* him or her, in this case as evidence of identity."[105] Since the first "live" application of the fingerprinting technique in colonial India around one hundred and fifty years ago, the police as an institution have learned to master the "martial art" of criminal identification to a state of near perfection.[106] The effectiveness of biometric solutions to societal problems like politically motivated violence, organized crime, and asylum abuse,

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[105] Torpey, J. (2000): *The Invention of the Passport: Surveillance, Citizenship and the State,* Cambridge University Press, p. 17 (emphasis in the original).

[106] See Cole, S. A. (2001): *Suspect Identities: A History of Fingerprinting and Criminal Identification,* Harvard University Press. Against this historical background, Simon Cole conceives of "fingerprints [as] literally inscriptions from the criminal body, which [can] be archived in the institutional memory of the bureaucracy (transmitted across time) or mobilized for transmission across space" (p. 223).

however, crucially depends on national and supranational legislation authorizing the informational "embrace" of particular social groups or populations. By lending professional support to such legislative efforts, the police are not attempting to "normalize the exceptional," as Janne Flyghed has convincingly argued.[107] Viewed from an organizational perspective, they merely try to apply their standard operating procedures and the technology they are most familiar with to a new set of problems.[108]

In regard to the introduction of biometric passports and travel documents in the EU, the professional interest of the police in mandatory fingerprinting via directly applicable Community Regulation initially manifested itself in the design of the new Visa Information System – a Schengen-related legislative initiative of the German Federal Ministry of the Interior developed in close cooperation with the U.S. Department of Homeland Security (cf. *section 4.2* above). The same rationale informed the European Commission's suggestion of February 2004 of establishing a central biometric database storing the fingerprint data of all passport holders in the EU (cf. *section 4.3*). Last but not least, this line of reasoning evidently influenced the way in which the G5 delegations to the JHA Council's Visa Working Party, i.e. the same working group that had already dealt with the draft Community Regulations on biometric visa and residence permits, handled the biometric passports dossier in the Council (cf. *section 4.4*). Practical considerations relating to the administrative enforcement of biometric verification and identification procedures modeled after the U.S. VISIT program in America were more important in this intergovernmental context than the careful weighing of policy alternatives.

The second causal factor lending empirical support to an interpretation of the Biometric Passports Regulation as a supranational legislative outcome re-

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[107] Flyghed, J. (2002): "Normalising the Exceptional: The Case of Political Violence," in: *Policing and Society,* Vol. 13, No. 1, pp. 23-41.

[108] For a more thorough discussion of fingerprinting as a police-specific standard operating procedure, see Aus (2006a): "Eurodac" [cf. footnote 42].

flecting the self-conscious matching of rules to situations is intrinsically linked to the recognitional nature of decision-making processes under time pressure. As sketched out above, the ideal-typical *homo sociologicus* responds to any given political challenge by searching for a satisfactory answer to the following question: What is the appropriate course of action for me in a situation like this? Organizational theorists are currently trying to specify the conditions under which policymakers adhere to a logic of appropriateness. A viable way of moving this research frontier forward arguably lies in fostering an interdisciplinary dialogue with cognitive psychologists like Gary Klein.[109] His research focuses on the decision-making behavior *inter alia* of firefighters, soldiers and nurses, i.e. on professionally trained civil servants frequently making important decisions under extreme *time pressure*. Klein's *recognition-primed decision model* postulates that experienced firefighters, for example, heavily rely on their ability to recognize and classify a given situation. "Naturalistic decision-making in field settings," as Klein describes his empirical research focus, seems to have very little to do with the weighing of policy alternatives and "rational political choice." Instead, decision-makers under time pressure try to *recognize familiar patterns* in a given operational environment in order to carry out a "doable" course of action.[110] Decision-making

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[109] Cf. Lipshitz, R. *et al.* (2006): "Naturalistic Decision Making and Organizational Decision Making: Exploring the Intersections," in: *Organization Studies,* Vol. 27, No. 7, pp. 917-23.

[110] See Klein, G. (1993): "A Recognition-Primed Decision (RPD) Model of Rapid Decision Making," in: Klein, G. *et al.* (eds.), *Decision Making in Action: Models and Methods,* Norwood, NJ: Ablex, pp. 138-47; and Klein, G. (1999): *Sources of Power: How People Make Decisions,* Cambridge, MA: The MIT Press. Klein's findings support and further qualify March and Simon's claim that "much of the behavior we observe in organizations is 'intuitive' in the sense that it occurs immediately upon recognition of a situation. The relevant cognitive and organizational processes are recognition and categorization processes more than they are processes of evaluating consequences." March, J. G. / H. A. Simon (1993): *Organizations,* Cambridge, MA: Blackwell Business, 2nd edition, p. 13. One may note in this context that Herbert Simon's pioneering studies on the so-called *bounded rationality* of firefighters were primarily concerned with "the extent to which complete rationality is limited by lack of knowledge [and] information regarding situations where [the fire department's] action is needed." Simon, H. A. (1965): *Administrative Behavior. A Study of Decision-Making Processes in Administrative Organization,* New York: The Free Press, 2nd edition, p. 82.

under pressure, in short, can best be understood as a non-analytic *pattern-matching process*.

In the case at hand, the members of the JHA Council not only had to meet the *U.S. deadline* for the introduction of biometric passports in conformity with the new requirements of the Visa Waiver Program (cf. *section 3.* above). The justice and interior ministers of "Schengenland" also had to act more or less immediately upon the *European Council's* political request of March 25, 2004 to formally endorse Community legislation on biometric visa and passports before the end of 2004 at the latest. The *tight deadline* determined by the heads of state or government did not necessitate a particular choice of biometric identifiers. However, the European Council had also asked the Commission and the Council to adopt a "coherent approach" towards third country nationals and EU citizens (cf. *section 4.1*). What did this additional request for "coherence" imply in regard to the mandatory or optional fingerprinting of EU citizens? The Community institutions' policy towards visa applicants had been modeled after the U.S. VISIT system. It thus prescribed the mandatory collection, central storage, and automated comparison of visa applicants' fingerprints. The supranational fingerprint database EURODAC for asylum applicants and "illegal" immigrants operated in a similar fashion. Recognizing the "added value" of these automated fingerprint identification systems for "homeland security" purposes and inspired by the Commission's idea of establishing a common European fingerprint register of passport applicants, several delegations to the JHA Council's Visa Working Party and SCIFA simply *reasoned by analogy* and called for the mandatory rather than optional inclusion of fingerprint biometrics into EU citizens' passports (cf. *section 4.4*). In the eyes of the German, French, Italian, and Spanish delegations, the reproduction of *operational blueprints* and identification of *legal precedents* was the most viable course of supranational legislative action given the extraordinary time pressure under which they had to find an inter-administrative agreement on the Biometric Passports Regulation.

The third explanatory factor worth mentioning from an Institutionalist point of view in regard to the negotiation of the Biometric Passports Regulation is the *"consensus reflex"* among the members of the Council's Permanent Representatives Committee (COREPER). A growing body of empirically informed literature sheds light on the distinct and highly institutionalized character of this committee. Jeffrey Lewis, for example, observed that "the standards of appropriateness found in COREPER include norms ruling out certain instrumental behavior (such as 'pushing for a vote' under conditions of qualified majority voting) … and a duty to 'find solutions' and keep the legislative agenda of the Council moving forward."[111] Supplementing Lewis's qualitative studies, Helen Wallace and her collaborators concluded a recently published quantitative analysis of decision-making behavior in the Council as follows: "[Irrespective] of the rules that govern any decision, the predominant patterns of bargaining are aimed either at building consensus as far as possible in eventual decisions or else at preventing measures from getting to the ministerial level of negotiation until and unless there is more or less a consensus."[112] Against this background, Dorothee Heisenberg suggested that "a greater understanding of consensus and its implications in the EU decision-making process should serve to underpin any analysis of the EU."[113]

The "general approach" of October 14, 2004 analyzed in *section 4.4.4* above may be interpreted as a typical product of the Permanent Representatives Com-

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[111] Lewis, J. (2005): "The Janus Face of Brussels: Socialization and Everyday Decision Making in the European Union," in: *International Organization,* Vol. 59, pp. 937-71, here: p. 939.

[112] Hayes-Renshaw, F. *et al.* (2006): "When and Why the EU Council of Ministers Votes Explicitly," in: *Journal of Common Market Studies,* Vol. 44, No. 1, pp. 161-94, here: p. 183. The aggregate data presented by Hayes-Renshaw, Van Aken, and Wallace *inter alia* show that the Council Secretariat did not record a single negative vote in connection with the legislative proceedings of the Justice and Home Affairs Council during the period of 1998–2004 (p. 170). *The JHA Council,* in other words, simply *does not vote.* For further comments on the JHA Council's "consensus reflex" from both Rationalist and Institutionalist perspectives, see Aus (2006b): *Logics of Decision-making on Community Asylum Policy* [cf. footnote 47].

[113] Heisenberg, D. (2005): "The Institution of 'Consensus' in the European Union: Formal versus Informal Decision-making in the Council," in: *European Journal of Political Research,* Vol. 44, pp. 65-90, here: p. 66.

mittee. Again, this "general approach" basically consisted of agreeing upon the mandatory fingerprinting of EU citizens while showing some degree of flexibility in regard to the timeframe for the administrative enforcement of this requirement. COREPER's "compromise solution" that the compulsory fingerprinting of passport applicants in the EU should commence "at the latest 36 months after the adoption of the technical specifications" may not have been elegantly put. This was also not deemed necessary given the secretive character of negotiations. Nor were the ambassadors *inter alia* of Sweden and Estonia very happy with the way in which the legislative agenda of the JHA Council was moving forward. In the end, however, no one "rocked the boat" – which would have been considered to be totally inappropriate. COREPER's "general approach" was more or less consciously endorsed by the members of the Justice and Home Affairs Council. This, in turn, paved the way for the formal adoption of the Biometric Passports Regulation as an "A" item by the General Affairs Council. With the decisive help of COREPER, the Council of the EU had managed to do what it was supposed to do.

5.3 Strategic Calculation and Rule Following in the Council of Ministers

Neither Rationalists nor Institutionalists can reasonably claim to hold a monopoly on accounting for the legislative output of the Council of the EU. The real challenge therefore lies in specifying the *conditions* under which decision-making processes in the Council are driven by strategic calculation, rule following, or both.[114]

The empirical evidence presented in this paper strongly suggests that tight *deadlines* and extreme *time pressure* lend support to political behavior motivated by

[114] On the treatment of causal mechanisms and scope conditions in contemporary European studies, see *inter alia* Jupille, J. *et al.* (2003): "Integrating Institutions: Rationalism, Constructivism, and the Study of the European Union," in: *Comparative Political Studies,* Vol. 36, No. 1/2, pp. 7-41; and Zürn, M. / J. T. Checkel (2005): "Getting Socialized to Build Bridges: Constructivism and Rationalism, Europe and the Nation-State," in: *International Organization,* Vol. 59, pp. 1045-79.

a *logic of appropriateness*. Community Regulations "rushed through" the legislative pipeline in order to meet the deadlines determined by the European Council are likely to reflect the worldviews and standard operating procedures of particular organizations rather than the careful weighing of policy alternatives in light of given preferences. The empirical findings of this case study thus confirm Alfred Marcus and Philip Bromiley's theoretically informed hypothesis that "the tighter the deadline, the less analysis is feasible."[115] The rule-driven and recognitional character of decision-making processes under time pressure is arguably not confined to the field of EU Justice and Home Affairs. It can reasonably be expected to apply across policy areas and levels of governance.[116]

This study has also shown that the willingness and ability of COREPER to work out "compromise solutions" like the "general approach" of October 14, 2004 ahead of ordinary Council meetings may leave a lasting imprint on the substantive profile of EU policies in an "Area of Freedom, Security and Justice." Even though it is impossible to reconstruct or predict in advance the impact of COREPER involvement on the precise content of EU policies without contextualizing the political issue at hand, one may reasonably assume that the *absence* of COREPER involvement would lead to the frequent *breakdown* of intergovernmental negotiations. As long as COREPER remains the "hub" of decision-making in the JHA Council and regards it as its professional *duty* to keep the EU's legislative agenda moving forward, we will continue to see the *unanimous* adoption of politically divisive Community Regulations, Directives, and Decisions in the field of EU Justice and Home Affairs.

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[115] Bromiley, P. / A. Marcus (1987): "Deadlines, Routines, and Change," in: *Policy Sciences,* Vol. 20, pp. 85-103, here: p. 98. Cf. also Sverdrup, U. (2002): "An Institutional Perspective on Treaty Reform: Contextualizing the Amsterdam and Nice Treaties," in: *Journal of European Public Policy,* Vol. 9, No. 1, pp. 120-40, here: p. 133.

[116] Against Stephen Krasner, who has argued that "the international system is an environment in which logics of expected consequences are likely to weigh more heavily than logics of appropriateness." Krasner, S. D. (1999): "Logics of Consequences and Appropriateness in the International System," in: Egeberg, M. / P. Lægreid (eds.), *Organizing Political Institutions. Essays for Johan P. Olsen,* Oslo: Scandinavian University Press, pp. 181-213, here: p. 186.

Last but not least, this paper has demonstrated that "first mover" strategies of relatively powerful executive actors participating in international regimes like the G6 can "pay off" if a collective choice between multiple equilibria has to be made. For the time being, the domain of application of this game-theoretical insight seems to be confined to the supranational standardization of biometric identification technology. Further empirical studies on the practices of the G6 and so-called "Schengen III" signatories are needed in order to move this research frontier forward.

6

Crime and Punishment in the EU: The Case of Human Smuggling



Crime and Punishment in the EU: The Case of Human Smuggling

Jonathan P. Aus

ARENA Report No 6/07

This report accounts for the transition from a national to a supranational definition of crime and punishment in Europe. Drawing on a case study on the negotiation of the so-called facilitators package in the Justice and Home Affairs Council, the author discusses the relative importance of strategic calculation and rule following in the domain of EU criminal law. The human smuggling case suggests a sequential ordering of logics of appropriateness and consequentiality. Union citizens will have the chance to influence the observed behavioral pattern in the context of future EC criminal law measures *inter alia* in the field of human smuggling.

Jonathan P. Aus, ARENA, University of Oslo

ARENA – Centre for European Studies at the University of Oslo promotes theoretically oriented, empirically informed studies seeking to describe, analyze or explain the dynamics of the evolving European system of governance. ARENA's primary goal is to establish high quality research on the transformation of the European political order, with a particular emphasis on the European Union.



P. O. Box 1143, Blindern
N-0317 Oslo, Norway
Tel. (+47) 22 85 76 77
arena@arena.uio.no
www.arena.uio.no

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Jonathan P. Aus

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ARENA
Centre for European Studies
University of Oslo
P. O. Box 1143, Blindern
N-0317 Oslo, Norway
Tel. (+ 47) 22 85 76 77
arena@arena.uio.no
www.arena.uio.no

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Oslo, May 2007

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1. Introduction*

Criminal law has traditionally been associated with the sovereign nation-state. Nowhere else is the state's domestic power more readily apparent than in regard to its willingness and ability to use coercive measures, including imprisonment, against its own citizens and foreign nationals subjected to its jurisdiction.[1] Penal sanctions and penitentiaries, to borrow the words of Max Weber, epitomize the state's "claim to the monopoly of the legitimate use of physical force in the enforcement of its order."[2]

Europe's institutional landscape has significantly changed since the times of Max Weber, however. Since the entry into force of the Treaty of Amsterdam on May 1, 1999, the collective decision-making bodies of the European Community (EC), i.e. the political institutions of the so-called First Pillar of the European Union, have been adopting Community Regulations, Directives and Decisions on civil law, external border control, visa, asylum and immigration policy.[3] As commonly known, these supranational legislative acts take precedence over national law and entail direct effect.[4]

Community laws in the emerging Area of Freedom, Security and Justice have been justified as "directly related flanking measures" (article 61 of the EC

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[1] Cf. Jung, H. (1998): "'L'Etat et moi': Some Reflections on the Relationship between the Criminal Law and the State," in: *European Journal of Crime, Criminal Law and Criminal Justice,* Vol. 6, No. 3, pp. 208-15. On punishment as a technology of power, see Foucault, M. (1977): *Discipline and Punish: The Birth of the Prison,* London: Penguin.

[2] Weber, M. [1922] (1978): *Economy and Society: An Outline of Interpretive Sociology,* University of California Press, p. 54.

[3] Cf. Guild, E. / C. Harlow (2001) (eds.): *Implementing Amsterdam: Immigration and Asylum Rights in EC Law,* Oxford: Hart. Cf. also Walker, N. (2004) (ed.): *Europe's Area of Freedom, Security and Justice*, Oxford University Press; and Müller-Graff, P.-C. (2005) (ed.): *Der Raum der Freiheit, der Sicherheit und des Rechts,* Baden-Baden: Nomos.

[4] The legal doctrines of supremacy and direct effect were developed by the European Court of Justice (ECJ) during the early 1960's. Cf. *inter alia* Weiler, J. H. (1994): "A Quiet Revolution: The European Court of Justice and its Interlocutors," in: *Comparative Political Studies,* Vol. 26, No. 4, pp. 510-34; and Alter, K. J. (2001): *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe,* Oxford University Press.

Treaty) to the free movement of persons in the Single Market.[5] Post-1999 Community legislation in the field of Justice and Home Affairs (JHA) thus officially stems from the transformation of a market-building project on regional scale going far beyond the functional scope and integrative level of international regimes like the North American Free Trade Agreement. Secondary Community law in the JHA domain, in other words, appears to be intrinsically linked with the establishment of an economic "area without internal frontiers" (article 14 of the EC Treaty) and, so the argument unfolds, with the potential mobility *inter alia* of workers, asylum seekers and criminals therein.[6] The European Community's self-referential reading of the development of a substantial part of its *acquis communautaire* fits well with the concept of "functional spill-over" figuring prominently among neo-functionalist regional integration scholars, i.e. with the allegedly expansive logic of sector integration.[7]

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[5] On the fundamental right of European market citizens to exercise their four economic freedoms in the EC, see Behrens, P. (1992): "Die Konvergenz der wirtschaftlichen Freiheiten im Europäischen Gemeinschaftsrecht," in: *Europarecht (EuR),* No. 2/1992, pp. 145-62. These rights may be exercised throughout the so-called European Economic Area (EEA), an integrated market covering the 27 EU Member States plus Norway, Iceland and Liechtenstein. For a supplementary analysis of the former European Economic Community's treatment of EU nationals as factors of production, see Preuß, U. K. (1996): "Two Challenges to European Citizenship," in: *Political Studies*, Vol. 14, pp. 534-52.

[6] Cf. Monar, J. (2001): "The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs," in: *Journal of Common Market Studies*, Vol. 39, No. 4, pp. 747-64. One may note in this context that the (rejected) Constitutional Treaty reaffirmed the dual objective of establishing a Single Market, on the one hand, and an Area of Freedom, Security and Justice, on the other (cf. article I-3 of the Treaty establishing a Constitution for Europe). The new EU agenda on immigration and asylum, internal security, and criminal justice could eventually cast doubts on the empirical validity of Johan P. Olsen's claim that "the single market is the institutional centrepiece of the evolving order." Olsen, J. P. (2007): *Europe in Search of Political Order,* Oxford University Press, p. 234.

[7] The political dynamics of "spill-over" processes on supranational level were initially described by Ernst Haas in the framework of a case study on the European Coal and Steel Community (ECSC), the historical predecessor of the EEC/EC. See Haas, E. B. (1958): *The Uniting of Europe: Political, Social, and Economic Forces 1950-1957*, Stanford University Press, esp. chapter 8. In regard to the arguably premature demise of the concept of functional spill-over, see Haas, E. B. (1975): *The Obsolescence of Regional Integration Theory,* University of California, Berkeley: Institute of International Studies (Research Series, No. 25). In spite of the self-declared obsolescence of neo-functionalism during the 1970's, the EEC/EC eventually "['spilled

In addition to the adoption of EC measures on asylum, immigration and external border control, we have been witnessing the JHA Council's use of legislative instruments in the area of *police and judicial cooperation in criminal matters*. In an attempt to formally uphold each Member State's claim to the "monopoly of the legitimate use of physical force in the enforcement of its order" in the domain of criminal justice, the heads of state or government have assigned this delicate field of EU governance to the Union's so-called Third Pillar.[8] The Framework Decision on the European Arrest Warrant of June 2002 is perhaps the most prominent example of an EU instrument derived from the Union's objective "to provide citizens with a high level of safety within an area of freedom, security and justice" (article 29 of the EU Treaty).

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over'] into functional arenas previously made impervious owing to national security calculations – air traffic control, transport infrastructure, energy, immigration…. [Virtually] the entire scope of government functions previously performed exclusively at the national level came within at least the purview of the EC." Schmitter, P. C. (2005): "Ernst B. Haas and the Legacy of Neo-functionalism," in: *Journal of European Public Policy,* Vol. 12, No. 2, pp. 255-72, here: pp. 265-66.

[8] Cf. Title VI of the EU Treaty as amended by the Treaties of Amsterdam and Nice. One may also point to the democratic reasoning of Germany's Federal Constitutional Court, the *Bundesverfassungsgericht,* in order to account for the persistently intergovernmental character of the Union's Third Pillar. In its so-called Maastricht judgment (BVerfGE 89, 155), for example, the Federal Constitutional Court concluded that "the constitutional prerequisites of democracy do not, at present, exist for the European Union." The Court therefore demanded that "the states – their parliaments and peoples – need adequately important task areas of their own." Kirchhof, P. (1999): "The Balance of Powers Between National and European Institutions," in: *European Law Journal,* Vol. 5, No. 3, pp. 225-42, here: p. 238. The Federal Constitutional Court's Maastricht judgment virtually pulled the plug on the further deepening of a seemingly democratically deficient integration process. In fact, the *Bundesverfassungsgericht* had deemed it appropriate to set *limits* to the expansion of the former European Economic Community's functional scope in general and EC involvement in criminal matters in particular. The Court's jurisprudence, however, did not prevent the heads of state or government from negotiating the "communitization" of asylum and immigration matters and the cross-pillar incorporation of the Schengen regime into the EU during the Amsterdam Intergovernmental Conference. Cf. *inter alia* Monar, J. / R. Morgan (1994) (eds.): *The Third Pillar of the European Union: Cooperation in the Fields of Justice and Home Affairs,* Brussels: European Interuniversity Press; Albrecht, P.-A. / S. Braum (1999): "Deficiencies in the Development of European Criminal Law," in: *European Law Journal,* Vol. 5, No. 3, pp. 293-310; and Corstens, G. (2003): "Criminal Law in the First Pillar?" in: *European Journal of Crime, Criminal Law and Criminal Justice,* Vol. 11, No. 1, pp. 131-44.

In contrast to a commonly held yet apparently erroneous view, JHA Council measures like the European Arrest Warrant do exert *legally binding force* upon the Member States. According to a benevolent interpretation of the ECJ's "Pupino" judgment of June 2005, EU Framework Decisions even entail *direct effect*.[9] The Court's jurisprudence concerning the legal status of Third Pillar Framework Decisions is politically all the more remarkable since these instruments may deal with the "approximation, where necessary, of rules on criminal matters in the Member States" in general and with the establishment of "minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organized crime, terrorism and illicit drug trafficking" in particular (articles 29 and 31 of the EU Treaty, respectively). Council Framework Decision 2002/946/JHA on the penalization of a particular and politically highly controversial form of organized crime, namely the smuggling of third country nationals into the so-called Schengen area, is a case in point.[10]

Unfortunately, the JHA Council's legislative activities in the field of criminal law have largely escaped the attention of political scientists.[11] This blind spot in political science research is all the more regrettable since the study of decision-making processes in the politically sensitive domain of supranational criminal law could arguably yield important insights into the dynamics of European political integration. In order to shed some light on the politics of

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[9] See European Court of Justice (2005a): "Judgment of the Court (Grand Chamber) of 16 June 2005 in Case C-105/03: Maria Pupino," http://curia.europa.eu. The ECJ's Pupino judgment evidently ridicules the relevant provisions of the EU Treaty and the political will of the "high contracting parties." In fact, article 34 (2) (b) EU unambiguously states that "[framework decisions] shall not entail direct effect." Cf. Guild, E. / S. Carrera (2005): *No Constitutional Treaty? Implications for the Area of Freedom, Security and Justice,* Brussels: Centre for European Policy Studies, CEPS Working Document No. 231/Oct. 2005, p. 2.

[10] Council of the EU (2002a): "Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence," in: *Official Journal of the European Communities* of Dec. 5, 2002, Vol. L 328, pp. 1-3 [arena-web].

[11] The few academic contributions to this research field have, to the best of my knowledge, been made exclusively by legal scholars. See *inter alia* Corstens, G. / J. Pradel (2002): *European Criminal Law,* The Hague: Kluwer Law International; Husabø, E. J. / A. Strandbakken (2005) (eds.): *Harmonization of Criminal Law in Europe,* Antwerpen and Oxford: Intersentia; and Weyembergh, A. (2005): "Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme," in: *Common Market Law Review,* Vol. 42, pp. 1567-97.

criminal law approximation in the EU, this article traces the decision-making process leading towards the formal adoption of Framework Decision 2002/946/JHA by the Council. The former Framework Decision prescribes that all EU Member States must, as a general rule, impose custodial sentences with a maximum sentence of not less than eight years against human smugglers.[12]

Supplementing this case study of predominantly Council-based decision-making processes in the field of criminal law, the present article also accounts for the political evolution of relatively recent ECJ case law, establishing, for the first time in EC history and irrespective of the rejection of the Constitutional Treaty in France and the Netherlands, a *Community* competence to impose criminal law sanctions.[13] The ECJ's judgment of September 2005 in case C-176/03 ("Commission vs. Council") paves the way for the adoption of EC criminal law measures *inter alia* in the field of illegal immigration. The judicially imposed transfer of criminal law competencies from the Third to the First Pillar of the EU could significantly alter the politics of criminal law approximation in the emerging Area of Freedom, Security and Justice.

The remainder of this study is organized as follows. *Section 2.* introduces Rationalist and Institutionalist perspectives on decision-making processes in the field of EU criminal law. *Section 3.* traces the negotiation of Framework Decision 2002/946/JHA in the Council. *Section 4.* accounts for the outcome of the power struggle between the Council and the Commission over criminal law competencies. Finally, *section 5.* provides a "double interpretation" of the empirical material and discusses the relative importance of strategic calculation and rule following in the JHA Council.

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[12] Cf. Council (2002a): "Framework Decision of 28 November 2002" [cf. footnote 10], art. 1 (3). As a Schengen-related measure, this Framework Decision also applies to Norway, Iceland and Switzerland (see *section 3.* below).

[13] See European Court of Justice (2005b): "Judgment of the Court (Grand Chamber) of 13 September 2005 in Case C-176/03: Commission of the European Communities v Council of the European Union," http://curia.europa.eu.

2. Rationalist and Institutionalist Perspectives on Decision-making in the Field of EU Criminal Law

2.1 Strategic Calculation and Efficient Histories of Rational Adaptation

Rationalists interpret the history of political integration in Europe as an efficient process. The process of unification is assumed to be driven by instrumentally rational actors striving to cope with an increasingly interdependent world – a world, that is, characterized by the increasing volume and speed of cross-border flows of goods, services, people, money and information. The transition from the Customs Union to the Single Market, for instance, has been interpreted as a willful attempt to take advantage of economies of scale and to increase the competitiveness of European corporations vis-à-vis their American and Japanese counterparts. Likewise, the free movement of workers who deliberately exploit wage-price differentials within the European Economic Area has been portrayed as an effective tool for fostering economic growth and employment.[14] Against this politico-economic background, Rationalists like Andrew Moravcsik have argued that "European integration was a series of rational adaptations by national leaders to constraints and opportunities stemming from the evolution of an interdependent world economy…."[15]

The assumed efficiency of post-World War II European history and the "added value" of EU institutions and policies are hallmarks of Functionalism. This strand of Rationalist theory maintains that national governments attempt to meet the "needs" of their polities in the most beneficial manner as possible – which, in an increasingly interdependent world, may require the

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[14] Cf. *inter alia* Straubhaar, T. (1988): *On the Economics of International Labor Migration,* Bern and Stuttgart: Haupt; and Fischer, P. A. / T. Straubhaar (1994): *Ökonomische Integration und Migration in einem Gemeinsamen Markt,* Bern and Stuttgart: Haupt. For a feminist perspective on international labor migration, see Sassen, S. (1998): "Notes on the Incorporation of Third World Women into Wage Labor through Immigration and Offshore Production," in: Sassen, *Globalization and its Discontents: Essays on the New Mobility of People and Money,* New York: The New Press, pp. 111-31.

[15] Moravcsik, A. (1998): *The Choice for Europe,* Cornell University Press, p. 472. Cf. also Mattli, W. (1999): *The Logic of Regional Integration,* Cambridge University Press.

supranational coordination of national policies.[16] David Mitrany's dictum that form follows function thus also seems to apply to the institutional design of the EU.[17] The EU, as Commission President Barroso has recently stated, exists and arguably needs to acquire new competencies in the field of internal security because it can deliver results:

> We need to deliver results. … Europe must [respond] to citizens' concerns over security. People are asking for 'more Europe' in order to combat terrorism and organised crime. They know that the efficient answer to these challenges is the European answer.[18]

In spite of occasional normative overtones, the principal social mechanism or behavioral "micro-foundation" of Functionalism is *strategic calculation*. Ernst B. Haas, one of the leading protagonists of this perspective in the context of EU studies, accordingly stated that

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[16] Cf. Haas, E. B. (1964): *Beyond the Nation-State: Functionalism and International Organization,* Stanford University Press. In a similar vain, Katharina Holzinger and Christoph Knill have argued that "international harmonization and more generally international co-operation presuppose the existence of interdependencies or externalities which push governments to resolve common problems through co-operation within international institutions, hence sacrificing some independence for the good of the community." Holzinger, K. / C. Knill (2005): "Causes and Conditions of Cross-national Policy Convergence," in: *Journal of European Public Policy,* Vol. 12, No. 5, pp. 775-96, here: p. 782. The same argument has been made by functional regime theorists like Robert Keohane: "[International] regimes are supplied by states acting as political entrepreneurs who see a potential profit in organizing collaboration. … [International regimes] reduce uncertainty and transaction costs, in response to rising interdependence." Keohane, R. O. (1993): "The Analysis of International Regimes: Towards a European-American Research Programme," in: Rittberger, V. (ed.), *Regime Theory and International Relations,* Oxford: Clarendon Press, pp. 23-45, here: pp. 34 and 37, respectively.

[17] Cf. Mitrany, D. (1943): *A Working Peace System: An Argument for the Functional Development of International Organization,* London: Royal Institute of International Affairs; and Giering, C. (1998): *Europa zwischen Zweckverband und Superstaat: Die Entwicklung der politikwissenschaftlichen Integrationstheorie im Prozeß der europäischen Integration,* Bonn: Europa Union Verlag, pp. 44-48.

[18] Barroso, J. M. (2006): *A Citizen's Agenda: Delivering Results for Europe,* Brussels, May 10, 2006 [arena-web], pp. 2-3.

> the most salient conclusion we can draw from the community-building experiment is the fact that major interest groups as well as politicians determine their support of, or opposition to, new central institutions and policies on the basis of a calculation of advantage.[19]

The ideal-typical actor inhabiting a Functionalist world, in other words, subscribes to a *logic of consequentiality*.

The theoretical contributions of first generation regional integration scholars like Ernst B. Haas mirrored the predominantly functional justification of supranational institutions and policies by "founding fathers" of the European Community such as Jean Monnet:

> The need was political as well as economic. … We thought that both [of] these objectives could in time be reached if conditions were created enabling these countries to increase their resources by merging them in a large and dynamic common market; and if these same countries could be made to consider that their problems were no longer solely of national concern, but were mutual European responsibilities.[20]

Following the successful establishment of the Common Market in 1993, we are currently witnessing the social construction of an Area of Freedom, Security and Justice in the European Union. This novel and genuinely political integrative project is supposed to provide "EU added value" in issue areas traditionally associated with the core of nation-state sovereignty, namely internal security and criminal justice.[21]

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[19] Haas (1958): *The Uniting of Europe* [cf. footnote 7], p. xxxiv. For further reading on the ontology of Ernst B. Haas, see Rosamond, B. (2005): "The Uniting of Europe and the Foundation of EU Studies: Revisiting the Neofunctionalism of Ernst B. Haas," in: *Journal of European Public Policy,* Vol. 12, No. 2, pp. 237-54; and Ruggie, J. G. *et al.* (2005): "Transformations in World Politics: The Intellectual Contributions of Ernst B. Haas," in: *Annual Review of Political Science,* Vol. 8, pp. 271-96.

[20] Monnet, J. (1962): "A Ferment of Change," in: *Journal of Common Market Studies,* Vol. 1, No. 3, pp. 203-211, here: p. 205.

[21] One may note in passing that the former head of the Council Secretariat's Directorate-General JHA, Mr. Charles Elsen, maintains that the seemingly grand concept of the Area of Freedom, Security and Justice was developed in a more or less random and *ad hoc* fashion. See Elsen, C. (2005): "Die Politik im Raum der Freiheit,

The so-called Area of Freedom, Security and Justice has officially been defined as a legal space "in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime" (article 2 of the EU Treaty). To the detriment of countries like Poland, the frontiers of the Schengen area do not always coincide with the external borders of the EU Member States.[22] Nevertheless, the proper functioning of the Area of Freedom, Security and Justice seemingly requires a high level of cross-national policy convergence throughout the EU.

According to the European Commission, this particularly holds true in regard to the fight against organized crime and illegal immigration:

> The creation of an area of freedom, security and justice requires all Member States to effectively apply common rules. The common security system is only as strong as its weakest point. … At the EU level, no Member State should be considered by would-be criminals as being relatively 'safer' for the conduct of unlawful activity.[23]

The Commission's reasoning spelled out above suggests that the maintenance of law and order in an increasingly interdependent area of free movement of persons can only be ensured by means of cross-national compliance with common minimum security standards defined in Brussels. In fact, there seems to be no rational alternative to policy harmonization in the fields of internal security and criminal justice: EU citizens and their political representatives could not possibly prefer rising levels of organized cross-border crime and irregular migration over the prospect and promise of "a high level of safety" throughout the Union (article 29 of the EU Treaty).

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der Sicherheit und des Rechts in der sich erweiternden Europäischen Union," in: Müller-Graff (ed.), *Der Raum der Freiheit* [cf. footnote 3], pp. 43-51, here: p. 43.

[22] Cf. *inter alia* Grabbe, H. (2000): "The Sharp Edges of Europe: Extending Schengen Eastwards," in: *International Affairs,* Vol. 76, No. 3, pp. 519-36; and Emerson, M. *et al.* (2002): *Navigating by the Stars: Norway, the European Economic Area and the European Union,* Brussels: Centre for European Policy Studies.

[23] European Commission (2001a): "Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration," Brussels, Nov. 15, 2001, Commission doc. *COM (2001) 672 final* [arena-web], pp. 10-11.

The idea that re-regulation or "positive integration" (Fritz Scharpf) in a de-regulated area of free movement equals more safety and less crime seems to have inspired EU measures like the Framework Decision on harmonized criminal law sanctions against drug traffickers adopted by the JHA Council in 2004.[24] After all, the elimination of internal border controls within the Schengen area *must* have, all other things being equal, eased the cross-border flow of heroin, cocaine and amphetamines.[25] The Commission's proposal of 2006 for an EC Directive aiming at the harmonization of national penal sanctions in the field of intellectual property rights illustrates that this functional line of reasoning can also be applied to cracked software and other forms of high-tech piracy.[26]

The functional justification of the legislative acts and initiatives cited above suggests that the approximation of national criminal laws in the EU is solely motivated by instrumentally rational considerations of relative efficiency and effectiveness. According to EU primary law, it cannot be otherwise: The general application of the *principle of subsidiarity* virtually guarantees that every single measure in the field of supranational criminal law will, by definition, provide "added value" to the states and citizens of Europe.[27]

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[24] See Council of the EU (2004a): "Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking," in: *Official Journal of the European Union* of Nov. 11, 2004, Vol. L 335, pp. 8-11 [arena-web].

[25] For a critical assessment of this thesis, see Busch, H. (1995): *Grenzenlose Polizei? Neue Grenzen und polizeiliche Zusammenarbeit in Europa,* Münster: Westfälisches Dampfboot; and Busch, H. (1999): *Polizeiliche Drogenbekämpfung: Eine internationale Verstrickung*, Münster: Westfälisches Dampfboot.

[26] See European Commission (2006a): "Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights," Brussels, Apr. 26, 2006, Commission doc. *COM (2006) 168 final* [arena-web].

[27] The principle of subsidiarity is laid out in article 5 of the EC Treaty and reads as follows: "In areas [like Justice and Home Affairs] which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community." One may note in passing that Rationalists subscribing to the idea of efficient histories do not need to bother with the particular framing of any given EU measure in the field of criminal law. After all, "the specific ways in which institutions orchestrate their transformation may be of interest to a student of political interpretation and

In spite of the legal obligation of supranational institutions to justify their policies in functional terms, a satisfactory Rationalist account of any given legislative measure in the domain of EU criminal law must shed light on the variable problem perceptions, interests and resources of Member States' governments. After all, legislative outcomes in this policy area cannot simply be attributed to the "invisible hand" of the Single Market. Nor can they be thought to have been decreed by a "benevolent dictator." Instead, the substantive profile of EU criminal law must be assumed to reflect the national interests of, and instrumentally rational exchanges between, the members of the Justice and Home Affairs Council of the EU, i.e. the principal legislative body of the "Third Pillar":

> [Public policy] is likely to result from the strategic interaction among several or many policy actors, each with its own understanding of the nature of the problem and the feasibility of particular solutions, each with its own [interests and] preferences, and each with its own capabilities or action resources that may be employed to affect the outcome.[28]

With a view to EU criminal law measures in the area of human smuggling, one may reasonably assume that a given Member State's interest in penal sanctions against human smugglers is positively related to the degree to which this Member State is actually affected by organized illegal border-crossings. In light of the fact that human smuggling is, by definition, a transnational phenomenon, government officials of a strongly affected Member State will presumably demand more restrictive EU legislation and/or a rigorous enforcement of existing national laws. Such calls for swift EU and/or national action may resonate with popular concerns over illegal immigration, especially during periods of heightened media attention and/or national election campaigns dominated by "law and order" issues.[29]

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dramaturgy, but the outcome itself is dictated by environmental conditions." March, J. G. / J. P. Olsen (1995): *Democratic Governance,* New York: The Free Press, p. 41.

[28] Scharpf, F. W. (1997): *Games Real Actors Play: Actor-Centered Institutionalism in Policy Research,* Boulder: Westview, p. 11.

[29] With a view to the amplifying role of mass media in this arguably most sensitive area of EU governance, one may readily support Europol's claim that "the high level of attention given to organised illegal immigration is largely the result of media reporting of incidents such as those in the Mediterranean Sea where often immigrants, mainly from the African continent, drown due to the difficult and dangerous journey when attempting to reach the southern coastlines of the EU." Europol (2006): *Organised Illegal Immigration into the European Union,* "Serious Crime

Whether or not a given Member State is affected by organized illegal border-crossings cannot be answered in the abstract, but requires additional empirical information. A comparative analysis of the relative share of undocumented third country nationals apprehended by national border control and police forces can arguably shed some light on Member States' variable exposure to irregular migration. (We may disregard for the moment that comparative apprehension data also tend to reflect the variable control density in different jurisdictions. In spite of this apparent limitation, however, official apprehension data constitute the most reliable source of information in this otherwise not easily accessible domain of unlawful activity.) The total number of "illegal aliens" apprehended in the EU 15 from 2000-2001 and their distribution between the Member States is illustrated in *Annex 1*. The comparative analysis *inter alia* shows that Greek authorities apprehended nearly 39% of the total undocumented migrant population in the EU. Denmark and Finland, by contrast, had a combined share of merely 0,1%. These relative shares correspond with an absolute figure of approximately 479,000 and 1,400 apprehended "illegal aliens" in Greece and Denmark/Finland, respectively.[30]

The second decision parameter one may theoretically postulate in this context is the variable capacity of national penal institutions. The expected utility of EU criminal law sanctions against human smugglers will be negative, in other words, if the Member State in question does not possess the necessary resources to impose such sanctions in administrative practice.

Assuming that Greek law enforcement authorities, for example, would manage to identify and detain at least one human smuggler for every one hundred apprehended "illegal aliens," and assuming further that each of these criminal suspects would subsequently receive a four-year custodial sentence to be served in the Hellenic Republic, Greek prisons would solely be occupied by human smugglers in the course of a few months. This hypothetical

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Overview" of Mar. 2006, The Hague [arena-web], p. 4. Cf. King, R. / N. Wood (eds.) (2001): *Media and Migration: Constructions of Mobility and Difference,* London and New York: Routledge; and Eder, K. / H.-J. Trenz (2003): "The Making of a European Public Space: The Case of Justice and Home Affairs," in: Kohler-Koch, B. (ed.), *Linking EU and National Governance,* Oxford University Press, pp. 111-35.

[30] In light of the fact that the size of the Greek population (10,9 million) roughly equaled the combined population of Denmark and Finland (10,5 million), the relative apprehension shares of Greece and Denmark/Finland are more or less comparable. See Eurostat (2007): *Europe in Figures: Eurostat Yearbook 2006-07*, Luxembourg [arena-web], p. 51.

scenario is based on the documented fact that the total capacity of Greek penal institutions in September 2000 stood at exactly 4,825 inmates, including available facilities for convicted murderers, rapists, etc. (The actual number of prisoners and pre-trial detainees during the year 2000 was exactly 8,038, indicating that Greek prisons were significantly overcrowded.)[31] The effective enforcement of penal sanctions against human smugglers in Greece, in short, would place enormous pressure on an already overburdened national criminal justice system. Member States like Greece simply do not possess the necessary resources for addressing the problem of human smuggling by means of criminal law.[32]

Thirdly and lastly, one may assume that a given Member State's assessment of the potential "added value" of EU criminal law sanctions against facilitators of illegal entry, transit and residence will be particularly positive if this Member State is over-proportionately affected by irregular secondary movements on the part of would-be asylum applicants. This theoretical expectation stems from the empirical observation that undocumented third country nationals do not necessarily remain in the country in which they unlawfully entered the

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[31] Council of Europe (2001): *SPACE I – Council of Europe Annual Penal Statistics: Survey 2000,* Strasbourg, Jan. 23, 2001 [arena-web], p. 11. Overcrowded prisons also posed a serious problem for the judicial authorities of Italy and Belgium (*ibid*.).

The hypothesized ratio of 1:100 between apprehended human smugglers and apprehended "illegal aliens" in Greece may be judged a conservative estimate in light of parallel developments in Germany, i.e. the Member State with the second largest share of apprehended "illegal aliens" in the EU (see Annex 1). As a matter of fact, German law enforcement authorities reportedly apprehended exactly 5,203 human smugglers between 2000 and 2001. This resulted in a ratio of 1:47 between apprehended human smugglers and apprehended "illegal aliens" in the Federal Republic. See Bundesministerium des Innern (2003): *Schengen Erfahrungsbericht 2002*, Berlin [arena-web], p. 18. All other things being equal, the hypothesized ratio of 1:100 in Greece would empirically hold if the control density in Greece would have been twice as low as in Germany.

[32] With a view to the EU 27, one may note that the poor state of penal institutions in Bulgaria and Romania constitutes a major impediment for the effective enforcement of criminal law sanctions *inter alia* against human smugglers. The Commission's observation of 2005 concerning overcrowded prisons in Romania, for example, is most likely still valid: "[The] living conditions for prisoners remain very cramped: about 1 in 6 are without their own bed. Sanitation and hygiene facilities are particular problems." European Commission (2005a): "Romania 2005 Comprehensive Monitoring Report," Brussels, Oct. 25, 2005, Commission Staff Working Document *SEC (2005) 1354* [arena-web], p. 16.

EU, but frequently choose to travel further to another Member State in order to apply for asylum there.[33]

A comparative analysis of the extent to which individual Member States have received applications for asylum arguably provides an indicator for both the volume and direction of irregular secondary movements on the part of refugees and would-be asylum seekers in EU-Europe. The total number of asylum applications submitted in the EU 15 from 2000-2001 and their distribution between the Member States is illustrated in *Annex 2*. As we can see, the UK received about 24% of all asylum applications lodged in the EU, thus overtaking Germany (22%) as Europe's principal asylum destination country during the 1990's. Greece, Portugal and Spain, on the other hand, had a combined share of merely 3%. The latter countries' cumulative share corresponds with an absolute figure of approximately 26,000 asylum

[33] Numerous sources of information strongly suggest an increasingly tight connection between human smuggling, on the one hand, and irregular secondary movements on the part of would-be asylum applicants in the EU, on the other. According to the International Organization for Migration, for example, "a high proportion of those apprehended trying to enter Western Europe illegally with the assistance of a smuggler are asylum-seekers. Many of those apprehended originated from the major source countries for refugees seeking asylum in Europe." International Organization for Migration (2000): *Migrant Trafficking and Human Smuggling in Europe: A Review of the Evidence with Case Studies from Hungary, Poland and Ukraine,* Geneva: IOM, p. 108. Likewise, the most recent figures published by the Commission's services concerning the "routes taken by persons who irregularly enter the territory of the European Union, before applying for asylum [in another Member State]" unambiguously prove that "a large section of those who entered the European territory via Italy and Greece and travel further, are headed mainly for the UK, while those entering via Spain most often headed for France…." European Commission (2006b): "Third Annual Report to the Council and the European Parliament on the Activities of the EURODAC Central Unit," Brussels, Sept. 15, 2006, Commission Staff Working Document *SEC (2006) 1170* [arena-web], p. 7. The Commission's analysis is based on the automated and cross-national comparison of the biometric data of apprehended irregular border-crossers and asylum applicants. Cf. Koser, K. (2001): "The Smuggling of Asylum Seekers into Western Europe: Contradictions, Conundrums, and Dilemmas," in: Kyle, D. / R. Koslowski (eds.), *Global Human Smuggling: Comparative Perspectives,* Johns Hopkins University Press, pp. 58-73; Jandl, M. (2004): "Research Note: The Relationship Between Human Smuggling and the Asylum System in Austria," in: *Journal of Ethnic and Migration Studies,* Vol. 30, No. 4, pp. 799-806; Papadopoulou, A. (2004): "Smuggling into Europe: Transit Migrants in Greece," in: *Journal of Refugee Studies,* Vol. 17, No. 2, pp. 167-84; and Antonopoulos, G. A. / J. Winterdyk (2006): "The Smuggling of Migrants in Greece: An Examination of its Social Organization," in: *European Journal of Criminology,* Vol. 3, No. 4, pp. 439-61.

applications, while the UK received roughly 187,000 applications for asylum during this two-year period.[34]

The preceding review of the variable capacity of national penal institutions and the relatively unequal distribution of both apprehended "illegal aliens" and asylum applicants between the EU Member States allow us to draw three preliminary conclusions with respect to the likely problem perceptions, interests and negotiating positions of individual Member States' governments in the JHA Council: 1) Government representatives of a more or less unaffected Member State like Finland might not feel an urgent need to address the problem of irregular migration by means of EU criminal law sanctions against human smugglers. 2) Nor should we expect to witness strong support for such supranational legislative measures on the part of an overburdened primary transit country like Greece or a secondary transit country like Austria. 3) The opposite should hold true for relatively resourceful asylum destination countries like the UK, Germany and France, especially if the fight against "asylum abuse" figures prominently on the domestic political agenda.[35]

Before analyzing the actual decision-making behavior of individual Member States' governments in the Council (see *section 3.* below), one should take note of two important developments relating to the free movement of persons in Europe during the period under consideration. The first is the effective elimination of internal border controls between the Schengen group and Greece as of March 25, 2000, and between the enlarged Schengen group and the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) as of March 25, 2001, respectively. The geographical scope of the "Area of Freedom" following the northern enlargement of Schengen is illustrated in *Annex 3.* Both the UK and Ireland evidently upheld their internal border controls vis-à-vis the "Schengen 15." The second and closely related

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[34] Again, the population size of the UK (58,9 million) was more or less equal to the combined population of Greece, Portugal and Spain (61,4 million). Eurostat (2007): *Europe in Figures* [cf. footnote 30], p. 51.

[35] It is important to note in this context that none of the likely negotiating positions mentioned above will prevent the relevant parties from offering side payments and/or striking package deals. For a theoretical discussion and empirical illustration of such practices in the framework of the JHA Council, see Aus, J. P. (2007a): "The Mechanisms of Consensus: Coming to Agreement on Community Asylum Policy," forthcoming in: Naurin, D. / H. Wallace (eds.), *Games Governments Play in Brussels: Unveiling the Council of the European Union,* Houndmills: Pelgrave Macmillan.

development is that the enlargement(s) of Schengen most likely led several asylum and migration destination countries in Western and Northern Europe to anticipate, all other things being equal, an increase in irregular secondary movements on the part of "illegal aliens" and would-be asylum applicants affecting their respective jurisdiction.

2.2 Rule Following and Inefficient Histories of Institutional Robustness

In contrast to Rationalist narratives of purposive-rational and functionally adequate institutional adaptation to external events, scholars subscribing to an Institutionalist approach emphasize the inefficiency of history. Historically inefficient and functionally inadequate processes of institutional development are allegedly characterized by "[a] slow pace of historical adaptation relative to the rate of environmental change."[36]

As indicated above, Institutionalists do not share the Rationalist assumption of a "tight coupling" between political institutions and their environments. Instead, scholars working in an Institutionalist tradition are trying to identify the sources and effects of institutional robustness, i.e. the tendency of political institutions and their representatives to uphold established structures and policies in spite of strong adaptational pressure. This remarkable phenomenon has led students of formally organized institutions to develop the concept of "loose coupling."[37] What this concept tries to suggests is that political institutions can usefully be portrayed as self-referential entities whose path-dependent development and internal properties influence the problem perceptions and practices of political actors:

> [The] process of institutional adaptation to exogenous factors is crucially influenced by endogenous institutional dynamics determined by the institutions' 'roots and routes' – the origins and the paths by which they have arrived where they are.

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[36] March, J. G. / J. P. Olsen (1998): "The Institutional Dynamics of International Political Orders," in: *International Organization,* Vol. 52, No. 4, pp. 943-69, here: p. 954.

[37] Cf. *inter alia* Sverdrup, U. (2000): *Ambiguity and Adaptation: Europeanization of Administrative Institutions as Loosely Coupled Processes,* Univ. of Oslo: Dept. of Political Science, Ph.D. thesis.

> Hence, institutions persist over time, although their environments may change.[38]

Relatively stable political institutions generate "interruptions of interdependence," to borrow the words of Niklas Luhmann.[39] The limited capacity of self-referential political institutions to "resonate" with their environments does not rule out that organizations can and do adjust to environmental changes. Empirical analyses of organizational reform processes seem to indicate, however, that "enduring institutions [respond] to volatile environments routinely, though not always optimally."[40] External events that cannot be reconciled with the organization's standard operating procedures are being perceived as noise.[41]

With a view to the limited scope of criminal law approximation in EU-Europe (the Council of Europe's activities *inter alia* in the field of extradition cannot be reviewed here), a theoretical interest in historical inefficiencies and limited institutional resonance suggests that "we need to understand the conditions under which, and the processes through which, existing institutional arrangements contribute to continuity or differentiation, rather than convergence."[42]

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[38] Knill, C. (2001): *The Europeanisation of National Administrations: Patterns of Institutional Change and Persistence,* Cambridge University Press, p. 22. For further reading on the concepts of "loose coupling" and path dependence, see *inter alia* March, J. G. / J. P. Olsen (1976): *Ambiguity and Choice in Organizations,* 2nd ed., Scandinavian University Press; North, D. C. (1990): *Institutions, Institutional Change and Economic Performance,* Cambridge University Press; Pierson, P. (1998): "The Path to European Integration: A Historical-Institutionalist Analysis," in: Sandholtz, W. / A. Stone Sweet (eds.), *European Integration and Supranational Governance,* Oxford University Press, pp. 27-58; and Crouch, C. / H. Farrell (2004): "Breaking the Path of Institutional Development? Alternatives to the New Determinism," in: *Rationality and Society,* Vol. 16, No. 1, pp. 5-43.

[39] Luhmann, N. (2000): *Organisation und Entscheidung,* Opladen: Westdeutscher Verlag, p. 394. This characteristic feature of political institutions is not well understood or at least systematically downplayed by functional regime theorists like Robert Keohane (cf. *section 2.1* above).

[40] Olsen, J. P. (2002): "The Many Faces of Europeanization," in: *Journal of Common Market Studies,* Vol. 40, No. 5, pp. 921-52, here: p. 925.

[41] Cf. Luhmann, N. (1990): *Ökologische Kommunikation. Kann die moderne Gesellschaft sich auf ökologische Gefährdungen einstellen?* 3rd ed., Opladen: Westdeutscher Verlag.

[42] Olsen, J. P. (2003): "Towards a European Administrative Space?" in: *Journal of European Public Policy,* Vol. 10, No. 4, pp. 506-31, here: p. 507.

The ambiguous institutional design of EU cooperation in the domain of criminal justice is a case in point. As commonly known, the Union's Third Pillar is characterized by an inbuilt tension between fostering transnational judicial cooperation in criminal matters, on the one hand, and the political wish to maintain national sovereignty over criminal law and procedure, on the other. The Third Pillar of the EU may best be understood as a "frozen" political compromise between proponents of greater unity and of enduring diversity.[43]

Sovereignty-related concerns also seem to explain why the heads of state or government were quick to embrace the principle of mutual recognition as "the cornerstone of judicial co-operation in both civil and criminal matters" during the Tampere European Council.[44] In contrast to JHA Council measures for the approximation of national criminal laws, the application of the principle of mutual recognition in areas like extradition does not put an end to the deep diversity between the Member States with respect to definitions of criminal offences and sentencing practices, let alone criminal procedure.[45] In fact, mutual recognition as a seemingly viable alternative to

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[43] The prospect of the entry into force of the Constitutional Treaty has admittedly generated a considerable amount of political "heat." However, the current temperature of the Third Pillar has fallen back to below zero. For further reading on the tension between unity and diversity within and beyond the Third Pillar, see *inter alia* van Caenegem, R. C. (2002): *European Law in the Past and the Future: Unity and Diversity over Two Millennia,* Cambridge University Press; and Olsen, J. P. (2006): "Unity and Diversity – European Style," in: Mydske, P. K. / I. Peters (eds.), *The Transformation of the European Nation State,* Berliner Wissenschaftsverlag, pp. 11-43.

[44] European Council (1999): *Tampere European Council, 15 and 16 October 1999: Presidency Conclusions* [arena-web], no. 33. Five years later, the heads of state or government reaffirmed this principle in the framework of the so-called Hague Programme on Strengthening Freedom, Security and Justice in the European Union, i.e. the new multi-annual legislative program in the field of EU Justice and Home Affairs. See European Council (2004): *Brussels European Council, 4 and 5 November 2004: Presidency Conclusions* [arena-web], p. 38.

[45] Cf. European Commission (2004): "Green Paper on the Approximation, Mutual Recognition and Enforcement of Criminal Sanctions in the European Union," Brussels, April 30, 2004, Commission doc. *COM (2004) 334 final* [arena-web]; Peers, S. (2004a): "Mutual Recognition and Criminal Law in the European Union: Has the Council Got It Wrong?" in: *Common Market Law Review,* Vol. 41, pp. 5-36; Alegre, S. / M. Leaf (2004): "Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon?" in: *European Law Journal,* Vol. 10, No. 2, pp. 200-17; Ligeti, K. (2005): *Strafrecht und strafrechtliche Zusammenarbeit in der Europäischen Union,* Berlin: Duncker & Humblot; and Lööf, R. (2006): "Shooting from the Hip: Proposed

harmonization raises a host of unanswered questions like the following: Why should the judicial authorities of country A extradite an individual accused of terrorism by country B while fundamentally disagreeing with country B's substantive assessment?[46] How should EU citizens living in an "Area of Freedom" make sense of the fact that lawful activities in one Member State lead to a deprivation of liberty in another? And why do citizens' perceptions of "crimes" like abortion seemingly correlate with national borders in the first place?

Institutionalist contributions to political science do not limit themselves to contextualizing national practices like the relentless prosecution and punishment of abortion in Ireland.[47] They also try to show that seemingly obsolescent political institutions like the Catholic Church provide citizens with *structures of meaning*. In the eyes of March and Olsen, for example, political institutions enable citizens to make sense of the world. This leads us to the notion of a *logic of appropriateness* as the cognitive basis of value-rational social action:

> The basic logic of action is rule following – prescriptions based on a logic of appropriateness and a sense of rights and obligations derived from an identity and membership in a political community and the ethos, practices, and expectations of its institutions. Rules are followed because they are seen as natural,

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Minimum Rights in Criminal Proceedings throughout the EU," in: *European Law Journal,* Vol. 12, No. 3, pp. 421-30.

[46] Such a situation may give rise to constitutional problems in numerous Member States. Against the background of a potential violation of the fundamental rights of a German citizen accused of supporting *al-Qaida* by a public prosecutor in Spain, for example, Germany's Federal Constitutional Court annulled the initial version of the German law for the application of the European Arrest Warrant in July of 2005. Even though the Constitutional Court recognized that the extradition of the accused to Spain might have resulted in the imposition of a custodial sentence for a behavioral pattern that was completely legal in Germany, the Court stopped short of challenging the European Arrest Warrant as such. See Bundesverfassungsgericht (2005): *Urteil des Zweiten Senats vom 18. Juli 2005 – 2 BvR 2236/04,* Karlsruhe, http://www.bverfg.de.

[47] According to Irish law, abortion is a criminal offence and may be punished by life imprisonment unless an abortion is absolutely necessary *inter alia* in order to save the life of a pregnant woman. Cf. Kurzer, P. (2001): "Irish Moral Conservatism and European Sexual Permissiveness," in: Kurzer, *Markets and Moral Regulation: Cultural Change in the European Union,* Cambridge University Press, pp. 143-69.

> rightful, expected, and legitimate. Members of an institution are expected to obey, and be the guardians of, its constitutive principles and standards.[48]

Value-rational political actors adhering to a logic of appropriateness do what they are supposed to do. Their sense of loyalty towards their political leaders, epitomized by the unconditional loyalty of the *Waffen-SS* towards the *Führer*, stems from "the belief in the absolute validity of the order as the expression of ultimate values," to borrow once more the words of Max Weber. As far as the cognitive dimension of value-rational political action is concerned, Weber therefore noted that "the meaning of the action does not lie in the achievement of a result ulterior to it, but in carrying out the specific type of action for its own sake."[49]

This line of self-referential reasoning on the part of political actors is particularly evident with respect to the core institutions of state sovereignty. Michel Foucault's work, for example, allows us to trace the origins and value-rational connotations of contemporary penal institutions. Foucault studied the ceremonial nature of the public execution in absolutist France in order to identify the social mechanisms and interpretive frames by which the *ancien régime* managed to stay in power. According to Foucault, the reinforcement of institutionalized structures of meaning in the domain of criminal justice required a brutal demonstration of state sovereignty:

> [In] this liturgy of punishment, there must be an emphatic affirmation of power and of its intrinsic superiority. And this superiority is not simply that of right, but that of the physical strength of the sovereign beating down upon the body of his adversary and mastering it: by breaking the law, the offender has touched the very person of the prince; and it is the prince – or at least those to whom he has delegated his force – who seizes upon the body of the condemned man and displays it marked, beaten, broken. The ceremony of punishment, then, is an exercise of 'terror.'[50]

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[48] March, J. G. / J. P. Olsen (2006a): "Elaborating the 'New Institutionalism,'" in: Rhodes, R. A. *et al.* (eds.), *The Oxford Handbook of Political Institutions,* Oxford University Press, pp. 3-20, here: p. 7.

[49] Weber (1978): *Economy and Society* [cf. footnote 2], pp. 25 and 33, respectively.

[50] Foucault (1977): *Discipline and Punish* [cf. footnote 1], p. 49. Foucault's descriptions lend support to Durkheim's dictum that the severity of punishment is greater where

It goes without saying that the vengeance of the sovereign was out of all proportions when the criminal offence directly challenged the authority of the king.

Once sovereignty had become vested in the people, the authoritarian impulse according to which "the least damage done to a governmental organ is punished" (Emile Durkheim) resurfaced in a republican framework. The democratic Republic could, of course, draw on the notion of the collective will of the people in order to justify the effective enforcement of criminal law. Like its absolutist predecessor, however, the Republic remained committed to the particularly harsh punishment of criminal offences against state organs. Durkheim accounted for the puzzling fact that "the smallest injury to the police power calls forth a penalty" as follows:

> The difficulty resolves itself easily if we notice that, wherever a directive power is established, its primary and principal function is to create respect for the beliefs, traditions, and collective practices: that is, to defend the common conscience against all enemies within and without. It thus becomes its symbol, its living expression in the eyes of all. … It is no longer a more or less important social function; it is the collective type incarnate.[51]

Up to the present day, both the sovereign nation-state and its historical successor, the supranational regional polity, must demonstrate their willingness and ability to punish criminal offences.[52] Again, this particularly holds true if the criminal activity in question has no victim but the nation-state or supranational polity. The premeditated violation of immigration rules or the facilitation thereof by human smugglers is a case in point.

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the central power is more absolute in character. See Durkheim, E. [1900] (1998): "Two Laws of Penal Evolution," in: Melossi, D. (ed.), *The Sociology of Punishment,* Aldershot: Ashgate, pp. 3-31.

[51] Durkheim, E. [1893] (1933): *On the Division of Labor in Society,* New York: Macmillan, p. 84.

[52] Mireille Hildebrandt accordingly noted that "[the types of behavior] sanctioned by means of criminal law are apparently considered to be crucial for the survival of the polity that has criminalized them, thus reinforcing them as the core of what unites a people, of what demonstrates their sameness and selfhood." Hildebrandt, M. (2007): "European Criminal Law and European Identity," in: *Criminal Law and Philosophy,* Vol. 1, No. 1, pp. 57-78, here: p. 65.

The image of the human smuggler as an enemy of the state leads us to another durable institution of the Westphalian order, namely to the legitimate exercise of territorial sovereignty. Paradoxically, the process of economic globalization has been paralleled by technologically more and more sophisticated mechanisms of migration control in Europe and North America.[53] Beyond that, the issue of illegal immigration has become highly salient in France and other EU Member States. Political scientists like Didier Bigo thus draw on the concept of the *frontier as an institution* in order to reiterate the commonly known fact that borders are intrinsically linked with conceptions of belonging and collective political identity:

> Frontier is used, at least in political science and geography in Europe, to connect space and population. It is the limit of a territory. Frontier is an institution, not a fact, not a result. The underlying concept comprises the possibility to consider a territory a space one belongs to. A frontier describes the relation between forces, between powers that must struggle for delimitation in a competitive way, whereas a border is the materialization in space of this struggle through time.[54]

Post-national political systems like the European Union must arguably reinvent the idea of territorial sovereignty in order to facilitate "the process of creating an ever closer union among the peoples of Europe" (article 1 of the EU Treaty). From an Institutionalist point of view, successful processes of regional political integration necessarily involve elements of drama, including the symbolic affirmation of the supranational polity's willingness and ability to

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[53] Cf. Sassen, S. (1996): *Losing Control? Sovereignty in an Age of Globalization,* Columbia University Press; Guiraudon, V. / G. Lahav (2000): "A Reappraisal of the State Sovereignty Debate: The Case of Migration Control," in: *Comparative Political Studies,* Vol. 33, No. 2, pp. 163-95; and Aus, J. P. (2006a): *Decision-making under Pressure: The Negotiation of the Biometric Passports Regulation in the Council,* University of Oslo: ARENA – Centre for European Studies, Working Paper No. 11/2006 [arena-web].

[54] Bigo, D. (2005): "Frontier Controls in the European Union: Who is in Control?" in: Bigo, D. / E. Guild (eds.), *Controlling Frontiers: Free Movement Into and Within Europe,* Aldershot: Ashgate, pp. 49-99, here: p. 52. For further reading on frontiers as an institution and the state as a "power container," see Giddens, A. (1987): *The Nation-State and Violence,* University of California Press; Anderson, M. / E. Bort (1998) (eds.): *The Frontiers of Europe,* London and Washington: Pinter; and Taylor, P. J. (2003): "The State as Container: Territoriality in the Modern World-System," in: Brenner, N. *et al.* (eds.), *State/Space: A Reader,* Malden: Blackwell, pp. 101-13.

exercise effective control over its borders. EU politics in the domains of illegal immigration and border control, in short, can reasonably be expected to lend empirical support to March and Olsen's conjecture that "modern polities are as replete with symbols, ritual, ceremony, and myth as the societies more familiar to anthropological tradition."[55]

Last but not least, an Institutionalist perspective on political institutions suggests that the European Union may best be understood as a "broad church." Members of this post-national political denomination share a collective belief in the normative validity of "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law" (article 6 of the EU Treaty). However, the EU also lodges an array of more or less autonomous institutional actors adhering to different sets of rules and standards of appropriate behavior. Council-specific rules and behavioral prescriptions, for example, distinguish and buffer the Council of Ministers as a relatively autonomous EU institution not only from national governments, but also from the Commission and the European Parliament.[56] The functionally differentiated and multi-pillared institutional design of the EU, in short, appears to be characterized by a variety of competing and contradictory rules, structures of meaning, and organizing principles.[57]

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[55] March, J. G. / J. P. Olsen (1989): *Rediscovering Institutions: The Organizational Basis of Politics*, New York: The Free Press, p. 7.

[56] Cf. Hayes-Renshaw, F. / H. Wallace (2006): *The Council of Ministers,* 2nd ed., Houndmills: Palgrave Macmillan.

[57] The EU, to be sure, is not the only modern polity displaying such features: both the EU Member States and non-EU polities like the U.S.A. are characterized by similar traits, including the formal separation of legislative, executive and judicial powers. Against the backdrop of the institutional dynamics of such "mixed" political orders, Karen Orren and Stephen Skowronek have proposed that "at any moment in time several different sets of rules and norms are likely to be operating simultaneously." Orren, K. / S. Skowronek (1996): "Institutions and Intercurrence: Theory Building in the Fullness of Time," in: Shapiro, I. / R. Hardin (eds.), *Political Order,* New York University Press, pp. 111-46, here: p. 111. On a higher level of abstraction, an Institutionalist reading of political life in Europe and elsewhere seems to suggest that "time is channeled, bent, or slowed [down] by institutions: insofar as individual actions or events are concerned, their occurrence within institutions changes their position from mere happenstance – one damn thing after another – to an observable pattern that orders them and relates them to other comparable and contrasting actions or events. However, time still 'marches on,' even as institutions 'lag behind,' 'catch up,' or 'overreach' developments elsewhere" (p. 141). For further reading on "multiple, incongruous authorities operating simultaneously," see Orren, K. / S. Skowronek (2004): *The Search for American Political Development,* Cambridge

Changes in the balance of power between EU institutions, then, may reasonably be assumed to flow not only from ordinary treaty revisions à la Maastricht, Amsterdam and Nice, but also from inter-institutional tensions evolving in the framework of day-to-day institutional encounters above the nation-state. In the context of supranational legislative activities connected with the establishment of an Area of Freedom, Security and Justice in the EU, for example, inter-institutional collisions may be triggered by overlapping jurisdictions between "Pillar One" and "Pillar Three." Legal bases or formal competency disputes of this sort may take the shape of conflicts between the Commission and the Council over the right of legislative initiative and implementing power, conflicts between the Council and the European Parliament over the appropriate decision-making procedure, etc. The resolution of such inter-institutional power struggles, in turn, may be brought about by an independent judicial authority adhering to yet another set of institutionalized rules and decision-making premises.[58] Within relatively new, dynamic and constitutionally unsettled domains of EU governance like Justice and Home Affairs, in other words, disagreements over policy substance and procedure may eventually escalate into conflicts over the allocation and separation of powers between EU institutions.

The following case study of decision-making processes in an Area of Freedom, Security and Justice is situated at the interface between criminal law and border control and sheds light on the development and resolution of power struggles between EU institutions. Its aim is to provide an empirical basis for a subsequent discussion of the relative importance of strategic calculation and rule following in the field of EU Justice and Home Affairs. I shall provide a "double interpretation" of the empirical material in *section 5.*, and will close with a delineation of the domains of application of Rationalist and Institutionalist perspectives.

University Press, pp. 78-119, here: p. 108; and Olsen (2007): *Europe in Search of Political Order* [cf. footnote 6].

[58] On the relative autonomy of judicial institutions and its theoretical implications, see *inter alia* Smith, R. M. (1988): "Political Jurisprudence, the 'New Institutionalism,' and the Future of Public Law," in: *American Political Science Review,* Vol. 82, No. 1, pp. 89-108.

3. The Politics of Criminal Law Approximation in the EU: The Case of Human Smuggling

3.1 "Death in Dover" and the High Politics of Illegal Immigration in the EU

On June 18, 2000, customs officials in the British port town of Dover, England, detected the dead bodies of fifty-eight Chinese nationals in the back of a truck allegedly transporting Dutch tomatoes. The migrants from China had evidently suffocated to death in a failed attempt to smuggle them out of the Schengen area and into the UK.[59]

The Dover tragedy attracted a considerable amount of media attention.[60] In fact, politicians throughout Europe were eager to share their views on the Dover case with a wider audience. One day after the tragic event, for example, JHA Commissioner António Vitorino issued the following press release:

> On behalf of the European Commission and for myself personally, I would like to express my deep shock at the discovery by the British authorities of the bodies of 58 people who suffocated to death in the lorry in which they were clandestinely traveling. … These events make it even more urgent, as if it were not urgent enough already, to develop a common immigration and asylum policy in the EU. These complex, sensitive questions require action going far beyond the limits of national sovereignty.

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[59] According to police reports, the deceased migrants had paid up to $ 30,000 each to so-called snakeheads, i.e. Chinese people smugglers, for arranging their 12,000 km journey from the Chinese province of Fujian to the UK. Cf. Chin, K. (2001): "The Social Organization of Chinese Human Smuggling," in: Kyle and Koslowski (eds.), *Global Human Smuggling* [cf. footnote 33], pp. 216-34; and Kwong, P. (1997): *Forbidden Workers: Illegal Chinese Immigrants and American Labor,* New York: The Free Press. One may note in this context that Europol, the European Police Office, assumes that "the largest number of persons smuggled towards the EU comes from the People's Republic of China." Council of the EU (2005a): Council doc. *13788/1/05 REV 1* [arena-web], p. 15.

[60] Cf. *inter alia BBC News* of June 19, 2000: "58 dead in port lorry."

Commissioner Vitorino used this opportunity to present the Commission's program for a comprehensive European immigration and asylum policy:

> [The] aim [of a common immigration and asylum policy in the EU] must, of course, be to step up the fight against illegal immigration and those who organise it.… But it must also include putting in place a partnership with the countries of origin with a view to ensuring the necessary development and stability there, establishing a common asylum system offering real protection to those who need it, as required by the Geneva Convention, and a genuine admission and integration policy that marks a definite break with the fantasy of 'zero immigration.'[61]

In marked contrast to the Commissioner's ideas, the European Council, i.e. the heads of state or government of the Member States, issued a policy statement that focused almost exclusively on the alleged need to step up the EU's fight against organized crime and trafficking in human beings:

> The European Council expressed its shock at the tragic deaths of 58 foreign nationals arriving in the United Kingdom. It condemned the criminal acts of those who profit from such traffic in human beings and committed the European Union to intensified cooperation to defeat such cross-border crime, which has caused so many other deaths across Europe. It called on the incoming French Presidency and the Commission to take forward urgently [legislative measures] in this area, in particular … by adopting severe sanctions against those involved in this serious and despicable crime.[62]

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[61] European Commission (2000): *Tragedy in Dover – Declaration by António Vitorino, European Justice and Home Affairs Commissioner,* Brussels, June 19, 2000 [arena-web]. Commissioner Vitorino was evidently referring to the so-called Tampere agenda endorsed by the European Council in Oct. 1999. See European Council (1999): *Tampere European Council* [cf. footnote 44].

[62] European Council (2000a): *Santa Maria da Feira European Council, 19 and 20 June 2000: Presidency Conclusions* [arena-web], no. 52. The statement reproduced above illustrates the European Council's important agenda setting role in politically sensitive fields of EU governance like Justice and Home Affairs. While issuing such statements, the heads of state or government can draw on art. 4 of the EU Treaty. According to this European Council-made treaty provision, the European Council is supposed to "provide the Union with the necessary impetus for its development and [to] define the general political guidelines thereof." Some scholars claim that "all important new

The political choreography of the European Council's reaction to the Dover tragedy in 2000 was strikingly similar to its response to the Dutroux affair several years earlier. The widely publicized Dutroux case of 1996 had motivated the European Council to "[express] its abhorrence at the sexual exploitation of children" and to call for swift legislative action in this area.[63] Such high-level requests for combating violence against children were virtually guaranteed to gain strong popular support.[64] The European Council's development of policy guidelines in the field of child abuse, in short, had been characterized by the reproduction of national patterns of political agenda setting on EU level.[65]

EU initiatives either originate in the European Council or receive from it its seal of approval." Hayes-Renshaw and Wallace (2006): *The Council of Ministers* [cf. footnote 56], p. 170.

[63] European Council (1996): *Dublin European Council, 13 and 14 December 1996: Presidency Conclusions* [arena-web], item V. 3. The European Council's intervention paved the way for the JHA Council's adoption of a so-called Joint Action on combating the sexual exploitation of children. See Council of the EU (1997): "Joint Action of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children (97/154/JHA)," in: *Official Journal of the European Communities* of Mar. 4, 1997, Vol. L 62, pp. 2-6 [arena-web]. This Joint Action was replaced by a Council Framework Decision in 2004. See Council of the EU (2004b): "Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography," in: *Official Journal of the European Union* of Jan. 20, 2004, Vol. L 13, pp. 44-48 [arena-web].

[64] According to an opinion poll carried out in the EU 15 from March 12 – May 4, 1999, for example, approximately 85% of EU citizens considered "tougher laws" to be "a useful means of combating violence against children." Likewise, around 72% of EU citizens spontaneously answered "Yes, definitely" to the question of "[whether] the European Union should get involved in combating violence against children." At the same time, however, 79% of EU citizens were "[not] aware of any policies or measures put forward by the European Union to combat violence against children." Eurobarometer (1999): *Europeans and Violence Against Children,* Eurobarometer 51.0 of June 4, 1999, Brussels: European Commission [arena-web], pp. 101, 121 and 123, respectively.

[65] Cf. Nelson, B. J. (1984): *Making an Issue of Child Abuse: Political Agenda Setting for Social Problems,* University of Chicago Press; and Gies, L. (2003): "Up, Close and Personal: The Discursive Transformation of Judicial Politics in Post-Dutroux Belgium," in: *International Journal for the Semiotics of Law,* Vol. 16, pp. 259-84. The agenda setting phase of the negotiation of the Framework Decision on combating terrorism in the Council was characterized by similar dynamics. See Council of the EU (2002b): "Council Framework Decision of 13 June 2002 on combating terrorism

The incoming French Presidency of the Council quickly drew up a legislative proposal for a "Framework Decision on Strengthening the Penal Framework for Preventing the Facilitation of Unauthorised Entry and Residence." By doing so, France effectively stripped the European Commission of its (shared) right of legislative initiative in this area.[66] The French proposal was officially received by the Council Secretariat on June 19, 2000. A short explanatory note by the French government followed shortly thereafter.[67]

Due to the poor quality of the hastily drawn up French proposal, the Council Legal Service deemed it appropriate to intervene into the decision-making process at an early stage.[68] Following the Legal Service's advice, the French government agreed to divide its original proposal into two separate but closely related instruments, namely a draft Community Directive based on article 63 (3) (b) of the EC Treaty, on the one hand, and a draft Framework Decision drawing on article 34 (2) (b) of the EU Treaty, on the other. While the EC Directive was supposed to define what the "facilitation of unauthorized entry, transit and residence" actually meant, the criminal law provisions sanctioning this practice were supposed to be dealt with in an EU Framework Decision.[69]

(2002/475/JHA)," in: *Official Journal of the European Communities* of June 22, 2002, Vol. L 164, pp. 3-7 [arena-web].

[66] As commonly known, the Commission has acquired the sole right of legislative initiative in most areas covered by the EC Treaty, i.e. within the First Pillar of the Union. When it comes to legislative acts falling under the Second or Third Pillar of the EU, however, the Commission has to *share* its otherwise exclusive right of initiative with the Member States (cf. *inter alia* art. 34 [2] of the EU Treaty). One may note in passing that the Constitutional Treaty would have *retained* Member States' rights of legislative initiative in the fields of police and judicial cooperation in criminal matters. However, the popularly rejected Constitutional Treaty would have also made national legislative initiatives in these areas dependent upon the explicit support of at least one quarter of the Member States (cf. article III-264 CT).

[67] Cf. Council of the EU (2000a): Council doc. *9892/00* [arena-web]; and Council of the EU (2000b): Council doc. *9892/00 ADD 1* [arena-web].

[68] Cf. Council of the EU (2000c): Council doc. *10460/00* [arena-web].

[69] This rather complicated approach ultimately resulted in the parallel adoption of a First Pillar Community Directive and a Third Pillar Framework Decision by the JHA Council. In regard to the former, see Council of the EU (2002c): "Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence," in: *Official Journal of the European Communities* of Dec. 5, 2002, Vol. L 328, pp. 17-18 [arena-web].

The two initiatives were simultaneously published in the Official Journal on September 4, 2000.[70] The French government justified its proposals by arguing that

> it is necessary to combat the facilitation of illegal immigration, whether this is merely assistance provided in crossing borders or whether it is connected to other forms of exploitation of human beings such as prostitution, exploitation of children or undeclared work. The European Union must demonstrate a common political will in the face of this phenomenon.[71]

The French government's desire to "demonstrate a common political will" of the EU in regard to human smuggling operations and loosely coupled social problems like prostitution and child abuse was probably as much geared towards French citizens and their voting behavior during the forthcoming municipal, parliamentary and presidential elections in 2001 and 2002 as it was directed towards the other members of the JHA Council.[72]

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[70] See French Republic (2000a): "Initiative of the French Republic with a view to the adoption of a Council Directive defining the facilitation of unauthorized entry, movement and residence," in: *Official Journal of the European Communities* of Sept. 4, 2000, Vol. C 253, pp. 1-2 [arena-web]; and French Republic (2000b): "Initiative of the French Republic with a view to the adoption of a Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of authorized [sic] entry and residence," in: *Official Journal of the European Communities* of Sept. 4, 2000, Vol. C 253, pp. 6-8 [arena-web].

[71] Council of the EU (2000d): Council doc. *10712/00* [arena-web], p. 2.

[72] Lending support to such an interpretation of the French government's behavior, Virginie Guiraudon concluded a recently published review of French debates on prostitution, refugee policy, and the influence of the National Front on French politics as follows: "The fact that these issues were debated during local and national electoral campaigns where crime and security were highly salient explains in part why the post-2002 government privileged a law and order approach." Guiraudon, V. (2006): "Trafficking and Smuggling in France: Social Problems as Transnational Security Issues," in: Guild, E. / P. Minderhoud (eds.), *Immigration and Criminal Law in the European Union: The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings,* Leiden and Boston: Martinus Nijhoff, pp. 41-67, here: p. 63. For further reading on the electoral breakthroughs and political influence of the *Front National,* see Schain, M. A. (2006): "The Extreme-Right and Immigration Policy-Making: Measuring Direct and Indirect Effects," in: *West European Politics,* Vol. 29, No. 2, pp. 270-89.

The French government's domestic political concerns might also explain why both the draft Directive and Framework Decision did not distinguish between trafficking in human beings and human smuggling at this point. In fact, the recitals to the two legislative initiatives explicitly mentioned the alleged need to "combat trafficking in human beings." Again, this particular framing of the issue at hand was a relatively safe way for the French government to gain popular approval.[73] Human smuggling and trafficking in human beings, however, are ordinarily classified as separate offences.[74]

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[73] Public opinion polls carried out in France in April-May and November-December 2000 revealed that 80% of French citizens expressly supported joint EU rather than national decision-making in regard to "the fight against the trade in, and exploitation of, human beings." No other area of EU governance enjoyed such a high level of popular approval in France. When asked about their attitudes towards joint EU rather than national decision-making in the fields of "police" and "justice," on the other hand, merely 34-40% of French citizens were in favor of common European policies. See Eurobarometer (2000): *Report Number 53,* Oct. 2000, Brussels: European Commission, annexes [arena-web], table 3.1; and Eurobarometer (2001): *Report Number 54,* Apr. 2001, Brussels: European Commission, annexes [arena-web], table 5.1.

[74] Europol officials have recently summarized the main difference between people smuggling and trafficking in human beings as follows: "An important characteristic of illegal immigration is that the illegal migrants are essentially willing participants and the organised criminals profit mainly from facilitating their migration. … The main difference [between human trafficking and] illegal immigration is that in trafficking in human beings (THB), the intention behind the facilitation is to exploit the illegal migrants during the journey to the country of destination and within that country." Council (2005a): doc. *13788/1/05 REV 1* [cf. footnote 59], pp. 14-15. For heuristic purposes, one may also think of people smugglers as "travel agents" and human traffickers as "slave traders." While approximately 400,000 predominantly male third country nationals enter the EU each year in an irregular fashion by resorting to the more or less costly and dangerous help of smugglers, Europol has estimated that "100,000 women are victims of trafficking in the EU annually." Council of the EU (2005b): Council doc. *15446/05* [arena-web], p. 2. The figures mentioned above have to be treated with caution. Cf. *inter alia* Mitsilegas, V. (2004): "Measuring Irregular Migration: Implications for Law, Policy and Human Rights," in: Bogusz, B. *et al.* (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives,* Leiden and Boston: Martinus Nijhoff, pp. 29-39; and Laczko, F. / E. Gozdziak (2005): *Data and Research on Human Trafficking: A Global Survey,* Geneva: International Organization for Migration (IOM).

3.2 Intergovernmental Negotiations under the French Presidency

The draft Framework Decision was initially discussed among the members of the JHA Council's *Working Party on Substantive Criminal Law*. (For an overview of the Council's working structures in the criminal justice domain, see *Annex 4*.) While the Member States governments' representatives gave a generally favorable reception to the French initiative, the Commission's representative was more reserved. Not only had the Commission been sidelined in the process of drafting the proposal (cf. *section 3.1* above). The Commission's services were also uncomfortable with the envisioned legal basis of the draft Framework Decision. In fact, the Commission claimed that "almost the entire content of [this instrument] submitted by the Presidency belonged under the first pillar."[75] Not a single national delegation participating in this meeting of September 19, 2000, however, seemed to share the Commission's assessment.

The French Presidency proceeded by drawing up a revised version of the Framework Decision. Such a revision was deemed necessary since the speedily drawn up initial draft had not yet specified the level of EU criminal sanctions against human smugglers. In fact, the original French text had merely called for "effective, proportionate and dissuasive criminal penalties" – a standard phrase employed by legal practitioners dealing with EU issues since the early 1990's.[76] The amended French proposal, on the other hand, suggested "a maximum sentence of not less than 10 years" of imprisonment for the unlawful smuggling of third country nationals into the European Union.[77]

In response to the harsh penalization requirement envisioned by the French Presidency, the Brussels bureau of the *United Nations High Commissioner for Refugees (UNHCR)* formally intervened into the Union's decision-making process in mid-October 2000. The UNHCR reminded the EU of the UN's

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[75] Council of the EU (2000e): Council doc. *10859/00* [arena-web], pp. 2-3.

[76] French Republic (2000b): "Initiative" [cf. footnote 70], art. 1. The concept of "effective, proportionate and dissuasive penalties" was developed by the ECJ in its so-called Greek Maize judgment of 1989. Cf. Nuotio, K. (2005): "Harmonization of Criminal Sanctions in the European Union: Criminal Law Science Fiction," in: Husabø and Strandbakken (eds.), *Harmonization of Criminal Law* [cf. footnote 11], pp. 79-101, here: pp. 81-85.

[77] Council of the EU (2000f): Council doc. *12025/00* [arena-web], art. 1 (2).

distinction between human trafficking and people smuggling.[78] Furthermore, the UN Refugee Agency declared that

> it is regrettable that, as a result of States' increasingly restrictive immigration policies, resorting to the services of smugglers has often been the only viable option for many genuine asylum-seekers who seek sanctuary in the European Union. … [The] draft Directive and draft Framework Decision do not attempt to reconcile the proposed measures to 'prevent facilitation of unauthorised entry and residency' with States' existing international legal obligations towards refugees and asylum-seekers. … [UNHCR] is seriously concerned that these efforts do not impinge upon the basic human right of individuals to seek and enjoy in other countries asylum from persecution.

Against this background, the UNHCR called upon the EU to insert a "general 'savings clause'" for the protection of smuggled refugees and asylum seekers into the draft Framework Decision, and to narrow down the personal scope of the draft Directive "in order to avoid that those assisting asylum-seekers and refugees purely out of humanitarian motives would risk criminal prosecution."[79]

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[78] For an overview of UN activities in both of these domains, see Gallagher, A. (2001): "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis," in: *Human Rights Quarterly,* Vol. 23, pp. 975-1004.

[79] Council of the EU (2000g): Council doc. *12351/00* [arena-web], pp. 3 and 5. While issuing such statements, the UNHCR tends to rely on a broad interpretation of its humanitarian mandate. See Forsythe, D. (2001): *UNHCR's Mandate: The Politics of Being Non-Political,* Geneva: UNHCR, Working Paper No. 33/Mar. 2001 (New Issues in Refugee Research). For further reading on the UNHCR's assessment of immigration control measures in Europe, see van der Klaauw, J. (2002): "European Asylum Policy and the Global Protection Regime: Challenges for UNHCR," in: Lavenex, S. / E. M. Uçarer (eds.), *Migration and the Externalities of European Integration,* Lanham: Lexington, pp. 33-53; and van der Klaauw, J. (2004): "Irregular Migration and Asylum Seeking: Forced Marriage or Reason for Divorce?" in: Bogusz *et al.* (eds.), *Irregular Migration and Human Rights* [cf. footnote 74], pp. 115-35. Johannes van der Klaauw served as the UNHCR's Senior European Affairs Officer in Brussels. Cf. also Morrison, J. / B. Crosland (2001): *The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy?* Geneva: UNHCR, Working Paper No. 39/Apr. 2001 (New Issues in Refugee Research).

The UNHCR's comments motivated the EU office of the *European Council on Refugees and Exiles (ECRE),* an umbrella association representing approximately seventy non-governmental organizations (NGOs) assisting refugees and asylum seekers, to draw up a similar statement. Unsurprisingly, the ECRE's position paper of November 7th was particularly concerned with the potentially negative impact of the so-called facilitators package on the humanitarian activities of NGOs:

> [The] draft Directive and Framework Decision are very broad in the scope of people they seek to define as 'facilitators' and will have the result of criminalizing lawyers, non-governmental organisations and church organisations which give advice to refugees. … ECRE cannot accept any initiative which potentially criminalizes humanitarian workers. It is a strange state of affairs that, on the eve of the 50th anniversary of the European Convention on Human Rights and Fundamental Freedoms, the European Union attempts to make criminals out of people who, like the Swede Raoul Wallenberg, facilitate the passage of people to protection.[80]

Meanwhile, the French Presidency had convened another meeting of the Working Party on Substantive Criminal Law. The Presidency had also arranged for a meeting of the so-called *Article 36 Committee* on this subject matter.[81] This way of channeling the dossier through the Council's administrative machinery was motivated by the French government's relatively tight schedule. The Presidency accordingly announced that "[it] would like these questions to be dealt with at the meeting of the Council of Ministers on 30 November and 1 December 2000."[82] In preparation for this

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[80] European Council on Refugees and Exiles (2000): *ECRE's comments on the French Presidency proposals for a Council Directive defining, and Framework Decision on preventing, the facilitation of unauthorised entry, movement and residence,* Brussels, Nov. 7, 2000 [arena-web], p. 3. Raoul Wallenberg was a Swedish diplomat who deliberately used illegal means, including bribes and false documents, to save the lives of Hungarian Jews during World War II.

[81] Cf. Council of the EU (2000h): Council doc. *12914/1/00 REV 1* [arena-web], p. 1. The Article 36 Committee, an administrative body of senior officials also known as the Comité de l'Article Trente-Six or CATS, is the post-Amsterdam successor of the K.4 Committee (1993-99). One may also think of the Article 36 Committee as the Third Pillar equivalent to the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) in the First Pillar.

[82] Council (2000h): Council doc. *12914/1/00 REV 1* [cf. footnote 81], p. 3.

ministerial gathering, the *Permanent Representatives Committee, Part Two* (*COREPER II)* discussed the file on November 15th and 22nd, while the *JHA Counselors* were scrutinizing the dossier in parallel.[83]

By November 24th, the French Presidency had produced a second revision of the legal text. In response to the UNHCR's comments, the Presidency had inserted a so-called humanitarian clause stipulating that the Framework Decision "shall apply without prejudice to the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights." The Austrian, Danish, Dutch, Finnish and Swedish delegations, however, thought that this wording was inadequate. They therefore suggested defining human smuggling as "the facilitation of unauthorized entry for financial gain" in order to "[make sure] not to affect adversely work done by humanitarian organisations for refugees."[84]

In regard to the level of criminal sanctions, the Presidency had watered down its initial proposal for the sake of fostering an early agreement in the Council: France now suggested a "maximum sentence of not less than 8 years." Both COREPER and the Council of Ministers were asked to "examine whether the maximum sentence of 8 years proposed by the Presidency can be accepted as a compromise by all delegations."[85]

After its meeting on November 30 – December 1, 2000 in Brussels, the *Justice and Home Affairs Council* stated that "a large majority of delegations could

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[83] See Council of the EU (2000i): Council doc. *13739/00* [arena-web]. The JHA Counselors Group is an informal working party composed of national justice and interior ministry officials who, not unlike the members of COREPER, are permanently based in Brussels. As far as EU measures for the approximation of national criminal laws are concerned, the JHA Counselors monitor the proceedings of the Working Party on Substantive Criminal Law and report both to COREPER II and the Article 36 Committee (cf. *Annex 4*). The informal group of JHA advisers is also known as the "mini-COREPER" of the JHA domain.

[84] Council (2000i): Council doc. *13739/00* [cf. footnote 83], p. 14. The outgoing French Presidency presented a slightly revised version of the humanitarian clause shortly before Christmas. The amended version of the clause provided that "any Member State may take the measures necessary to ensure that the penalties … shall not apply to any natural or legal person whom the judicial authorities consider to have acted exclusively with the aim of providing assistance to refugees and asylum seekers." Council of the EU (2000j): Council doc. *14920/00* [arena-web], p. 1.

[85] Council (2000i): Council doc. *13739/00* [cf. footnote 83], p. 3.

accept that, in the most serious cases, the maximum sentence should be eight years imprisonment." With a view to the humanitarian clause requested by the UNHCR, the Council of Ministers declared that "the Council was most concerned to respect the activities of humanitarian organisations which give voluntary assistance to illegal immigrants, and to protect victims of trafficking in human beings." However, the Council also underlined its intention of "reconciling respect for these principles with the desire vigorously to combat the facilitation of unauthorised immigration."[86]

The predictable failure of the JHA Council to reach a political agreement at this stage was not well received by the *European Council.* In fact, the Nice European Council reacted to this negotiation impasse by instructing the JHA Council "that the last remaining problems concerning the texts aimed at combating the traffic in human beings and illegal immigration be settled as soon as possible in accordance with the explicit request made at Feira."[87] In spite of this clear political instruction, the European Council's attention was mainly focused on concluding the Intergovernmental Conference on institutional reform at this point.[88]

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[86] Council of the EU (2000k): "2314th Council meeting – Justice, Home Affairs and Civil Protection – Brussels, 30 November and 1 December 2000," Council doc. *13865/00* [arena-web], p. 12.

[87] European Council (2000b): *Nice European Council Meeting, 7, 8 and 9 December 2000: Presidency Conclusions* [arena-web], no. 50.

[88] The institutional reforms agreed upon by the heads of state or government in Nice were, in the eyes of some observers, "neither a success for the French Presidency nor for the EU as a whole." Lequesne, C. (2001): "The French Presidency: The Half Success of Nice," in: *Journal of Common Market Studies,* Vol. 39 (Annual Review), pp. 47-50, here: p. 48. This outcome may arguably be attributed to the fact that "the French government scrupulously used the position of the chair to advance proposals that essentially constituted national position papers framed as Presidency compromises. … When accused by other member states and the Commission of partiality, arrogance, and misuse of the Presidency, the French government referred to the necessity for achieving results." Tallberg, J. (2006): *Leadership and Negotiation in the European Union,* Cambridge University Press, pp. 138-39. It probably did not help the French Presidency either that the European Council meeting in Nice was accompanied by approximately 60,000 protesters and French riot police. Cf. *inter alia The Independent* of Dec. 8, 2000: "Amid the clouds of tear gas, a disparate alliance is united in protest."

3.3 Intergovernmental Negotiations under the Swedish Presidency

During the first half of 2001, the legislative dossier was handled by the Swedish Presidency. Immediately after the Swedes had taken the chair, the Finnish delegation submitted a note to the Working Party on Substantive Criminal Law. Finland was lending support to the UNHCR's view that human smuggling should not be confused with trafficking in human beings:

> The Finnish delegation believes that it is important to emphasize the distinction between facilitation of illegal entry and trafficking in human beings. These are separate offenses as regards the definition as well as the seriousness of the activities involved.

The Finnish delegation therefore made the suggestion

> to discuss trafficking in human beings in a separate initiative…. This solution would be more clear also in relation to Norway and Iceland as trafficking in human beings might not be considered as [a] further development of the Schengen acquis. Also the Commission has announced that it is preparing a separate initiative to this end.[89]

The Commission would indeed submit a proposal for a Council Framework Decision on combating trafficking in human beings in January of 2001. In the explanatory memorandum accompanying the previously mentioned proposal, the Commission explained why it considered smuggling and trafficking to be separate offences:

> While smuggling of migrants could be said to constitute a crime against the state and often involves a mutual interest between the smuggler and the smuggled, trafficking in human beings constitute [sic] a crime against a person and involves an exploitative purpose. The Commission is therefore of the view that the French initiatives on facilitation of unauthorised entry, movement and residence are related to smuggling of migrants.[90]

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[89] Council of the EU (2001a): Council doc. *5186/01* [arena-web], pp. 1-2.

[90] European Commission (2001c): "Combating Trafficking in Human Beings and Combating the Sexual Exploitation of Children and Child Pornography: Two Proposals for Framework Decisions," Brussels, Jan. 22, 2001, Commission doc.

The Swedish Presidency made an extraordinary effort to keep the Council's legislative agenda moving forward.[91] In a friendly gesture towards its Nordic non-EU neighbors, the Swedish government also created a political platform for the expression of Norwegian and Icelandic views on Schengen-related decision-making processes. From now on, the Working Party on Substantive Criminal Law and higher-ranking Council bodies would be discussing the human smuggling dossier in the composition of a *Mixed Committee (EU + Norway and Iceland)*.

During the first meeting of the Working Party on Substantive Criminal Law (Mixed Committee) under the Swedish Presidency on January 15, 2001, it became clear that "there was no agreement on the length of imprisonment. Norway, Iceland, Finland, Denmark and Sweden called for a level lower than 8 years." In regard to the humanitarian clause, on the other hand, it emerged that "Germany, France, Denmark, Greece, Ireland, the Netherlands, Portugal, and the UK were against" this provision. The only thing that "all delegations agreed [upon was] that the proposal was not aimed at trafficking

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COM (2000) 854 final/2 [arena-web], p. 8. The JHA Council would formally endorse the Commission's proposal in July of 2002. See Council of the EU (2002d): "Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA)," in: *Official Journal of the European Communities* of Aug. 1, 2002, Vol. L 203, pp. 1-4 [arena-web]. One may note in this context that the cross-border prosecution of human traffickers has developed into one of the main fields of activity of Eurojust. Cf. Eurojust (2006): *Annual Report 2005*, The Hague [arena-web], p. 32. Cf. also Rijken, C. (2003): *Trafficking in Persons: Prosecution from a European Perspective,* The Hague: T.M.C. Asser; and Obokata, T. (2006): "EU Action Against Trafficking of Human Beings: Past, Present and the Future," in: Guild and Minderhoud (eds.), *Immigration and Criminal Law* [cf. footnote 72], pp. 387-406.

[91] According to Ole Elgström, the Swedish government was able to "take advantage of a well co-ordinated and effective bureaucracy" while chairing "more than 2,000 meetings that took place in Brussels and Luxembourg and the 80-plus informal meetings that were held in Sweden." Beyond that, the Swedish Presidency's consensual policy style stood in marked contrast to the former French Presidency's approach. In fact, "the French had been widely criticized for 'Great Power arrogance' and for the shameless promotion of French self-interests." Elgström, O. (2002a): "Dull but Successful – the Swedish Presidency," in: *Journal of Common Market Studies,* Vol. 40 (Annual Review), pp. 45-48, here: p. 46; and Elgström, O. (2002b): "Evaluating the Swedish Presidency," in: *Cooperation and Conflict,* Vol. 37, No. 2, pp. 183-89, here: p. 183, respectively. For further reading on the Swedish Presidency, see Tallberg, J. (2001) (ed.): *När Europa kom till Sverige: Ordförandeskapet i EU 2001,* Stockholm: SNS Förlag.

in human beings," and that it may therefore be "appropriate to re-examine the recitals to both the draft Framework Decision and the draft Directive."[92]

A few days later, the *Austrian* delegation, i.e. the political representatives of a Member State which, until recently, had suffered from diplomatic sanctions imposed by the other Member States in an (ultimately failed) attempt to influence the party-political composition of the Austrian federal government,[93] submitted a note to the Council Secretariat stating that

> the measures set out in France's initiative go far beyond the objective aimed at. [Under these] proposals, even acts causing little social harm would be subject to very strict sanctions. … [We] must avoid giving the impression that the Union is one-sidedly taking excessively harsh action against the facilitation of immigration and residence by persons in breach of the Member States' laws, without at the same time considering aspects of a balanced migration policy….[94]

Ironically, the Council delegation most critical of "one-sided and excessively harsh action" against human smugglers was speaking on behalf of a government widely accused of xenophobia and right-wing populism.

The Working Party on Substantive Criminal Law (Mixed Committee) met again on February 13th-14th in order to further elaborate the humanitarian clause and the level of criminal sanctions. With a view to the humanitarian clause, the Swedish Presidency presented a revised version of article 1 of the draft Directive. The Directive now called for "appropriate sanctions" against human smugglers "unless it is established that the act was committed principally with the aim of providing assistance to refugees and asylum seekers." This definition was criticized as being too broad *inter alia* by the governments of Denmark, Greece and the UK, whereas the Belgian delegation, in contrast, demanded that "the application of the humanitarian clause in national law should be mandatory."

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[92] Council of the EU (2001b): Council doc. *5645/01* [arena-web], pp. 5, 12 and 15, respectively.

[93] Cf. Merlingen, M. *et al.* (2001): "The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria," in: *Journal of Common Market Studies,* Vol. 39, No. 1, pp. 59-77. The sanctions against Austria, imposed in Feb. 2000, had been lifted in Sept. 2000.

[94] Council of the EU (2001c): Council doc. *6091/01* [arena-web], pp. 1-2.

In regard to the length of imprisonment, the Swedish Presidency further watered down the amended French text by suggesting "a maximum sentence of not less than 6 years." This relatively dovish Swedish proposal, in turn, motivated France, Germany, Portugal and the UK to formally enter substantive reservations. The former group of countries demanded a minimum maximum sentence of at least eight years. Denmark, Iceland, the Netherlands and Norway, on the other hand, "thought that 8 years in any case was too high," while Finland considered that "6 years was rather high," and Iceland "could [only] accept 4 years."[95]

3.3.1 Supranational Parliamentary Rejection

In the midst of these Council-based negotiations over the appropriate level of criminal sanctions against human smugglers and the possible exemption of asylum seekers and their helpers from criminal prosecution, the European Parliament (EP) passed a resolution in which it categorically rejected the French legislative initiatives.[96] The Euro-parliamentarians' *en bloc* rejection was partly a symbolic response to the EP's political marginalization vis-à-vis the Council under the consultation procedure (cf. *inter alia* article 67 of the EC Treaty in its Amsterdam version). However, the EP also expressed serious doubts over the substantive profile of the draft Directive and Framework Decision.

The Euro-parliamentarians' substantive disapproval had initially been voiced by the EP's *rapporteur* for this cross-pillar dossier, Mr. Ozan Ceyhun, a German MEP affiliated with the Group of the Greens/European Free Alliance and member of the EP's Committee on Citizens' Freedoms and Rights, Justice and Home Affairs. Similar to the Commission's position and the Austrian delegation's stance in the Council, the so-called Ceyhun Report of October 25, 2000 emphasized the alleged need for a proactive EU policy on legal immigration:

> The Union can only successfully control illegal immigration within the framework of a comprehensive immigration policy. Without a common immigration and asylum policy which takes

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[95] Council of the EU (2001d): Council doc. *6254/01* [arena-web], pp. 3-4.

[96] See European Parliament (2001): "Unauthorised entry, movement and residence: Thursday, 15 February 2001," in: *Official Journal of the European Communities* of Oct. 1, 2001, Vol. C 276, pp. 244-45 [arena-web]. The resolution was adopted by a majority of 249 against 189 votes.

> account not only of the persons concerned but also of the socio-economic interests of the Member States, any measure will be doomed to failure.

MEP Ceyhun qualified his remarks as follows:

> [These] proposals do not offer sufficiently realistic solutions. … Harsher legislation and increased border controls have only a minimal effect on unauthorised immigration. … [The] European Union must as a matter of urgency adopt a European policy on immigration promoting legal immigration into its territory and ensuring that legal immigrants, whose important contributions to the European economy must be stressed, are genuinely assimilated.

The Ceyhun Report also shared the UNHCR's view that EU measures against human smugglers should not infringe upon the human right of third country nationals to seek asylum in Europe or elsewhere:

> The purpose of such measures must never be to dissuade asylum-seekers from exercising their legitimate right to seek the protection of a signatory state, since this would constitute an infringement of the 1951 Geneva Convention. … Associations, organisations or other legal persons acting for humanitarian reasons shall be immune from criminal prosecution.

Last but not least, the Ceyhun Report generally disapproved of the Council's use of Third Pillar measures in "communitized" policy areas like illegal immigration. Lending support to the Commission's legal assessment, the European Parliament thus also objected to the French initiatives on procedural grounds:

> It would have been preferable to combine these two proposals and base them on the same legal basis, those of the first pillar, in other words Article 61 and 63 of the EC Treaty which govern the implementation of a common immigration policy. … [The] intergovernmental procedure [deprives] the EP of any power of co-decision in this matter….[97]

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[97] European Parliament (2000): "Report on the initiative of the French Republic with a view to the adoption of a Council Directive defining the facilitation of

3.3.2 Subsequent Negotiations under the Swedish Presidency

Taking note of the European Parliament's categorical rejection of the draft texts, the JHA Council's Article 36 Committee (Mixed Committee) met again on February 19-20, 2001 in order to take a fresh look at the unfinished dossier. The Commission formally entered a substantive reservation concerning the legal basis of the Framework Decision on this occasion (cf. *section 3.3.4* below). Beyond that, the Swedish Presidency, following the Council Legal Service's advice and in an attempt to clarify the legal status of Norway and Iceland, inserted a new provision stating that the legislative acts constituted a further development of the Schengen *acquis*.[98]

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unauthorised entry, movement and residence, [and] on the initiative of the French Republic with a view to the adoption of a Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence," Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, EP doc. *A5-0315/2000 final* of Oct. 25, 2000 [arena-web], pp. 5, 8, 19-20 and 23, respectively.

[98] This newly inserted provision referred to the Schengen Implementation Agreement ("Schengen II") of 1990 in general and art. 27 Schengen II in particular. Art. 27 of the Schengen Implementation Agreement called for "appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the contracting parties in breach of that contracting party's laws on the entry and residence of aliens." The further development of this provision by the JHA Council took place in the context of the Northern enlargement of Schengen. The Nordic countries' full legal and operational compliance with the rules and standard operating procedures of the Schengen regime culminated in the elimination of internal border controls between Denmark, Finland, Iceland, Norway and Sweden, on the one hand, and Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal and Spain, on the other, as of March 25, 2001 (cf. section 2.1 and Annex 4). One may note in this context that the Norwegian and Icelandic governments find themselves in the rather unfortunate position of having to negotiate further developments of the Schengen *acquis* with their EU counterparts in light of a so-called guillotine clause: Norway and Iceland can be excluded from the Schengen scheme altogether if they do not approve of every single Schengen-related EU decision. See Council of the EU / Norway / Iceland (1999): "Agreement between the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis," in: *Official Journal of the European Communities* of July 10, 1999, Vol. L 176, pp. 36-49 [arena-web], art. 8 (4).

For the time being, the Article 36 Committee was not able to reach an agreement on the precise framing of the humanitarian clause. In fact, "the United Kingdom delegation [in particular] thought that the expression 'to provide humanitarian assistance to the person concerned' … might be too broad." With a view to the level of penal sanctions, on the other hand, the Swedish Presidency presented delegations with a compromise solution. This compromise proposal had been drawn up in light of (apparently irreconcilable)

> differences between the general level of punishment in different Member States. Many delegations thought that the maximum sentence to determine should be 8 years. However, it appeared that in some Member States that level would be out of line with their criminal law in general. The only realistic way forward was therefore, in the view of the Presidency, to provide some sort of exception.

The exception envisioned by the Presidency, i.e. Sweden's suggestion to offer Member States' governments (and especially the more reluctant Nordic ones) an opt-out clause from an otherwise uniformly high level of penal sanctions against human smugglers, immediately triggered formal reservations by the UK and France. The heavily criticized compromise solution suggested by the Swedish government read as follows:

> If imperative to preserve the coherence of the national penalty system, the actions defined in paragraph 3 [calling for a maximum custodial sentence of at least 8 years] shall be punishable by custodial sentences with a maximum sentence of not less than 6 years, provided that it is among the most severe maximum sentences available for crimes of comparable gravity.[99]

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[99] Council of the EU (2001e): Council doc. *6465/01* [arena-web], p. 14. The Nordic governments' negotiating behavior corresponds to Hans Nielsson's empirical observation that "frequently, the delegation's negotiating aim is to avoid changing its national law by ensuring that the proposed instrument is compatible with that goal." Nilsson, H. G. (2004): "The Justice and Home Affairs Council," in: Westlake, M. / D. Galloway, *The Council of the European Union,* London: John Harper Publishing, 3rd edition, pp. 113-42, here: p. 136. Hans Nilsson served as Head of Division on judicial cooperation in the General Secretariat of the Council. Likewise, a Council Secretariat official interviewed by myself reported the following: "An argument I had all the time – I was half amused, half exasperated – was: 'President, we cannot accept that, because, in that case, we would have to change our national legislation!' Well,

In light of the upcoming JHA Council meeting scheduled for March 15th, the Swedish Presidency delegated the dossier to COREPER II (Mixed Committee). COREPER's deliberations, however, did not yield concrete results. The Member States' ambassadors merely managed to present the Council of Ministers with a structured list of items on which intergovernmental agreement on administrative level had *not* been reached, including the humanitarian clause and the lowest maximum sentence. Complicating matters further, the Permanent Representatives Committee had to inform the JHA Council that the Danish and British delegations had formally entered parliamentary scrutiny reservations.[100]

Three days ahead of the actual Council meeting, the UNHCR submitted a second position paper. In order to further strengthen the humanitarian clause considered by the Council, the UN Refugee Agency recommended "mandatory wording reflecting the principle that penalties should not be imposed to persons who, for exclusively humanitarian reasons, have facilitated the unauthorised entry of an asylum-seeker into the territory of a Member State."[101]

As one may have expected, the Justice and Home Affairs Council (Mixed Committee) could not agree on the final wording of the so-called humanitarian clause during its meeting of March 15-16, 2001 in Brussels. Nor was there a political agreement on the level of criminal sanctions. Against this background, the Council of Ministers instructed its subordinate bodies that "work should be continued on the two draft instruments with a view to reaching political agreement at the May JHA Council."[102]

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but that's precisely what you are here for! Funny, but that happened all of the time with some delegations! In the beginning, with some of the compromises, a couple of people just didn't understand what we were doing." Author's interview, May 11, 2004.

[100] Cf. Council of the EU (2001f): Council doc. *6766/01* [arena-web], p. 14. Cf. also *section 3.4* below.

[101] UNHCR (2001): *UNHCR observations on the Draft Council Directive defining the facilitation of unauthorised entry, movement and residence…,* Mar. 12, 2001 [arena-web], p. 2.

[102] Council of the EU (2001g): "2337th Council meeting – Justice, Home Affairs and Civil Protection – Brussels, 15 and 16 March 2001," Council doc. *6757/01* [arena-web], p. 10.

About a week after the ministerial gathering in March, the acting President of the JHA Council explained the political purpose of introducing more or less harmonized criminal sanctions against human smugglers throughout the EU in the following manner:

> This sends a clear message: it is criminal to cruelly and cynically carry on human smuggling operations and exploit vulnerable people. … Through increased sanctions we are prepared to send out the message that the Member States take a very serious view of these criminal activities and that we want our police to give priority to the fight against crime in this area.

Again, one of Europe's leading political figures had deliberately juxtaposed the smuggling of third country nationals into the EU with the "cruel and cynical exploitation of vulnerable people." The acting President of the Council rounded off her touching statement by adding that "although we did not reach agreement this time, a good spirit of compromise prevailed. My aim is to reach political agreement on these matters on 28-29 May."[103]

3.3.3 Towards a Compromise Solution

The outcome of the ministerial gathering in March was thoroughly discussed during a subsequent meeting of the JHA Counselors Group (Mixed Committee) on April 2nd. Building on the adviser group's work, the Swedish Presidency asked the Member States to "agree to the following compromise."

In regard to the humanitarian clause, the Presidency called upon delegations to give their consent to a new wording of article 1 (2) of the draft Directive. This provision now stated that "any Member State *may* decide not to impose sanctions … where the aim of the behavior is to provide humanitarian assistance to the person concerned" (emphasis added). The Swedish Presidency, in other words, recommended the optional rather than mandatory application of the humanitarian clause. With a view to the level of criminal sanctions as defined in article 1 (3) of the draft Framework Decision, on the other hand, the Swedish government returned to the French idea of "a maximum sentence of not less than 8 years." Article 1 (4) of the Swedish

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[103] Swedish Presidency (2001a): *Report on Asylum and Migration Affairs to the European Parliament's LIBE Committee by the Minister for Development Cooperation, Migration and Asylum Policy, Maj-Inger Klingvall, on 21 March 2001* [arena-web], item no. 2.

Presidency's new draft, however, contained the opt-out clause analyzed in *section 3.3.2* above.

In addition to these substantive amendments, the Swedish Presidency had drawn up a draft *Declaration for Entry in the Minutes of the Council*. This declaration was supposed to provide a political platform for those Member States' governments particularly eager to impose harsh penal sanctions against human smugglers. The draft declaration read as follows:

> Facilitation [of unauthorised entry and residence of aliens] nowadays takes the serious form of illegal immigration networks which deceive those who have recourse to them and place them in very dangerous situations, as was dramatically demonstrated by the deaths in Dover in June 2000. Such networks are now inextricably linked with organised crime. … [Aware] that the leaders of illegal immigration networks are criminals who cause serious harm to others, the undersigned Member States undertake to implement measures in their national law laying down, for the conduct referred to in Article 1 (3) of the Framework Decision, a maximum penalty of ten years' imprisonment.

In the end, this declaration was signed by the governments of France, Luxembourg and the UK.

In light of the fact that "this [overall] solution was acceptable to the majority of the delegations" in the JHA Counselors Group, the Swedish Presidency called upon COREPER II "to examine whether agreement can be reached on the basis of the compromise proposed."[104]

The Permanent Representatives Committee examined the compromise solution mentioned above on April 4th and 11th. The Member States'

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[104] Council of the EU (2001h): Council doc. *7671/01* [arena-web], pp. 1-3. The Presidency's behavior described above confirms Fiona Hayes-Renshaw and Helen Wallace's observation that "frequently, the accommodation is achieved through declarations in the Council minutes, and often attached to decisions taken, in the end, by consensus. A second [way to accommodate differences] is to provide for a variety of formulations within the body of the relevant text for divergent interpretation or application of the relevant rules to particular member states." Both practices were evidently employed in this case. Hayes-Renshaw and Wallace (2006): *The Council of Ministers* [cf. footnote 56], p. 291.

ambassadors, however, also had to find ways and means to accommodate the views of the *Austrian* delegation. In fact, Austria's substantive reservation concerning the entire Framework Decision stemmed from the center-right coalition government's unwillingness to support any EU effort aimed at the approximation of national criminal laws.[105] In light of the unanimity requirement in the Council, COREPER II thus hammered out yet another draft *Declaration for Entry in the Minutes of the Council* which contained the following statement:

> The Council recognises that the question of approximation of sanctions in general merits further discussion…. [The Council] instructs the relevant bodies of the Council to begin, during the Swedish Presidency, detailed discussions on this subject.[106]

With only one month left before the decisive JHA Council meeting, the dossier was delegated back to the Working Party on Substantive Criminal Law (Mixed Committee). The working group's meeting of April 20th was succeeded by yet another gathering of COREPER II (Mixed Committee) on April 25th.[107]

As it turned out, these "endgame" negotiations proved rather difficult. Several delegations made novel claims on these occasions. In light of newly raised Dutch concerns with article 1 (3) of the draft Framework Decision, for example, the scope of the former instrument was temporarily narrowed down in order not to criminalize *attempted* human smuggling and mere *participation* in smuggling operations.[108] By May 3rd, however, it had become clear that such a narrowing down of the scope of the draft Framework Decision would be opposed by France and Spain.[109] The French and Spanish governments accordingly entered substantive reservations concerning article 1 (3) of the

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[105] The principal reason for this uncompromising stance was that the Austrian Minister of Justice, Dieter Böhmdorfer, was closely affiliated with the Freiheitliche Partei Österreichs (FPÖ), i.e. the infamous right-wing coalition partner of the center-right Österreichische Volkspartei (ÖVP).

[106] Council of the EU (2001i): Council doc. *8164/01* [arena-web], p. 2. In the end, this declaration was not entered into the Council's minutes since intergovernmental discussions on this subject matter had indeed been launched by the Presidency.

[107] Cf. Council of the EU (2001j): Council doc. *8115/01* [arena-web].

[108] See Council of the EU (2001k): Council doc. *8242/01* [arena-web], pp. 2 and 4.

[109] See Council of the EU (2001l): Council doc. *8522/01* [arena-web], p. 1.

Framework Decision while discussing this item within the Article 36 Committee (Mixed Committee).[110]

3.3.4 The Commission's Request for an EC Legal Basis

In the midst of these heated intergovernmental negotiations approximately three weeks ahead of the forthcoming JHA Council meeting, the Commission's services submitted a position paper on the *legal basis* of the legislative acts under discussion. The Commission Staff Working Paper on this subject matter was formally received by the Council Secretariat on May 4, 2001. In this paper, the Commission's Directorate-General (DG) Justice and Home Affairs, i.e. the predecessor of today's DG Justice, Freedom and Security, essentially reiterated its position of September 2000 that "the French initiative should be based in its entirety on a legal base in Community law, namely Article 63 (3) (b) TEC."[111]

The Commission's legal experts primarily drew on the case law of the European Court of Justice (ECJ) in order to justify their claim that the EC (rather than the EU) had the "competence to prescribe that the Member States shall ensure that such behavior [i.e. human smuggling] be the subject of a *criminal* offence and *criminal* penalties." The Commission's benevolent interpretation of the ECJ's case law culminated in the following legal assessment:

> The Commission services … are not pretending to any substantive Community competence in relation to criminal matters *per se*…. However, the Commission services do contend that, if the Community has – within a given competence – the power to regulate behaviour in order to achieve a Community objective, then it has also the competence to decree that the regulated behaviour (or the non-compliance with the regulated behaviour) be sanctioned at national level by *criminal* sanctions and penalties and this is, particularly, the case where it is considered that only criminal sanctions can assure the respect of Community obligations regarding the regulated behaviour.

Furthermore, the Commission reminded the Council that "the Commission used exactly the same reasoning in its recent proposal for a Directive on the

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[110] Council of the EU (2001m): Council doc. *8632/01* [arena-web], p. 3.

[111] Council of the EU (2001n): Council doc. *8845/01* [arena-web], p. 2.

protection of the environment through criminal law."[112] The Commission's proposal mentioned above had been tabled in March 2001, i.e. about two months earlier.[113]

As we shall see below, the Council at first categorically rejected the Commission's request for Community involvement in the area of criminal law. The Member States' objections to any sort of supranational criminal law competence stemmed from their firm belief that *they* – rather than the European Commission, let alone the European Parliament – were authorized to prescribe the use of physical force against EU citizens and third country nationals not complying with EU rules. The Council, in short, simply did not think that the European Community had already acquired the quality of a *political community* in the sense of Max Weber.[114] The Council was forced to reconsider its position on this constitutional matter following the ECJ's judgment in the "Commission vs. Council" case of September 2005 (see *section 4.* below).

3.3.5 Coming to Agreement in the JHA Council

In spite of the Commission's request for a First Pillar legal basis, the Swedish Presidency was eager to reach a political agreement on the legislative dossier during its tenure. The Third Pillar legal basis of the Framework Decision was therefore maintained.

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[112] Council (2001n): doc. *8845/01* [cf. footnote 111], pp. 3-5 (emphasis in the original).

[113] Cf. European Commission (2001d): "Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law," Brussels, Mar. 13, 2001, Commission doc. *COM (2001) 139 final* [arena-web]. The Commission's legal reasoning was spelled out in greater detail in a Commission Staff Working Paper of Feb. 2001. See European Commission (2001e): "Establishment of an *Acquis* on Criminal Sanctions Against Environmental Offences," Brussels, Feb. 7, 2001, Commission Staff Working Document *SEC (2001) 227* [arena-web].

[114] According to Max Weber, "the political community [is] one of those communities whose action includes, at least under normal circumstances, coercion through jeopardy and destruction of life and freedom of movement applying to outsiders as well as to the members themselves." Weber (1978): *Economy and Society* [cf. footnote 2], p. 903.

All outstanding issues were addressed by COREPER II (Mixed Committee) on May 16th.[115] By May 21st, the Council Secretariat was able to report that the Member States (except for Austria) had found an inter-administrative agreement on both the level of criminal sanctions and the humanitarian clause. The ambassadors thus asked the Council to formally approve of their preparatory work "with a view to reaching political agreement on the two instruments in the Mixed Committee at ministerial level."[116] The consensus reached among government officials was reiterated in a background note to the forthcoming Council meeting. This document informed the interested public that

> the Mixed Committee [at ministerial level] will aim to confirm the provisional agreement reached at the level of senior officials – subject to the lifting of a substantive reservation from the Austrian delegation on the inclusion of a humanitarian clause and the setting of a minimum/maximum level of penal sanctions….[117]

Unsurprisingly, the Justice and Home Affairs Council (Mixed Committee) reached a political agreement on both the draft Directive and Framework Decision on May 29, 2001. In line with the compromise proposal prepared by the JHA Counselors and COREPER II (cf. *section 3.3.3* above), the Council of Ministers agreed upon the optional application of the humanitarian clause and a maximum sentence of not less than eight years (or six years) of imprisonment. The JHA Council had to acknowledge, however, that "the agreement reached is at this stage subject to parliamentary scrutiny reservations by some delegations."[118] In fact, the legislative acts could not yet be formally adopted by the Council due to the ongoing parliamentary scrutiny of the intergovernmental decision-making process in Denmark, Sweden and the UK.[119]

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[115] Council of the EU (2001o): Council doc. *8632/01 ADD 1* [arena-web].

[116] Council of the EU (2001p): Council doc. *8632/01 ADD 1 REV 1* [arena-web], p. 2.

[117] Swedish Presidency (2001b): *Background Note: Justice, Home Affairs and Civil Protection Council, 28 & 29 May* [arena-web], p. 13.

[118] Council of the EU (2001q): "2350th Council meeting – Justice, Home Affairs and Civil Protection – Brussels, 28-29 May 2001," Council doc. *9118/01* [arena-web], p. 22.

[119] See Council of the EU (2001r): Council doc. *9403/01* [arena-web], p. 1; and *section 3.4* below.

In spite of this caveat, the outgoing President of the JHA Council, the Swedish Minister for Development Cooperation, Migration and Asylum Policy, Maj-Inger Klingvall, was now in a position to highlight "the achievements made during the Swedish Presidency" on the so-called facilitators package. By informing the interested public that "it is important for the EU to have common rules to punish smugglers of humans who exploit innocent people in a most cynical manner," the Swedish minister made sure that these EU measures would be well received in Sweden.[120] Minister Klingvall concluded the Swedish Council Presidency with the following statement:

> All Member States safeguard their national legislation, but to make progress we have to learn to give and take, to compromise and sometimes to lose something that is dear to us nationally, in order to win something else, to reach our common objectives.[121]

3.4 National Parliamentary Scrutiny

Building on the political agreement reached in May 2001, the Council Secretariat focused its attention on fine-tuning the draft legislative instruments. The Council Legal Service in particular left its imprint on the legal texts by rephrasing the recitals to the two legislative measures.[122] No substantive changes were made during the Belgian Presidency (second half of

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[120] Similar to the situation in France (cf. *section 3.1* above), public opinion polls carried out in Sweden in October-November 2001 confirmed that 78% of Swedish citizens favored joint EU over national decision-making with respect to "the fight against the trade in, and exploitation of, human beings." Merely 19-22% of Swedish citizens, on the other hand, expressly supported common European policies in the areas of "police" and "justice." See Eurobarometer (2002): *Report Number 56,* Apr. 2002, Brussels: European Commission, annexes [arena-web], table 4.1. The Swedish minister did not elaborate further on the exploitation of human beings by a smuggler who, according to article 1 (1) (a) of the Directive, "intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens."

[121] Swedish Presidency (2001c): *Report by Minister for Migration and Asylum Policy Maj-Inger Klingvall in the European Parliament on 19 June 2001* [arena-web], p. 8.

[122] Cf. Council of the EU (2001s): Council doc. *10075/01* [arena-web]. The Council Legal Service stopped short, however, of rephrasing the recitals referring to the alleged need to criminalize "networks which exploit human beings" (recital 2 to the final legislative acts).

2001), however – except for clarifying that the draft Framework Decision would also apply to Gibraltar.[123]

The main reason why both the draft Directive and Framework Decision could not yet be formally adopted by the Council was that the British, Danish and Swedish governments were simply not authorized to withdraw their parliamentary scrutiny reservations at this point. The European Scrutiny Committee of the British House of Commons in particular prevented an early adoption of the facilitators package by the JHA Council. As a matter of fact, the Commons did not clear the file until April of 2002 in light of a perceived need to generate parliamentary-democratic "legitimacy by procedure" (Niklas Luhmann) in the sensitive area of EU criminal law. In order to illustrate the procedural mechanisms by which domestic institutional arrangements may affect the course of legislative proceedings in the "Third Pillar" of the EU, the following paragraphs provide a brief summary of the process of national parliamentary scrutiny in Britain.

The parliamentarians in London had been particularly interested in the Blair government's position vis-à-vis the envisioned level of criminal sanctions against human smugglers. The Minister of State at the Home Office, Barbara Roche, had justified the British executive's stance on this subject matter in an explanatory memorandum of January 25, 2001 as follows:

> The Government is mindful of the minimum maximum penalty of 8 years' imprisonment for the offences of fraudulent making or altering of currency in the Framework Decision on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro. The Government considers that crimes of serious facilitation, which in some cases endanger life, should be liable to a similar penalty.

The European Scrutiny Committee, on the other hand,

> found the analogy drawn by the Minister with the penalties for counterfeiting the euro to be less than convincing. … We note that some Member States consider that a penalty of eight years is too long, and we ask the Minister to inform us of the outcome

[123] Cf. Council of the EU (2001t): Council doc. *10075/01 COR 1* [arena-web]; and Council of the EU (2001u): Council doc. *11015/01* [arena-web].

> of discussions on that issue. … We do not clear [the] document, and shall await the Minister's reply.[124]

The Blair government simply ignored this parliamentary request.

Two months after the JHA Council had reached a political agreement on the so-called facilitators package, the European Scrutiny Committee issued the following statement:

> We deplore the practice of a Minister announcing in the Council, before a document has cleared scrutiny, that the scrutiny reserve will be lifted, and will take a serious view of any further instance of this. We ask the Minister to explain why such an announcement was made in this case. In the meantime we shall hold the document under scrutiny.[125]

The Parliamentary Under-Secretary of State at the Home Office, Angela Eagle, only came back to the Committee on January 15, 2002. The British government justified its late response by resorting to the following argument:

> The delay in replying to the Committee's Report was due to confusion over whether a reply should be sent in light of the provisional agreement reached at the May 2001 JHA Council.

This brief explanation did not satisfy the parliamentarians either. The European Scrutiny Committee thus declared the following:

> We consider that there have been serious failings in the presentation of this proposal for scrutiny. We do not understand why there should have been any confusion over the need to provide an Explanatory Memorandum to accompany the latest

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[124] House of Commons (2001a): *Strengthening the Penal Framework to Prevent Unauthorised Entry and Residence,* Select Committee on European Scrutiny, Ninth Report of Mar. 21, 2001 [arena-web], items 1.11, 1.16 and 1.17. Cf. Council of the EU (2000l): "Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (2000/383/JHA)," in: *Official Journal of the European Communities* of June 14, 2000, Vol. L 140, pp. 1-3 [arena-web].

[125] House of Commons (2001b): *Strengthening the Penal Framework to Prevent Unauthorised Entry and Residence,* Select Committee on European Scrutiny, First Report of July 18, 2001 [arena-web], item 7.10.

> texts of this proposal, and why it should have taken over six months for it to be produced, particularly when we had specifically requested the Minister on 18 July 2001 to provide an account of where matters stood with this proposal and to deposit the current revised versions. … We are considering whether to recommend a debate on this document, and will make a decision when we have the Minister's reply. We therefore look forward to a prompt reply from the Minister and shall hold [the] document under scrutiny in the meantime.[126]

By March 2002, the Parliamentary Under-Secretary of State had managed to send a second letter to the House of Commons in which she accounted for the apparent confusion among UK government officials:

> I must apologise for the fact that my letter of 15 January stated that there had been a 'provisional agreement' on the text, as it was in fact a political agreement. It was because political agreement had been reached on the text that officials were not clear that it would be correct to submit an Explanatory Memorandum on the agreed texts. Under the terms of the scrutiny reserve resolution, the Parliamentary reservation should have been lifted at the point of political agreement rather than formal adoption.... The Government did not do this because a number of other Member States retained parliamentary reservations at the point of political agreement. I apologise again for the confusion which arose within the department about the effect of the Government's decision on the scrutiny process.

Again, the parliamentarians were not satisfied with this response:

> We ask the Minister to explain more precisely whether the Government did participate in the political agreement reached by the Council on 28-29 May 2001 and, if so, to explain why this was done when the proposal was still subject to scrutiny. … We shall hold the present document under scrutiny pending the

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[126] House of Commons (2002a): *Strengthening the Penal Framework to Prevent Unauthorised Entry and Residence,* Select Committee on European Scrutiny, Fifteenth Report of Jan. 30, 2002 [arena-web], items 6.6, 6.19 and 6.23.

> Minister's reply, which we shall expect to receive in time to consider in conjunction with her Explanatory Memorandum.[127]

It was only after the Home Office had sent a third letter to the European Scrutiny Committee that the UK's parliamentary scrutiny reservation in the Council could be lifted. In this letter of April 10, 2002, the British government laid out that

> the circumstances of the May 2001 JHA Council were exceptional by reason of the general election period, and that the Government judged that there were important reasons for agreeing to the French Presidency proposals on illegal immigration.

This straightforward answer apparently satisfied the (predominantly Labour Party-affiliated) members of the European Scrutiny Committee. The House of Commons used this opportunity, however, to remind the British executive that

> the presentation of this matter for scrutiny has been a chapter of accidents. It would have been preferable for the Government to have acknowledged at the time that it was overriding the scrutiny reserve when it participated in the political agreement to this proposal at the Justice and Home Affairs Council in May 2001. It was at this stage that any further substantial discussion of the proposal was effectively foreclosed, and it was then that the Government should have sought to justify the overriding of the scrutiny reserve as best it could. … We do not think that any purpose is now served by holding the documents under scrutiny, and we are content to clear them.[128]

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[127] House of Commons (2002b): *Strengthening the Penal Framework to Prevent Unauthorised Entry and Residence,* Select Committee on European Scrutiny, Twenty-Second Report of Mar. 20, 2002 [arena-web], items 8.5, 8.8 and 8.10.

[128] House of Commons (2002c): *Strengthening the Penal Framework to Prevent Unauthorised Entry and Residence,* Select Committee on European Scrutiny, Twenty-Fifth and Twenty-Sixth Report of Apr. 23, 2002 [arena-web], items 11.13, 11.15 and 11.17.

Similar processes of national parliamentary scrutiny took place in Denmark and Sweden.[129] Mirroring the European Parliament's lack of influence on EU level (cf. *section 3.3.1* above), the retroactive involvement of selected national parliaments did not affect the substantive profile of the legislative acts at hand. However, it effectively delayed the Council's formal adoption of the two measures by approximately one and a half years (cf. *section 3.6* below).

3.5 Mounting Political Pressure

During the Spanish Presidency of the Council (first half of 2002), the dossier was still blocked due to the British, Danish and Swedish parliamentary scrutiny reservations mentioned above. The only noteworthy substantive change to report during this period was the Irish government's opt-in to certain parts of the Schengen *aquis* in general and to the two draft legislative acts at hand in particular.[130]

The political demand for EU action in the field of illegal immigration was increasing, however. In fact, the Spanish government under Prime Minister Aznar deliberately placed the fight against illegal immigration on top of the

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[129] Cf. *inter alia* Folketinget (2002): *Forslag til lov om ændring af udlændingeloven,* Copenhagen, Mar. 20, 2002 [arena-web]; and Riksdagen (2001): *Rambeslut om förstärkning av den straffrättsliga ramen för bekämpning av olaglig inresa m.m.,* Stockholm, Nov. 15, 2001 [arena-web]. One may note in this context that the UK, Sweden and Denmark scored highest throughout the EU 25 with respect to the percentage of citizens who do *not* subscribe to the statement that "policy on the prevention and fight against cross-border crime would be more effective if it were decided jointly at the European Union level rather than by individual Member States." See Eurobarometer (2006): *Opinions on Organised, Cross-border Crime and Corruption,* Special Eurobarometer of Mar. 2006, Brussels: European Commission [arena-web], p. 7.

[130] Cf. Council of the EU (2002e): Council doc. *7555/02* [arena-web]; and Council of the EU (2002f): Council doc. *7555/02 COR 1* [arena-web]. In effect, both Ireland and the UK are bound by the facilitators package.

EU agenda.[131] The Spanish Presidency's activities were strongly supported by the Blair government in the UK and the Berlusconi government in Italy.[132]

The restrictive immigration policy agenda of the Spanish Presidency *inter alia* resulted in the formal adoption of Council recommendations on "measures against third countries which refuse to cooperate with the European Union in preventing and combating illegal immigration and smuggling and trafficking in human beings." In fact, the JHA Council's policy advice to "countries of boarding, departure or transit" like Morocco was that they should

> [make] the smuggling and trafficking in human beings subject to criminal penalties…, [impose] criminal penalties for conduct relating to the falsification and fraudulent use of travel documents, [increase] control measures at sea borders for vessels suspected of being involved in smuggling or trafficking in human beings…, [enhance] police controls inside national territory, aimed at breaking down networks of smugglers or traffickers in human beings…, [and strengthen] control measures at their borders, to prevent entry of persons wishing to use their

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[131] According to Carmen González Enriquez, the Popular Party had "made 'the fight against immigration mafias' a rhetorical motto planned to cover up the absence of a real policy in this area." González Enriquez, C. (2006): "The Fight Against Illegal Immigration, Smuggling and Trafficking in Human Beings in Spain: Ambiguities and Rhetoric," in: Guild and Minderhoud (eds.), *Immigration and Criminal Law* [cf. footnote 72], pp. 325-43, here: p. 328.

[132] In regard to the Blair government's "attempt to play to the domestic gallery because the UK government wanted to be seen as tough on irregular migration," see Geddes, A. (2006): "The Politics of Irregular Migration, Human Trafficking and People Smuggling in the United Kingdom," in: Guild and Minderhoud (eds.), *Immigration and Criminal Law* [cf. footnote 72], pp. 371-85, here: p. 380. The tendency to demonstrate strong political leadership in the fight against illegal immigration was even more clearly apparent in Italy. Not only did the centre-right coalition government led by Silvio Berlusconi attach top priority to stemming seemingly "unstoppable invasions of *clandestini*." Prime Minister Berlusconi also happened to own nearly half of all Italian television stations. Puggioni, R. (2006): "Looking for some Coherence: Migrants In-between Criminalisation and Protection in Italy," in: Guild and Minderhoud (eds.), *Immigration and Criminal Law* [cf. footnote 72], pp. 169-200, here: p. 170.

> territory as a transit path to move illegally towards European Union Member States….[133]

In regard to the domestic policy agenda, the Seville European Council instructed

> the Council and the Commission, within their respective spheres of responsibility, to attach top priority to the … formal adoption, at the next Justice and Home Affairs Council meeting, of the Framework Decision on combating trafficking in human beings, the Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence and the Directive defining the facilitation of irregular entry, transit and residence.[134]

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[133] Council of the EU (2002g): Council doc. *10017/02* [arena-web], pp. 6-7. Shortly thereafter, the former Spanish Presidency was engaged in a military confrontation with neighboring Morocco. Cf. Monar, J. (2002): "The CFSP and the Leila/Perejil Island Incident: The Nemesis of Solidarity and Leadership," in: *European Foreign Affairs Review,* Vol. 7, pp. 251-55; and Peers, S. (2004b): "Irregular Immigration and EU External Relations," in: Bogusz *et al.* (eds.), *Irregular Migration and Human Rights* [cf. footnote 74], pp. 193-219. Empirical phenomena like the JHA Council's interaction with third countries in the field of illegal immigration illustrate that political institutions may attempt to change their environments instead of adapting to them. Politically integrated regional units, in other words, may very well contribute to global instability: "Regional integration may lead to a future world made up of fewer and fewer units, each a unit with all the power and will to self-assertion that we associate with classical nationalism. The future, then, may be such as to force us to equate peace with nonintegration and associate the likelihood of major war with successful regional integration." Haas, E. B. (1971): "The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing," in: Lindberg, L. N. / S. A. Scheingold (eds.), *Regional Integration: Theory and Research,* Harvard University Press, pp. 3-42, here: p. 41. Likewise, David Mitrany argued that "by its nature and tendency a political union must be nationalistic; and that as such it must impede, and may defeat, the great historic quest for a general system of peace and development." Mitrany, D. (1965): "The Prospect of Integration: Federal or Functional," in: *Journal of Common Market Studies,* Vol. 4, No. 2, pp. 119-49, here: p. 145.

[134] European Council (2002): *Seville European Council, 21 and 22 June 2002: Presidency Conclusions* [arena-web], no. 30.

3.6 Formal Adoption

By July 2002, the JHA Council had formally endorsed the Framework Decision on combating trafficking in human beings (cf. *section 3.3* above). It did not take long before the Danish Presidency of the Council (second half of 2002) had also managed to overcome the last procedural obstacles for the formal adoption of both the draft EC Directive and the EU Framework Decision on human smuggling. In fact, the Council Secretariat was able to inform the JHA Council on September 16th that "the parliamentary scrutiny reservations [have] been lifted."[135]

The Council Secretariat spent the following three weeks preparing the final version of the legislative acts, a process culminating in the release of an "'A' item note" to COREPER II on September 30th.[136] The Member States' ambassadors endorsed this document in a routine fashion, which, in turn, allowed the Council Secretariat to issue a final "'A' item note" to the Council on October 7th. The stage was set for the formal adoption of the facilitators package during the JHA Council meeting scheduled for November 28-29, 2002.[137]

Unsurprisingly, the Justice and Home Affairs Council, presided over by the Danish ministers Lene Espersen and Bertel Haarder, formally adopted both the EC Directive and the EU Framework Decision on criminal law sanctions against human smugglers as an item approved without debate at the 2469th meeting of the Council in Brussels.[138]

The Commission's legal discontent was formally recorded in the Council's minutes. The relevant Commission statement reads as follows:

> Given the importance of stepping up the fight against this form of crime without delay, the Commission is in favour of the adoption of sanctions at national level in cases of breach of

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[135] Council of the EU (2002h): Council doc. *10430/02* [arena-web], p. 2.

[136] Cf. Council of the EU (2002i): Council doc. *11909/02* [arena-web]; Council of the EU (2002j): Council doc. *11909/02 COR 1* [arena-web]; and Council of the EU (2002k): Council doc. *10430/1/02 REV 1* [arena-web].

[137] Cf. Council of the EU (2002l): Council doc. *10430/1/02 REV 2* [arena-web].

[138] Cf. Council of the EU (2002m): "2469th Council meeting – Justice and Home Affairs – Brussels, 28-29 November 2002," Council doc. *14817/02* [arena-web], p. 20.

> Community rules intended to prevent unauthorised entry, movement and residence.
>
> The Commission takes the view, however, that the Framework Decision is not the appropriate legal instrument by which to require Member States to introduce such sanctions and considers that its adoption cannot constitute a precedent. The Commission believes that the Community has the competence to require the Member States to impose sanctions at national level, including penal sanctions where appropriate, where this is necessary to achieve a Community objective, under the powers conferred on it for the purpose of achieving the aims set out in Article 2 of the Treaty establishing the European Community.[139]

4. Criminal Law in the First Pillar: Towards a Transformation of European Politics?

Parallel to the routine endorsement of the facilitators package, the Council Secretariat paved the way for the formal adoption of a Danish initiative for an EU Framework Decision on the protection of the environment through criminal law.[140] In light of the Commission's counter-proposal for an EC Directive presented in March 2001 (cf. *section 3.3.4* above), the Council's likely approval of this Framework Decision was about to signal another political defeat for the Commission.

By mid-November 2002, however, it had become clear that the Commission was prepared to take legal action against the Council. In fact, the Commission had drawn up the following statement for entry into the Council's minutes:

> The Commission takes the view that the Framework Decision is not the appropriate legal instrument by which to require

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[139] Cf. Council of the EU (2002n): Council doc. *14931/02 ADD 1* [arena-web], p. 5.

[140] Cf. Kingdom of Denmark (2000): "Initiative of the Kingdom of Denmark with a view to adopting a Council Framework Decision on combating serious environmental crime," in: *Official Journal of the European Communities* of Feb. 11, 2000, Vol. C 39, pp. 4-7 [arena-web].

> Member States to introduce sanctions of a criminal nature at national level in the case of offences detrimental to the environment. As the Commission pointed out on several occasions within Council bodies, it considers that in the context of the competences conferred on it for the purpose of attaining the [Community's] objectives …, the Community is competent to require the Member States to impose sanctions at national level – including criminal sanctions if appropriate – where that proves necessary in order to attain a Community objective. … If the Council adopts the Framework Decision despite this Community competence, the Commission reserves all the rights conferred on it by the Treaty.[141]

The Commission, in other words, combined its legal reasoning in the human smuggling case (cf. *sections 3.2*, *3.3.4* and *3.6* above) with an explicit threat of litigation.

In spite of the Commission's unequivocal warning, the JHA Council adopted the Framework Decision on the protection of the environment through criminal law in January of 2003.[142]

4.1 Legal Proceedings Before the Court

On April 15, 2003, the Commission requested the European Court of Justice (ECJ) to annul the Framework Decision on the protection of the environment through criminal law due to an alleged infringement of Community competencies by the Union. For the first time in EU history, a legal action based on article 35 (6) of the EU Treaty had been brought before the Court.[143]

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[141] Council of the EU (2002o): Council doc. *13743/02* [arena-web], pp. 4-5.

[142] See Council of the EU (2003a): "Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law," in: *Official Journal of the European Union* of Feb. 5, 2003, Vol. L 29, pp. 55-58 [arena-web].

[143] This treaty provision *inter alia* states the following: "The [European] Court of Justice shall have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers." In contrast to the Member States and the Commission, individual

In the course of the ensuing legal proceedings, the European Parliament intervened in support of the Commission. Eleven Member States' governments (Denmark, Finland, France, Germany, Greece, Ireland, the Netherlands, Portugal, Spain, Sweden and the UK), on the other hand, intervened in support of the Council. The active involvement of both the European Parliament and a large number of Member States indicated that all parties were fully aware of the possible constitutional implications of the Court's judgment.

By September 13, 2005, the ECJ had reached a verdict. To the delight of the Commission's Legal Service and to the great chagrin of both the Council's Legal Service and a vast majority of the "old" Member States, the ECJ annulled the Framework Decision on the protection of the environment through criminal law due to an apparent infringement of article 47 of the EU Treaty.[144] Beyond clarifying that the legislative measure at hand "could have been adopted on the basis of Article 175 EC [relating to a Community policy on the environment]," the Court used this opportunity to elaborate in principal terms on the scope of the Community's competencies in the field of criminal law. The decisive passage of the ECJ's judgment reads as follows:

> As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence. However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.[145]

In light of the fact that no single provision of the EC Treaty specifically authorized the Community to lay down rules in the field of criminal law, and

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citizens have not been granted the right to request the judicial review of Framework Decisions. Cf. Council of the EU (2003b): Council doc. *9088/03* [arena-web].

[144] This treaty provision *inter alia* states that "nothing in this Treaty [on European Union] shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them."

[145] European Court of Justice (2005b): "Judgment" [cf. footnote 13], grounds of the judgment, no. 47-48.

against the background of the Union's explicit criminal law mandate under Title VI of the EU Treaty, the Court's judgment was obviously characterized by "strong teleology."[146] Furthermore, the judges had evidently adhered to a distinctly *functional* line of reasoning in order to justify the Community's newly gained and exclusive power to impose penal sanctions for the effective enforcement of EC rules. Given the Court's recurrently functional explanation of its case law, the most recent manifestation of this rationale did not come as a surprise. In its *ERTA* judgment of 1971, for example, the ECJ had developed the legal doctrine of the Community's *implied powers* in the domain of foreign policy by resorting to the following argument:

> [Each] time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.[147]

Likewise, the ECJ's judgment in *Commission vs. Council* resembled "the first case in which [the Court] confirmed unequivocally that the Community does

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[146] Spinellis, D. (2006): "Court of Justice of the European Communities: Judgment of 13 September 2005 (Case C-176/03, Commission v. Council) annulling the Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law," in: *European Constitutional Law Review,* Vol. 2, pp. 293-302, here: p. 299. See also Tobler, C. (2006): "Case Law: Case C-176/03, Commission v. Council, judgment of the Grand Chamber of 13 September 2005," in: *Common Market Law Review,* Vol. 43, pp. 835-54; Pohl, T. (2006): "Verfassungsvertrag durch Richterspruch: Die Entscheidung des EuGH zu Kompetenzen der Gemeinschaft im Umweltstrafrecht," in: *Zeitschrift für Internationale Strafrechtsdogmatik (ZIS),* Vol. 1, No. 5, pp. 213-21; and Apps, K. M. (2006): "Case C-176/03, Commission v. Council: Pillars Askew – Criminal Law EC Style," in: *Columbia Journal of European Law,* Vol. 12, pp. 625-37.

[147] European Court of Justice (1971): "Judgment of the Court of 31 March 1971: Commission of the European Communities v. Council of the European Communities, Case 22-70 ('European Road Transport Agreement/ERTA')," in: *European Court Reports 1971,* p. 263, grounds of the judgment, no. 17. The ECJ's *implied powers* doctrine would alter the conduct of foreign economic policy-making in Europe for years to come. Cf. *inter alia* Young, A. R. (2000): "The Adaptation of European Foreign Economic Policy: From Rome to Seattle," in: *Journal of Common Market Studies,* Vol. 38, No. 1, pp. 93-116.

enjoy certain legislative competences of its own in the field of criminal law" due to existing EC rules in areas like environmental protection.[148]

4.2 New Patterns of Conflict and Cooperation?

In the eyes of the Commission, the scope of the Court's judgment of September 2005 extends far beyond the confines of supranational environmental policy. In fact, the Commission quickly drew up a "Communication on the implications of the Court's judgment" in which the Commission shared its exceptionally broad interpretation of the judgment with a wider audience:

> [The] judgment lays down principles going far beyond the case in question. The same arguments can be applied in their entirety to the other common policies and to the four freedoms (freedom of movement of persons, goods, services and capital). … [The] Court's reasoning can [be] applied to all Community policies and freedoms which involve binding legislation with which criminal penalties should be associated in order to ensure their effectiveness.

Beyond claiming that the entire *acquis communautaire* should, whenever deemed necessary by the Commission, be enforced by means of penal sanctions, the Commission's services held that the EC's newly gained competencies in the field of criminal law would cover the whole range of criminal law measures:

> When for a given sector, the Commission considers that criminal law measures are required in order to ensure that Community law is fully effective, these measures may, depending on the needs of the sector in question, include the actual principle of resorting to criminal penalties, the definition of the offence – that is, the constituent element of the offence – and, where appropriate, the nature and level of the criminal penalties applicable, or other aspects relating to criminal law.[149]

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[148] Dougan, M. (2006): "Legal Developments," in: *Journal of Common Market Studies,* Vol. 44 (Annual Review), pp. 119-35, here: p. 131.

[149] European Commission (2005b): "Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C-176/03 Commission v Council)," Brussels, Nov. 24,

Against this background, the Commission identified a number of Council Framework Decisions that were apparently adopted on an erroneous legal basis. Among the Third Pillar measures whose legality the Commission, in its role as the so-called Guardian of the Treaties, would like to see restored is the Framework Decision on penal sanctions against facilitators of illegal entry, transit and residence analyzed in *section 3.* above.[150] The Commission's services are currently preparing a legislative proposal that will "[transform] the so-called facilitators package … into a single [EC] directive following the judgment of the European Court of Justice in case C-176/03."[151]

2005, Commission doc. *COM (2005) 583 final/2* [arena-web], no. 6, 8 and 10, respectively. One may note in this context that the Commission generally does not issue Communications in response to ECJ judgments. One of the very rare occasions where the Commission has actually resorted to this practice was the *Cassis de Dijon* judgment of 1979. Cf. Tobler (2006): "Case Law: Case C-176/03" [cf. footnote 146], p. 835.

[150] See Commission (2005b): "Communication" [cf. footnote 149], annex. Other Framework Decisions seemingly affected by the Court's judgment include the Union's measures against money laundering (June 2001), corruption in the private sector (July 2003), and attacks against information systems (Feb. 2005). The ECJ will have the chance to comment on the Commission's assessment in the currently pending ship-source pollution case (Case C-440/05, Commission v. Council). See Council of the EU (2005c): "Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution," in: *Official Journal of the European Union* of Sept. 30, 2005, Vol. L 255, pp. 164-67 [arena-web]; and European Court of Justice (2006): "Action brought on 8 December 2005 by the Commission of the European Communities against the Council of the European Union (Case C-440/05)," in: *Official Journal of the European Union* of Jan. 28, 2006, Vol. C 22, p. 10 [arena-web].

[151] European Commission (2006c): "Report from the Commission based on Article 9 of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence," Brussels, Dec. 6, 2006, Commission doc. *COM (2006) 770 final* [arena-web], p. 9. This document also contains a preliminary assessment of the transposition of the Framework Decision into national law. The empirical basis for this assessment is rather weak, however, since the Commission has not yet received any information from Austria, Cyprus, Greece, Luxembourg and Portugal, and only partial information from Estonia, Malta, Spain and Sweden. For further reading on the transposition measures undertaken by individual Member States and Schengen-affiliated third countries, see European Commission (2006d): "Annex to the Report from the Commission based on Article 9 of the Council Framework Decision of 28 November 2002…," Brussels, Dec. 6, 2006, Commission Staff Working Document *SEC (2006) 1591* [arena-web].

Assuming that the Court's judgment does indeed affect the entire *acquis communautaire,* we are about to witness a full-fledged transformation of European politics in the field of criminal law.[152] In light of the fact that policy areas like illegal immigration are typically governed by the so-called Community method, the Court's judgment will significantly alter the respective role of the European Parliament, the Commission and the Council in criminal law-related decision-making processes *inter alia* in the domain of human smuggling.[153]

The judicially imposed transition from Third Pillar decision-making procedures to the co-decision procedure implies that the *European Parliament* is now in a position to decisively influence the substantive profile of future EC criminal law measures, including "hard" Community Directives for the harmonization of national criminal laws. All other things being equal, this will result in the emergence of a left/right pattern of political contestation vis-à-vis criminal law-related decision-making processes above the nation-state.[154] Considering the declining turnout in EP elections in combination with the remarkable absence of genuine European political parties and a European public sphere, however, one may reasonably doubt whether the EP's newly gained competencies will suffice to reduce or even halt "the widening gulf between the European Union and the people it serves."[155]

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[152] Cf. Egeberg, M. (2006): "The Institutional Architecture of the EU and the Transformation of European Politics," in: Egeberg, M. (ed.), *Multilevel Union Administration: The Transformation of Executive Politics in Europe,* Houndmills: Pelgrave Macmillan, pp. 17-30.

[153] In regard to illegal immigration and future EC penal sanctions against facilitators thereof, the Council has been "digging its own grave," so to speak, by explicitly authorizing the application of the Community method as of Jan. 1, 2005. See Council of the EU (2004c): "Council Decision of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty (2004/927/EC)," in: *Official Journal of the European Union* of Dec. 31, 2004, Vol. L 396, pp. 45-46 [arena-web].

[154] Cf. *inter alia* Thomassen, J. J. *et al.* (2004): "Political Competition in the European Parliament: Evidence from Roll Call and Survey Analyses," in: Marks, G. / M. R. Steenbergen (eds.), *European Integration and Political Conflict,* Cambridge University Press, pp. 141-64; and Hix, S. *et al.* (2006): "Dimensions of Politics in the European Parliament," in: *American Journal of Political Science,* Vol. 50, No. 2, pp. 494-511.

[155] European Commission (2001b): "European Governance: A White Paper," Brussels, July 25, 2001, Commission doc. *COM (2001) 428 final* [arena-web], p. 7. Merely 45,6% of EU citizens actively participated in the June 2004 elections to the

The shift towards the Community method also signals that the *Commission* has acquired the exclusive right of legislative initiative in the field of supranational criminal law. This will put an end to the promotion of national "pet projects" by individual Member States' governments. Unilateral initiatives like the French proposal on human smuggling analyzed in *section 3.1* above will thus be replaced with the "hobbyhorses" of a supranational political institution that has frequently associated "the general interest of the Community" (article 213 of the EC Treaty) with the competitiveness of major European corporations.[156]

Last but not least, the Court's judgment implies that individual *Member States* will no longer be able to block common European policies in the sphere of criminal law since the potentially isolated views of their political representatives in the Council may ultimately be ignored by the other members of the Council under qualified majority voting rules. (According to the currently valid Treaty of Nice, the threshold for adopting Community legislation backed by a "triple majority" in the Council is to gather at least 255 out of a total of 345 weighted votes, plus to obtain the explicit support of at least 14 of the 27 Member States representing no less than 62% of the EU population.) All other things being equal, the prospect of qualified majority voting on EC criminal law will further diminish the democratic oversight of national parliaments and increase the speed of reaching unanimous intergovernmental agreement in the JHA Council:

European Parliament in spite of compulsory voting in Belgium, Cyprus, Greece and Luxembourg – the lowest turnout ever in EU history.

[156] The Commission has already made use of its sole right of legislative initiative by suggesting more or less harmonized penal sanctions for the effective enforcement of intellectual property rights. See Commission (2006a): "Amended proposal" [cf. footnote 26]. Beyond shedding light on the Commission's economic policy objectives, this legislative proposal also illustrates how future supranational criminal law measures initiated by the European Commission may deliberately aim at the effective regional enforcement of global economic policy regimes like the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). For a follow-up of the Commission's proposal in the JHA Council's Working Party on Substantive Criminal Law, see Council of the EU (2006a): Council doc. *10329/06* [arena-web]. For further reading on the political preferences of top Commission officials "[who] appear to be either moderate market liberals or mild regulated capitalists," see Hooghe, L. (2001): *The European Commission and the Integration of Europe,* Cambridge University Press, p. 121.

> Qualified majority voting is not a magic solution. It will not overpass the difficulties: different cultures, different traditions, different ways of seeing the same problem. But, in fact, qualified majority voting will put an end to the comfortable position of relying on a veto for not negotiating a European solution. The veto is a blocking instrument. Qualified majority voting will be a leverage to achieve decisions by unanimity.[157]

The citizens of Europe will have to decide whether this overall development not only constitutes an unprecedented qualitative leap in the process of European political integration, but also "a step forward for democracy."[158]

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[157] Vitorino, A. (2004): *Oral Statement at the Intermediate Press Conference of the 2613th Council Meeting – Justice and Home Affairs,* Luxembourg, Oct. 25, 2004, audio record [arena-web], at 15:33 min.; transcription JPA. Member States' anticipation of accelerated decision-making in the field of EC criminal law may also account for the Council's politico-administrative reaction to the Court's judgment and subsequent Commission activities, namely to automatically forward every Commission proposal containing provisions on criminal law to COREPER II and the Article 36 Committee. See Council of the EU (2006b): Council doc. *6466/06* [arena-web], annex.

[158] European Commission (2005c): "Commission welcomes Court of Justice judgment recognising the exclusive competence of the Community to adopt criminal law measures to ensure the effectiveness of Community law," Brussels, Nov. 23, 2005, Press Release, Commission doc. *MEMO/05/437* [arena-web], p. 2. Alternatively, the citizens of Europe and their helpers might subscribe to the democratic reasoning of the Irish minister of justice, Michael McDowell: "If you are dealing with something like sexual crime then individual Member States may feel that they are the best judges of where the balance should be struck in relation to any particular issue, and their legislatures might feel very strongly that the European Parliament would not strike the same balance as they might do domestically. Whereas everybody is in favour of motherhood, apple pie and democratic involvement by the European Parliament in principle, in any individual case for a country that is in a minority, assuming QMV, to give to the European Parliament the democratic function and effectively to take it away from their own Parliament, might not be attractive." McDowell, M. (2006): "Oral Evidence, 15 June 2006," in: House of Lords, *The Criminal Law Competence of the European Community. Report with Evidence,* European Union Committee, 42nd report of session 2005-2006, HL paper 227, London, July 28, 2006, pp. 47-54, here: p. 52.

5. Interpretation and Conclusions

5.1 EU Criminal Law and the Logic of Consequentiality

From a Rationalist point of view, the Council-based negotiations leading towards the formal adoption of Framework Decision 2002/946/JHA on human smuggling may best be represented as a so-called Stag Hunt game.

Initially formulated by Jean-Jacques Rousseau in his *Discourse on Inequality* of 1754, the Stag Hunt game describes a situation in which a group of hunters is chasing a deer. The success of the stag hunt requires that every hunter

> must remain faithful to his [or her] post; but if a hare happened to pass within reach of one of them, we cannot doubt that he [or she] would have gone off in pursuit of it without scruple.[159]

Assuming that all actors involved in this weakest-link stag hunt are aware of the possibility of individual defection (which would allow the deer to escape), the game-theoretically interesting question is whether one should reasonably choose to chase a rabbit if the opportunity arises (which is, after all, a relatively safe way to catch at least something independent of the choices made by others), or whether one should take the risk of committing oneself solely to the joint stag hunt (which, if successful, has a higher payoff than the rabbit). While the former course of action might be motivated by "the fear of being a 'sucker,'" to borrow a phrase coined by Jon Elster, the latter alternative is very attractive for *homo oeconomicus* because it could yield the greatest individual benefit.[160]

One way of solving the collective action problem initially raised by Rousseau is to assure each hunter of the other hunters' cooperation: "[All] that is necessary is that each individual is assured that the others are doing the 'right' thing, and then it is in one's own interest also to do the 'right' thing."[161]

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[159] I have reproduced Rousseau's original description of the stag hunt from the important contribution to evolutionary game theory by Skyrms, B. (2004): *The Stag Hunt and the Evolution of Social Structure,* Cambridge University Press, p. 1.

[160] Elster, J. (1983): *Explaining Technical Change,* Cambridge University Press, p. 78.

[161] Sen, A. K. (1967): "Isolation, Assurance and the Social Rate of Discount," in: *The Quarterly Journal of Economics,* Vol. 81, No. 1, pp. 112-24, here: p. 122.

What is needed in order to get from the non-cooperative and Pareto-inferior hare hunting equilibrium to the cooperative and Pareto-superior stag hunting equilibrium, in other words, is a social contract between the hunters. Such an arrangement would not only confirm that all players perceive the situation at hand in a common manner. It would also support the building of mutual trust.[162] Without such a social contract, the likelihood of non-cooperative behavior motivated by a desire to "play it safe" is very high. As a matter of fact, the probability of defection among complete strangers increases exponentially as the number of players grows.[163]

With a view to the human smuggling case at hand, the Council of Ministers widely shared the Commission's view that "the common security system is only as strong as its weakest point" (*section 2.1* above). In light of the absence of internal border controls within the enlarged Schengen area and Member States' increasingly interdependent policies in the fields of immigration and asylum, the French government's initiative for the "further development" of the Schengen *acquis* with respect to the approximation of national criminal laws in the domain of human smuggling was welcomed by other Member States' governments as a potentially beneficial course of action (cf. *section 3.2*). After all, the prevention and, if necessary, prosecution and punishment of the unlawful activities of human smugglers seemingly required that all members of the Council could agree in principle on strengthening the "weakest links" in the emerging internal security architecture of EU-Europe.

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[162] The concept of mutual trust as employed in the context of the Stag Hunt or Assurance game must be understood in a "thin" manner that essentially builds on the notion of credible commitments: "Weak trust implies at least the expectation that information communicated about alter's own options and preferences will be truthful, rather than purposefully misleading, and that commitments explicitly entered will be honored as long as the circumstances under which they were entered do not change significantly…." Scharpf (1997): *Games Real Actors Play* [cf. footnote 28], p. 137. For further reading on the prominent status of the concept of credible commitments within a Rationalist perspective on regional integration, see Moravcsik (1998): *The Choice for Europe* [cf. footnote 15], p. 73.

[163] See Zürn, M. (1992): *Interessen und Institutionen in der internationalen Politik: Grundlegung und Anwendungen des situationsstrukturellen Ansatzes,* Opladen: Leske und Budrich, p. 182. Another way of phrasing this argument is that "a thousand-person stag hunt would be more difficult to achieve than a two-person stag hunt, because – assuming that everyone must cooperate for a successful outcome to the hunt – the problem of trust is multiplied." Skyrms (2004): *The Stag Hunt* [cf. footnote 159], p. 10.

It soon emerged, however, that certain Member States' governments were more interested than others in EU criminal law measures against human smugglers. The British government's promotion of harsh penal sanctions and its opposition towards a mandatory application of the humanitarian clause, for example, may best be understood as an instrumentally rational response to the UK's status as the number one asylum destination country in the European Union. In a similar vain, the Finnish government's demands for relatively modest penal sanctions and the exemption of smuggled refugees and their helpers from criminal prosecution may reasonably be interpreted as reflecting Finland's status as a more or less unaffected Member State. The observed variation with respect to the negotiating positions of individual Member States' governments fits well with the theoretical expectations laid out in *section 2.1* above.

The justice and interior ministers also weighed the prospective "added value" of the proposed EU measures against potentially irreversible sovereignty-related costs in the politically sensitive field of criminal law. The Council thus categorically rejected the Commission's and the European Parliament's requests for a "First Pillar" Directive instead of a "Third Pillar" Framework Decision. The evidently strong impulse of "[each] Member State [to] safeguard [its] national legislation" and the corresponding fear that it would "lose something that is dear to [it] nationally," to borrow the words of former Council President Klingvall (*section 3.3.5*), arguably mirrored the Pareto-inferior and yet individually rational impulse of the lone hare hunter in the Stag Hunt game.[164] As documented in *section 3.3.3* above, the Austrian government in particular was less than convinced of the need for an EU instrument in the field of human smuggling, not to mention the Commission's idea of a full-fledged harmonization of national criminal laws via Community Directive. The widespread fear of losing national control over substantive and procedural criminal law also motivated eleven Member States' governments to intervene in support of the Council during the subsequent legal proceedings before the Court (cf. *section 4.1* above). If anybody was willing to take the risk of trusting in the Commission's allegedly superior ability to "deliver results" in the fields of internal security and criminal justice, it was certainly not the Justice and Home Affairs Council of the EU.

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[164] In regard to the sovereignty-related costs of Pareto-superior international agreements in the fields of external security and defense, see Jervis, R. (1978): "Cooperation Under the Security Dilemma," in: *World Politics,* Vol. 30, No. 2, pp. 167-214.

In the end, the Member States' governments settled for a compromise solution that underlined the Council's willingness to take collective action, but also allowed for divergent interpretations of, and national derogations from, the EU-wide penalization of human smugglers (cf. *sections 3.3.3* and *3.3.5*). The ultimately adopted cross-pillar legislative package consisting of Council Directive 2002/90/EC and Council Framework Decision 2002/946/JHA, in other words, may best be understood as a more or less unsatisfactory agreement among government officials who had different and variably salient preferences regarding the outcome. The formal involvement of "reluctant strangers" in this Schengen-related context, i.e. the active participation of the non-EU countries Norway and Iceland, further added to the complexity of the Council's proceedings. Nevertheless, the Swedish Presidency managed to accommodate both the particularly eager and less motivated "hunters" in this Stag Hunt game.[165]

Now that we have offered a viable game-theoretical interpretation of the negotiation of the so-called facilitators package in the Council, we may focus our attention on a readily apparent misperception on the part of our "hunters" and the unintended consequences of acting upon the following erroneous belief: Human smugglers are not easy prey, as the Stag Hunt analogy suggests, but intelligent human beings capable of anticipating the "moves" of other "players." As a matter of fact, the strategies and methods of human smugglers are far more sophisticated than animals' behavioral traits

[165] I would like to reiterate at this point that the negotiated agreement at hand does not lend empirical support to the standard efficiency argument promoted *inter alia* by Jonas Tallberg. It holds true, of course, that the Council Presidency may "[prevent] negotiation failure from materializing." From a game-theoretically informed point of view, however, this type of consensus-seeking behavior on the part of the Presidency and other Council bodies like COREPER does not, in itself, justify one to "present EU bargaining as a naturally efficient process." Tallberg, J. (2004): "The Power of the Presidency: Brokerage, Efficiency and Distribution in EU Negotiations," in: *Journal of Common Market Studies,* Vol. 42, No. 5, pp. 999-1022, here: pp. 999 and 1020, respectively. Instead, intergovernmental negotiations among the members of the Council will often, assuming that the "structure of the situation" (Michael Zürn) at hand resembles a Stag Hunt game, "merely produce unsatisfactory compromises in which potential welfare gains are 'left on the table.'" Scharpf (1997): *Games Real Actors Play* [cf. footnote 28], p. 146.

like the so-called "'protean display,' a randomly changing direction that confuses the pursuer without depending upon the path of the latter."[166]

Humanly devised strategies and counterstrategies may co-evolve. It has been demonstrated, for example, that human smugglers make extensive use of cutting-edge information technology in order to avoid detection by the police. Drawing on semi-structured interviews with ninety individuals who were directly involved in smuggling Chinese nationals into the U.S., Sheldon Zhang and Ko-Lin Chin accordingly report that "our snakehead subjects mostly used mobile phones and pagers to communicate with clients and partners."[167] Likewise, the fieldwork carried out by Ahmet Içduygu has revealed that the typical human smuggler facilitating the irregular passage of third country nationals from Turkey to Greece may turn out to be "a shepherd who has two GSM cards and a mobile phone in his pocket."[168] The standard equipment of EU border control officials, in turn, now includes night vision devices and thermal image cameras. Beyond that, certain Member States' governments have shown a particularly strong interest in the mandatory collection, storage, and Community-wide exchange of the fingerprint data of apprehended irregular border-crossers in order to "fight criminal human smuggling even more effectively."[169]

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[166] Elster, J. (1984): *Ulysses and the Sirens: Studies in Rationality and Irrationality*, Cambridge University Press, p. 15. Most predators are apparently unable to adjust to this evolutionarily highly innovative counterstrategy of prey.

[167] Zhang, S. / K.-L. Chin (2002): "Enter the Dragon: Inside Chinese Human Smuggling Organizations," in: *Criminology,* Vol. 40, No. 4, pp. 737-67, here: p. 756.

[168] Içduygu, A. (2004): "Transborder Crime between Turkey and Greece: Human Smuggling and its Regional Consequences," in: *Southeast European and Black Sea Studies,* Vol. 4, No. 2, pp. 294-314, here: p. 301. According to Içduygu, this technique has allowed human smugglers "to escape the control of the security forces and to meet easily with other smugglers in the dark, even up in the mountains, as opposed to the old techniques of meeting each other by marking stones near the borders" (*ibid.*).

[169] Severin, K. (1997): "Illegale Einreise und internationale Schleuserkriminalität," in: *Aus Politik und Zeitgeschichte,* Vol. 46, pp. 11-19, here: p. 19 (translation JPA). Mr. Severin served as the Director of the Border Control Directorate Koblenz of the former German *Bundesgrenzschutz,* today's *Bundespolizei*. For further reading on the mandatory biometric enrollment of apprehended irregular border-crossers via Community Regulation and the low level of compliance with this supranational legal requirement in EU countries of transit, see Aus, J. P. (2006b): "Eurodac: A Solution Looking for a Problem?" in: *European Integration online Papers (EIoP),* Vol. 10, No. 6, http://eiop.or.at/eiop/texte/2006-006a.htm.

The main reason why we are probably going to witness further rounds of this human "cat and mouse" game is the existence of a thriving *market* for the illicit services of human smugglers. Human smuggling, in other words, can arguably be understood as a business.[170]

Not unlike "legitimate" service providers such as travel agents, human smugglers sell the international routes they operate at market prices.[171] If the demand for these kinds of services on the part of third country nationals increases, for example due to rising levels of unemployment in countries of origin in combination with irregular employment opportunities in countries of destination, human smugglers can generate high profits. The prospect of high profits, in turn, tends to draw more people into the human smuggling business.[172]

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[170] Cf. Salt, J. / J. Stein (1997): "Migration as a Business: The Case of Trafficking," in: *International Migration,* Vol. 35, No. 4, pp. 467-94; Schloenhardt, A. (1999): "Organized Crime and the Business of Migrant Trafficking," in: *Crime, Law and Social Change,* Vol. 32, pp. 203-33; Aronowitz, A. A. (2001): "Smuggling and Trafficking in Human Beings: The Phenomenon, the Markets that Drive it and the Organizations that Promote it," in: *European Journal on Criminal Policy and Research,* Vol. 9, pp. 163-95; and Bilger, V. *et al.* (2006): "Human Smuggling as a Transnational Service Industry: Evidence from Austria," in: *International Migration,* Vol. 44, No. 4, pp. 59-93. This strand of Rationalist literature builds on the seminal article by Becker, G. S. (1968): "Crime and Punishment: An Economic Approach," in: *Journal of Political Economy,* Vol. 76, No. 2, pp. 169-217.

[171] On the basis of Melanie Petros's review of over 500 secondary sources, one may reasonably assume that the market price for an intra-European human smuggling operation currently stands at approximately $ 2,700 per person. Available routes include Turkey–Greece and Estonia–Sweden. Prices go up for more challenging routes like China–UK and Afghanistan–Germany (ca. $ 9,400). The price for other popular routes like Morocco–Spain seems to lie somewhere in between the two figures mentioned above. See Petros, M. (2005): *The Costs of Human Smuggling and Trafficking,* Geneva: Global Commission on International Migration, Working Paper No. 31/Apr. 2005. In light of these relatively high prices, most third country nationals incur debts in order to finance their unlawful journey into the EU.

[172] Cf. Koslowski, R. (2000): "The Mobility Money Can Buy: Human Smuggling and Border Control in the European Union," in: Andreas, P. / T. Snyder (eds.), *The Wall Around the West: State Borders and Immigration Controls in North America and Europe*, Lanham: Rowman and Littlefield, pp. 203-18; and Koslowski, R. (2001): "Economic Globalization, Human Smuggling, and Global Governance," in: Kyle and Koslowski (eds.), *Global Human Smuggling* [cf. footnote 33], pp. 337-58.

It is important to note in this market-driven context that profit-oriented human smugglers do not necessarily choose to go out of business after having considered the possibility of imprisonment in case of detection. EU measures like Framework Decision 2002/946/JHA, if properly implemented by the Member States, obviously create higher risks for illicit service providers, but criminal entrepreneurs can factor in such risks by charging higher fees. Criminalizing intermediary agents, in short, does not address the basic "push" and "pull" factors that drive irregular migration and create favorable market conditions for human smugglers, including the systematic violation of human rights in countries of origin of refugees and asylum seekers, and the demand for cheap, flexible and unprotected migrant labor on the part of EU employers within and beyond "communitized" sectors like agriculture.[173]

As far as the JHA Council's attempt to solve the problem of human smuggling by means of criminal sanctions is concerned, one may conclude that the ministers were acting in a *parametrically* rational rather than strategically rational manner. The former distinction has been made by Jon Elster and is reproduced here for heuristic purposes:

> The parametrically rational actor treats his [or her] environment as a constant, whereas the strategically rational actor takes account of the fact that the environment is made up of other actors, and that he [or she] is part of their environment, and that they know this, etc. … In a community of parametrically rational actors, each will believe that he [or she] is the only one whose behaviour is variable, and that all the others are parameters for his [or her] decision problem. Acting upon these

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[173] Cf. Gosh, B. (1998): *Huddled Masses and Uncertain Shores: Insights into Irregular Migration,* The Hague: Martinus Nijhoff; Entorf, H. (2002): "Rational Migration Policy Should Tolerate Non-zero Illegal Migration Flows: Lessons from Modelling the Market for Illegal Migration," in: *International Migration,* Vol. 40, No. 1, pp. 27-41; and Boswell, C. / T. Straubhaar (2004): "The Illegal Employment of Foreign Workers: An Overview," in: *Intereconomics – Review of European Economic Policy,* Vol. 39, No. 1, pp. 4-7. JHA Commissioner Franco Frattini has recently described the situation of illegally employed third country nationals in Italy as follows: "Even in my own country, in agriculture, in public work, in small- and medium-sized enterprises it is quite easy to find a job illegally. Because they cannot be recruited formally they are exploited. Because they are illegal they don't have rights to social service, to education, to learn languages." *European Voice* of June 22, 2006: "EU to crack down on black labour."

> inconsistent beliefs, the actors will generate unintended and perverse consequences ….[174]

The JHA Council members' failure to take into account the interaction effects mentioned above while negotiating the so-called facilitators package suggests that the concepts of parametric and "territorially bounded" rationality should figure more prominently among students of decision-making processes in the field of supranational criminal law.

Last but not least, this study has demonstrated the European Commission's willingness and resourceful ability to pursue a "one step backwards, two steps forwards" strategy vis-à-vis the Council of Ministers which, if successful, would allow the EC to acquire competencies in the field of criminal law.

The Commission's strategy consisted of five steps. Firstly, the JHA Council had to maneuver itself into the legally ambivalent position of authorizing both an EC Directive defining the relevant criminal offence and an EU Framework Decision laying down minimum penal sanctions for the Union-wide punishment thereof. Secondly, the Commission had to enter formal statements into the Council's minutes that could be used in an eventual court case (cf. *sections 3.3.4* and *3.6* above). Thirdly, the Commission's Legal Service had to wait for a particularly suitable case before suing the Council. Once such a likely precedent had been identified, the Commission could, fourthly, initiate legal proceedings before the ECJ (cf. *section 4.1*). If the Court would indeed annul the relevant EU Framework Decision and follow the Commission's functional line of reasoning in its entirety, then the "detour" via the ECJ would allow the Commission to gain, fifthly, the exclusive right of legislative initiative *inter alia* in the field of human

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[174] Elster (1984): *Ulysses and the Sirens* [cf. footnote 166], p. 18. Yet another illustration of the unintended consequences of parametrically rational Community law is the so-called Carrier Sanctions Directive. This Schengen-related EC law *inter alia* calls for financial penalties of a minimum amount of at least € 3,000 per person (and a maximum amount of not less than € 500,000 for each infringement) against private-sector airlines, ferries, coaches and other carriers transporting undocumented third country nationals into the EU. Again, the "perverse consequence" of this Community Directive is, all other things being equal, an increased demand for the illicit services of human smugglers. See Council of the EU (2001v): "Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985," in: *Official Journal of the European Communities* of July 10, 2001, Vol. L 187, pp. 45-46 [arena-web], art. 4.

smuggling (cf. *section 4.2*), and the right to initiate infringement procedures against those Member States not willing to comply with future EC Directives for the harmonization of national criminal laws.

The spectacular success of the Commission's strategy in 2005 that sent shockwaves through national ministries of justice was made possible by a strongly teleological interpretation of the Treaties by the ECJ. As documented in *section 4.1* above, the Court essentially ruled that if the EC has acquired the competence to adopt Community Regulations and Directives in a given policy sector, then the EC should also have the competence to impose criminal law sanctions for the effective enforcement of these legal acts. The ECJ's case-law arguably provides the "missing link" that neo-Functionalist regional integration scholars have been trying to identify for decades.[175] As it turns out, processes of "functional spill-over" in the emerging Area of Freedom, Security and Justice may not be driven by the strategic calculations of economic interest groups and politicians (cf. *section 2.1*), but rather by the functional legal reasoning of supranational judges who perceive of themselves, to borrow a famous phrase from Karl Marx's *Capital*, as "the midwives of an old society pregnant with a new one." For the Rationalist observer, it should come as no surprise that the teleological method of interpretation employed by these "midwives of efficient history" not only tends to extend the competencies of both the Commission and the European Parliament, but also those of the ECJ.

5.2 EU Criminal Law and the Logic of Appropriateness

From an Institutionalist point of view, the so-called facilitators package agreed upon by the JHA Council may best be understood as an emphatic affirmation of institutionalized structures of meaning.

In order to account for the criminalization of human smugglers by the EU, we arguably need to recall Emile Durkheim's dictum that "punishment consists of a passionate reaction."[176] As documented in *section 3.1* above, the

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[175] Cf. Burley, A.-M. / W. Mattli (1993): "Europe Before the Court: A Political Theory of Legal Integration," in: *International Organization,* Vol. 47, No. 1, pp. 41-76; and McCown, M. (2003): "The European Parliament Before the Bench: ECJ Precedent and EP Litigation Strategies," in: *Journal of European Public Policy,* Vol. 10, No. 6, pp. 974-95.

[176] Durkheim (1933): *Division of Labor* [cf. footnote 51], p. 85.

"deep shock" that was publicly expressed by the European Council in the immediate aftermath of the tragic death of the fifty-eight migrants in Dover was followed up by high-level political demands for "severe sanctions" against the perpetrators of this "despicable crime." Not unlike ordinary EU citizens, the heads of state or government were evidently deeply irritated by the Dover incident of June 2000. The European Council's subsequent demand for the criminalization of human smugglers fits well with Durkheim's sociology of punishment:

> [We] must not say that an action shocks the common conscience because it is criminal, but rather that it is criminal because it shocks the common conscience. We do not reprove it because it is a crime, but it is a crime because we reprove it.[177]

Using the Dover tragedy as an opportunity to display its strength and political leadership, the incoming French Presidency quickly drew up a legislative proposal that was supposed to "demonstrate a common political will": the alleged "exploitation of human beings" by people smugglers was a felony that would be severely punished by the French Republic and/or the EU. Sending

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[177] Durkheim (1933): *Division of Labor* [cf. footnote 51], pp. 80-81. One may add that Weber concurred with Durkheim on this point: "The modern view of criminal justice, broadly, is that public concern with morality or expediency decrees expiation for the violation of a norm…." Weber (1978): *Economy and Society* [cf. footnote 2], p. 647. The sociologically informed Institutionalism of both Durkheim and Weber with respect to the self-referential social construction of crime has its roots in the study of religious communities. In order to understand the remarkably similar logic of criminal justice over space and time, it is arguably helpful to recall the following thought experiment spelled out by Durkheim about one hundred years ago: "Imagine a community of saints in an exemplary and perfect monastery. In it crime as such will be unknown, but faults that appear venial to the ordinary person will arouse the same scandal as does normal crime in ordinary consciences. If therefore that community has the power to judge and punish, it will term such acts criminal and deal with them as such." Durkheim, E. [1907] (1982): *The Rules of Sociological Method,* London: Macmillan, p. 100. The reader who finds this hypothetical scenario less than convincing might appreciate Weber's historical account of blasphemy as a religious crime: "The whole group was endangered when a magical norm, e.g., a taboo, was infringed and, in consequence, the wrath of magical forces, spirits or deities, threatened to descend with evil consequences not merely upon the blasphemer (or criminal) himself but upon the whole community which suffered him to exist within their midst. Stimulated by magi or priests, the members of the community would outlaw the culprit or lynch him, as for instance through stoning among the Jews." Weber (1978): *Economy and Society* [cf. footnote 2], p. 650.

out this political message was arguably more important for the French government than being able to present the members of the Working Party on Substantive Criminal Law with a precise legal definition of human smuggling as opposed to trafficking in human beings. The French Presidency's symbolic posture, in short, provides an illustration of March and Olsen's claim that

> part of the drama of decision making reinforces the idea that policy makers and their policies affect outcomes in the political system. Such a belief is, in fact, difficult to confirm…. But the belief is important to a political system. It allocates responsibility, thus simultaneously reaffirming human control over history and absolving most individuals of responsibility for it.[178]

Likewise, the JHA Council's publicly expressed "desire vigorously to combat the facilitation of unauthorized immigration" (*section 3.2*) and the European Council's subsequent political instruction to attach "top priority" to the formal adoption of the facilitators package (*section 3.5*) were not only designed to demonstrate a firm hand in the fields of law enforcement and criminal justice. These statements also reflected a deeply rooted collective belief in the legitimate exercise of *territorial sovereignty*. The now universally accepted claim to the legitimate exercise of territorial sovereignty can be traced back to the Treaty of Westphalia of 1648.[179] For the members of the

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[178] March and Olsen (1989): *Rediscovering Institutions* [cf. footnote 55], p. 50. In a similar vain, David Garland described the semiotics of criminal justice as follows: "[An] act of punishment is [a] sign that the authorities are in control, that crime is an aberration, and that the conventions that govern social life retain their force and vitality – which is why policies of crime control and punishment can so often become metaphors for political strength and take on a political significance out of proportion to their penological effect." Garland, D. (1993): "Sociological Perspectives on Punishment," in: Duff, A. (ed.), *Punishment,* Aldershot: Dartmouth, pp. 453-503, here: p. 465. For further reading on the "sign-of-authority function" of criminal law, see Garland, D. (1990): *Punishment and Modern Society: A Study in Social Theory,* Oxford University Press.

[179] This accord put an end to one of the most violent episodes of early modern European history, namely the Thirty Years' War (1618-1648). The establishment and mutual recognition of territorial sovereignty was laid out in article 64 of the treaty. This legal provision reads as follows: "And to prevent for the future any Differences arising in the Politick State, all and every one of the Electors, Princes and States of the Roman Empire, are so establish'd and confirm'd in their antient, Prerogatives, Libertys, Privileges, free exercise of Territorial Right, as well Ecclesiastick, as Politick Lordships, Regales, by virtue of this present Transaction: that they never can or ought to be molested therein by any whomsoever upon any manner of pretence."

Schengen group, the emphatic affirmation of this remarkably robust institution implied a duty to impose "appropriate penalties on any person [who] assists or tries to assist an alien to enter or reside within the territory of one of the contracting parties in breach of that contracting party's laws on the entry and residence of aliens" (article 27 of the Schengen Implementation Agreement of 1990; cf. *section 3.3.2* above). The "further development" of this provision following the incorporation of the intergovernmental Schengen regime into the institutional framework of the EU, i.e. the introduction of more or less harmonized criminal law sanctions against human smugglers throughout the Union, constituted a deliberate attempt to preserve the territorial integrity of the Member States in spite of the elimination of internal border controls within the Schengen area.

In order to understand the *territorial politics* of Schengen-related decision-making processes in the JHA Council, one should recall that the geographical scope of the so-called Area of Freedom does not always coincide with the jurisdictions of the EU Member States. This has not only led to complex legal arrangements like the extra-territorial application of EU criminal law in third countries like Norway. It has also allowed both Ireland and the UK to participate in Schengen-related EU criminal law measures like Framework Decision 2002/946/JHA in spite of upholding their border controls vis-à-vis

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Bueno de Mesquita, B. (2000): "Popes, Kings, and Endogenous Institutions: The Concordat of Worms and the Origins of Sovereignty," in: *International Studies Review,* Vol. 2, No. 2, pp. 93-118, here: p. 94. The Treaty of Westphalia signaled a major departure from the complex and overlapping jurisdictions of medieval feudal Europe. Alexander B. Murphy described the organizing principles of this earlier period in the following manner: "The frame of reference for most was the local commune or fief [which the tradable vassal or serf was not allowed to leave unless granted explicit permission], but the ruling elite thought in terms of (often non-contiguous) royal and/or ecclesiastical territories with fluid boundaries that could easily be changed through inheritance, warfare, or partition." Murphy, A. B. (1996): "The Sovereign State System as Political-territorial Ideal: Historical and Contemporary Considerations," in: Biersteker, T. J. / C. Weber (eds.), *State Sovereignty as Social Construct,* Cambridge University Press, pp. 81-120, here: p. 84. A distant echo of this past era could still be heard in the 20th century. The German Emperor Wilhelm II, for example, not only invented the idea of a *Nationalkaisertum* and subsequently steered the Imperialist German *Reich* into the First World War. As a member of the House of Hohenzollern family dynasty and son of Her Royal Highness Princess Victoria, the oldest daughter of Queen Victoria, Emperor Wilhelm II also maintained a love-hate relationship with the United Kingdom. See Mommsen, W. J. (2002): *War der Kaiser an allem schuld? Wilhelm II. und die preußisch-deutschen Machteliten,* München: Ullstein.

continental Europe. In light of the remarkable absence of "tear down this wall" speeches by leading British and Irish politicians, it is at least debatable whether the tragic deaths of the fifty-eight migrants in Dover can solely be attributed to the unlawful activities of human smugglers, as emphatically stated by the European Council in June 2000 and formally acknowledged by an English court in April 2001. If the UK would have eliminated its border controls vis-à-vis the Schengen countries in accordance with article 14 of the EC Treaty, the migrants would presumably not have traveled from the Netherlands to England in the back of a sealed truck in the first place.[180]

The negotiation of the facilitators package in the Council has also shown that EU measures in the field of criminal law may not necessarily be compatible with the rules and norms of international human rights regimes. The institutional collision between the UNHCR and the JHA Council over the potential criminalization of asylum seekers and their helpers documented in *sections 3.2* and *3.3.2* above is a case in point. The substantive outcome of this clash, i.e. the refusal of the Council of the EU to incorporate a

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[180] Unfortunately, however, history cannot be reversed. On April 5, 2001, the Maidstone Crown Court in England thus sentenced the truck driver, Mr. Perry Wacker, to fourteen years of imprisonment. Mr. Wacker, an EU citizen of Dutch nationality, was convicted of conspiracy to facilitate the unauthorized entry of third country nationals into the UK (eight-year custodial sentence). He was also convicted of fifty-eight offences of manslaughter (six-year custodial sentence). While the English court apparently judged the facilitation of illegal entry into the UK to be a particularly severe criminal offence, it also acknowledged that Mr. Wacker did not drive from Rotterdam to Zeebrugge before boarding a ferry to Dover with the intention of murdering the migrants. His being found guilty of manslaughter derived from the fact that Mr. Wacker had at some point of this fateful journey turned off the truck's ventilation system in order to avoid detection by British border control officials.

While passing the fourteen-year custodial sentence, the English judge, Mr. Alan Moses, reportedly told the felon that "people like you create a risk of greater prejudice against those people who quite legitimately come to this country seeking refuge as asylum seekers or whatever." *BBC News* of April 5, 2001: "Driver jailed over immigrant deaths." Judge Moses was apparently referring to the widespread hostility of the British public and mass media towards refugees and asylum seekers in general and to the physical attacks by local youths in Dover against Kosovo Albanians and Iraqi Kurds in particular. Cf. Hansen, R. / D. King (2000): "Illiberalism and the New Politics of Asylum: Liberalism's Dark Side," in: *The Political Quarterly,* Vol. 71, No. 4, pp. 396-403; and Information Centre about Asylum and Refugees in the UK (2004): *Attitudes towards Asylum Seekers, Refugees and Other Immigrants,* London: King's College.

mandatory humanitarian clause into the legislative instruments at hand, attests to the relative autonomy of EU institutions vis-à-vis UN bodies. This observation casts doubts upon the empirical validity of Saskia Sassen's claim that the process of globalization not only leads to the institutionalization of "the global rights of capital," but also to the strengthening of "the human rights of all individuals regardless of nationality."[181] As far as the human right "to seek and to enjoy in other countries asylum from persecution" as laid out in article 14 of the Universal Declaration of Human Rights and further specified by the Geneva Convention relating to the Status of Refugees is concerned, processes of regional political integration may very well undermine universal principles of international refugee law.[182]

The human smuggling case also sheds light on the *institution of consensus* in the Council. I have provided a detailed account of the origins and effects of this informal set of supranational rules and procedures elsewhere.[183] Against this background, I would merely like to recall that the Swedish Presidency worked very hard to reach a compromise solution. In spite of the UNHCR's interventions, for example, the Swedish Presidency maintained the "exploitation" frame it had inherited from its French predecessor, thus both

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[181] Sassen, S. (2000): "Regulating Immigration in a Global Age: A New Policy Landscape," in: *The Annals of the American Academy of Political and Social Science,* No. 570 (July 2000), pp. 65-77, here: p. 73.

[182] As a result of EU legislation on the approximation of national criminal laws in the domain of human smuggling, the Member States and Schengen-affiliated third countries find themselves in a legal limbo between EU "laws which criminalise border crossing of the kind which fulfils the definition of smuggling or trafficking, and the Member States' obligations under Article 31 (1) Geneva Convention not to penalise refugees for the manner in which they entered the state." Guild, E. (2006): "Conclusions: The Variable Political and Legal Geography of People Smuggling and Trafficking in Europe," in: Guild and Minderhoud (eds.), *Immigration and Criminal Law* [cf. footnote 72], pp. 407-14, here: p. 410. The treaty provision cited by Elspeth Guild above reads as follows: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who … enter or are present in their territory without authorization…." On the origins of the institution of asylum and the establishment of the UNHCR in the context of unprecedented cross-border refugee movements triggered by World Wars I and II, see Carlier, J.-Y. (1995): "Völkerrechtliche Grundlagen des Flüchtlingsrechts," in: Basso-Sekretariat Berlin (ed.), *Festung Europa auf der Anklagebank,* Münster: Westfälisches Dampfboot, pp. 19-31; and Loescher, G. (2001): *The UNHCR and World Politics: A Perilous Path,* Oxford University Press.

[183] See Aus (2007a): "The Mechanisms of Consensus" [cf. footnote 35].

ensuring the continuity of the Council's deliberations and rendering unlikely a mandatory application of the so-called humanitarian clause (cf. *sections 3.3.2* and *3.3.5* above). The Swedish Presidency also introduced an "opt out" clause allowing for derogations from an otherwise uniformly high level of penal sanctions in order to accommodate the views of all delegations. Taken together, these efforts enabled the informal JHA Counselors group and COREPER II to reach an inter-administrative agreement that was formally endorsed by the Council.

We have also learned that *national parliaments* can considerably delay the formal adoption of Third Pillar legislation. The decision of the British House of Commons not to allow the UK government to lift its parliamentary scrutiny reservation in the Council for nearly one and a half years is a case in point (cf. *section 3.4* above). This course of national parliamentary behavior was not motivated by instrumentally rational considerations. Instead, the House of Commons, i.e. the institutional embodiment of the principle of parliamentary sovereignty at least since the Glorious Revolution of 1688, made a value-rational decision: It would passionately defend the political principle that Third Pillar measures must live up to appropriate national parliamentary scrutiny, and that gross executive violations of this rule can not be tolerated.[184] This principled stance not only suggests that national parliaments are particularly robust political institutions epitomizing the "inefficiency of history."[185] It also sheds light on the mindset of national parliamentarians like Fabio Evangelisiti, an Italian MP who once critically noted that "Europe's migration and security policies have been worked out

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[184] The idea of executive accountability vis-à-vis citizens and their democratically elected representatives can be traced back to ancient Greece. Plato, for example, strongly advised his fellow Athenians to "take every possible precaution to prevent our Auxiliaries [from] behaving more like savage tyrants than partners and friends." Plato [ca. 375 B.C.] (2003): *The Republic,* London: Penguin, p. 118. This ancient idea was rediscovered by modern authors like James Madison, an American politician and later U.S. President who perceived of "the accumulation of all powers, legislative, executive, and judiciary, in the same hands [as] the very definition of tyranny." Madison, J. [1788] (1961): "The Federalist No. 47," in: Hamilton, A. *et al., The Federalist Papers,* New York: Mentor, pp. 300-13, here: p. 301. For an excellent review of the history of this political idea, see Goldsworthy, J. (1999): *The Sovereignty of Parliament: History and Philosophy,* Oxford University Press.

[185] Cf. *inter alia* Benz, A. (2004): "Path-Dependent Institutions and Strategic Veto Players: National Parliaments in the European Union," in: *West European Politics,* Vol. 27, No. 5, pp. 875-900.

without any kind of effective democratic oversight."[186] As one may infer from such statements and the European Parliament's largely symbolic *en bloc* rejection of the facilitators package documented in *section 3.3.1* above, parliamentarians across Europe continually reinforce institutionalized structures of meaning that associate the concept of freedom with representative democracy. For better or worse, such an understanding of freedom may not necessarily be conducive to the efficient coordination of national crime control policies in the EU.[187]

Last but not least, one may reasonably conclude that the ECJ did what it was supposed to do in passing its judgment in the *Commission vs. Council* case, namely to "ensure that in the interpretation and application of this Treaty the law is observed" (article 220 of the EC Treaty). Instead of offering a literal interpretation of the Treaties, the members of the Court took into account that "the jurisprudence of the Court of Justice is itself a source of law," as former Judge Edward once accurately noted.[188] The judicial establishment of a limited EC criminal law competence, then, must be read against the backdrop of landmark decisions like *Van Gend en Loos* and *Costa vs. ENEL*. The Court's legal adjudication in *Commission vs. Council*, in short, added yet another chapter to a judge-made "chain novel" teasing out the true nature of the Community legal order:

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[186] Evangelisiti, F. (1999): "The Role of National Parliaments in the Creation of the Area of Freedom, Security and Justice: An Italian Point of View," in: O'Keefe, D. / P. Twomey (eds.), *Legal Issues of the Amsterdam Treaty*, Oxford and Portland: Hart, pp. 323-28, here: p. 325.

[187] The apparent existence of institutional cleavages between national executives and legislatures, on the one hand, and between the Council of the EU and the European Parliament, on the other, fits well with Karen Orren and Stephen Skowronek's description of polities "in which positive lawmaking, introduced in one [institutional] sphere, is likely of its own accord to expose and undermine contrary principles of governance operating elsewhere." Orren and Skowronek (2004): *The Search* [cf. footnote 57], p. 182. Again, such institutional disputes over policy and procedure may lead to changes in the balance of power between EU institutions if the institutional design of the supranational polity is unsettled and highly contested (cf. *section 2.2* above).

[188] Edward, D. A. (2003): "Richterrecht in Community Law," in: Schulze, R. / U. Seif (eds.), *Richterrecht und Rechtsfortbildung in der Europäischen Rechtsgemeinschaft,* Tübingen: Mohr Siebeck, pp. 75-80, here: p. 75. Justice Edward served as a member of the ECJ from 1992-2004.

> [An ECJ judge] adds to the tradition he [or she] interprets; future judges confront a new tradition that includes what he [or she] has done. … In this [chain novel] a group of novelists writes a novel *seriatim*; each novelist in the chain interprets the chapters he [or she] has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on. Each has the job of writing his [or her] chapter so as to make the novel being constructed the best it can be …. [189]

Notwithstanding its readily apparent political connotations, the Court's judgment in case C-176/03 provided a viable and yet path-dependent solution to an intricate legal problem, namely to the possible infringement of EC rules by the "Third Pillar" of the EU in general and legislative measures like Council Framework Decision 2003/80/JHA in particular. It was the duty of the Court of Justice of the European Communities to resolve the thorny legal issue brought before it. The ECJ's verdict, in turn, may best be understood as a deliberate attempt to ensure the coherence, consistency and effective application of Community rules.[190]

The arguably most controversial feature of the transition from a national to a supranational definition of crime and punishment in contemporary Europe, however, lies in the Court's teleological legal reasoning. The ECJ's unconditional devotion to the *telos* of environmental protection has not only been received as an expression of value-rational judicial activism (cf. the legal commentary cited in *section 4.1* above). It also suggests that the European Community's newly gained criminal law competence is essentially the by-product of the Court's pursuit of a highly contingent policy agenda.

5.3 The Politics of Criminal Law Approximation in the EU Revisited

If the research program of "Rational Choice Institutionalism" were not built on an oxymoron, there would be no need to delineate the domain of

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[189] Dworkin, R. (1986): *Law's Empire,* Harvard University Press, p. 229.

[190] Again, there is nothing unusual about such an attempt from an Institutionalist point of view. Cf. Bengoetxea, J. *et al.* (2001): "Integration and Integrity in the Legal Reasoning of the European Court of Justice," in: de Búrca, G. / J. H. Weiler (eds.), *The European Court of Justice,* Oxford University Press, pp. 43-86; and Soriano, L. M. (2003): "A Modest Notion of Coherence in Legal Reasoning: A Model for the European Court of Justice," in: *Ratio Juris,* Vol. 16, No. 3, pp. 296-323.

application of logics of consequentiality and appropriateness, respectively, in any given decision-making process within or above the nation-state. In light of the distinctiveness of the two logics and the practical difficulty of "[fitting] different motivations and logics of action into a single framework," however, one may reasonably proceed by "[examining] the conditions under which each logic is invoked."[191]

The empirical evidence presented above suggests that decision-making processes in the field of EU criminal law may be characterized by a *sequential ordering* of logics of appropriateness and consequentiality if the relevant political actors and legislative items display certain properties.

With a view to the attributes of political actors adhering to a logic of appropriateness, it is important to recall that the drive towards the criminalization and punishment of human smugglers in the EU was instigated by the European Council in general, and its passionate and *ad hoc* reaction to the "Dover tragedy" of June 2000 in particular. In the eyes of the heads of state or government, the Dover incident constituted a "shocking" and "despicable" violation of institutionalized rules and structures of meaning. The unlawful, potentially life-threatening and thus totally inappropriate activities of human smugglers seemed to call for "severe sanctions" on the part of the EU and its Member States. The French Presidency's hastily drawn up proposal for both an EC Directive and an EU Framework Decision was accordingly aimed at reaffirming the JHA Council's collective will to combat the alleged exploitation of human beings by people smugglers, and the Schengen group's political determination to exercise effective territorial sovereignty in spite of the elimination of internal border controls within the so-called Area of Freedom. This more or less emphatic invocation of EU punitive power by leading European politicians replicated a similar pattern of political agenda setting in the field of child abuse.

Once the French Presidency's draft facilitators package had reached the JHA Council's Working Party on Substantive Criminal Law and other preparatory

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[191] March, J. G. / J. P. Olsen (2006b): "The Logic of Appropriateness," in: Moran, M. *et al.* (eds.), *The Oxford Handbook of Public Policy,* Oxford University Press, pp. 689-708, here: p. 702. Cf. *inter alia* Aus, J. P. (2007b): "Conjunctural Causation in Comparative Case-Oriented Research," forthcoming in: *Quality & Quantity – International Journal of Methodology*; and Zürn, M. / J. T. Checkel (2005): "Getting Socialized to Build Bridges: Constructivism and Rationalism, Europe and the Nation-State," in: *International Organization,* Vol. 59, pp. 1045-79.

intergovernmental bodies, the emphasis shifted towards a logic of consequentiality. The Member States' governments found themselves caught up in a weakest-link Stag Hunt game whose potentially Patero-superior solution had to be weighed against variable national interests and sovereignty-related costs. The ensuing inter-administrative exchanges in Brussels, however, overshadowed the fact that the Member States' officials were acting in a parametrically rational manner with respect to the substantive problem at hand.

At the end of the Swedish Presidency's tenure, the intergovernmental negotiations within the Council's preparatory bodies were concluded by a value-rational adherence to Council-specific informal rules. The successful efforts by the JHA Counselors group and COREPER II to reach a timely compromise acceptable to all delegations paved the way for a political agreement on ministerial level. This course of events lends support to previous studies on the "consensus reflex" of the Council of Ministers and the insulation of the Council's working parties from domestic politics as an important scope condition thereof.[192] If there is something to be added to this literature, then it is the European Council's ability to accelerate the speed of the JHA Council's legislative proceedings, and the capacity of national parliaments to delay the formal adoption of EU criminal law in case of a flagrant violation of the institutionalized rule of appropriate parliamentary scrutiny.

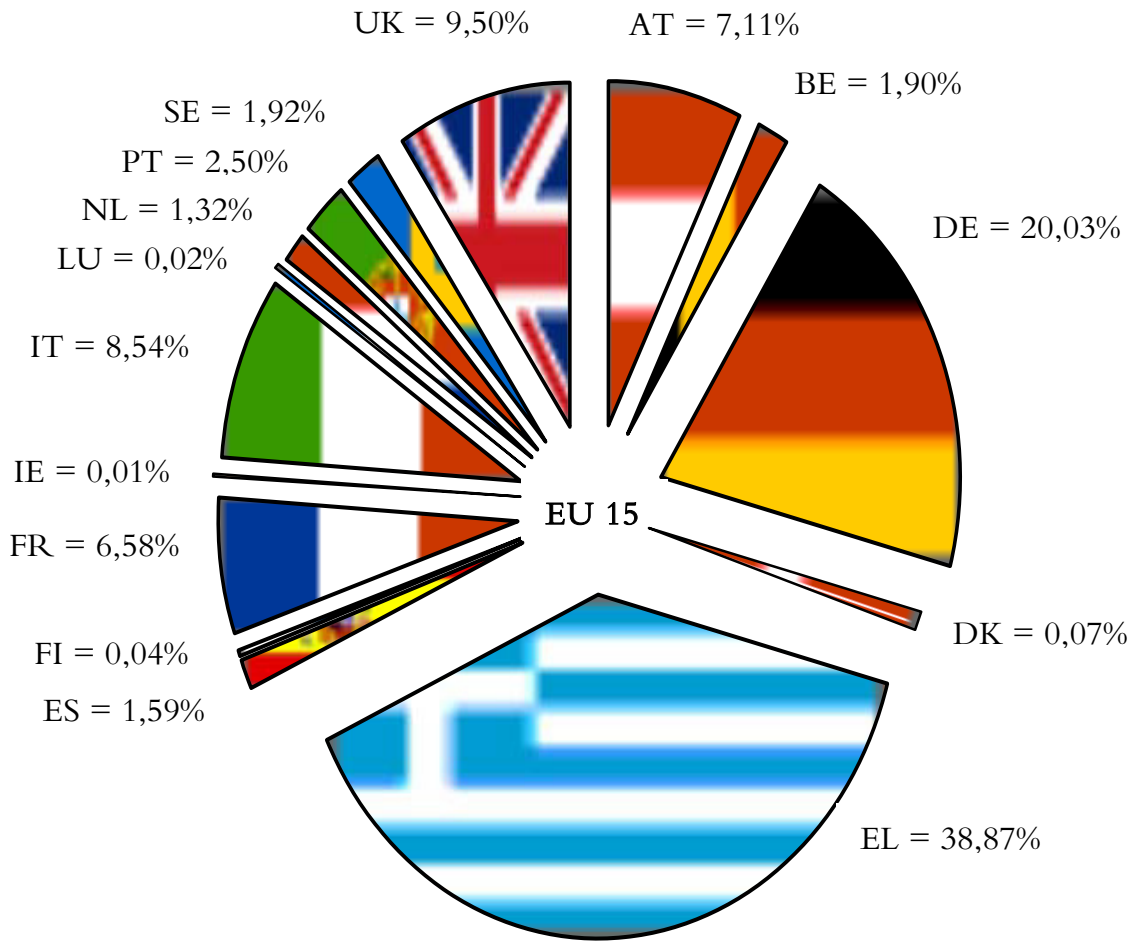
In light of the fact that the European Commission is going to present a legislative proposal for a Community Directive on harmonized criminal law sanctions against human smugglers in the course of 2007, EU citizens and students of European political integration alike will now have the chance to observe for themselves whether the sequential ordering of logics of appropriateness and consequentiality documented above will empirically hold under slightly modified institutional conditions.

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[192] Cf. Lewis, J. (2005): "The Janus Face of Brussels: Socialization and Everyday Decision Making in the European Union," in: *International Organization,* Vol. 59, pp. 937-71; Heisenberg, D. (2005): "The Institution of 'Consensus' in the European Union: Formal Versus Informal Decision-making in the Council," in: *European Journal of Political Research,* Vol. 44, pp. 65-90; Hayes-Renshaw, F. *et al.* (2006): "When and Why the EU Council of Ministers Votes Explicitly," in: *Journal of Common Market Studies,* Vol. 44, No. 1, pp. 161-94; and Aus (2007a): "The Mechanisms of Consensus" [cf. footnote 35].

Annex 1:

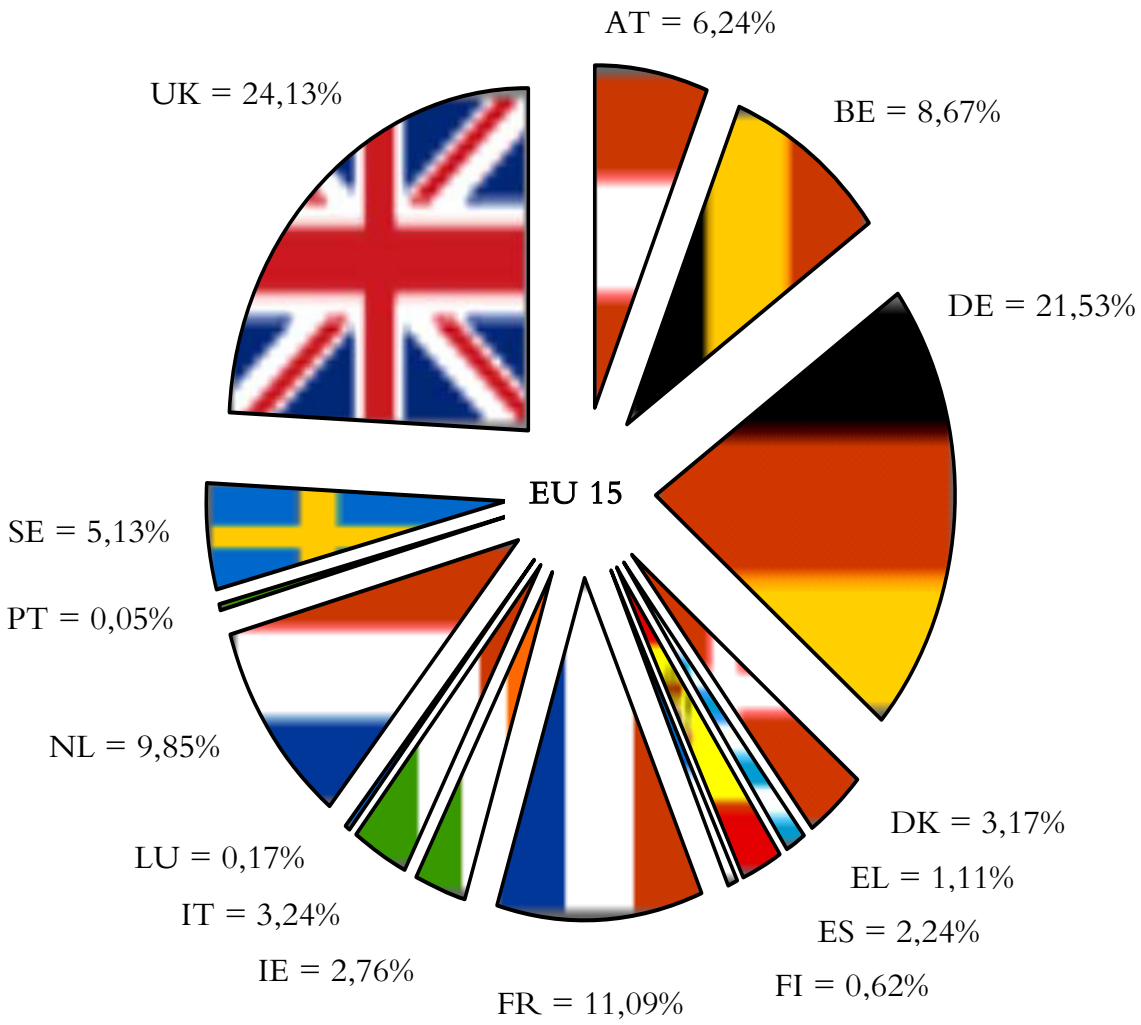
Distribution of Apprehended "Illegal Aliens" Between the Member States (EU 15), 2000-2001 (*N* = 1,232,429) [193]



[193] Groupe d'étude de Démographie Appliquée / Berlin Institute for Comparative Social Research (2006): *Migration and Asylum in Europe 2003,* Louvain-la-Neuve and Berlin [arena-web], p. 101. These data have been made available to the Council Secretariat by national governments in the framework of the former CIREFI working group of the JHA Council. (CIREFI is the French acronym for the Centre for Information, Discussion and Exchange on the Crossing of Borders and Immigration.) The members of CIREFI defined the category of "apprehended illegal aliens" as "persons other than those entitled under Community law who are officially found to be on the territory of a Member State without possessing border documents, were refused entry or are subject to an entry or residence prohibition, or have become liable to expulsion" (p. 93).

Annex 2:

Distribution of Asylum Applicants Between the Member States (EU 15), 2000-2001 (*N* = 775,990) [194]



[194] United Nations High Commissioner for Refugees (2002): *Number of Asylum Applications Submitted in 30 Industrialized Countries, 1992-2001,* Geneva: UNHCR, Population Data Unit [arena-web].

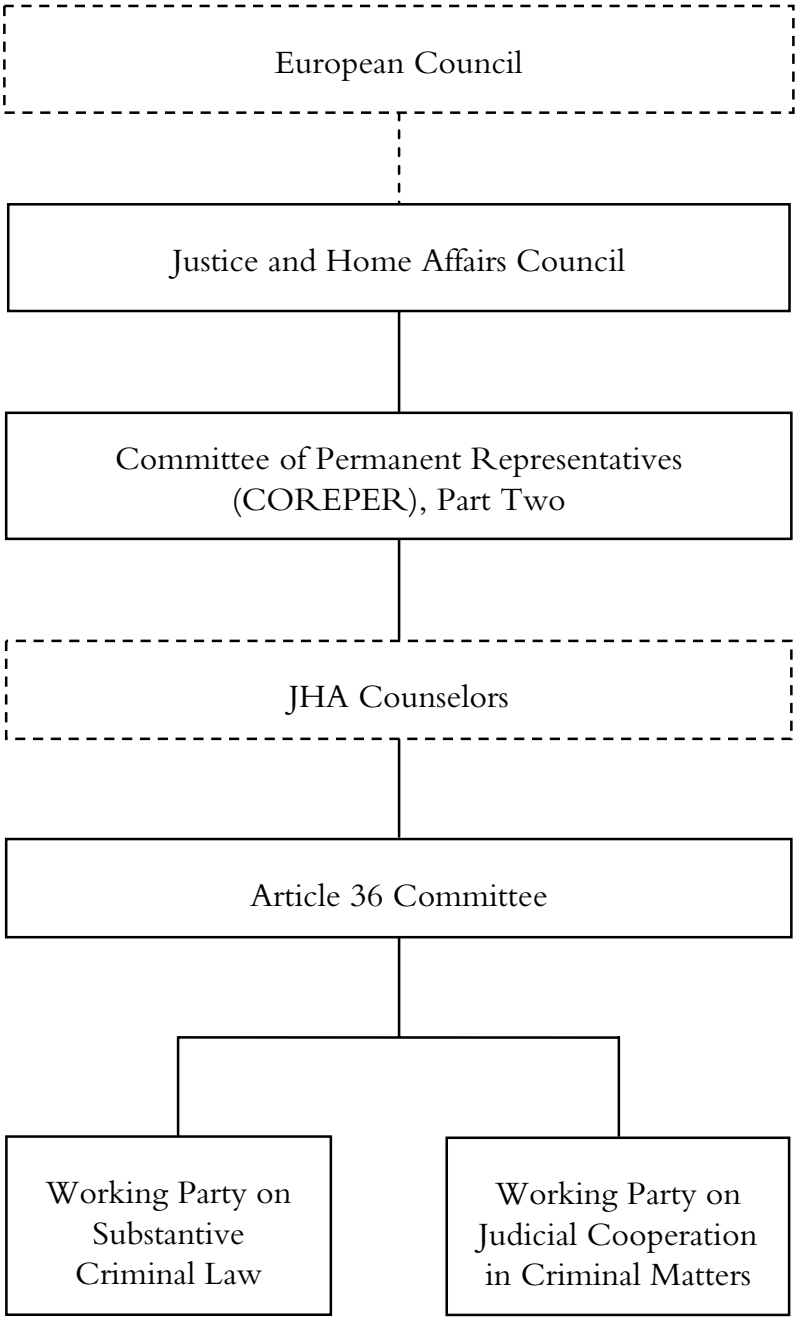
Annex 3:

Geographical Scope of the "Area of Freedom" Following the Northern Enlargement of Schengen in 2001



Annex 4:

Working Structures of the Council in the Criminal Justice Domain, 1999-2004[195]



[195] Cf. Nilsson (2004): "The Justice and Home Affairs Council" [cf. footnote 99], p. 133.

About the Author

Jonathan P. Aus (Dipl.-Pol.) graduated in political science from the Free University of Berlin, Otto-Suhr-Institute for Political Science. He was also awarded an interdisciplinary Master of European Studies (M.E.S.) degree from the University of Hamburg, College of Europe Hamburg. His doctoral research was carried out at ARENA – Centre for European Studies at the University of Oslo under the supervision of Professor Johan P. Olsen.

Address for Correspondence

ARENA – Centre for European Studies
University of Oslo
P.O. Box 1143, Blindern
0317 Oslo
Norway
Phone: (+47) 22 85 56 56
Fax: (+47) 22 85 78 32
Email: j.p.aus@arena.uio.no
Internet: www.arena.uio.no/about/staff/aus.xml