



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

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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

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 unambiguously 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

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 Institutional 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 Institutional Perspective

According to the Institutional 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

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 vein, 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,

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.

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-

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

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, Subcommittee 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

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-

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.

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

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

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

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*

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

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

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 *ihadists* 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

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,

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

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:

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

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

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

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-

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 re-admission 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 shepherded 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-

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

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

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.

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

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

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

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.

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

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

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 vein, 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,

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-

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

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-

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.

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. Lægveid (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.