



EU Governance in an Area of Freedom, Security and Justice: Logics of Decision-making in the Justice and Home Affairs Council

Jonathan P. Aus

Working Paper

No. 15, October 2007

Working Papers can be downloaded from the ARENA homepage:

<http://www.arena.uio.no/publications/>

Abstract *

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

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

Reproduction of this text is subject to permission by the author.

© Arena 2007

Table of Contents

1. Topic.....	4
2. Research Design and Epistemology.....	5
3. Ideas and Evidence: A Structured Dialogue	7
3.1 Theoretical Perspectives on Decision-making Above the Nation-State.....	7
3.1.1 Rationalism and the Logic of Consequentiality	7
3.1.2 Institutionalism and the Logic of Appropriateness	9
3.2 Case Studies on Decision-making in an Area of Freedom, Security and Justice	11
3.2.1 Selection Criteria: Significance, Coverage, Comparability.....	11
3.2.2 Data Sources: Council Records	16
3.2.3 The Dublin II Regulation	20
3.2.4 The Eurodac Regulation.....	23
3.2.5 The Biometric Passports Regulation	27
3.2.6 The Facilitators Package.....	31
3.3 Scope Conditions of the Logics of Appropriateness and Consequentiality in the JHA Council	34
3.3.1 Scope Conditions of the Logic of Appropriateness.....	36
3.3.2 Scope Conditions of the Logic of Consequentiality	42
4. Contributions to the Research Field	48
References	51

1. Topic

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

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

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

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

2. Research Design and Epistemology

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

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

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

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

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

3. Ideas and Evidence: A Structured Dialogue

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

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

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

3.1.1 Rationalism and the Logic of Consequentiality

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

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

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

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

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

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

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

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

3.1.2 Institutionalism and the Logic of Appropriateness

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2.1 Selection Criteria: Significance, Coverage, Comparability

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2.2 Data Sources: Council Records

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2.3 The Dublin II Regulation

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

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

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

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

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

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

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

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

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

3.2.4 The Eurodac Regulation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2.5 The Biometric Passports Regulation

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2.6 The Facilitators Package

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.3.1 Scope Conditions of the Logic of Appropriateness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.3.2 Scope Conditions of the Logic of Consequentiality

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Contributions to the Research Field

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

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

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

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

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

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

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

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

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

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

References

- Allison, G. T. / P. Zelikow (1999): *Essence of Decision: Explaining the Cuban Missile Crisis*, 2nd edition, New York: Longman.
- 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.
- Aus, J. P. (2003a): *Supranational Governance in an “Area of Freedom, Security and Justice”*: *Eurodac and the Politics of Biometric Control*, University of Sussex: Sussex European Institute, SEI Working Paper No. 72/December 2003.
- Aus, J. P. (2003b): “Biometrische Kontrollen nach dem 11. September,” in: *Bürgerrechte und Polizei*, Vol. 76, No. 3, pp. 36-42.
- 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/2006-006.htm> (online publication date: July 21, 2006).
- Aus, J. P. (2006b): *Decision-making under Pressure: The Negotiation of the Biometric Passports Regulation in the Council*, University of Oslo: ARENA – Centre for European Studies, ARENA Working Paper No. 11/September 2006.
- Aus, J. P. (2007a): “Conjunctural Causation in Comparative Case-Oriented Research,” in: *Quality & Quantity*, DOI 10.1007/s11135-007-9104-4 (online publication date: March 21, 2007).
- Aus, J. P. (2007b): “The Mechanisms of Consensus: Coming to Agreement on Community Asylum Policy,” forthcoming in: Naurin, D. / H. Wallace (eds.), *Games Governments Play in Brussels: Unveiling the Council of the European Union*, Houndmills: Palgrave Macmillan.
- Aus, J. P. (2007c): *Crime and Punishment in the EU: The Case of Human Smuggling*, University of Oslo: ARENA – Centre for European Studies, ARENA Report No. 4/07 (May 2007).
- Bjurulf, B. / O. Elgström (2004): “Negotiating Transparency: The Role of Institutions,” in: *Journal of Common Market Studies*, Vol. 42, No. 2, pp. 249-69.
- Boin, A. / P. ‘t Hart (2003): “Public Leadership in Times of Crisis: Mission Impossible?” in: *Public Administration Review*, Vol. 63, No. 5, pp. 544-53.
- Börzel, T. A. (2002): *States and Regions in the European Union: Institutional Adaptation in Germany and Spain*, Cambridge University Press.
- Börzel, T. A. (2005): “Mind the Gap! European Integration Between Level and Scope,” in: *Journal of European Public Policy*, Vol. 12, No. 2, pp. 217-36.
- Bunyan, T. (2002): *Secrecy and Openness in the European Union: The Ongoing Struggle for Freedom of Information*, London: Statewatch, Sept. 30, 2002, available at www.statewatch.org/secret/freeinfo/.

- Checkel, J. T. (2006): "Tracing Causal Mechanisms," in: *International Studies Review*, Vol. 8, No. 2, pp. 362-70.
- Checkel, J. T. (2007a) (ed.): *International Institutions and Socialization in Europe*, Cambridge University Press.
- Checkel, J. T. (2007b): "Social Mechanisms and Regional Cooperation: Are Europe and the EU Really All That Different?" forthcoming in: Acharya, A. / A. I. Johnston (eds.), *Regional International Institutions in Global Politics*, Cambridge University Press.
- Cohn, J. (1999): "When Did Political Science Forget About Politics? Irrational Exuberance," in: *The New Republic*, No. 221 (Oct. 25, 1999), pp. 25-31.
- Commission of the European Communities (2004): "Report from the Commission on the implementation of the principles in EC Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents," Brussels, Jan. 30, 2004, Commission doc. *COM (2004) 45 final*.
- Commission of the European Communities (2005): "Communication from the Commission to the Council and the European Parliament on Improved Effectiveness, Enhanced Interoperability and Synergies among European Databases in the area of Justice and Home Affairs," Brussels, Nov. 24, 2005, Commission doc. *COM (2005) 597 final*.
- Commission of the European Communities (2007): "Annex to the Communication on the Evaluation of the Dublin System," Commission Staff Working Document, Brussels, June 6, 2007, Commission doc. *SEC (2007) 742*.
- Council of the European Union (2006): "Note from the German Delegation to the Police Cooperation Working Party," Brussels, Dec. 20, 2006, Council doc. *16982/06*.
- Council of the European Union (2007a): *Council Annual Report on Access to Documents – 2006*, General Secretariat of the Council: Directorate-General F, April 2007.
- Council of the European Union (2007b): "Council Conclusions on Access to Eurodac by Member States' Police and Law Enforcement Authorities as well as Europol," Brussels, June 19, 2007, Council doc. *11004/07*.
- Council of the European Union (2007c): "2807th Council meeting – Justice and Home Affairs," Press Release, Luxembourg, June 12-13, 2007, Council doc. *10267/07*.
- Council of the European Union (2007d): "Draft Council Decision on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime," Brussels, June 5, 2007, Council doc. *10232/07*.
- Council of the European Union / European Parliament (2001): "Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents," in: *Official Journal of the European Communities* of May 31, 2001, Vol. L 145, pp. 43-48.

- Curtin, D. M. (2000): "Citizens' Fundamental Right of Access to EU Information: An Evolving Digital Passepartout?" in: *Common Market Law Review*, Vol. 37, No. 1, pp. 7-41.
- Cyert, R. M. / J. G. March (1992): *A Behavioral Theory of the Firm*, 2nd edition, Oxford: Blackwell Business.
- De Leeuw, M. E. (2007): "Openness in the Legislative Process in the European Union," in: *European Law Review*, Vol. 32, No. 3, pp. 295-318.
- Den Boer, M. (2004): *Plural Governance and EU Internal Security: Chances and Limitations of Enhanced Cooperation in the Area of Freedom, Security and Justice*, paper presented at the ARENA Research Seminar on May 25, 2004, University of Oslo: ARENA – Centre for European Studies, accessible at www.arena.uio.no/events/papers/denBoer.pdf.
- Egeberg, M. (2004): "An Organisational Approach to European Integration: Outline of a Complementary Perspective," in: *European Journal of Political Research*, Vol. 43, No. 2, pp. 199-219.
- Elster, J. (1983): *Sour Grapes: Studies in the Subversion of Rationality*, Cambridge University Press.
- Elster, J. (2000): "Rationality, Economy, and Society," in: Turner, S. (ed.), *The Cambridge Companion to Weber*, Cambridge University Press, pp. 21-41.
- Eriksen, E. O. (1999): "Towards a Logic of Justification: On the Possibility of Post-National Solidarity," in: Egeberg, M. / P. Lægreid (eds.), *Organizing Political Institutions: Essays for Johan P. Olsen*, Scandinavian University Press, pp. 215-44.
- 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.
- George, A. L. / A. Bennett (2005): *Case Studies and Theory Development in the Social Sciences*, The MIT Press.
- Habermas, J. (2007): "Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik," in: Niesen, P. / B. Herborth (eds.), *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik*, Frankfurt am Main: Suhrkamp, pp. 406-59.
- Hall, P. A. / R. C. Taylor (1996): "Political Science and the Three New Institutionalisms," in: *Political Studies*, Vol. 44, No. 5, pp. 936-57.
- Hayes-Renshaw, F. / H. Wallace (1997): *The Council of Ministers*, Houndmills: Macmillan.
- Hayes-Renshaw, F. / H. Wallace (2006): *The Council of Ministers*, 2nd edition, Houndmills: Palgrave Macmillan.
- 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.

- Hooghe, L. / G. Marks (2001): *Multi-Level Governance and European Integration*, Lanham, MD: Rowman and Littlefield.
- 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.
- Kohler-Koch, B. / B. Rittberger (2006): "Review Article: The 'Governance Turn' in EU Studies," in: *Journal of Common Market Studies*, Vol. 44 (Annual Review), pp. 27-49.
- Kuijper, P. J. (2000): "Some Legal Problems Associated with the Communitarization of Policy on Visas, Asylum and Immigration under the Amsterdam Treaty and Incorporation of the Schengen Acquis," in: *Common Market Law Review*, Vol. 37, No. 2, pp. 345-66.
- Lavenex, S. (2006): "Towards the Constitutionalization of Aliens' Rights in the European Union?" in: *Journal of European Public Policy*, Vol. 13, No. 8, pp. 1284-1301.
- Laver, M. / J. Garry (2000): "Estimating Policy Positions from Political Texts," in: *American Journal of Political Science*, Vol. 44, No. 3, pp. 619-34.
- 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.
- Lilleker, D. G. (2003): "Interviewing the Political Elite: Navigating a Potential Minefield," in: *Politics*, Vol. 23, No. 3, pp. 207-14.
- March, J. G. / H. A. Simon (1993): *Organizations*, 2nd edition, Cambridge, MA: Blackwell Business.
- 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 (1989): *Rediscovering Institutions: The Organizational Basis of Politics*, New York: The Free Press.
- March, J. G. / J. P. Olsen (1998): "The Institutional Dynamics of International Political Orders," in: *International Organization*, Vol. 52, No. 4, pp. 943-69.
- March, J. G. / J. P. Olsen (2006a): "The Logic of Appropriateness," in: Moran, M. et al. (eds.), *The Oxford Handbook of Public Policy*, Oxford University Press, pp. 689-708.
- March, J. G. / J. P. Olsen (2006b): "Elaborating the 'New Institutionalism,'" in: Rhodes, R. A. et al. (eds.), *The Oxford Handbook of Political Institutions*, Oxford University Press, pp. 3-20.
- McKeown, T. J. (1999): "Case Studies and the Statistical Worldview: Review of King, Keohane, and Verba's *Designing Social Inquiry: Scientific Inference in Qualitative Research*," in: *International Organization*, Vol. 53, No. 1, pp. 161-90.
- Monar, J. (2006a): "Institutionalizing Freedom, Security and Justice," in: Peterson, J. / M. Shackleton (eds.), *The Institutions of the European Union*, 2nd edition, Oxford University Press, pp. 186-209.

- Monar, J. (2006b): *Specific Factors, Typology and Development Trends of Modes of Governance in the EU Justice and Home Affairs Domain*, Strasbourg: Université Robert Schuman / New Modes of Governance project “deliverable,” May 31, 2006.
- Monar, J. (2006c): “Justice and Home Affairs,” in: *Journal of Common Market Studies*, Vol. 44 (Annual Review), pp. 101-17.
- Moravcsik, A. (1998): *The Choice for Europe*, Cornell University Press.
- Müller, H. (2004): “Arguing, Bargaining and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations,” in: *European Journal of International Relations*, Vol. 10, No. 3, pp. 395-435.
- Nanz, P. / J. Steffek (2007): “Zivilgesellschaftliche Partizipation und die Demokratisierung internationalen Regierens,” in: Niesen, P. / B. Herborth (eds.), *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik*, Frankfurt am Main: Suhrkamp, pp. 87-110.
- Naurin, D. (2004): “Transparency and Legitimacy,” in: Dobson, L. / A. Follesdal (eds.), *Political Theory and the European Constitution*, London and New York: Routledge, pp. 139-50.
- Olsen, J. P. (2007): *Europe in Search of Political Order: An Institutional Perspective on Unity/Diversity, Citizens/Their Helpers, Democratic Design/Historical Drift, and the Co-existence of Orders*, Oxford University Press.
- Orren, K. / S. Skowronek (2004): *The Search for American Political Development*, Cambridge University Press.
- Peers, S. (2007): “Key Legislative Developments on Migration in the European Union,” in: *European Journal of Migration and Law*, Vol. 9, No. 2, pp. 229-51.
- Pillai, R. (1996): “Crisis and the Emergence of Charismatic Leadership in Groups: An Experimental Investigation,” in: *Journal of Applied Social Psychology*, Vol. 26, No. 6, pp. 543-62.
- Ragin, C. C. (1987): *The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies*, University of California Press.
- Ragin, C. C. (2006): “The Limitations of Net-Effects Thinking,” in: Rhinoux, B. / H. Grimm (eds.), *Innovative Comparative Methods for Policy Analysis: Beyond the Quantitative-Qualitative Divide*, New York: Springer, pp. 13-41.
- Scharpf, F. W. (1997): *Games Real Actors Play: Actor-Centered Institutionalism in Policy Research*, Boulder, CO: Westview Press.
- Schattschneider, E. E. (1960): *The Semisovereign People: A Realist's View of Democracy in America*, New York: Holt, Rinehard and Winston.
- Schily, O. (2005): “Die Bildung von Allianzen gegen Kriminalität und Gewalt als nationale und internationale sicherheitspolitische Herausforderung,” in: Bundeskriminalamt: *Neue Allianzen gegen Kriminalität und Gewalt*, Herbsttagung des BKA, Nov. 2-3, 2005, Wiesbaden, pp. 8-14.

- Schimmelfennig, F. (2005): "Strategic Calculation and International Socialization: Membership Incentives, Party Constellations, and Sustained Compliance in Central and Eastern Europe," in: *International Organization*, Vol. 59, pp. 827-60.
- Schwartz-Shea, P. (2003): "Is This the Curriculum We Want? Doctoral Requirements and Offerings in Methods and Methodology," in: *PS: Political Science & Politics*, Vol. 36, No. 3, pp. 379-86.
- Shapiro, I. (2002): "Problems, Methods, and Theories in the Study of Politics, or What's Wrong With Political Science and What To Do About It," in: *Political Theory*, Vol. 30, No. 4, pp. 596-619.
- Shapiro, I. / S. Skowronek / D. Galvin (2006) (eds.): *Rethinking Political Institutions: The Art of the State*, New York University Press.
- Stern, E. K. (2003): *Crisis Decisionmaking: A Cognitive Institutional Approach*, Stockholm: Swedish National Defense College.
- Stone Sweet, A. / W. Sandholtz / N. Fligstein (2001) (eds.): *The Institutionalization of Europe*, Oxford University Press.
- Tallberg, J. (2006): *Leadership and Negotiation in the European Union*, Cambridge University Press.
- Thomson, R. / F. N. Stokman / C. H. Achen / T. König (2006) (eds.): *The European Union Decides*, Cambridge University Press.
- Weber, M. (1973) [1904]: "Die 'Objektivität' sozialwissenschaftlicher und sozialpolitischer Erkenntnis," in: Weber, *Gesammelte Aufsätze zur Wissenschaftslehre*, ed. by J. Winkelmann, 4th edition, Tübingen: Mohr Siebeck, pp. 146-214.
- Weber, M. (1978) [1922]: *Economy and Society: An Outline of Interpretive Sociology*, University of California Press.
- Williams, M. (2000): "Interpretivism and Generalisation," in: *Sociology*, Vol. 34, No. 2, pp. 209-24.
- Zürn, M. (1992): *Interessen und Institutionen in der internationalen Politik: Grundlegung und Anwendungen des situationsstrukturellen Ansatzes*, Opladen: Leske und Budrich.
- 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.