



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

Jonathan P. Aus

ARENA Report No 6/07

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

Jonathan P. Aus, ARENA, University of Oslo

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



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

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

Jonathan P. Aus

Copyright © ARENA and the author
ISSN 0807-3139

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

All primary sources cited in this report are locally stored at the ARENA website and can be accessed online by following the appropriate hyperlink.

Oslo, May 2007

Table of Contents

1. Introduction	1
2. Rationalist and Institutional Perspectives on Decision-making in the Field of EU Criminal Law	6
2.1 Strategic Calculation and Efficient Histories of Rational Adaptation	6
2.2 Rule Following and Inefficient Histories of Institutional Robustness	16
3. The Politics of Criminal Law Approximation in the EU: The Case of Human Smuggling	25
3.1 “Death in Dover” and the High Politics of Illegal Immigration in the EU	25
3.2 Intergovernmental Negotiations under the French Presidency	31
3.3 Intergovernmental Negotiations under the Swedish Presidency	36
3.3.1 <i>Supranational Parliamentary Rejection</i>	39
3.3.2 <i>Subsequent Negotiations under the Swedish Presidency</i>	41
3.3.3 <i>Towards a Compromise Solution</i>	44
3.3.4 <i>The Commission’s Request for an EC Legal Basis</i>	47
3.3.5 <i>Coming to Agreement in the JHA Council</i>	48
3.4 National Parliamentary Scrutiny	50
3.5 Mounting Political Pressure	55
3.6 Formal Adoption	58
4. Criminal Law in the First Pillar: Towards a Transformation of European Politics?	59
4.1 Legal Proceedings Before the Court	60
4.2 New Patterns of Conflict and Cooperation?	63
5. Interpretation and Conclusions	68
5.1 EU Criminal Law and the Logic of Consequentiality	68
5.2 EU Criminal Law and the Logic of Appropriateness	76
5.3 The Politics of Criminal Law Approximation in the EU Revisited	84

Annexes

Annex 1: Distribution of Apprehended “Illegal Aliens” Between the Member States (EU 15), 2000-2001	87
Annex 2: Distribution of Asylum Applicants Between the Member States (EU 15), 2000-2001	88
Annex 3: Geographical Scope of the “Area of Freedom” Following the Northern Enlargement of Schengen in 2001	89
Annex 4: Working Structures of the Council in the Criminal Justice Domain, 1999-2004	90

I. Introduction*

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

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

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

* This study was funded by ARENA – Centre for European Studies at the University of Oslo. Its financial support is gratefully acknowledged. I would like to thank Johan P. Olsen for helpful comments on earlier drafts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.1 Strategic Calculation and Efficient Histories of Rational Adaptation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The idea that re-regulation or “positive integration” (Fritz Scharpf) in a de-regulated area of free movement equals more safety and less crime seems to have inspired EU measures like the Framework Decision on harmonized criminal law sanctions against drug traffickers adopted by the JHA Council in 2004.²⁴ After all, the elimination of internal border controls within the Schengen area *must* have, all other things being equal, eased the cross-border flow of heroin, cocaine and amphetamines.²⁵ The Commission’s proposal of 2006 for an EC Directive aiming at the harmonization of national penal sanctions in the field of intellectual property rights illustrates that this functional line of reasoning can also be applied to cracked software and other forms of high-tech piracy.²⁶

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2 Rule Following and Inefficient Histories of Institutional Robustness

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

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

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

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

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

Hence, institutions persist over time, although their environments may change.³⁸

Relatively stable political institutions generate “interruptions of interdependence,” to borrow the words of Niklas Luhmann.³⁹ The limited capacity of self-referential political institutions to “resonate” with their environments does not rule out that organizations can and do adjust to environmental changes. Empirical analyses of organizational reform processes seem to indicate, however, that “enduring institutions [respond] to volatile environments routinely, though not always optimally.”⁴⁰ External events that cannot be reconciled with the organization’s standard operating procedures are being perceived as noise.⁴¹

With a view to the limited scope of criminal law approximation in EU-Europe (the Council of Europe’s activities *inter alia* in the field of extradition cannot be reviewed here), a theoretical interest in historical inefficiencies and limited institutional resonance suggests that “we need to understand the conditions under which, and the processes through which, existing institutional arrangements contribute to continuity or differentiation, rather than convergence.”⁴²

³⁸ Knill, C. (2001): *The Europeanisation of National Administrations: Patterns of Institutional Change and Persistence*, Cambridge University Press, p. 22. For further reading on the concepts of “loose coupling” and path dependence, see *inter alia* March, J. G. / J. P. Olsen (1976): *Ambiguity and Choice in Organizations*, 2nd ed., Scandinavian University Press; North, D. C. (1990): *Institutions, Institutional Change and Economic Performance*, Cambridge University Press; Pierson, P. (1998): “The Path to European Integration: A Historical-Institutionalist Analysis,” in: Sandholtz, W. / A. Stone Sweet (eds.), *European Integration and Supranational Governance*, Oxford University Press, pp. 27-58; and Crouch, C. / H. Farrell (2004): “Breaking the Path of Institutional Development? Alternatives to the New Determinism,” in: *Rationality and Society*, Vol. 16, No. 1, pp. 5-43.

³⁹ Luhmann, N. (2000): *Organisation und Entscheidung*, Opladen: Westdeutscher Verlag, p. 394. This characteristic feature of political institutions is not well understood or at least systematically downplayed by functional regime theorists like Robert Keohane (cf. section 2.1 above).

⁴⁰ Olsen, J. P. (2002): “The Many Faces of Europeanization,” in: *Journal of Common Market Studies*, Vol. 40, No. 5, pp. 921-52, here: p. 925.

⁴¹ Cf. Luhmann, N. (1990): *Ökologische Kommunikation. Kann die moderne Gesellschaft sich auf ökologische Gefährdungen einstellen?* 3rd ed., Opladen: Westdeutscher Verlag.

⁴² Olsen, J. P. (2003): “Towards a European Administrative Space?” in: *Journal of European Public Policy*, Vol. 10, No. 4, pp. 506-31, here: p. 507.

The ambiguous institutional design of EU cooperation in the domain of criminal justice is a case in point. As commonly known, the Union's Third Pillar is characterized by an inbuilt tension between fostering transnational judicial cooperation in criminal matters, on the one hand, and the political wish to maintain national sovereignty over criminal law and procedure, on the other. The Third Pillar of the EU may best be understood as a "frozen" political compromise between proponents of greater unity and of enduring diversity.⁴³

Sovereignty-related concerns also seem to explain why the heads of state or government were quick to embrace the principle of mutual recognition as "the cornerstone of judicial co-operation in both civil and criminal matters" during the Tampere European Council.⁴⁴ In contrast to JHA Council measures for the approximation of national criminal laws, the application of the principle of mutual recognition in areas like extradition does not put an end to the deep diversity between the Member States with respect to definitions of criminal offences and sentencing practices, let alone criminal procedure.⁴⁵ In fact, mutual recognition as a seemingly viable alternative to

⁴³ The prospect of the entry into force of the Constitutional Treaty has admittedly generated a considerable amount of political "heat." However, the current temperature of the Third Pillar has fallen back to below zero. For further reading on the tension between unity and diversity within and beyond the Third Pillar, see *inter alia* van Caenegem, R. C. (2002): *European Law in the Past and the Future: Unity and Diversity over Two Millennia*, Cambridge University Press; and Olsen, J. P. (2006): "Unity and Diversity – European Style," in: Mydske, P. K. / I. Peters (eds.), *The Transformation of the European Nation State*, Berliner Wissenschaftsverlag, pp. 11-43.

⁴⁴ European Council (1999): *Tampere European Council, 15 and 16 October 1999: Presidency Conclusions* [[arena-web](#)], no. 33. Five years later, the heads of state or government reaffirmed this principle in the framework of the so-called Hague Programme on Strengthening Freedom, Security and Justice in the European Union, i.e. the new multi-annual legislative program in the field of EU Justice and Home Affairs. See European Council (2004): *Brussels European Council, 4 and 5 November 2004: Presidency Conclusions* [[arena-web](#)], p. 38.

⁴⁵ Cf. European Commission (2004): "Green Paper on the Approximation, Mutual Recognition and Enforcement of Criminal Sanctions in the European Union," Brussels, April 30, 2004, Commission doc. COM (2004) 334 final [[arena-web](#)]; Peers, S. (2004a): "Mutual Recognition and Criminal Law in the European Union: Has the Council Got It Wrong?" in: *Common Market Law Review*, Vol. 41, pp. 5-36; Alegre, S. / M. Leaf (2004): "Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon?" in: *European Law Journal*, Vol. 10, No. 2, pp. 200-17; Ligeti, K. (2005): *Strafrecht und strafrechtliche Zusammenarbeit in der Europäischen Union*, Berlin: Duncker & Humblot; and Löff, R. (2006): "Shooting from the Hip: Proposed

harmonization raises a host of unanswered questions like the following: Why should the judicial authorities of country A extradite an individual accused of terrorism by country B while fundamentally disagreeing with country B's substantive assessment?⁴⁶ How should EU citizens living in an "Area of Freedom" make sense of the fact that lawful activities in one Member State lead to a deprivation of liberty in another? And why do citizens' perceptions of "crimes" like abortion seemingly correlate with national borders in the first place?

Institutionalist contributions to political science do not limit themselves to contextualizing national practices like the relentless prosecution and punishment of abortion in Ireland.⁴⁷ They also try to show that seemingly obsolescent political institutions like the Catholic Church provide citizens with *structures of meaning*. In the eyes of March and Olsen, for example, political institutions enable citizens to make sense of the world. This leads us to the notion of a *logic of appropriateness* as the cognitive basis of value-rational social action:

The basic logic of action is rule following – prescriptions based on a logic of appropriateness and a sense of rights and obligations derived from an identity and membership in a political community and the ethos, practices, and expectations of its institutions. Rules are followed because they are seen as natural,

Minimum Rights in Criminal Proceedings throughout the EU," in: *European Law Journal*, Vol. 12, No. 3, pp. 421-30.

⁴⁶ Such a situation may give rise to constitutional problems in numerous Member States. Against the background of a potential violation of the fundamental rights of a German citizen accused of supporting *al-Qaida* by a public prosecutor in Spain, for example, Germany's Federal Constitutional Court annulled the initial version of the German law for the application of the European Arrest Warrant in July of 2005. Even though the Constitutional Court recognized that the extradition of the accused to Spain might have resulted in the imposition of a custodial sentence for a behavioral pattern that was completely legal in Germany, the Court stopped short of challenging the European Arrest Warrant as such. See Bundesverfassungsgericht (2005): *Urteil des Zweiten Senats vom 18. Juli 2005 – 2 BvR 2236/04*, Karlsruhe, <http://www.bverfg.de>.

⁴⁷ According to Irish law, abortion is a criminal offence and may be punished by life imprisonment unless an abortion is absolutely necessary *inter alia* in order to save the life of a pregnant woman. Cf. Kurzer, P. (2001): "Irish Moral Conservatism and European Sexual Permissiveness," in: Kurzer, *Markets and Moral Regulation: Cultural Change in the European Union*, Cambridge University Press, pp. 143-69.

rightful, expected, and legitimate. Members of an institution are expected to obey, and be the guardians of, its constitutive principles and standards.⁴⁸

Value-rational political actors adhering to a logic of appropriateness do what they are supposed to do. Their sense of loyalty towards their political leaders, epitomized by the unconditional loyalty of the *Waffen-SS* towards the *Führer*, stems from “the belief in the absolute validity of the order as the expression of ultimate values,” to borrow once more the words of Max Weber. As far as the cognitive dimension of value-rational political action is concerned, Weber therefore noted that “the meaning of the action does not lie in the achievement of a result ulterior to it, but in carrying out the specific type of action for its own sake.”⁴⁹

This line of self-referential reasoning on the part of political actors is particularly evident with respect to the core institutions of state sovereignty. Michel Foucault’s work, for example, allows us to trace the origins and value-rational connotations of contemporary penal institutions. Foucault studied the ceremonial nature of the public execution in absolutist France in order to identify the social mechanisms and interpretive frames by which the *ancien régime* managed to stay in power. According to Foucault, the reinforcement of institutionalized structures of meaning in the domain of criminal justice required a brutal demonstration of state sovereignty:

[In] this liturgy of punishment, there must be an emphatic affirmation of power and of its intrinsic superiority. And this superiority is not simply that of right, but that of the physical strength of the sovereign beating down upon the body of his adversary and mastering it: by breaking the law, the offender has touched the very person of the prince; and it is the prince – or at least those to whom he has delegated his force – who seizes upon the body of the condemned man and displays it marked, beaten, broken. The ceremony of punishment, then, is an exercise of ‘terror.’⁵⁰

⁴⁸ March, J. G. / J. P. Olsen (2006a): “Elaborating the ‘New Institutionalism,’” in: Rhodes, R. A. *et al.* (eds.), *The Oxford Handbook of Political Institutions*, Oxford University Press, pp. 3–20, here: p. 7.

⁴⁹ Weber (1978): *Economy and Society* [cf. footnote 2], pp. 25 and 33, respectively.

⁵⁰ Foucault (1977): *Discipline and Punish* [cf. footnote 1], p. 49. Foucault’s descriptions lend support to Durkheim’s dictum that the severity of punishment is greater where

It goes without saying that the vengeance of the sovereign was out of all proportions when the criminal offence directly challenged the authority of the king.

Once sovereignty had become vested in the people, the authoritarian impulse according to which “the least damage done to a governmental organ is punished” (Emile Durkheim) resurfaced in a republican framework. The democratic Republic could, of course, draw on the notion of the collective will of the people in order to justify the effective enforcement of criminal law. Like its absolutist predecessor, however, the Republic remained committed to the particularly harsh punishment of criminal offences against state organs. Durkheim accounted for the puzzling fact that “the smallest injury to the police power calls forth a penalty” as follows:

The difficulty resolves itself easily if we notice that, wherever a directive power is established, its primary and principal function is to create respect for the beliefs, traditions, and collective practices: that is, to defend the common conscience against all enemies within and without. It thus becomes its symbol, its living expression in the eyes of all. ... It is no longer a more or less important social function; it is the collective type incarnate.⁵¹

Up to the present day, both the sovereign nation-state and its historical successor, the supranational regional polity, must demonstrate their willingness and ability to punish criminal offences.⁵² Again, this particularly holds true if the criminal activity in question has no victim but the nation-state or supranational polity. The premeditated violation of immigration rules or the facilitation thereof by human smugglers is a case in point.

the central power is more absolute in character. See Durkheim, E. [1900] (1998): “Two Laws of Penal Evolution,” in: Melossi, D. (ed.), *The Sociology of Punishment*, Aldershot: Ashgate, pp. 3-31.

⁵¹ Durkheim, E. [1893] (1933): *On the Division of Labor in Society*, New York: Macmillan, p. 84.

⁵² Mireille Hildebrandt accordingly noted that “[the types of behavior] sanctioned by means of criminal law are apparently considered to be crucial for the survival of the polity that has criminalized them, thus reinforcing them as the core of what unites a people, of what demonstrates their sameness and selfhood.” Hildebrandt, M. (2007): “European Criminal Law and European Identity,” in: *Criminal Law and Philosophy*, Vol. 1, No. 1, pp. 57-78, here: p. 65.

The image of the human smuggler as an enemy of the state leads us to another durable institution of the Westphalian order, namely to the legitimate exercise of territorial sovereignty. Paradoxically, the process of economic globalization has been paralleled by technologically more and more sophisticated mechanisms of migration control in Europe and North America.⁵³ Beyond that, the issue of illegal immigration has become highly salient in France and other EU Member States. Political scientists like Didier Bigo thus draw on the concept of the *frontier as an institution* in order to reiterate the commonly known fact that borders are intrinsically linked with conceptions of belonging and collective political identity:

Frontier is used, at least in political science and geography in Europe, to connect space and population. It is the limit of a territory. Frontier is an institution, not a fact, not a result. The underlying concept comprises the possibility to consider a territory a space one belongs to. A frontier describes the relation between forces, between powers that must struggle for delimitation in a competitive way, whereas a border is the materialization in space of this struggle through time.⁵⁴

Post-national political systems like the European Union must arguably reinvent the idea of territorial sovereignty in order to facilitate “the process of creating an ever closer union among the peoples of Europe” (article 1 of the EU Treaty). From an Institutional point of view, successful processes of regional political integration necessarily involve elements of drama, including the symbolic affirmation of the supranational polity’s willingness and ability to

⁵³ Cf. Sassen, S. (1996): *Losing Control? Sovereignty in an Age of Globalization*, Columbia University Press; Guiraudon, V. / G. Lahav (2000): “A Reappraisal of the State Sovereignty Debate: The Case of Migration Control,” in: *Comparative Political Studies*, Vol. 33, No. 2, pp. 163-95; and Aus, J. P. (2006a): *Decision-making under Pressure: The Negotiation of the Biometric Passports Regulation in the Council*, University of Oslo: ARENA – Centre for European Studies, Working Paper No. 11/2006 [[arena-web](#)].

⁵⁴ Bigo, D. (2005): “Frontier Controls in the European Union: Who is in Control?” in: Bigo, D. / E. Guild (eds.), *Controlling Frontiers: Free Movement Into and Within Europe*, Aldershot: Ashgate, pp. 49-99, here: p. 52. For further reading on frontiers as an institution and the state as a “power container,” see Giddens, A. (1987): *The Nation-State and Violence*, University of California Press; Anderson, M. / E. Bort (1998) (eds.): *The Frontiers of Europe*, London and Washington: Pinter; and Taylor, P. J. (2003): “The State as Container: Territoriality in the Modern World-System,” in: Brenner, N. et al. (eds.), *State/Space: A Reader*, Malden: Blackwell, pp. 101-13.

exercise effective control over its borders. EU politics in the domains of illegal immigration and border control, in short, can reasonably be expected to lend empirical support to March and Olsen's conjecture that "modern polities are as replete with symbols, ritual, ceremony, and myth as the societies more familiar to anthropological tradition."⁵⁵

Last but not least, an Institutionalist perspective on political institutions suggests that the European Union may best be understood as a "broad church." Members of this post-national political denomination share a collective belief in the normative validity of "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law" (article 6 of the EU Treaty). However, the EU also lodges an array of more or less autonomous institutional actors adhering to different sets of rules and standards of appropriate behavior. Council-specific rules and behavioral prescriptions, for example, distinguish and buffer the Council of Ministers as a relatively autonomous EU institution not only from national governments, but also from the Commission and the European Parliament.⁵⁶ The functionally differentiated and multi-pillared institutional design of the EU, in short, appears to be characterized by a variety of competing and contradictory rules, structures of meaning, and organizing principles.⁵⁷

⁵⁵ March, J. G. / J. P. Olsen (1989): *Rediscovering Institutions: The Organizational Basis of Politics*, New York: The Free Press, p. 7.

⁵⁶ Cf. Hayes-Renshaw, F. / H. Wallace (2006): *The Council of Ministers*, 2nd ed., Houndmills: Palgrave Macmillan.

⁵⁷ The EU, to be sure, is not the only modern polity displaying such features: both the EU Member States and non-EU polities like the U.S.A. are characterized by similar traits, including the formal separation of legislative, executive and judicial powers. Against the backdrop of the institutional dynamics of such "mixed" political orders, Karen Orren and Stephen Skowronek have proposed that "at any moment in time several different sets of rules and norms are likely to be operating simultaneously." Orren, K. / S. Skowronek (1996): "Institutions and Intercurrence: Theory Building in the Fullness of Time," in: Shapiro, I. / R. Hardin (eds.), *Political Order*, New York University Press, pp. 111-46, here: p. 111. On a higher level of abstraction, an Institutionalist reading of political life in Europe and elsewhere seems to suggest that "time is channeled, bent, or slowed [down] by institutions: insofar as individual actions or events are concerned, their occurrence within institutions changes their position from mere happenstance – one damn thing after another – to an observable pattern that orders them and relates them to other comparable and contrasting actions or events. However, time still 'marches on,' even as institutions 'lag behind,' 'catch up,' or 'overreach' developments elsewhere" (p. 141). For further reading on "multiple, incongruous authorities operating simultaneously," see Orren, K. / S. Skowronek (2004): *The Search for American Political Development*, Cambridge

Changes in the balance of power between EU institutions, then, may reasonably be assumed to flow not only from ordinary treaty revisions à la Maastricht, Amsterdam and Nice, but also from inter-institutional tensions evolving in the framework of day-to-day institutional encounters above the nation-state. In the context of supranational legislative activities connected with the establishment of an Area of Freedom, Security and Justice in the EU, for example, inter-institutional collisions may be triggered by overlapping jurisdictions between “Pillar One” and “Pillar Three.” Legal bases or formal competency disputes of this sort may take the shape of conflicts between the Commission and the Council over the right of legislative initiative and implementing power, conflicts between the Council and the European Parliament over the appropriate decision-making procedure, etc. The resolution of such inter-institutional power struggles, in turn, may be brought about by an independent judicial authority adhering to yet another set of institutionalized rules and decision-making premises.⁵⁸ Within relatively new, dynamic and constitutionally unsettled domains of EU governance like Justice and Home Affairs, in other words, disagreements over policy substance and procedure may eventually escalate into conflicts over the allocation and separation of powers between EU institutions.

The following case study of decision-making processes in an Area of Freedom, Security and Justice is situated at the interface between criminal law and border control and sheds light on the development and resolution of power struggles between EU institutions. Its aim is to provide an empirical basis for a subsequent discussion of the relative importance of strategic calculation and rule following in the field of EU Justice and Home Affairs. I shall provide a “double interpretation” of the empirical material in *section 5.*, and will close with a delineation of the domains of application of Rationalist and Institutionalist perspectives.

University Press, pp. 78-119, here: p. 108; and Olsen (2007): *Europe in Search of Political Order* [cf. footnote 6].

⁵⁸ On the relative autonomy of judicial institutions and its theoretical implications, see *inter alia* Smith, R. M. (1988): “Political Jurisprudence, the ‘New Institutionalism,’ and the Future of Public Law,” in: *American Political Science Review*, Vol. 82, No. 1, pp. 89-108.

3. The Politics of Criminal Law Approximation in the EU: The Case of Human Smuggling

3.1 “Death in Dover” and the High Politics of Illegal Immigration in the EU

On June 18, 2000, customs officials in the British port town of Dover, England, detected the dead bodies of fifty-eight Chinese nationals in the back of a truck allegedly transporting Dutch tomatoes. The migrants from China had evidently suffocated to death in a failed attempt to smuggle them out of the Schengen area and into the UK.⁵⁹

The Dover tragedy attracted a considerable amount of media attention.⁶⁰ In fact, politicians throughout Europe were eager to share their views on the Dover case with a wider audience. One day after the tragic event, for example, JHA Commissioner António Vitorino issued the following press release:

On behalf of the European Commission and for myself personally, I would like to express my deep shock at the discovery by the British authorities of the bodies of 58 people who suffocated to death in the lorry in which they were clandestinely traveling. ... These events make it even more urgent, as if it were not urgent enough already, to develop a common immigration and asylum policy in the EU. These complex, sensitive questions require action going far beyond the limits of national sovereignty.

⁵⁹ According to police reports, the deceased migrants had paid up to \$ 30,000 each to so-called snakeheads, i.e. Chinese people smugglers, for arranging their 12,000 km journey from the Chinese province of Fujian to the UK. Cf. Chin, K. (2001): “The Social Organization of Chinese Human Smuggling,” in: Kyle and Koslowski (eds.), *Global Human Smuggling* [cf. footnote 33], pp. 216-34; and Kwong, P. (1997): *Forbidden Workers: Illegal Chinese Immigrants and American Labor*, New York: The Free Press. One may note in this context that Europol, the European Police Office, assumes that “the largest number of persons smuggled towards the EU comes from the People’s Republic of China.” Council of the EU (2005a): Council doc. 13788/1/05 REV 1 [[arena-web](#)], p. 15.

⁶⁰ Cf. *inter alia* *BBC News* of June 19, 2000: “58 dead in port lorry.”

Commissioner Vitorino used this opportunity to present the Commission's program for a comprehensive European immigration and asylum policy:

[The] aim [of a common immigration and asylum policy in the EU] must, of course, be to step up the fight against illegal immigration and those who organise it.... But it must also include putting in place a partnership with the countries of origin with a view to ensuring the necessary development and stability there, establishing a common asylum system offering real protection to those who need it, as required by the Geneva Convention, and a genuine admission and integration policy that marks a definite break with the fantasy of 'zero immigration.'⁶¹

In marked contrast to the Commissioner's ideas, the European Council, i.e. the heads of state or government of the Member States, issued a policy statement that focused almost exclusively on the alleged need to step up the EU's fight against organized crime and trafficking in human beings:

The European Council expressed its shock at the tragic deaths of 58 foreign nationals arriving in the United Kingdom. It condemned the criminal acts of those who profit from such traffic in human beings and committed the European Union to intensified cooperation to defeat such cross-border crime, which has caused so many other deaths across Europe. It called on the incoming French Presidency and the Commission to take forward urgently [legislative measures] in this area, in particular ... by adopting severe sanctions against those involved in this serious and despicable crime.⁶²

⁶¹ European Commission (2000): *Tragedy in Dover – Declaration by António Vitorino, European Justice and Home Affairs Commissioner*, Brussels, June 19, 2000 [[arena-web](#)]. Commissioner Vitorino was evidently referring to the so-called Tampere agenda endorsed by the European Council in Oct. 1999. See European Council (1999): *Tampere European Council* [cf. footnote 44].

⁶² European Council (2000a): *Santa Maria da Feira European Council, 19 and 20 June 2000: Presidency Conclusions* [[arena-web](#)], no. 52. The statement reproduced above illustrates the European Council's important agenda setting role in politically sensitive fields of EU governance like Justice and Home Affairs. While issuing such statements, the heads of state or government can draw on art. 4 of the EU Treaty. According to this European Council-made treaty provision, the European Council is supposed to "provide the Union with the necessary impetus for its development and [to] define the general political guidelines thereof." Some scholars claim that "all important new

The political choreography of the European Council's reaction to the Dover tragedy in 2000 was strikingly similar to its response to the Dutroux affair several years earlier. The widely publicized Dutroux case of 1996 had motivated the European Council to "[express] its abhorrence at the sexual exploitation of children" and to call for swift legislative action in this area.⁶³ Such high-level requests for combating violence against children were virtually guaranteed to gain strong popular support.⁶⁴ The European Council's development of policy guidelines in the field of child abuse, in short, had been characterized by the reproduction of national patterns of political agenda setting on EU level.⁶⁵

EU initiatives either originate in the European Council or receive from it its seal of approval." Hayes-Renshaw and Wallace (2006): *The Council of Ministers* [cf. footnote 56], p. 170.

⁶³ European Council (1996): *Dublin European Council, 13 and 14 December 1996: Presidency Conclusions* [arena-web], item V. 3. The European Council's intervention paved the way for the JHA Council's adoption of a so-called Joint Action on combating the sexual exploitation of children. See Council of the EU (1997): "Joint Action of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children (97/154/JHA)," in: *Official Journal of the European Communities* of Mar. 4, 1997, Vol. L 62, pp. 2-6 [arena-web]. This Joint Action was replaced by a Council Framework Decision in 2004. See Council of the EU (2004b): "Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography," in: *Official Journal of the European Union* of Jan. 20, 2004, Vol. L 13, pp. 44-48 [arena-web].

⁶⁴ According to an opinion poll carried out in the EU 15 from March 12 – May 4, 1999, for example, approximately 85% of EU citizens considered "tougher laws" to be "a useful means of combating violence against children." Likewise, around 72% of EU citizens spontaneously answered "Yes, definitely" to the question of "[whether] the European Union should get involved in combating violence against children." At the same time, however, 79% of EU citizens were "[not] aware of any policies or measures put forward by the European Union to combat violence against children." Eurobarometer (1999): *Europeans and Violence Against Children*, Eurobarometer 51.0 of June 4, 1999, Brussels: European Commission [arena-web], pp. 101, 121 and 123, respectively.

⁶⁵ Cf. Nelson, B. J. (1984): *Making an Issue of Child Abuse: Political Agenda Setting for Social Problems*, University of Chicago Press; and Gies, L. (2003): "Up, Close and Personal: The Discursive Transformation of Judicial Politics in Post-Dutroux Belgium," in: *International Journal for the Semiotics of Law*, Vol. 16, pp. 259-84. The agenda setting phase of the negotiation of the Framework Decision on combating terrorism in the Council was characterized by similar dynamics. See Council of the EU (2002b): "Council Framework Decision of 13 June 2002 on combating terrorism

The incoming French Presidency of the Council quickly drew up a legislative proposal for a “Framework Decision on Strengthening the Penal Framework for Preventing the Facilitation of Unauthorised Entry and Residence.” By doing so, France effectively stripped the European Commission of its (shared) right of legislative initiative in this area.⁶⁶ The French proposal was officially received by the Council Secretariat on June 19, 2000. A short explanatory note by the French government followed shortly thereafter.⁶⁷

Due to the poor quality of the hastily drawn up French proposal, the Council Legal Service deemed it appropriate to intervene into the decision-making process at an early stage.⁶⁸ Following the Legal Service’s advice, the French government agreed to divide its original proposal into two separate but closely related instruments, namely a draft Community Directive based on article 63 (3) (b) of the EC Treaty, on the one hand, and a draft Framework Decision drawing on article 34 (2) (b) of the EU Treaty, on the other. While the EC Directive was supposed to define what the “facilitation of unauthorized entry, transit and residence” actually meant, the criminal law provisions sanctioning this practice were supposed to be dealt with in an EU Framework Decision.⁶⁹

(2002/475/JHA),” in: *Official Journal of the European Communities* of June 22, 2002, Vol. L 164, pp. 3-7 [[arena-web](#)].

⁶⁶ As commonly known, the Commission has acquired the sole right of legislative initiative in most areas covered by the EC Treaty, i.e. within the First Pillar of the Union. When it comes to legislative acts falling under the Second or Third Pillar of the EU, however, the Commission has to *share* its otherwise exclusive right of initiative with the Member States (cf. *inter alia* art. 34 [2] of the EU Treaty). One may note in passing that the Constitutional Treaty would have *retained* Member States’ rights of legislative initiative in the fields of police and judicial cooperation in criminal matters. However, the popularly rejected Constitutional Treaty would have also made national legislative initiatives in these areas dependent upon the explicit support of at least one quarter of the Member States (cf. article III-264 CT).

⁶⁷ Cf. Council of the EU (2000a): Council doc. 9892/00 [[arena-web](#)]; and Council of the EU (2000b): Council doc. 9892/00 ADD 1 [[arena-web](#)].

⁶⁸ Cf. Council of the EU (2000c): Council doc. 10460/00 [[arena-web](#)].

⁶⁹ This rather complicated approach ultimately resulted in the parallel adoption of a First Pillar Community Directive and a Third Pillar Framework Decision by the JHA Council. In regard to the former, see Council of the EU (2002c): “Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence,” in: *Official Journal of the European Communities* of Dec. 5, 2002, Vol. L 328, pp. 17-18 [[arena-web](#)].

The two initiatives were simultaneously published in the Official Journal on September 4, 2000.⁷⁰ The French government justified its proposals by arguing that

it is necessary to combat the facilitation of illegal immigration, whether this is merely assistance provided in crossing borders or whether it is connected to other forms of exploitation of human beings such as prostitution, exploitation of children or undeclared work. The European Union must demonstrate a common political will in the face of this phenomenon.⁷¹

The French government's desire to "demonstrate a common political will" of the EU in regard to human smuggling operations and loosely coupled social problems like prostitution and child abuse was probably as much geared towards French citizens and their voting behavior during the forthcoming municipal, parliamentary and presidential elections in 2001 and 2002 as it was directed towards the other members of the JHA Council.⁷²

⁷⁰ See French Republic (2000a): "Initiative of the French Republic with a view to the adoption of a Council Directive defining the facilitation of unauthorized entry, movement and residence," in: *Official Journal of the European Communities* of Sept. 4, 2000, Vol. C 253, pp. 1-2 [[arena-web](#)]; and French Republic (2000b): "Initiative of the French Republic with a view to the adoption of a Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of authorized [sic] entry and residence," in: *Official Journal of the European Communities* of Sept. 4, 2000, Vol. C 253, pp. 6-8 [[arena-web](#)].

⁷¹ Council of the EU (2000d): Council doc. 10712/00 [[arena-web](#)], p. 2.

⁷² Lending support to such an interpretation of the French government's behavior, Virginie Guiraudon concluded a recently published review of French debates on prostitution, refugee policy, and the influence of the National Front on French politics as follows: "The fact that these issues were debated during local and national electoral campaigns where crime and security were highly salient explains in part why the post-2002 government privileged a law and order approach." Guiraudon, V. (2006): "Trafficking and Smuggling in France: Social Problems as Transnational Security Issues," in: Guild, E. / P. Minderhoud (eds.), *Immigration and Criminal Law in the European Union: The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings*, Leiden and Boston: Martinus Nijhoff, pp. 41-67, here: p. 63. For further reading on the electoral breakthroughs and political influence of the *Front National*, see Schain, M. A. (2006): "The Extreme-Right and Immigration Policy-Making: Measuring Direct and Indirect Effects," in: *West European Politics*, Vol. 29, No. 2, pp. 270-89.

The French government's domestic political concerns might also explain why both the draft Directive and Framework Decision did not distinguish between trafficking in human beings and human smuggling at this point. In fact, the recitals to the two legislative initiatives explicitly mentioned the alleged need to "combat trafficking in human beings." Again, this particular framing of the issue at hand was a relatively safe way for the French government to gain popular approval.⁷³ Human smuggling and trafficking in human beings, however, are ordinarily classified as separate offences.⁷⁴

⁷³ Public opinion polls carried out in France in April-May and November-December 2000 revealed that 80% of French citizens expressly supported joint EU rather than national decision-making in regard to "the fight against the trade in, and exploitation of, human beings." No other area of EU governance enjoyed such a high level of popular approval in France. When asked about their attitudes towards joint EU rather than national decision-making in the fields of "police" and "justice," on the other hand, merely 34-40% of French citizens were in favor of common European policies. See Eurobarometer (2000): *Report Number 53*, Oct. 2000, Brussels: European Commission, annexes [[arena-web](#)], table 3.1; and Eurobarometer (2001): *Report Number 54*, Apr. 2001, Brussels: European Commission, annexes [[arena-web](#)], table 5.1.

⁷⁴ Europol officials have recently summarized the main difference between people smuggling and trafficking in human beings as follows: "An important characteristic of illegal immigration is that the illegal migrants are essentially willing participants and the organised criminals profit mainly from facilitating their migration. ... The main difference [between human trafficking and] illegal immigration is that in trafficking in human beings (THB), the intention behind the facilitation is to exploit the illegal migrants during the journey to the country of destination and within that country." Council (2005a): doc. *13788/1/05 REV 1* [cf. footnote 59], pp. 14-15. For heuristic purposes, one may also think of people smugglers as "travel agents" and human traffickers as "slave traders." While approximately 400,000 predominantly male third country nationals enter the EU each year in an irregular fashion by resorting to the more or less costly and dangerous help of smugglers, Europol has estimated that "100,000 women are victims of trafficking in the EU annually." Council of the EU (2005b): Council doc. *15446/05* [[arena-web](#)], p. 2. The figures mentioned above have to be treated with caution. Cf. *inter alia* Mitsilegas, V. (2004): "Measuring Irregular Migration: Implications for Law, Policy and Human Rights," in: Bogusz, B. et al. (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden and Boston: Martinus Nijhoff, pp. 29-39; and Laczko, F. / E. Gozdziaik (2005): *Data and Research on Human Trafficking: A Global Survey*, Geneva: International Organization for Migration (IOM).

3.2 Intergovernmental Negotiations under the French Presidency

The draft Framework Decision was initially discussed among the members of the JHA Council's *Working Party on Substantive Criminal Law*. (For an overview of the Council's working structures in the criminal justice domain, see *Annex 4*.) While the Member States governments' representatives gave a generally favorable reception to the French initiative, the Commission's representative was more reserved. Not only had the Commission been sidelined in the process of drafting the proposal (cf. *section 3.1* above). The Commission's services were also uncomfortable with the envisioned legal basis of the draft Framework Decision. In fact, the Commission claimed that "almost the entire content of [this instrument] submitted by the Presidency belonged under the first pillar."⁷⁵ Not a single national delegation participating in this meeting of September 19, 2000, however, seemed to share the Commission's assessment.

The French Presidency proceeded by drawing up a revised version of the Framework Decision. Such a revision was deemed necessary since the speedily drawn up initial draft had not yet specified the level of EU criminal sanctions against human smugglers. In fact, the original French text had merely called for "effective, proportionate and dissuasive criminal penalties" – a standard phrase employed by legal practitioners dealing with EU issues since the early 1990's.⁷⁶ The amended French proposal, on the other hand, suggested "a maximum sentence of not less than 10 years" of imprisonment for the unlawful smuggling of third country nationals into the European Union.⁷⁷

In response to the harsh penalization requirement envisioned by the French Presidency, the Brussels bureau of the *United Nations High Commissioner for Refugees (UNHCR)* formally intervened into the Union's decision-making process in mid-October 2000. The UNHCR reminded the EU of the UN's

⁷⁵ Council of the EU (2000e): Council doc. 10859/00 [[arena-web](#)], pp. 2-3.

⁷⁶ French Republic (2000b): "Initiative" [cf. footnote 70], art. 1. The concept of "effective, proportionate and dissuasive penalties" was developed by the ECJ in its so-called Greek Maize judgment of 1989. Cf. Nuotio, K. (2005): "Harmonization of Criminal Sanctions in the European Union: Criminal Law Science Fiction," in: Husabø and Strandbakken (eds.), *Harmonization of Criminal Law* [cf. footnote 11], pp. 79-101, here: pp. 81-85.

⁷⁷ Council of the EU (2000f): Council doc. 12025/00 [[arena-web](#)], art. 1 (2).

distinction between human trafficking and people smuggling.⁷⁸ Furthermore, the UN Refugee Agency declared that

it is regrettable that, as a result of States' increasingly restrictive immigration policies, resorting to the services of smugglers has often been the only viable option for many genuine asylum-seekers who seek sanctuary in the European Union. ... [The] draft Directive and draft Framework Decision do not attempt to reconcile the proposed measures to 'prevent facilitation of unauthorised entry and residency' with States' existing international legal obligations towards refugees and asylum-seekers. ... [UNHCR] is seriously concerned that these efforts do not impinge upon the basic human right of individuals to seek and enjoy in other countries asylum from persecution.

Against this background, the UNHCR called upon the EU to insert a "general 'savings clause'" for the protection of smuggled refugees and asylum seekers into the draft Framework Decision, and to narrow down the personal scope of the draft Directive "in order to avoid that those assisting asylum-seekers and refugees purely out of humanitarian motives would risk criminal prosecution."⁷⁹

⁷⁸ For an overview of UN activities in both of these domains, see Gallagher, A. (2001): "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis," in: *Human Rights Quarterly*, Vol. 23, pp. 975-1004.

⁷⁹ Council of the EU (2000g): Council doc. 12351/00 [[arena-web](#)], pp. 3 and 5. While issuing such statements, the UNHCR tends to rely on a broad interpretation of its humanitarian mandate. See Forsythe, D. (2001): *UNHCR's Mandate: The Politics of Being Non-Political*, Geneva: UNHCR, Working Paper No. 33/Mar. 2001 (New Issues in Refugee Research). For further reading on the UNHCR's assessment of immigration control measures in Europe, see van der Klaauw, J. (2002): "European Asylum Policy and the Global Protection Regime: Challenges for UNHCR," in: Lavenex, S. / E. M. Uçarer (eds.), *Migration and the Externalities of European Integration*, Lanham: Lexington, pp. 33-53; and van der Klaauw, J. (2004): "Irregular Migration and Asylum Seeking: Forced Marriage or Reason for Divorce?" in: Bogusz *et al.* (eds.), *Irregular Migration and Human Rights* [cf. footnote 74], pp. 115-35. Johannes van der Klaauw served as the UNHCR's Senior European Affairs Officer in Brussels. Cf. also Morrison, J. / B. Crosland (2001): *The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy?* Geneva: UNHCR, Working Paper No. 39/Apr. 2001 (New Issues in Refugee Research).

The UNHCR's comments motivated the EU office of the *European Council on Refugees and Exiles (ECRE)*, an umbrella association representing approximately seventy non-governmental organizations (NGOs) assisting refugees and asylum seekers, to draw up a similar statement. Unsurprisingly, the ECRE's position paper of November 7th was particularly concerned with the potentially negative impact of the so-called facilitators package on the humanitarian activities of NGOs:

[The] draft Directive and Framework Decision are very broad in the scope of people they seek to define as 'facilitators' and will have the result of criminalizing lawyers, non-governmental organisations and church organisations which give advice to refugees. ... ECRE cannot accept any initiative which potentially criminalizes humanitarian workers. It is a strange state of affairs that, on the eve of the 50th anniversary of the European Convention on Human Rights and Fundamental Freedoms, the European Union attempts to make criminals out of people who, like the Swede Raoul Wallenberg, facilitate the passage of people to protection.⁸⁰

Meanwhile, the French Presidency had convened another meeting of the Working Party on Substantive Criminal Law. The Presidency had also arranged for a meeting of the so-called *Article 36 Committee* on this subject matter.⁸¹ This way of channeling the dossier through the Council's administrative machinery was motivated by the French government's relatively tight schedule. The Presidency accordingly announced that "[it] would like these questions to be dealt with at the meeting of the Council of Ministers on 30 November and 1 December 2000."⁸² In preparation for this

⁸⁰ European Council on Refugees and Exiles (2000): *ECRE's comments on the French Presidency proposals for a Council Directive defining, and Framework Decision on preventing, the facilitation of unauthorised entry, movement and residence*, Brussels, Nov. 7, 2000 [[arena-web](#)], p. 3. Raoul Wallenberg was a Swedish diplomat who deliberately used illegal means, including bribes and false documents, to save the lives of Hungarian Jews during World War II.

⁸¹ Cf. Council of the EU (2000h): Council doc. 12914/1/00 REV 1 [[arena-web](#)], p. 1. The Article 36 Committee, an administrative body of senior officials also known as the Comité de l'Article Trente-Six or CATS, is the post-Amsterdam successor of the K.4 Committee (1993-99). One may also think of the Article 36 Committee as the Third Pillar equivalent to the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) in the First Pillar.

⁸² Council (2000h): Council doc. 12914/1/00 REV 1 [cf. footnote 81], p. 3.

ministerial gathering, the *Permanent Representatives Committee, Part Two (COREPER II)* discussed the file on November 15th and 22nd, while the *JHA Counselors* were scrutinizing the dossier in parallel.⁸³

By November 24th, the French Presidency had produced a second revision of the legal text. In response to the UNHCR's comments, the Presidency had inserted a so-called humanitarian clause stipulating that the Framework Decision "shall apply without prejudice to the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights." The Austrian, Danish, Dutch, Finnish and Swedish delegations, however, thought that this wording was inadequate. They therefore suggested defining human smuggling as "the facilitation of unauthorized entry for financial gain" in order to "[make sure] not to affect adversely work done by humanitarian organisations for refugees."⁸⁴

In regard to the level of criminal sanctions, the Presidency had watered down its initial proposal for the sake of fostering an early agreement in the Council: France now suggested a "maximum sentence of not less than 8 years." Both COREPER and the Council of Ministers were asked to "examine whether the maximum sentence of 8 years proposed by the Presidency can be accepted as a compromise by all delegations."⁸⁵

After its meeting on November 30 – December 1, 2000 in Brussels, the *Justice and Home Affairs Council* stated that "a large majority of delegations could

⁸³ See Council of the EU (2000i): Council doc. 13739/00 [[arena-web](#)]. The JHA Counselors Group is an informal working party composed of national justice and interior ministry officials who, not unlike the members of COREPER, are permanently based in Brussels. As far as EU measures for the approximation of national criminal laws are concerned, the JHA Counselors monitor the proceedings of the Working Party on Substantive Criminal Law and report both to COREPER II and the Article 36 Committee (cf. *Annex 4*). The informal group of JHA advisers is also known as the "mini-COREPER" of the JHA domain.

⁸⁴ Council (2000i): Council doc. 13739/00 [cf. footnote 83], p. 14. The outgoing French Presidency presented a slightly revised version of the humanitarian clause shortly before Christmas. The amended version of the clause provided that "any Member State may take the measures necessary to ensure that the penalties ... shall not apply to any natural or legal person whom the judicial authorities consider to have acted exclusively with the aim of providing assistance to refugees and asylum seekers." Council of the EU (2000j): Council doc. 14920/00 [[arena-web](#)], p. 1.

⁸⁵ Council (2000i): Council doc. 13739/00 [cf. footnote 83], p. 3.

accept that, in the most serious cases, the maximum sentence should be eight years imprisonment.” With a view to the humanitarian clause requested by the UNHCR, the Council of Ministers declared that “the Council was most concerned to respect the activities of humanitarian organisations which give voluntary assistance to illegal immigrants, and to protect victims of trafficking in human beings.” However, the Council also underlined its intention of “reconciling respect for these principles with the desire vigorously to combat the facilitation of unauthorised immigration.”⁸⁶

The predictable failure of the JHA Council to reach a political agreement at this stage was not well received by the *European Council*. In fact, the Nice European Council reacted to this negotiation impasse by instructing the JHA Council “that the last remaining problems concerning the texts aimed at combating the traffic in human beings and illegal immigration be settled as soon as possible in accordance with the explicit request made at Feira.”⁸⁷ In spite of this clear political instruction, the European Council’s attention was mainly focused on concluding the Intergovernmental Conference on institutional reform at this point.⁸⁸

⁸⁶ Council of the EU (2000k): “2314th Council meeting – Justice, Home Affairs and Civil Protection – Brussels, 30 November and 1 December 2000,” Council doc. 13865/00 [[arena-web](#)], p. 12.

⁸⁷ European Council (2000b): *Nice European Council Meeting, 7, 8 and 9 December 2000: Presidency Conclusions* [[arena-web](#)], no. 50.

⁸⁸ The institutional reforms agreed upon by the heads of state or government in Nice were, in the eyes of some observers, “neither a success for the French Presidency nor for the EU as a whole.” Lequesne, C. (2001): “The French Presidency: The Half Success of Nice,” in: *Journal of Common Market Studies*, Vol. 39 (Annual Review), pp. 47–50, here: p. 48. This outcome may arguably be attributed to the fact that “the French government scrupulously used the position of the chair to advance proposals that essentially constituted national position papers framed as Presidency compromises. ... When accused by other member states and the Commission of partiality, arrogance, and misuse of the Presidency, the French government referred to the necessity for achieving results.” Tallberg, J. (2006): *Leadership and Negotiation in the European Union*, Cambridge University Press, pp. 138–39. It probably did not help the French Presidency either that the European Council meeting in Nice was accompanied by approximately 60,000 protesters and French riot police. Cf. *inter alia* *The Independent* of Dec. 8, 2000: “Amid the clouds of tear gas, a disparate alliance is united in protest.”

3.3 Intergovernmental Negotiations under the Swedish Presidency

During the first half of 2001, the legislative dossier was handled by the Swedish Presidency. Immediately after the Swedes had taken the chair, the Finnish delegation submitted a note to the Working Party on Substantive Criminal Law. Finland was lending support to the UNHCR's view that human smuggling should not be confused with trafficking in human beings:

The Finnish delegation believes that it is important to emphasize the distinction between facilitation of illegal entry and trafficking in human beings. These are separate offenses as regards the definition as well as the seriousness of the activities involved.

The Finnish delegation therefore made the suggestion

to discuss trafficking in human beings in a separate initiative.... This solution would be more clear also in relation to Norway and Iceland as trafficking in human beings might not be considered as [a] further development of the Schengen acquis. Also the Commission has announced that it is preparing a separate initiative to this end.⁸⁹

The Commission would indeed submit a proposal for a Council Framework Decision on combating trafficking in human beings in January of 2001. In the explanatory memorandum accompanying the previously mentioned proposal, the Commission explained why it considered smuggling and trafficking to be separate offences:

While smuggling of migrants could be said to constitute a crime against the state and often involves a mutual interest between the smuggler and the smuggled, trafficking in human beings constitute [sic] a crime against a person and involves an exploitative purpose. The Commission is therefore of the view that the French initiatives on facilitation of unauthorised entry, movement and residence are related to smuggling of migrants.⁹⁰

⁸⁹ Council of the EU (2001a): Council doc. 5186/01 [[arena-web](#)], pp. 1-2.

⁹⁰ European Commission (2001c): "Combating Trafficking in Human Beings and Combating the Sexual Exploitation of Children and Child Pornography: Two Proposals for Framework Decisions," Brussels, Jan. 22, 2001, Commission doc.

The Swedish Presidency made an extraordinary effort to keep the Council's legislative agenda moving forward.⁹¹ In a friendly gesture towards its Nordic non-EU neighbors, the Swedish government also created a political platform for the expression of Norwegian and Icelandic views on Schengen-related decision-making processes. From now on, the Working Party on Substantive Criminal Law and higher-ranking Council bodies would be discussing the human smuggling dossier in the composition of a *Mixed Committee (EU + Norway and Iceland)*.

During the first meeting of the Working Party on Substantive Criminal Law (Mixed Committee) under the Swedish Presidency on January 15, 2001, it became clear that "there was no agreement on the length of imprisonment. Norway, Iceland, Finland, Denmark and Sweden called for a level lower than 8 years." In regard to the humanitarian clause, on the other hand, it emerged that "Germany, France, Denmark, Greece, Ireland, the Netherlands, Portugal, and the UK were against" this provision. The only thing that "all delegations agreed [upon was] that the proposal was not aimed at trafficking

COM (2000) 854 final/2 [[arena-web](#)], p. 8. The JHA Council would formally endorse the Commission's proposal in July of 2002. See Council of the EU (2002d): "Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA)," in: *Official Journal of the European Communities* of Aug. 1, 2002, Vol. L 203, pp. 1-4 [[arena-web](#)]. One may note in this context that the cross-border prosecution of human traffickers has developed into one of the main fields of activity of Eurojust. Cf. Eurojust (2006): *Annual Report 2005*, The Hague [[arena-web](#)], p. 32. Cf. also Rijken, C. (2003): *Trafficking in Persons: Prosecution from a European Perspective*, The Hague: T.M.C. Asser; and Obokata, T. (2006): "EU Action Against Trafficking of Human Beings: Past, Present and the Future," in: Guild and Minderhoud (eds.), *Immigration and Criminal Law* [cf. footnote 72], pp. 387-406.

⁹¹ According to Ole Elgström, the Swedish government was able to "take advantage of a well co-ordinated and effective bureaucracy" while chairing "more than 2,000 meetings that took place in Brussels and Luxembourg and the 80-plus informal meetings that were held in Sweden." Beyond that, the Swedish Presidency's consensual policy style stood in marked contrast to the former French Presidency's approach. In fact, "the French had been widely criticized for 'Great Power arrogance' and for the shameless promotion of French self-interests." Elgström, O. (2002a): "Dull but Successful – the Swedish Presidency," in: *Journal of Common Market Studies*, Vol. 40 (Annual Review), pp. 45-48, here: p. 46; and Elgström, O. (2002b): "Evaluating the Swedish Presidency," in: *Cooperation and Conflict*, Vol. 37, No. 2, pp. 183-89, here: p. 183, respectively. For further reading on the Swedish Presidency, see Tallberg, J. (2001) (ed.): *När Europa kom till Sverige: Ordförandeskapet i EU 2001*, Stockholm: SNS Förlag.

in human beings,” and that it may therefore be “appropriate to re-examine the recitals to both the draft Framework Decision and the draft Directive.”⁹²

A few days later, the *Austrian* delegation, i.e. the political representatives of a Member State which, until recently, had suffered from diplomatic sanctions imposed by the other Member States in an (ultimately failed) attempt to influence the party-political composition of the Austrian federal government,⁹³ submitted a note to the Council Secretariat stating that

the measures set out in France’s initiative go far beyond the objective aimed at. [Under these] proposals, even acts causing little social harm would be subject to very strict sanctions. ... [We] must avoid giving the impression that the Union is one-sidedly taking excessively harsh action against the facilitation of immigration and residence by persons in breach of the Member States’ laws, without at the same time considering aspects of a balanced migration policy....⁹⁴

Ironically, the Council delegation most critical of “one-sided and excessively harsh action” against human smugglers was speaking on behalf of a government widely accused of xenophobia and right-wing populism.

The Working Party on Substantive Criminal Law (Mixed Committee) met again on February 13th-14th in order to further elaborate the humanitarian clause and the level of criminal sanctions. With a view to the humanitarian clause, the Swedish Presidency presented a revised version of article 1 of the draft Directive. The Directive now called for “appropriate sanctions” against human smugglers “unless it is established that the act was committed principally with the aim of providing assistance to refugees and asylum seekers.” This definition was criticized as being too broad *inter alia* by the governments of Denmark, Greece and the UK, whereas the Belgian delegation, in contrast, demanded that “the application of the humanitarian clause in national law should be mandatory.”

⁹² Council of the EU (2001b): Council doc. 5645/01 [[arena-web](#)], pp. 5, 12 and 15, respectively.

⁹³ Cf. Merlingen, M. *et al.* (2001): “The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria,” in: *Journal of Common Market Studies*, Vol. 39, No. 1, pp. 59-77. The sanctions against Austria, imposed in Feb. 2000, had been lifted in Sept. 2000.

⁹⁴ Council of the EU (2001c): Council doc. 6091/01 [[arena-web](#)], pp. 1-2.

In regard to the length of imprisonment, the Swedish Presidency further watered down the amended French text by suggesting “a maximum sentence of not less than 6 years.” This relatively dovish Swedish proposal, in turn, motivated France, Germany, Portugal and the UK to formally enter substantive reservations. The former group of countries demanded a minimum maximum sentence of at least eight years. Denmark, Iceland, the Netherlands and Norway, on the other hand, “thought that 8 years in any case was too high,” while Finland considered that “6 years was rather high,” and Iceland “could [only] accept 4 years.”⁹⁵

3.3.1 Supranational Parliamentary Rejection

In the midst of these Council-based negotiations over the appropriate level of criminal sanctions against human smugglers and the possible exemption of asylum seekers and their helpers from criminal prosecution, the European Parliament (EP) passed a resolution in which it categorically rejected the French legislative initiatives.⁹⁶ The Euro-parliamentarians’ *en bloc* rejection was partly a symbolic response to the EP’s political marginalization vis-à-vis the Council under the consultation procedure (cf. *inter alia* article 67 of the EC Treaty in its Amsterdam version). However, the EP also expressed serious doubts over the substantive profile of the draft Directive and Framework Decision.

The Euro-parliamentarians’ substantive disapproval had initially been voiced by the EP’s *rapporteur* for this cross-pillar dossier, Mr. Ozan Ceyhun, a German MEP affiliated with the Group of the Greens/European Free Alliance and member of the EP’s Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs. Similar to the Commission’s position and the Austrian delegation’s stance in the Council, the so-called Ceyhun Report of October 25, 2000 emphasized the alleged need for a proactive EU policy on legal immigration:

The Union can only successfully control illegal immigration within the framework of a comprehensive immigration policy. Without a common immigration and asylum policy which takes

⁹⁵ Council of the EU (2001d): Council doc. 6254/01 [[arena-web](#)], pp. 3–4.

⁹⁶ See European Parliament (2001): “Unauthorised entry, movement and residence: Thursday, 15 February 2001,” in: *Official Journal of the European Communities* of Oct. 1, 2001, Vol. C 276, pp. 244–45 [[arena-web](#)]. The resolution was adopted by a majority of 249 against 189 votes.

account not only of the persons concerned but also of the socio-economic interests of the Member States, any measure will be doomed to failure.

MEP Ceyhun qualified his remarks as follows:

[These] proposals do not offer sufficiently realistic solutions. ... Harsher legislation and increased border controls have only a minimal effect on unauthorised immigration. ... [The] European Union must as a matter of urgency adopt a European policy on immigration promoting legal immigration into its territory and ensuring that legal immigrants, whose important contributions to the European economy must be stressed, are genuinely assimilated.

The Ceyhun Report also shared the UNHCR's view that EU measures against human smugglers should not infringe upon the human right of third country nationals to seek asylum in Europe or elsewhere:

The purpose of such measures must never be to dissuade asylum-seekers from exercising their legitimate right to seek the protection of a signatory state, since this would constitute an infringement of the 1951 Geneva Convention. ... Associations, organisations or other legal persons acting for humanitarian reasons shall be immune from criminal prosecution.

Last but not least, the Ceyhun Report generally disapproved of the Council's use of Third Pillar measures in "communitized" policy areas like illegal immigration. Lending support to the Commission's legal assessment, the European Parliament thus also objected to the French initiatives on procedural grounds:

It would have been preferable to combine these two proposals and base them on the same legal basis, those of the first pillar, in other words Article 61 and 63 of the EC Treaty which govern the implementation of a common immigration policy. ... [The] intergovernmental procedure [deprives] the EP of any power of co-decision in this matter....⁹⁷

⁹⁷ European Parliament (2000): "Report on the initiative of the French Republic with a view to the adoption of a Council Directive defining the facilitation of

3.3.2 Subsequent Negotiations under the Swedish Presidency

Taking note of the European Parliament's categorical rejection of the draft texts, the JHA Council's Article 36 Committee (Mixed Committee) met again on February 19-20, 2001 in order to take a fresh look at the unfinished dossier. The Commission formally entered a substantive reservation concerning the legal basis of the Framework Decision on this occasion (cf. *section 3.3.4* below). Beyond that, the Swedish Presidency, following the Council Legal Service's advice and in an attempt to clarify the legal status of Norway and Iceland, inserted a new provision stating that the legislative acts constituted a further development of the Schengen *acquis*.⁹⁸

unauthorised entry, movement and residence, [and] on the initiative of the French Republic with a view to the adoption of a Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence," Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, EP doc. *A5-0315/2000 final* of Oct. 25, 2000 [[arena-web](#)], pp. 5, 8, 19-20 and 23, respectively.

⁹⁸ This newly inserted provision referred to the Schengen Implementation Agreement ("Schengen II") of 1990 in general and art. 27 Schengen II in particular. Art. 27 of the Schengen Implementation Agreement called for "appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the contracting parties in breach of that contracting party's laws on the entry and residence of aliens." The further development of this provision by the JHA Council took place in the context of the Northern enlargement of Schengen. The Nordic countries' full legal and operational compliance with the rules and standard operating procedures of the Schengen regime culminated in the elimination of internal border controls between Denmark, Finland, Iceland, Norway and Sweden, on the one hand, and Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal and Spain, on the other, as of March 25, 2001 (cf. *section 2.1* and *Annex 4*). One may note in this context that the Norwegian and Icelandic governments find themselves in the rather unfortunate position of having to negotiate further developments of the Schengen *acquis* with their EU counterparts in light of a so-called guillotine clause: Norway and Iceland can be excluded from the Schengen scheme altogether if they do not approve of every single Schengen-related EU decision. See Council of the EU / Norway / Iceland (1999): "Agreement between the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis*," in: *Official Journal of the European Communities* of July 10, 1999, Vol. L 176, pp. 36-49 [[arena-web](#)], art. 8 (4).

For the time being, the Article 36 Committee was not able to reach an agreement on the precise framing of the humanitarian clause. In fact, “the United Kingdom delegation [in particular] thought that the expression ‘to provide humanitarian assistance to the person concerned’ ... might be too broad.” With a view to the level of penal sanctions, on the other hand, the Swedish Presidency presented delegations with a compromise solution. This compromise proposal had been drawn up in light of (apparently irreconcilable)

differences between the general level of punishment in different Member States. Many delegations thought that the maximum sentence to determine should be 8 years. However, it appeared that in some Member States that level would be out of line with their criminal law in general. The only realistic way forward was therefore, in the view of the Presidency, to provide some sort of exception.

The exception envisioned by the Presidency, i.e. Sweden’s suggestion to offer Member States’ governments (and especially the more reluctant Nordic ones) an opt-out clause from an otherwise uniformly high level of penal sanctions against human smugglers, immediately triggered formal reservations by the UK and France. The heavily criticized compromise solution suggested by the Swedish government read as follows:

If imperative to preserve the coherence of the national penalty system, the actions defined in paragraph 3 [calling for a maximum custodial sentence of at least 8 years] shall be punishable by custodial sentences with a maximum sentence of not less than 6 years, provided that it is among the most severe maximum sentences available for crimes of comparable gravity.⁹⁹

⁹⁹ Council of the EU (2001e): Council doc. 6465/01 [[arena-web](#)], p. 14. The Nordic governments’ negotiating behavior corresponds to Hans Nilsson’s empirical observation that “frequently, the delegation’s negotiating aim is to avoid changing its national law by ensuring that the proposed instrument is compatible with that goal.” Nilsson, H. G. (2004): “The Justice and Home Affairs Council,” in: Westlake, M. / D. Galloway, *The Council of the European Union*, London: John Harper Publishing, 3rd edition, pp. 113–42, here: p. 136. Hans Nilsson served as Head of Division on judicial cooperation in the General Secretariat of the Council. Likewise, a Council Secretariat official interviewed by myself reported the following: “An argument I had all the time – I was half amused, half exasperated – was: ‘President, we cannot accept that, because, in that case, we would have to change our national legislation!’ Well,

In light of the upcoming JHA Council meeting scheduled for March 15th, the Swedish Presidency delegated the dossier to COREPER II (Mixed Committee). COREPER's deliberations, however, did not yield concrete results. The Member States' ambassadors merely managed to present the Council of Ministers with a structured list of items on which intergovernmental agreement on administrative level had *not* been reached, including the humanitarian clause and the lowest maximum sentence. Complicating matters further, the Permanent Representatives Committee had to inform the JHA Council that the Danish and British delegations had formally entered parliamentary scrutiny reservations.¹⁰⁰

Three days ahead of the actual Council meeting, the UNHCR submitted a second position paper. In order to further strengthen the humanitarian clause considered by the Council, the UN Refugee Agency recommended "mandatory wording reflecting the principle that penalties should not be imposed to persons who, for exclusively humanitarian reasons, have facilitated the unauthorised entry of an asylum-seeker into the territory of a Member State."¹⁰¹

As one may have expected, the Justice and Home Affairs Council (Mixed Committee) could not agree on the final wording of the so-called humanitarian clause during its meeting of March 15-16, 2001 in Brussels. Nor was there a political agreement on the level of criminal sanctions. Against this background, the Council of Ministers instructed its subordinate bodies that "work should be continued on the two draft instruments with a view to reaching political agreement at the May JHA Council."¹⁰²

but that's precisely what you are here for! Funny, but that happened all of the time with some delegations! In the beginning, with some of the compromises, a couple of people just didn't understand what we were doing." Author's interview, May 11, 2004.

¹⁰⁰ Cf. Council of the EU (2001f): Council doc. 6766/01 [[arena-web](#)], p. 14. Cf. also section 3.4 below.

¹⁰¹ UNHCR (2001): *UNHCR observations on the Draft Council Directive defining the facilitation of unauthorised entry, movement and residence...*, Mar. 12, 2001 [[arena-web](#)], p. 2.

¹⁰² Council of the EU (2001g): "2337th Council meeting – Justice, Home Affairs and Civil Protection – Brussels, 15 and 16 March 2001," Council doc. 6757/01 [[arena-web](#)], p. 10.

About a week after the ministerial gathering in March, the acting President of the JHA Council explained the political purpose of introducing more or less harmonized criminal sanctions against human smugglers throughout the EU in the following manner:

This sends a clear message: it is criminal to cruelly and cynically carry on human smuggling operations and exploit vulnerable people. ... Through increased sanctions we are prepared to send out the message that the Member States take a very serious view of these criminal activities and that we want our police to give priority to the fight against crime in this area.

Again, one of Europe's leading political figures had deliberately juxtaposed the smuggling of third country nationals into the EU with the "cruel and cynical exploitation of vulnerable people." The acting President of the Council rounded off her touching statement by adding that "although we did not reach agreement this time, a good spirit of compromise prevailed. My aim is to reach political agreement on these matters on 28-29 May."¹⁰³

3.3.3 Towards a Compromise Solution

The outcome of the ministerial gathering in March was thoroughly discussed during a subsequent meeting of the JHA Counselors Group (Mixed Committee) on April 2nd. Building on the adviser group's work, the Swedish Presidency asked the Member States to "agree to the following compromise."

In regard to the humanitarian clause, the Presidency called upon delegations to give their consent to a new wording of article 1 (2) of the draft Directive. This provision now stated that "any Member State *may* decide not to impose sanctions ... where the aim of the behavior is to provide humanitarian assistance to the person concerned" (emphasis added). The Swedish Presidency, in other words, recommended the optional rather than mandatory application of the humanitarian clause. With a view to the level of criminal sanctions as defined in article 1 (3) of the draft Framework Decision, on the other hand, the Swedish government returned to the French idea of "a maximum sentence of not less than 8 years." Article 1 (4) of the Swedish

¹⁰³ Swedish Presidency (2001a): *Report on Asylum and Migration Affairs to the European Parliament's LIBE Committee by the Minister for Development Cooperation, Migration and Asylum Policy, Maj-Inger Klingvall, on 21 March 2001* [[arena-web](#)], item no. 2.

Presidency's new draft, however, contained the opt-out clause analyzed in section 3.3.2 above.

In addition to these substantive amendments, the Swedish Presidency had drawn up a draft *Declaration for Entry in the Minutes of the Council*. This declaration was supposed to provide a political platform for those Member States' governments particularly eager to impose harsh penal sanctions against human smugglers. The draft declaration read as follows:

Facilitation [of unauthorised entry and residence of aliens] nowadays takes the serious form of illegal immigration networks which deceive those who have recourse to them and place them in very dangerous situations, as was dramatically demonstrated by the deaths in Dover in June 2000. Such networks are now inextricably linked with organised crime. ... [Aware] that the leaders of illegal immigration networks are criminals who cause serious harm to others, the undersigned Member States undertake to implement measures in their national law laying down, for the conduct referred to in Article 1 (3) of the Framework Decision, a maximum penalty of ten years' imprisonment.

In the end, this declaration was signed by the governments of France, Luxembourg and the UK.

In light of the fact that "this [overall] solution was acceptable to the majority of the delegations" in the JHA Counselors Group, the Swedish Presidency called upon COREPER II "to examine whether agreement can be reached on the basis of the compromise proposed."¹⁰⁴

The Permanent Representatives Committee examined the compromise solution mentioned above on April 4th and 11th. The Member States'

¹⁰⁴ Council of the EU (2001h): Council doc. 7671/01 [[arena-web](#)], pp. 1-3. The Presidency's behavior described above confirms Fiona Hayes-Renshaw and Helen Wallace's observation that "frequently, the accommodation is achieved through declarations in the Council minutes, and often attached to decisions taken, in the end, by consensus. A second [way to accommodate differences] is to provide for a variety of formulations within the body of the relevant text for divergent interpretation or application of the relevant rules to particular member states." Both practices were evidently employed in this case. Hayes-Renshaw and Wallace (2006): *The Council of Ministers* [cf. footnote 56], p. 291.

ambassadors, however, also had to find ways and means to accommodate the views of the *Austrian* delegation. In fact, Austria's substantive reservation concerning the entire Framework Decision stemmed from the center-right coalition government's unwillingness to support any EU effort aimed at the approximation of national criminal laws.¹⁰⁵ In light of the unanimity requirement in the Council, COREPER II thus hammered out yet another draft *Declaration for Entry in the Minutes of the Council* which contained the following statement:

The Council recognises that the question of approximation of sanctions in general merits further discussion.... [The Council] instructs the relevant bodies of the Council to begin, during the Swedish Presidency, detailed discussions on this subject.¹⁰⁶

With only one month left before the decisive JHA Council meeting, the dossier was delegated back to the Working Party on Substantive Criminal Law (Mixed Committee). The working group's meeting of April 20th was succeeded by yet another gathering of COREPER II (Mixed Committee) on April 25th.¹⁰⁷

As it turned out, these "endgame" negotiations proved rather difficult. Several delegations made novel claims on these occasions. In light of newly raised Dutch concerns with article 1 (3) of the draft Framework Decision, for example, the scope of the former instrument was temporarily narrowed down in order not to criminalize *attempted* human smuggling and mere *participation* in smuggling operations.¹⁰⁸ By May 3rd, however, it had become clear that such a narrowing down of the scope of the draft Framework Decision would be opposed by France and Spain.¹⁰⁹ The French and Spanish governments accordingly entered substantive reservations concerning article 1 (3) of the

¹⁰⁵ The principal reason for this uncompromising stance was that the Austrian Minister of Justice, Dieter Böhmendorfer, was closely affiliated with the Freiheitliche Partei Österreichs (FPÖ), i.e. the infamous right-wing coalition partner of the center-right Österreichische Volkspartei (ÖVP).

¹⁰⁶ Council of the EU (2001i): Council doc. 8164/01 [[arena-web](#)], p. 2. In the end, this declaration was not entered into the Council's minutes since intergovernmental discussions on this subject matter had indeed been launched by the Presidency.

¹⁰⁷ Cf. Council of the EU (2001j): Council doc. 8115/01 [[arena-web](#)].

¹⁰⁸ See Council of the EU (2001k): Council doc. 8242/01 [[arena-web](#)], pp. 2 and 4.

¹⁰⁹ See Council of the EU (2001l): Council doc. 8522/01 [[arena-web](#)], p. 1.

Framework Decision while discussing this item within the Article 36 Committee (Mixed Committee).¹¹⁰

3.3.4 The Commission's Request for an EC Legal Basis

In the midst of these heated intergovernmental negotiations approximately three weeks ahead of the forthcoming JHA Council meeting, the Commission's services submitted a position paper on the *legal basis* of the legislative acts under discussion. The Commission Staff Working Paper on this subject matter was formally received by the Council Secretariat on May 4, 2001. In this paper, the Commission's Directorate-General (DG) Justice and Home Affairs, i.e. the predecessor of today's DG Justice, Freedom and Security, essentially reiterated its position of September 2000 that "the French initiative should be based in its entirety on a legal base in Community law, namely Article 63 (3) (b) TEC."¹¹¹

The Commission's legal experts primarily drew on the case law of the European Court of Justice (ECJ) in order to justify their claim that the EC (rather than the EU) had the "competence to prescribe that the Member States shall ensure that such behavior [i.e. human smuggling] be the subject of a *criminal* offence and *criminal* penalties." The Commission's benevolent interpretation of the ECJ's case law culminated in the following legal assessment:

The Commission services ... are not pretending to any substantive Community competence in relation to criminal matters *per se*.... However, the Commission services do contend that, if the Community has – within a given competence – the power to regulate behaviour in order to achieve a Community objective, then it has also the competence to decree that the regulated behaviour (or the non-compliance with the regulated behaviour) be sanctioned at national level by *criminal* sanctions and penalties and this is, particularly, the case where it is considered that only criminal sanctions can assure the respect of Community obligations regarding the regulated behaviour.

Furthermore, the Commission reminded the Council that "the Commission used exactly the same reasoning in its recent proposal for a Directive on the

¹¹⁰ Council of the EU (2001m): Council doc. 8632/01 [[arena-web](#)], p. 3.

¹¹¹ Council of the EU (2001n): Council doc. 8845/01 [[arena-web](#)], p. 2.

protection of the environment through criminal law.”¹¹² The Commission’s proposal mentioned above had been tabled in March 2001, i.e. about two months earlier.¹¹³

As we shall see below, the Council at first categorically rejected the Commission’s request for Community involvement in the area of criminal law. The Member States’ objections to any sort of supranational criminal law competence stemmed from their firm belief that *they* – rather than the European Commission, let alone the European Parliament – were authorized to prescribe the use of physical force against EU citizens and third country nationals not complying with EU rules. The Council, in short, simply did not think that the European Community had already acquired the quality of a *political community* in the sense of Max Weber.¹¹⁴ The Council was forced to reconsider its position on this constitutional matter following the ECJ’s judgment in the “Commission vs. Council” case of September 2005 (see *section 4*. below).

3.3.5 Coming to Agreement in the JHA Council

In spite of the Commission’s request for a First Pillar legal basis, the Swedish Presidency was eager to reach a political agreement on the legislative dossier during its tenure. The Third Pillar legal basis of the Framework Decision was therefore maintained.

¹¹² Council (2001n): doc. 8845/01 [cf. footnote 111], pp. 3-5 (emphasis in the original).

¹¹³ Cf. European Commission (2001d): “Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law,” Brussels, Mar. 13, 2001, Commission doc. *COM (2001) 139 final* [arena-web]. The Commission’s legal reasoning was spelled out in greater detail in a Commission Staff Working Paper of Feb. 2001. See European Commission (2001e): “Establishment of an *Acquis* on Criminal Sanctions Against Environmental Offences,” Brussels, Feb. 7, 2001, Commission Staff Working Document *SEC (2001) 227* [arena-web].

¹¹⁴ According to Max Weber, “the political community [is] one of those communities whose action includes, at least under normal circumstances, coercion through jeopardy and destruction of life and freedom of movement applying to outsiders as well as to the members themselves.” Weber (1978): *Economy and Society* [cf. footnote 2], p. 903.

All outstanding issues were addressed by COREPER II (Mixed Committee) on May 16th.¹¹⁵ By May 21st, the Council Secretariat was able to report that the Member States (except for Austria) had found an inter-administrative agreement on both the level of criminal sanctions and the humanitarian clause. The ambassadors thus asked the Council to formally approve of their preparatory work “with a view to reaching political agreement on the two instruments in the Mixed Committee at ministerial level.”¹¹⁶ The consensus reached among government officials was reiterated in a background note to the forthcoming Council meeting. This document informed the interested public that

the Mixed Committee [at ministerial level] will aim to confirm the provisional agreement reached at the level of senior officials – subject to the lifting of a substantive reservation from the Austrian delegation on the inclusion of a humanitarian clause and the setting of a minimum/maximum level of penal sanctions....¹¹⁷

Unsurprisingly, the Justice and Home Affairs Council (Mixed Committee) reached a political agreement on both the draft Directive and Framework Decision on May 29, 2001. In line with the compromise proposal prepared by the JHA Counselors and COREPER II (cf. *section 3.3.3* above), the Council of Ministers agreed upon the optional application of the humanitarian clause and a maximum sentence of not less than eight years (or six years) of imprisonment. The JHA Council had to acknowledge, however, that “the agreement reached is at this stage subject to parliamentary scrutiny reservations by some delegations.”¹¹⁸ In fact, the legislative acts could not yet be formally adopted by the Council due to the ongoing parliamentary scrutiny of the intergovernmental decision-making process in Denmark, Sweden and the UK.¹¹⁹

¹¹⁵ Council of the EU (2001o): Council doc. 8632/01 ADD 1 [[arena-web](#)].

¹¹⁶ Council of the EU (2001p): Council doc. 8632/01 ADD 1 REV 1 [[arena-web](#)], p. 2.

¹¹⁷ Swedish Presidency (2001b): *Background Note: Justice, Home Affairs and Civil Protection Council, 28 & 29 May* [[arena-web](#)], p. 13.

¹¹⁸ Council of the EU (2001q): “2350th Council meeting – Justice, Home Affairs and Civil Protection – Brussels, 28-29 May 2001,” Council doc. 9118/01 [[arena-web](#)], p. 22.

¹¹⁹ See Council of the EU (2001r): Council doc. 9403/01 [[arena-web](#)], p. 1; and *section 3.4* below.

In spite of this caveat, the outgoing President of the JHA Council, the Swedish Minister for Development Cooperation, Migration and Asylum Policy, Maj-Inger Klingvall, was now in a position to highlight “the achievements made during the Swedish Presidency” on the so-called facilitators package. By informing the interested public that “it is important for the EU to have common rules to punish smugglers of humans who exploit innocent people in a most cynical manner,” the Swedish minister made sure that these EU measures would be well received in Sweden.¹²⁰ Minister Klingvall concluded the Swedish Council Presidency with the following statement:

All Member States safeguard their national legislation, but to make progress we have to learn to give and take, to compromise and sometimes to lose something that is dear to us nationally, in order to win something else, to reach our common objectives.¹²¹

3.4 National Parliamentary Scrutiny

Building on the political agreement reached in May 2001, the Council Secretariat focused its attention on fine-tuning the draft legislative instruments. The Council Legal Service in particular left its imprint on the legal texts by rephrasing the recitals to the two legislative measures.¹²² No substantive changes were made during the Belgian Presidency (second half of

¹²⁰ Similar to the situation in France (cf. *section 3.1* above), public opinion polls carried out in Sweden in October–November 2001 confirmed that 78% of Swedish citizens favored joint EU over national decision-making with respect to “the fight against the trade in, and exploitation of, human beings.” Merely 19–22% of Swedish citizens, on the other hand, expressly supported common European policies in the areas of “police” and “justice.” See Eurobarometer (2002): *Report Number 56*, Apr. 2002, Brussels: European Commission, annexes [arena-web], table 4.1. The Swedish minister did not elaborate further on the exploitation of human beings by a smuggler who, according to article 1 (1) (a) of the Directive, “intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens.”

¹²¹ Swedish Presidency (2001c): *Report by Minister for Migration and Asylum Policy Maj-Inger Klingvall in the European Parliament on 19 June 2001* [arena-web], p. 8.

¹²² Cf. Council of the EU (2001s): Council doc. 10075/01 [arena-web]. The Council Legal Service stopped short, however, of rephrasing the recitals referring to the alleged need to criminalize “networks which exploit human beings” (recital 2 to the final legislative acts).

2001), however – except for clarifying that the draft Framework Decision would also apply to Gibraltar.¹²³

The main reason why both the draft Directive and Framework Decision could not yet be formally adopted by the Council was that the British, Danish and Swedish governments were simply not authorized to withdraw their parliamentary scrutiny reservations at this point. The European Scrutiny Committee of the British House of Commons in particular prevented an early adoption of the facilitators package by the JHA Council. As a matter of fact, the Commons did not clear the file until April of 2002 in light of a perceived need to generate parliamentary-democratic “legitimacy by procedure” (Niklas Luhmann) in the sensitive area of EU criminal law. In order to illustrate the procedural mechanisms by which domestic institutional arrangements may affect the course of legislative proceedings in the “Third Pillar” of the EU, the following paragraphs provide a brief summary of the process of national parliamentary scrutiny in Britain.

The parliamentarians in London had been particularly interested in the Blair government’s position vis-à-vis the envisioned level of criminal sanctions against human smugglers. The Minister of State at the Home Office, Barbara Roche, had justified the British executive’s stance on this subject matter in an explanatory memorandum of January 25, 2001 as follows:

The Government is mindful of the minimum maximum penalty of 8 years’ imprisonment for the offences of fraudulent making or altering of currency in the Framework Decision on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro. The Government considers that crimes of serious facilitation, which in some cases endanger life, should be liable to a similar penalty.

The European Scrutiny Committee, on the other hand,

found the analogy drawn by the Minister with the penalties for counterfeiting the euro to be less than convincing. ... We note that some Member States consider that a penalty of eight years is too long, and we ask the Minister to inform us of the outcome

¹²³ Cf. Council of the EU (2001t): Council doc. 10075/01 COR 1 [[arena-web](#)]; and Council of the EU (2001u): Council doc. 11015/01 [[arena-web](#)].

of discussions on that issue. ... We do not clear [the] document, and shall await the Minister's reply.¹²⁴

The Blair government simply ignored this parliamentary request.

Two months after the JHA Council had reached a political agreement on the so-called facilitators package, the European Scrutiny Committee issued the following statement:

We deplore the practice of a Minister announcing in the Council, before a document has cleared scrutiny, that the scrutiny reserve will be lifted, and will take a serious view of any further instance of this. We ask the Minister to explain why such an announcement was made in this case. In the meantime we shall hold the document under scrutiny.¹²⁵

The Parliamentary Under-Secretary of State at the Home Office, Angela Eagle, only came back to the Committee on January 15, 2002. The British government justified its late response by resorting to the following argument:

The delay in replying to the Committee's Report was due to confusion over whether a reply should be sent in light of the provisional agreement reached at the May 2001 JHA Council.

This brief explanation did not satisfy the parliamentarians either. The European Scrutiny Committee thus declared the following:

We consider that there have been serious failings in the presentation of this proposal for scrutiny. We do not understand why there should have been any confusion over the need to provide an Explanatory Memorandum to accompany the latest

¹²⁴ House of Commons (2001a): *Strengthening the Penal Framework to Prevent Unauthorised Entry and Residence*, Select Committee on European Scrutiny, Ninth Report of Mar. 21, 2001 [[arena-web](#)], items 1.11, 1.16 and 1.17. Cf. Council of the EU (2000): "Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (2000/383/JHA)," in: *Official Journal of the European Communities* of June 14, 2000, Vol. L 140, pp. 1-3 [[arena-web](#)].

¹²⁵ House of Commons (2001b): *Strengthening the Penal Framework to Prevent Unauthorised Entry and Residence*, Select Committee on European Scrutiny, First Report of July 18, 2001 [[arena-web](#)], item 7.10.

texts of this proposal, and why it should have taken over six months for it to be produced, particularly when we had specifically requested the Minister on 18 July 2001 to provide an account of where matters stood with this proposal and to deposit the current revised versions. ... We are considering whether to recommend a debate on this document, and will make a decision when we have the Minister's reply. We therefore look forward to a prompt reply from the Minister and shall hold [the] document under scrutiny in the meantime.¹²⁶

By March 2002, the Parliamentary Under-Secretary of State had managed to send a second letter to the House of Commons in which she accounted for the apparent confusion among UK government officials:

I must apologise for the fact that my letter of 15 January stated that there had been a 'provisional agreement' on the text, as it was in fact a political agreement. It was because political agreement had been reached on the text that officials were not clear that it would be correct to submit an Explanatory Memorandum on the agreed texts. Under the terms of the scrutiny reserve resolution, the Parliamentary reservation should have been lifted at the point of political agreement rather than formal adoption.... The Government did not do this because a number of other Member States retained parliamentary reservations at the point of political agreement. I apologise again for the confusion which arose within the department about the effect of the Government's decision on the scrutiny process.

Again, the parliamentarians were not satisfied with this response:

We ask the Minister to explain more precisely whether the Government did participate in the political agreement reached by the Council on 28-29 May 2001 and, if so, to explain why this was done when the proposal was still subject to scrutiny. ... We shall hold the present document under scrutiny pending the

¹²⁶ House of Commons (2002a): *Strengthening the Penal Framework to Prevent Unauthorised Entry and Residence*, Select Committee on European Scrutiny, Fifteenth Report of Jan. 30, 2002 [[arena-web](#)], items 6.6, 6.19 and 6.23.

Minister's reply, which we shall expect to receive in time to consider in conjunction with her Explanatory Memorandum.¹²⁷

It was only after the Home Office had sent a third letter to the European Scrutiny Committee that the UK's parliamentary scrutiny reservation in the Council could be lifted. In this letter of April 10, 2002, the British government laid out that

the circumstances of the May 2001 JHA Council were exceptional by reason of the general election period, and that the Government judged that there were important reasons for agreeing to the French Presidency proposals on illegal immigration.

This straightforward answer apparently satisfied the (predominantly Labour Party-affiliated) members of the European Scrutiny Committee. The House of Commons used this opportunity, however, to remind the British executive that

the presentation of this matter for scrutiny has been a chapter of accidents. It would have been preferable for the Government to have acknowledged at the time that it was overriding the scrutiny reserve when it participated in the political agreement to this proposal at the Justice and Home Affairs Council in May 2001. It was at this stage that any further substantial discussion of the proposal was effectively foreclosed, and it was then that the Government should have sought to justify the overriding of the scrutiny reserve as best it could. ... We do not think that any purpose is now served by holding the documents under scrutiny, and we are content to clear them.¹²⁸

¹²⁷ House of Commons (2002b): *Strengthening the Penal Framework to Prevent Unauthorised Entry and Residence*, Select Committee on European Scrutiny, Twenty-Second Report of Mar. 20, 2002 [[arena-web](#)], items 8.5, 8.8 and 8.10.

¹²⁸ House of Commons (2002c): *Strengthening the Penal Framework to Prevent Unauthorised Entry and Residence*, Select Committee on European Scrutiny, Twenty-Fifth and Twenty-Sixth Report of Apr. 23, 2002 [[arena-web](#)], items 11.13, 11.15 and 11.17.

Similar processes of national parliamentary scrutiny took place in Denmark and Sweden.¹²⁹ Mirroring the European Parliament's lack of influence on EU level (cf. *section 3.3.1* above), the retroactive involvement of selected national parliaments did not affect the substantive profile of the legislative acts at hand. However, it effectively delayed the Council's formal adoption of the two measures by approximately one and a half years (cf. *section 3.6* below).

3.5 Mounting Political Pressure

During the Spanish Presidency of the Council (first half of 2002), the dossier was still blocked due to the British, Danish and Swedish parliamentary scrutiny reservations mentioned above. The only noteworthy substantive change to report during this period was the Irish government's opt-in to certain parts of the Schengen *aquis* in general and to the two draft legislative acts at hand in particular.¹³⁰

The political demand for EU action in the field of illegal immigration was increasing, however. In fact, the Spanish government under Prime Minister Aznar deliberately placed the fight against illegal immigration on top of the

¹²⁹ Cf. *inter alia* Folketinget (2002): *Forslag til lov om ændring af udlændingeloven*, Copenhagen, Mar. 20, 2002 [[arena-web](#)]; and Riksdagen (2001): *Rambeslut om förstärkning av den straffrättsliga ramen för bekämpning av olaglig inresa m.m.*, Stockholm, Nov. 15, 2001 [[arena-web](#)]. One may note in this context that the UK, Sweden and Denmark scored highest throughout the EU 25 with respect to the percentage of citizens who do *not* subscribe to the statement that “policy on the prevention and fight against cross-border crime would be more effective if it were decided jointly at the European Union level rather than by individual Member States.” See Eurobarometer (2006): *Opinions on Organised, Cross-border Crime and Corruption*, Special Eurobarometer of Mar. 2006, Brussels: European Commission [[arena-web](#)], p. 7.

¹³⁰ Cf. Council of the EU (2002e): Council doc. 7555/02 [[arena-web](#)]; and Council of the EU (2002f): Council doc. 7555/02 COR 1 [[arena-web](#)]. In effect, both Ireland and the UK are bound by the facilitators package.

EU agenda.¹³¹ The Spanish Presidency's activities were strongly supported by the Blair government in the UK and the Berlusconi government in Italy.¹³²

The restrictive immigration policy agenda of the Spanish Presidency *inter alia* resulted in the formal adoption of Council recommendations on “measures against third countries which refuse to cooperate with the European Union in preventing and combating illegal immigration and smuggling and trafficking in human beings.” In fact, the JHA Council's policy advice to “countries of boarding, departure or transit” like Morocco was that they should

[make] the smuggling and trafficking in human beings subject to criminal penalties..., [impose] criminal penalties for conduct relating to the falsification and fraudulent use of travel documents, [increase] control measures at sea borders for vessels suspected of being involved in smuggling or trafficking in human beings..., [enhance] police controls inside national territory, aimed at breaking down networks of smugglers or traffickers in human beings..., [and strengthen] control measures at their borders, to prevent entry of persons wishing to use their

¹³¹ According to Carmen González Enriquez, the Popular Party had “made ‘the fight against immigration mafias’ a rhetorical motto planned to cover up the absence of a real policy in this area.” González Enriquez, C. (2006): “The Fight Against Illegal Immigration, Smuggling and Trafficking in Human Beings in Spain: Ambiguities and Rhetoric,” in: Guild and Minderhoud (eds.), *Immigration and Criminal Law* [cf. footnote 72], pp. 325–43, here: p. 328.

¹³² In regard to the Blair government's “attempt to play to the domestic gallery because the UK government wanted to be seen as tough on irregular migration,” see Geddes, A. (2006): “The Politics of Irregular Migration, Human Trafficking and People Smuggling in the United Kingdom,” in: Guild and Minderhoud (eds.), *Immigration and Criminal Law* [cf. footnote 72], pp. 371–85, here: p. 380. The tendency to demonstrate strong political leadership in the fight against illegal immigration was even more clearly apparent in Italy. Not only did the centre-right coalition government led by Silvio Berlusconi attach top priority to stemming seemingly “unstoppable invasions of *clandestini*.” Prime Minister Berlusconi also happened to own nearly half of all Italian television stations. Puggioni, R. (2006): “Looking for some Coherence: Migrants In-between Criminalisation and Protection in Italy,” in: Guild and Minderhoud (eds.), *Immigration and Criminal Law* [cf. footnote 72], pp. 169–200, here: p. 170.

territory as a transit path to move illegally towards European Union Member States....¹³³

In regard to the domestic policy agenda, the Seville European Council instructed

the Council and the Commission, within their respective spheres of responsibility, to attach top priority to the ... formal adoption, at the next Justice and Home Affairs Council meeting, of the Framework Decision on combating trafficking in human beings, the Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence and the Directive defining the facilitation of irregular entry, transit and residence.¹³⁴

¹³³ Council of the EU (2002g): Council doc. 10017/02 [[arena-web](#)], pp. 6-7. Shortly thereafter, the former Spanish Presidency was engaged in a military confrontation with neighboring Morocco. Cf. Monar, J. (2002): "The CFSP and the Leila/Perejil Island Incident: The Nemesis of Solidarity and Leadership," in: *European Foreign Affairs Review*, Vol. 7, pp. 251-55; and Peers, S. (2004b): "Irregular Immigration and EU External Relations," in: Bogusz *et al.* (eds.), *Irregular Migration and Human Rights* [cf. footnote 74], pp. 193-219. Empirical phenomena like the JHA Council's interaction with third countries in the field of illegal immigration illustrate that political institutions may attempt to change their environments instead of adapting to them. Politically integrated regional units, in other words, may very well contribute to global instability: "Regional integration may lead to a future world made up of fewer and fewer units, each a unit with all the power and will to self-assertion that we associate with classical nationalism. The future, then, may be such as to force us to equate peace with nonintegration and associate the likelihood of major war with successful regional integration." Haas, E. B. (1971): "The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing," in: Lindberg, L. N. / S. A. Scheingold (eds.), *Regional Integration: Theory and Research*, Harvard University Press, pp. 3-42, here: p. 41. Likewise, David Mitrany argued that "by its nature and tendency a political union must be nationalistic; and that as such it must impede, and may defeat, the great historic quest for a general system of peace and development." Mitrany, D. (1965): "The Prospect of Integration: Federal or Functional," in: *Journal of Common Market Studies*, Vol. 4, No. 2, pp. 119-49, here: p. 145.

¹³⁴ European Council (2002): *Seville European Council, 21 and 22 June 2002: Presidency Conclusions* [[arena-web](#)], no. 30.

3.6 Formal Adoption

By July 2002, the JHA Council had formally endorsed the Framework Decision on combating trafficking in human beings (cf. *section 3.3* above). It did not take long before the Danish Presidency of the Council (second half of 2002) had also managed to overcome the last procedural obstacles for the formal adoption of both the draft EC Directive and the EU Framework Decision on human smuggling. In fact, the Council Secretariat was able to inform the JHA Council on September 16th that “the parliamentary scrutiny reservations [have] been lifted.”¹³⁵

The Council Secretariat spent the following three weeks preparing the final version of the legislative acts, a process culminating in the release of an “A’ item note” to COREPER II on September 30th.¹³⁶ The Member States’ ambassadors endorsed this document in a routine fashion, which, in turn, allowed the Council Secretariat to issue a final “A’ item note” to the Council on October 7th. The stage was set for the formal adoption of the facilitators package during the JHA Council meeting scheduled for November 28-29, 2002.¹³⁷

Unsurprisingly, the Justice and Home Affairs Council, presided over by the Danish ministers Lene Espersen and Bertel Haarder, formally adopted both the EC Directive and the EU Framework Decision on criminal law sanctions against human smugglers as an item approved without debate at the 2469th meeting of the Council in Brussels.¹³⁸

The Commission’s legal discontent was formally recorded in the Council’s minutes. The relevant Commission statement reads as follows:

Given the importance of stepping up the fight against this form of crime without delay, the Commission is in favour of the adoption of sanctions at national level in cases of breach of

¹³⁵ Council of the EU (2002h): Council doc. 10430/02 [[arena-web](#)], p. 2.

¹³⁶ Cf. Council of the EU (2002i): Council doc. 11909/02 [[arena-web](#)]; Council of the EU (2002j): Council doc. 11909/02 COR 1 [[arena-web](#)]; and Council of the EU (2002k): Council doc. 10430/1/02 REV 1 [[arena-web](#)].

¹³⁷ Cf. Council of the EU (2002l): Council doc. 10430/1/02 REV 2 [[arena-web](#)].

¹³⁸ Cf. Council of the EU (2002m): “2469th Council meeting – Justice and Home Affairs – Brussels, 28–29 November 2002,” Council doc. 14817/02 [[arena-web](#)], p. 20.

Community rules intended to prevent unauthorised entry, movement and residence.

The Commission takes the view, however, that the Framework Decision is not the appropriate legal instrument by which to require Member States to introduce such sanctions and considers that its adoption cannot constitute a precedent. The Commission believes that the Community has the competence to require the Member States to impose sanctions at national level, including penal sanctions where appropriate, where this is necessary to achieve a Community objective, under the powers conferred on it for the purpose of achieving the aims set out in Article 2 of the Treaty establishing the European Community.¹³⁹

4. Criminal Law in the First Pillar: Towards a Transformation of European Politics?

Parallel to the routine endorsement of the facilitators package, the Council Secretariat paved the way for the formal adoption of a Danish initiative for an EU Framework Decision on the protection of the environment through criminal law.¹⁴⁰ In light of the Commission's counter-proposal for an EC Directive presented in March 2001 (cf. *section 3.3.4* above), the Council's likely approval of this Framework Decision was about to signal another political defeat for the Commission.

By mid-November 2002, however, it had become clear that the Commission was prepared to take legal action against the Council. In fact, the Commission had drawn up the following statement for entry into the Council's minutes:

The Commission takes the view that the Framework Decision is not the appropriate legal instrument by which to require

¹³⁹ Cf. Council of the EU (2002n): Council doc. 14931/02 ADD 1 [[arena-web](#)], p. 5.

¹⁴⁰ Cf. Kingdom of Denmark (2000): "Initiative of the Kingdom of Denmark with a view to adopting a Council Framework Decision on combating serious environmental crime," in: *Official Journal of the European Communities* of Feb. 11, 2000, Vol. C 39, pp. 4-7 [[arena-web](#)].

Member States to introduce sanctions of a criminal nature at national level in the case of offences detrimental to the environment. As the Commission pointed out on several occasions within Council bodies, it considers that in the context of the competences conferred on it for the purpose of attaining the [Community's] objectives ..., the Community is competent to require the Member States to impose sanctions at national level – including criminal sanctions if appropriate – where that proves necessary in order to attain a Community objective. ... If the Council adopts the Framework Decision despite this Community competence, the Commission reserves all the rights conferred on it by the Treaty.¹⁴¹

The Commission, in other words, combined its legal reasoning in the human smuggling case (cf. *sections 3.2, 3.3.4 and 3.6* above) with an explicit threat of litigation.

In spite of the Commission's unequivocal warning, the JHA Council adopted the Framework Decision on the protection of the environment through criminal law in January of 2003.¹⁴²

4.1 Legal Proceedings Before the Court

On April 15, 2003, the Commission requested the European Court of Justice (ECJ) to annul the Framework Decision on the protection of the environment through criminal law due to an alleged infringement of Community competencies by the Union. For the first time in EU history, a legal action based on article 35 (6) of the EU Treaty had been brought before the Court.¹⁴³

¹⁴¹ Council of the EU (2002o): Council doc. 13743/02 [[arena-web](#)], pp. 4-5.

¹⁴² See Council of the EU (2003a): "Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law," in: *Official Journal of the European Union* of Feb. 5, 2003, Vol. L 29, pp. 55-58 [[arena-web](#)].

¹⁴³ This treaty provision *inter alia* states the following: "The [European] Court of Justice shall have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers." In contrast to the Member States and the Commission, individual

In the course of the ensuing legal proceedings, the European Parliament intervened in support of the Commission. Eleven Member States' governments (Denmark, Finland, France, Germany, Greece, Ireland, the Netherlands, Portugal, Spain, Sweden and the UK), on the other hand, intervened in support of the Council. The active involvement of both the European Parliament and a large number of Member States indicated that all parties were fully aware of the possible constitutional implications of the Court's judgment.

By September 13, 2005, the ECJ had reached a verdict. To the delight of the Commission's Legal Service and to the great chagrin of both the Council's Legal Service and a vast majority of the "old" Member States, the ECJ annulled the Framework Decision on the protection of the environment through criminal law due to an apparent infringement of article 47 of the EU Treaty.¹⁴⁴ Beyond clarifying that the legislative measure at hand "could have been adopted on the basis of Article 175 EC [relating to a Community policy on the environment]," the Court used this opportunity to elaborate in principal terms on the scope of the Community's competencies in the field of criminal law. The decisive passage of the ECJ's judgment reads as follows:

As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence. However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.¹⁴⁵

In light of the fact that no single provision of the EC Treaty specifically authorized the Community to lay down rules in the field of criminal law, and

citizens have not been granted the right to request the judicial review of Framework Decisions. Cf. Council of the EU (2003b): Council doc. 9088/03 [[arena-web](#)].

¹⁴⁴ This treaty provision *inter alia* states that "nothing in this Treaty [on European Union] shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them."

¹⁴⁵ European Court of Justice (2005b): "Judgment" [cf. footnote 13], grounds of the judgment, no. 47-48.

against the background of the Union's explicit criminal law mandate under Title VI of the EU Treaty, the Court's judgment was obviously characterized by "strong teleology."¹⁴⁶ Furthermore, the judges had evidently adhered to a distinctly *functional* line of reasoning in order to justify the Community's newly gained and exclusive power to impose penal sanctions for the effective enforcement of EC rules. Given the Court's recurrently functional explanation of its case law, the most recent manifestation of this rationale did not come as a surprise. In its *ERTA* judgment of 1971, for example, the ECJ had developed the legal doctrine of the Community's *implied powers* in the domain of foreign policy by resorting to the following argument:

[Each] time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.¹⁴⁷

Likewise, the ECJ's judgment in *Commission vs. Council* resembled "the first case in which [the Court] confirmed unequivocally that the Community does

¹⁴⁶ Spinellis, D. (2006): "Court of Justice of the European Communities: Judgment of 13 September 2005 (Case C-176/03, Commission v. Council) annulling the Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law," in: *European Constitutional Law Review*, Vol. 2, pp. 293-302, here: p. 299. See also Tobler, C. (2006): "Case Law: Case C-176/03, Commission v. Council, judgment of the Grand Chamber of 13 September 2005," in: *Common Market Law Review*, Vol. 43, pp. 835-54; Pohl, T. (2006): "Verfassungsvertrag durch Richterspruch: Die Entscheidung des EuGH zu Kompetenzen der Gemeinschaft im Umweltstrafrecht," in: *Zeitschrift für Internationale Strafrechtsdogmatik (ZIS)*, Vol. 1, No. 5, pp. 213-21; and Apps, K. M. (2006): "Case C-176/03, Commission v. Council: Pillars Askew – Criminal Law EC Style," in: *Columbia Journal of European Law*, Vol. 12, pp. 625-37.

¹⁴⁷ European Court of Justice (1971): "Judgment of the Court of 31 March 1971: Commission of the European Communities v. Council of the European Communities, Case 22-70 ('European Road Transport Agreement/ERTA')," in: *European Court Reports 1971*, p. 263, grounds of the judgment, no. 17. The ECJ's *implied powers* doctrine would alter the conduct of foreign economic policy-making in Europe for years to come. Cf. *inter alia* Young, A. R. (2000): "The Adaptation of European Foreign Economic Policy: From Rome to Seattle," in: *Journal of Common Market Studies*, Vol. 38, No. 1, pp. 93-116.

enjoy certain legislative competences of its own in the field of criminal law” due to existing EC rules in areas like environmental protection.¹⁴⁸

4.2 New Patterns of Conflict and Cooperation?

In the eyes of the Commission, the scope of the Court’s judgment of September 2005 extends far beyond the confines of supranational environmental policy. In fact, the Commission quickly drew up a “Communication on the implications of the Court’s judgment” in which the Commission shared its exceptionally broad interpretation of the judgment with a wider audience:

[The] judgment lays down principles going far beyond the case in question. The same arguments can be applied in their entirety to the other common policies and to the four freedoms (freedom of movement of persons, goods, services and capital). ... [The] Court’s reasoning can [be] applied to all Community policies and freedoms which involve binding legislation with which criminal penalties should be associated in order to ensure their effectiveness.

Beyond claiming that the entire *acquis communautaire* should, whenever deemed necessary by the Commission, be enforced by means of penal sanctions, the Commission’s services held that the EC’s newly gained competencies in the field of criminal law would cover the whole range of criminal law measures:

When for a given sector, the Commission considers that criminal law measures are required in order to ensure that Community law is fully effective, these measures may, depending on the needs of the sector in question, include the actual principle of resorting to criminal penalties, the definition of the offence – that is, the constituent element of the offence – and, where appropriate, the nature and level of the criminal penalties applicable, or other aspects relating to criminal law.¹⁴⁹

¹⁴⁸ Dougan, M. (2006): “Legal Developments,” in: *Journal of Common Market Studies*, Vol. 44 (Annual Review), pp. 119-35, here: p. 131.

¹⁴⁹ European Commission (2005b): “Communication from the Commission to the European Parliament and the Council on the implications of the Court’s judgment of 13 September 2005 (Case C-176/03 Commission v Council),” Brussels, Nov. 24,

Against this background, the Commission identified a number of Council Framework Decisions that were apparently adopted on an erroneous legal basis. Among the Third Pillar measures whose legality the Commission, in its role as the so-called Guardian of the Treaties, would like to see restored is the Framework Decision on penal sanctions against facilitators of illegal entry, transit and residence analyzed in *section 3.* above.¹⁵⁰ The Commission's services are currently preparing a legislative proposal that will "[transform] the so-called facilitators package ... into a single [EC] directive following the judgment of the European Court of Justice in case C-176/03."¹⁵¹

2005, Commission doc. *COM (2005) 583 final/2* [[arena-web](#)], no. 6, 8 and 10, respectively. One may note in this context that the Commission generally does not issue Communications in response to ECJ judgments. One of the very rare occasions where the Commission has actually resorted to this practice was the *Cassis de Dijon* judgment of 1979. Cf. Tobler (2006): "Case Law: Case C-176/03" [cf. footnote 146], p. 835.

¹⁵⁰ See Commission (2005b): "Communication" [cf. footnote 149], annex. Other Framework Decisions seemingly affected by the Court's judgment include the Union's measures against money laundering (June 2001), corruption in the private sector (July 2003), and attacks against information systems (Feb. 2005). The ECJ will have the chance to comment on the Commission's assessment in the currently pending ship-source pollution case (Case C-440/05, *Commission v. Council*). See Council of the EU (2005c): "Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution," in: *Official Journal of the European Union* of Sept. 30, 2005, Vol. L 255, pp. 164-67 [[arena-web](#)]; and European Court of Justice (2006): "Action brought on 8 December 2005 by the Commission of the European Communities against the Council of the European Union (Case C-440/05)," in: *Official Journal of the European Union* of Jan. 28, 2006, Vol. C 22, p. 10 [[arena-web](#)].

¹⁵¹ European Commission (2006c): "Report from the Commission based on Article 9 of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence," Brussels, Dec. 6, 2006, Commission doc. *COM (2006) 770 final* [[arena-web](#)], p. 9. This document also contains a preliminary assessment of the transposition of the Framework Decision into national law. The empirical basis for this assessment is rather weak, however, since the Commission has not yet received any information from Austria, Cyprus, Greece, Luxembourg and Portugal, and only partial information from Estonia, Malta, Spain and Sweden. For further reading on the transposition measures undertaken by individual Member States and Schengen-affiliated third countries, see European Commission (2006d): "Annex to the Report from the Commission based on Article 9 of the Council Framework Decision of 28 November 2002....," Brussels, Dec. 6, 2006, Commission Staff Working Document *SEC (2006) 1591* [[arena-web](#)].

Assuming that the Court's judgment does indeed affect the entire *acquis communautaire*, we are about to witness a full-fledged transformation of European politics in the field of criminal law.¹⁵² In light of the fact that policy areas like illegal immigration are typically governed by the so-called Community method, the Court's judgment will significantly alter the respective role of the European Parliament, the Commission and the Council in criminal law-related decision-making processes *inter alia* in the domain of human smuggling.¹⁵³

The judicially imposed transition from Third Pillar decision-making procedures to the co-decision procedure implies that the *European Parliament* is now in a position to decisively influence the substantive profile of future EC criminal law measures, including "hard" Community Directives for the harmonization of national criminal laws. All other things being equal, this will result in the emergence of a left/right pattern of political contestation vis-à-vis criminal law-related decision-making processes above the nation-state.¹⁵⁴ Considering the declining turnout in EP elections in combination with the remarkable absence of genuine European political parties and a European public sphere, however, one may reasonably doubt whether the EP's newly gained competencies will suffice to reduce or even halt "the widening gulf between the European Union and the people it serves."¹⁵⁵

¹⁵² Cf. Egeberg, M. (2006): "The Institutional Architecture of the EU and the Transformation of European Politics," in: Egeberg, M. (ed.), *Multilevel Union Administration: The Transformation of Executive Politics in Europe*, Houndmills: Palgrave Macmillan, pp. 17-30.

¹⁵³ In regard to illegal immigration and future EC penal sanctions against facilitators thereof, the Council has been "digging its own grave," so to speak, by explicitly authorizing the application of the Community method as of Jan. 1, 2005. See Council of the EU (2004c): "Council Decision of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty (2004/927/EC)," in: *Official Journal of the European Union* of Dec. 31, 2004, Vol. L 396, pp. 45-46 [[arena-web](#)].

¹⁵⁴ Cf. *inter alia* Thomassen, J. J. *et al.* (2004): "Political Competition in the European Parliament: Evidence from Roll Call and Survey Analyses," in: Marks, G. / M. R. Steenbergen (eds.), *European Integration and Political Conflict*, Cambridge University Press, pp. 141-64; and Hix, S. *et al.* (2006): "Dimensions of Politics in the European Parliament," in: *American Journal of Political Science*, Vol. 50, No. 2, pp. 494-511.

¹⁵⁵ European Commission (2001b): "European Governance: A White Paper," Brussels, July 25, 2001, Commission doc. COM (2001) 428 final [[arena-web](#)], p. 7. Merely 45,6% of EU citizens actively participated in the June 2004 elections to the

The shift towards the Community method also signals that the *Commission* has acquired the exclusive right of legislative initiative in the field of supranational criminal law. This will put an end to the promotion of national “pet projects” by individual Member States’ governments. Unilateral initiatives like the French proposal on human smuggling analyzed in *section 3.1* above will thus be replaced with the “hobbyhorses” of a supranational political institution that has frequently associated “the general interest of the Community” (article 213 of the EC Treaty) with the competitiveness of major European corporations.¹⁵⁶

Last but not least, the Court’s judgment implies that individual *Member States* will no longer be able to block common European policies in the sphere of criminal law since the potentially isolated views of their political representatives in the Council may ultimately be ignored by the other members of the Council under qualified majority voting rules. (According to the currently valid Treaty of Nice, the threshold for adopting Community legislation backed by a “triple majority” in the Council is to gather at least 255 out of a total of 345 weighted votes, plus to obtain the explicit support of at least 14 of the 27 Member States representing no less than 62% of the EU population.) All other things being equal, the prospect of qualified majority voting on EC criminal law will further diminish the democratic oversight of national parliaments and increase the speed of reaching unanimous intergovernmental agreement in the JHA Council:

European Parliament in spite of compulsory voting in Belgium, Cyprus, Greece and Luxembourg – the lowest turnout ever in EU history.

¹⁵⁶ The Commission has already made use of its sole right of legislative initiative by suggesting more or less harmonized penal sanctions for the effective enforcement of intellectual property rights. See Commission (2006a): “Amended proposal” [cf. footnote 26]. Beyond shedding light on the Commission’s economic policy objectives, this legislative proposal also illustrates how future supranational criminal law measures initiated by the European Commission may deliberately aim at the effective regional enforcement of global economic policy regimes like the World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). For a follow-up of the Commission’s proposal in the JHA Council’s Working Party on Substantive Criminal Law, see Council of the EU (2006a): Council doc. 10329/06 [[arena-web](#)]. For further reading on the political preferences of top Commission officials “[who] appear to be either moderate market liberals or mild regulated capitalists,” see Hooghe, L. (2001): *The European Commission and the Integration of Europe*, Cambridge University Press, p. 121.

Qualified majority voting is not a magic solution. It will not overpass the difficulties: different cultures, different traditions, different ways of seeing the same problem. But, in fact, qualified majority voting will put an end to the comfortable position of relying on a veto for not negotiating a European solution. The veto is a blocking instrument. Qualified majority voting will be a leverage to achieve decisions by unanimity.¹⁵⁷

The citizens of Europe will have to decide whether this overall development not only constitutes an unprecedented qualitative leap in the process of European political integration, but also “a step forward for democracy.”¹⁵⁸

¹⁵⁷ Vitorino, A. (2004): *Oral Statement at the Intermediate Press Conference of the 2613th Council Meeting – Justice and Home Affairs*, Luxembourg, Oct. 25, 2004, audio record [[arena-web](#)], at 15:33 min.; transcription JPA. Member States’ anticipation of accelerated decision-making in the field of EC criminal law may also account for the Council’s politico-administrative reaction to the Court’s judgment and subsequent Commission activities, namely to automatically forward every Commission proposal containing provisions on criminal law to COREPER II and the Article 36 Committee. See Council of the EU (2006b): Council doc. 6466/06 [[arena-web](#)], annex.

¹⁵⁸ European Commission (2005c): “Commission welcomes Court of Justice judgment recognising the exclusive competence of the Community to adopt criminal law measures to ensure the effectiveness of Community law,” Brussels, Nov. 23, 2005, Press Release, Commission doc. MEMO/05/437 [[arena-web](#)], p. 2. Alternatively, the citizens of Europe and their helpers might subscribe to the democratic reasoning of the Irish minister of justice, Michael McDowell: “If you are dealing with something like sexual crime then individual Member States may feel that they are the best judges of where the balance should be struck in relation to any particular issue, and their legislatures might feel very strongly that the European Parliament would not strike the same balance as they might do domestically. Whereas everybody is in favour of motherhood, apple pie and democratic involvement by the European Parliament in principle, in any individual case for a country that is in a minority, assuming QMV, to give to the European Parliament the democratic function and effectively to take it away from their own Parliament, might not be attractive.” McDowell, M. (2006): “Oral Evidence, 15 June 2006,” in: House of Lords, *The Criminal Law Competence of the European Community. Report with Evidence*, European Union Committee, 42nd report of session 2005-2006, HL paper 227, London, July 28, 2006, pp. 47-54, here: p. 52.

5. Interpretation and Conclusions

5.1 EU Criminal Law and the Logic of Consequentiality

From a Rationalist point of view, the Council-based negotiations leading towards the formal adoption of Framework Decision 2002/946/JHA on human smuggling may best be represented as a so-called Stag Hunt game.

Initially formulated by Jean-Jacques Rousseau in his *Discourse on Inequality* of 1754, the Stag Hunt game describes a situation in which a group of hunters is chasing a deer. The success of the stag hunt requires that every hunter

must remain faithful to his [or her] post; but if a hare happened to pass within reach of one of them, we cannot doubt that he [or she] would have gone off in pursuit of it without scruple.¹⁵⁹

Assuming that all actors involved in this weakest-link stag hunt are aware of the possibility of individual defection (which would allow the deer to escape), the game-theoretically interesting question is whether one should reasonably choose to chase a rabbit if the opportunity arises (which is, after all, a relatively safe way to catch at least something independent of the choices made by others), or whether one should take the risk of committing oneself solely to the joint stag hunt (which, if successful, has a higher payoff than the rabbit). While the former course of action might be motivated by “the fear of being a ‘sucker,’” to borrow a phrase coined by Jon Elster, the latter alternative is very attractive for *homo oeconomicus* because it could yield the greatest individual benefit.¹⁶⁰

One way of solving the collective action problem initially raised by Rousseau is to assure each hunter of the other hunters’ cooperation: “[All] that is necessary is that each individual is assured that the others are doing the ‘right’ thing, and then it is in one’s own interest also to do the ‘right’ thing.”¹⁶¹

¹⁵⁹ I have reproduced Rousseau’s original description of the stag hunt from the important contribution to evolutionary game theory by Skyrms, B. (2004): *The Stag Hunt and the Evolution of Social Structure*, Cambridge University Press, p. 1.

¹⁶⁰ Elster, J. (1983): *Explaining Technical Change*, Cambridge University Press, p. 78.

¹⁶¹ Sen, A. K. (1967): “Isolation, Assurance and the Social Rate of Discount,” in: *The Quarterly Journal of Economics*, Vol. 81, No. 1, pp. 112–24, here: p. 122.

What is needed in order to get from the non-cooperative and Pareto-inferior hare hunting equilibrium to the cooperative and Pareto-superior stag hunting equilibrium, in other words, is a social contract between the hunters. Such an arrangement would not only confirm that all players perceive the situation at hand in a common manner. It would also support the building of mutual trust.¹⁶² Without such a social contract, the likelihood of non-cooperative behavior motivated by a desire to “play it safe” is very high. As a matter of fact, the probability of defection among complete strangers increases exponentially as the number of players grows.¹⁶³

With a view to the human smuggling case at hand, the Council of Ministers widely shared the Commission’s view that “the common security system is only as strong as its weakest point” (*section 2.1* above). In light of the absence of internal border controls within the enlarged Schengen area and Member States’ increasingly interdependent policies in the fields of immigration and asylum, the French government’s initiative for the “further development” of the Schengen *acquis* with respect to the approximation of national criminal laws in the domain of human smuggling was welcomed by other Member States’ governments as a potentially beneficial course of action (cf. *section 3.2*). After all, the prevention and, if necessary, prosecution and punishment of the unlawful activities of human smugglers seemingly required that all members of the Council could agree in principle on strengthening the “weakest links” in the emerging internal security architecture of EU-Europe.

¹⁶² The concept of mutual trust as employed in the context of the Stag Hunt or Assurance game must be understood in a “thin” manner that essentially builds on the notion of credible commitments: “Weak trust implies at least the expectation that information communicated about alter’s own options and preferences will be truthful, rather than purposefully misleading, and that commitments explicitly entered will be honored as long as the circumstances under which they were entered do not change significantly....” Scharpf (1997): *Games Real Actors Play* [cf. footnote 28], p. 137. For further reading on the prominent status of the concept of credible commitments within a Rationalist perspective on regional integration, see Moravcsik (1998): *The Choice for Europe* [cf. footnote 15], p. 73.

¹⁶³ See Zürn, M. (1992): *Interessen und Institutionen in der internationalen Politik: Grundlegung und Anwendungen des situationsstrukturellen Ansatzes*, Opladen: Leske und Budrich, p. 182. Another way of phrasing this argument is that “a thousand-person stag hunt would be more difficult to achieve than a two-person stag hunt, because – assuming that everyone must cooperate for a successful outcome to the hunt – the problem of trust is multiplied.” Skyrms (2004): *The Stag Hunt* [cf. footnote 159], p. 10.

It soon emerged, however, that certain Member States' governments were more interested than others in EU criminal law measures against human smugglers. The British government's promotion of harsh penal sanctions and its opposition towards a mandatory application of the humanitarian clause, for example, may best be understood as an instrumentally rational response to the UK's status as the number one asylum destination country in the European Union. In a similar vein, the Finnish government's demands for relatively modest penal sanctions and the exemption of smuggled refugees and their helpers from criminal prosecution may reasonably be interpreted as reflecting Finland's status as a more or less unaffected Member State. The observed variation with respect to the negotiating positions of individual Member States' governments fits well with the theoretical expectations laid out in *section 2.1* above.

The justice and interior ministers also weighed the prospective "added value" of the proposed EU measures against potentially irreversible sovereignty-related costs in the politically sensitive field of criminal law. The Council thus categorically rejected the Commission's and the European Parliament's requests for a "First Pillar" Directive instead of a "Third Pillar" Framework Decision. The evidently strong impulse of "[each] Member State [to] safeguard [its] national legislation" and the corresponding fear that it would "lose something that is dear to [it] nationally," to borrow the words of former Council President Klingvall (*section 3.3.5*), arguably mirrored the Pareto-inferior and yet individually rational impulse of the lone hare hunter in the Stag Hunt game.¹⁶⁴ As documented in *section 3.3.3* above, the Austrian government in particular was less than convinced of the need for an EU instrument in the field of human smuggling, not to mention the Commission's idea of a full-fledged harmonization of national criminal laws via Community Directive. The widespread fear of losing national control over substantive and procedural criminal law also motivated eleven Member States' governments to intervene in support of the Council during the subsequent legal proceedings before the Court (cf. *section 4.1* above). If anybody was willing to take the risk of trusting in the Commission's allegedly superior ability to "deliver results" in the fields of internal security and criminal justice, it was certainly not the Justice and Home Affairs Council of the EU.

¹⁶⁴ In regard to the sovereignty-related costs of Pareto-superior international agreements in the fields of external security and defense, see Jervis, R. (1978): "Cooperation Under the Security Dilemma," in: *World Politics*, Vol. 30, No. 2, pp. 167-214.

In the end, the Member States' governments settled for a compromise solution that underlined the Council's willingness to take collective action, but also allowed for divergent interpretations of, and national derogations from, the EU-wide penalization of human smugglers (cf. sections 3.3.3 and 3.3.5). The ultimately adopted cross-pillar legislative package consisting of Council Directive 2002/90/EC and Council Framework Decision 2002/946/JHA, in other words, may best be understood as a more or less unsatisfactory agreement among government officials who had different and variably salient preferences regarding the outcome. The formal involvement of "reluctant strangers" in this Schengen-related context, i.e. the active participation of the non-EU countries Norway and Iceland, further added to the complexity of the Council's proceedings. Nevertheless, the Swedish Presidency managed to accommodate both the particularly eager and less motivated "hunters" in this Stag Hunt game.¹⁶⁵

Now that we have offered a viable game-theoretical interpretation of the negotiation of the so-called facilitators package in the Council, we may focus our attention on a readily apparent misperception on the part of our "hunters" and the unintended consequences of acting upon the following erroneous belief: Human smugglers are not easy prey, as the Stag Hunt analogy suggests, but intelligent human beings capable of anticipating the "moves" of other "players." As a matter of fact, the strategies and methods of human smugglers are far more sophisticated than animals' behavioral traits

¹⁶⁵ I would like to reiterate at this point that the negotiated agreement at hand does not lend empirical support to the standard efficiency argument promoted *inter alia* by Jonas Tallberg. It holds true, of course, that the Council Presidency may "[prevent] negotiation failure from materializing." From a game-theoretically informed point of view, however, this type of consensus-seeking behavior on the part of the Presidency and other Council bodies like COREPER does not, in itself, justify one to "present EU bargaining as a naturally efficient process." Tallberg, J. (2004): "The Power of the Presidency: Brokerage, Efficiency and Distribution in EU Negotiations," in: *Journal of Common Market Studies*, Vol. 42, No. 5, pp. 999-1022, here: pp. 999 and 1020, respectively. Instead, intergovernmental negotiations among the members of the Council will often, assuming that the "structure of the situation" (Michael Zürn) at hand resembles a Stag Hunt game, "merely produce unsatisfactory compromises in which potential welfare gains are 'left on the table.'" Scharpf (1997): *Games Real Actors Play* [cf. footnote 28], p. 146.

like the so-called “‘protean display,’ a randomly changing direction that confuses the pursuer without depending upon the path of the latter.”¹⁶⁶

Humanly devised strategies and counterstrategies may co-evolve. It has been demonstrated, for example, that human smugglers make extensive use of cutting-edge information technology in order to avoid detection by the police. Drawing on semi-structured interviews with ninety individuals who were directly involved in smuggling Chinese nationals into the U.S., Sheldon Zhang and Ko-Lin Chin accordingly report that “our snakehead subjects mostly used mobile phones and pagers to communicate with clients and partners.”¹⁶⁷ Likewise, the fieldwork carried out by Ahmet İçduygu has revealed that the typical human smuggler facilitating the irregular passage of third country nationals from Turkey to Greece may turn out to be “a shepherd who has two GSM cards and a mobile phone in his pocket.”¹⁶⁸ The standard equipment of EU border control officials, in turn, now includes night vision devices and thermal image cameras. Beyond that, certain Member States’ governments have shown a particularly strong interest in the mandatory collection, storage, and Community-wide exchange of the fingerprint data of apprehended irregular border-crossers in order to “fight criminal human smuggling even more effectively.”¹⁶⁹

¹⁶⁶ Elster, J. (1984): *Ulysses and the Sirens: Studies in Rationality and Irrationality*, Cambridge University Press, p. 15. Most predators are apparently unable to adjust to this evolutionarily highly innovative counterstrategy of prey.

¹⁶⁷ Zhang, S. / K.-L. Chin (2002): “Enter the Dragon: Inside Chinese Human Smuggling Organizations,” in: *Criminology*, Vol. 40, No. 4, pp. 737-67, here: p. 756.

¹⁶⁸ İçduygu, A. (2004): “Transborder Crime between Turkey and Greece: Human Smuggling and its Regional Consequences,” in: *Southeast European and Black Sea Studies*, Vol. 4, No. 2, pp. 294-314, here: p. 301. According to İçduygu, this technique has allowed human smugglers “to escape the control of the security forces and to meet easily with other smugglers in the dark, even up in the mountains, as opposed to the old techniques of meeting each other by marking stones near the borders” (*ibid.*).

¹⁶⁹ Severin, K. (1997): “Illegale Einreise und internationale Schleuserkriminalität,” in: *Aus Politik und Zeitgeschichte*, Vol. 46, pp. 11-19, here: p. 19 (translation JPA). Mr. Severin served as the Director of the Border Control Directorate Koblenz of the former German *Bundesgrenzschutz*, today’s *Bundespolizei*. For further reading on the mandatory biometric enrollment of apprehended irregular border-crossers via Community Regulation and the low level of compliance with this supranational legal requirement in EU countries of transit, see Aus, J. P. (2006b): “Eurodac: A Solution Looking for a Problem?” in: *European Integration online Papers (EIoP)*, Vol. 10, No. 6, <http://eiop.or.at/eiop/texte/2006-006a.htm>.

The main reason why we are probably going to witness further rounds of this human “cat and mouse” game is the existence of a thriving *market* for the illicit services of human smugglers. Human smuggling, in other words, can arguably be understood as a business.¹⁷⁰

Not unlike “legitimate” service providers such as travel agents, human smugglers sell the international routes they operate at market prices.¹⁷¹ If the demand for these kinds of services on the part of third country nationals increases, for example due to rising levels of unemployment in countries of origin in combination with irregular employment opportunities in countries of destination, human smugglers can generate high profits. The prospect of high profits, in turn, tends to draw more people into the human smuggling business.¹⁷²

¹⁷⁰ Cf. Salt, J. / J. Stein (1997): “Migration as a Business: The Case of Trafficking,” in: *International Migration*, Vol. 35, No. 4, pp. 467-94; Schloenhardt, A. (1999): “Organized Crime and the Business of Migrant Trafficking,” in: *Crime, Law and Social Change*, Vol. 32, pp. 203-33; Aronowitz, A. A. (2001): “Smuggling and Trafficking in Human Beings: The Phenomenon, the Markets that Drive it and the Organizations that Promote it,” in: *European Journal on Criminal Policy and Research*, Vol. 9, pp. 163-95; and Bilger, V. *et al.* (2006): “Human Smuggling as a Transnational Service Industry: Evidence from Austria,” in: *International Migration*, Vol. 44, No. 4, pp. 59-93. This strand of Rationalist literature builds on the seminal article by Becker, G. S. (1968): “Crime and Punishment: An Economic Approach,” in: *Journal of Political Economy*, Vol. 76, No. 2, pp. 169-217.

¹⁷¹ On the basis of Melanie Petros’s review of over 500 secondary sources, one may reasonably assume that the market price for an intra-European human smuggling operation currently stands at approximately \$ 2,700 per person. Available routes include Turkey–Greece and Estonia–Sweden. Prices go up for more challenging routes like China–UK and Afghanistan–Germany (ca. \$ 9,400). The price for other popular routes like Morocco–Spain seems to lie somewhere in between the two figures mentioned above. See Petros, M. (2005): *The Costs of Human Smuggling and Trafficking*, Geneva: Global Commission on International Migration, Working Paper No. 31/Apr. 2005. In light of these relatively high prices, most third country nationals incur debts in order to finance their unlawful journey into the EU.

¹⁷² Cf. Koslowski, R. (2000): “The Mobility Money Can Buy: Human Smuggling and Border Control in the European Union,” in: Andreas, P. / T. Snyder (eds.), *The Wall Around the West: State Borders and Immigration Controls in North America and Europe*, Lanham: Rowman and Littlefield, pp. 203-18; and Koslowski, R. (2001): “Economic Globalization, Human Smuggling, and Global Governance,” in: Kyle and Koslowski (eds.), *Global Human Smuggling* [cf. footnote 33], pp. 337-58.

It is important to note in this market-driven context that profit-oriented human smugglers do not necessarily choose to go out of business after having considered the possibility of imprisonment in case of detection. EU measures like Framework Decision 2002/946/JHA, if properly implemented by the Member States, obviously create higher risks for illicit service providers, but criminal entrepreneurs can factor in such risks by charging higher fees. Criminalizing intermediary agents, in short, does not address the basic “push” and “pull” factors that drive irregular migration and create favorable market conditions for human smugglers, including the systematic violation of human rights in countries of origin of refugees and asylum seekers, and the demand for cheap, flexible and unprotected migrant labor on the part of EU employers within and beyond “communitized” sectors like agriculture.¹⁷³

As far as the JHA Council’s attempt to solve the problem of human smuggling by means of criminal sanctions is concerned, one may conclude that the ministers were acting in a *parametrically* rational rather than strategically rational manner. The former distinction has been made by Jon Elster and is reproduced here for heuristic purposes:

The parametrically rational actor treats his [or her] environment as a constant, whereas the strategically rational actor takes account of the fact that the environment is made up of other actors, and that he [or she] is part of their environment, and that they know this, etc. ... In a community of parametrically rational actors, each will believe that he [or she] is the only one whose behaviour is variable, and that all the others are parameters for his [or her] decision problem. Acting upon these

¹⁷³ Cf. Gosh, B. (1998): *Huddled Masses and Uncertain Shores: Insights into Irregular Migration*, The Hague: Martinus Nijhoff; Entorf, H. (2002): “Rational Migration Policy Should Tolerate Non-zero Illegal Migration Flows: Lessons from Modelling the Market for Illegal Migration,” in: *International Migration*, Vol. 40, No. 1, pp. 27-41; and Boswell, C. / T. Straubhaar (2004): “The Illegal Employment of Foreign Workers: An Overview,” in: *Intereconomics – Review of European Economic Policy*, Vol. 39, No. 1, pp. 4-7. JHA Commissioner Franco Frattini has recently described the situation of illegally employed third country nationals in Italy as follows: “Even in my own country, in agriculture, in public work, in small- and medium-sized enterprises it is quite easy to find a job illegally. Because they cannot be recruited formally they are exploited. Because they are illegal they don’t have rights to social service, to education, to learn languages.” *European Voice* of June 22, 2006: “EU to crack down on black labour.”

inconsistent beliefs, the actors will generate unintended and perverse consequences¹⁷⁴

The JHA Council members' failure to take into account the interaction effects mentioned above while negotiating the so-called facilitators package suggests that the concepts of parametric and "territorially bounded" rationality should figure more prominently among students of decision-making processes in the field of supranational criminal law.

Last but not least, this study has demonstrated the European Commission's willingness and resourceful ability to pursue a "one step backwards, two steps forwards" strategy vis-à-vis the Council of Ministers which, if successful, would allow the EC to acquire competencies in the field of criminal law.

The Commission's strategy consisted of five steps. Firstly, the JHA Council had to maneuver itself into the legally ambivalent position of authorizing both an EC Directive defining the relevant criminal offence and an EU Framework Decision laying down minimum penal sanctions for the Union-wide punishment thereof. Secondly, the Commission had to enter formal statements into the Council's minutes that could be used in an eventual court case (cf. sections 3.3.4 and 3.6 above). Thirdly, the Commission's Legal Service had to wait for a particularly suitable case before suing the Council. Once such a likely precedent had been identified, the Commission could, fourthly, initiate legal proceedings before the ECJ (cf. section 4.1). If the Court would indeed annul the relevant EU Framework Decision and follow the Commission's functional line of reasoning in its entirety, then the "detour" via the ECJ would allow the Commission to gain, fifthly, the exclusive right of legislative initiative *inter alia* in the field of human

¹⁷⁴ Elster (1984): *Ulysses and the Sirens* [cf. footnote 166], p. 18. Yet another illustration of the unintended consequences of parametrically rational Community law is the so-called Carrier Sanctions Directive. This Schengen-related EC law *inter alia* calls for financial penalties of a minimum amount of at least €3,000 per person (and a maximum amount of not less than €500,000 for each infringement) against private-sector airlines, ferries, coaches and other carriers transporting undocumented third country nationals into the EU. Again, the "perverse consequence" of this Community Directive is, all other things being equal, an increased demand for the illicit services of human smugglers. See Council of the EU (2001v): "Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985," in: *Official Journal of the European Communities* of July 10, 2001, Vol. L 187, pp. 45-46 [[arena-web](#)], art. 4.

smuggling (cf. *section 4.2*), and the right to initiate infringement procedures against those Member States not willing to comply with future EC Directives for the harmonization of national criminal laws.

The spectacular success of the Commission's strategy in 2005 that sent shockwaves through national ministries of justice was made possible by a strongly teleological interpretation of the Treaties by the ECJ. As documented in *section 4.1* above, the Court essentially ruled that if the EC has acquired the competence to adopt Community Regulations and Directives in a given policy sector, then the EC should also have the competence to impose criminal law sanctions for the effective enforcement of these legal acts. The ECJ's case-law arguably provides the "missing link" that neo-Functionalist regional integration scholars have been trying to identify for decades.¹⁷⁵ As it turns out, processes of "functional spill-over" in the emerging Area of Freedom, Security and Justice may not be driven by the strategic calculations of economic interest groups and politicians (cf. *section 2.1*), but rather by the functional legal reasoning of supranational judges who perceive of themselves, to borrow a famous phrase from Karl Marx's *Capital*, as "the midwives of an old society pregnant with a new one." For the Rationalist observer, it should come as no surprise that the teleological method of interpretation employed by these "midwives of efficient history" not only tends to extend the competencies of both the Commission and the European Parliament, but also those of the ECJ.

5.2 EU Criminal Law and the Logic of Appropriateness

From an Institutional point of view, the so-called facilitators package agreed upon by the JHA Council may best be understood as an emphatic affirmation of institutionalized structures of meaning.

In order to account for the criminalization of human smugglers by the EU, we arguably need to recall Emile Durkheim's dictum that "punishment consists of a passionate reaction."¹⁷⁶ As documented in *section 3.1* above, the

¹⁷⁵ Cf. Burley, A.-M. / W. Mattli (1993): "Europe Before the Court: A Political Theory of Legal Integration," in: *International Organization*, Vol. 47, No. 1, pp. 41-76; and McCown, M. (2003): "The European Parliament Before the Bench: ECJ Precedent and EP Litigation Strategies," in: *Journal of European Public Policy*, Vol. 10, No. 6, pp. 974-95.

¹⁷⁶ Durkheim (1933): *Division of Labor* [cf. footnote 51], p. 85.

“deep shock” that was publicly expressed by the European Council in the immediate aftermath of the tragic death of the fifty-eight migrants in Dover was followed up by high-level political demands for “severe sanctions” against the perpetrators of this “despicable crime.” Not unlike ordinary EU citizens, the heads of state or government were evidently deeply irritated by the Dover incident of June 2000. The European Council’s subsequent demand for the criminalization of human smugglers fits well with Durkheim’s sociology of punishment:

[We] must not say that an action shocks the common conscience because it is criminal, but rather that it is criminal because it shocks the common conscience. We do not reprove it because it is a crime, but it is a crime because we reprove it.¹⁷⁷

Using the Dover tragedy as an opportunity to display its strength and political leadership, the incoming French Presidency quickly drew up a legislative proposal that was supposed to “demonstrate a common political will”: the alleged “exploitation of human beings” by people smugglers was a felony that would be severely punished by the French Republic and/or the EU. Sending

¹⁷⁷ Durkheim (1933): *Division of Labor* [cf. footnote 51], pp. 80–81. One may add that Weber concurred with Durkheim on this point: “The modern view of criminal justice, broadly, is that public concern with morality or expediency decrees expiation for the violation of a norm....” Weber (1978): *Economy and Society* [cf. footnote 2], p. 647. The sociologically informed Institutionalism of both Durkheim and Weber with respect to the self-referential social construction of crime has its roots in the study of religious communities. In order to understand the remarkably similar logic of criminal justice over space and time, it is arguably helpful to recall the following thought experiment spelled out by Durkheim about one hundred years ago: “Imagine a community of saints in an exemplary and perfect monastery. In it crime as such will be unknown, but faults that appear venial to the ordinary person will arouse the same scandal as does normal crime in ordinary consciences. If therefore that community has the power to judge and punish, it will term such acts criminal and deal with them as such.” Durkheim, E. [1907] (1982): *The Rules of Sociological Method*, London: Macmillan, p. 100. The reader who finds this hypothetical scenario less than convincing might appreciate Weber’s historical account of blasphemy as a religious crime: “The whole group was endangered when a magical norm, e.g., a taboo, was infringed and, in consequence, the wrath of magical forces, spirits or deities, threatened to descend with evil consequences not merely upon the blasphemer (or criminal) himself but upon the whole community which suffered him to exist within their midst. Stimulated by magi or priests, the members of the community would outlaw the culprit or lynch him, as for instance through stoning among the Jews.” Weber (1978): *Economy and Society* [cf. footnote 2], p. 650.

out this political message was arguably more important for the French government than being able to present the members of the Working Party on Substantive Criminal Law with a precise legal definition of human smuggling as opposed to trafficking in human beings. The French Presidency's symbolic posture, in short, provides an illustration of March and Olsen's claim that

part of the drama of decision making reinforces the idea that policy makers and their policies affect outcomes in the political system. Such a belief is, in fact, difficult to confirm.... But the belief is important to a political system. It allocates responsibility, thus simultaneously reaffirming human control over history and absolving most individuals of responsibility for it.¹⁷⁸

Likewise, the JHA Council's publicly expressed "desire vigorously to combat the facilitation of unauthorized immigration" (*section 3.2*) and the European Council's subsequent political instruction to attach "top priority" to the formal adoption of the facilitators package (*section 3.5*) were not only designed to demonstrate a firm hand in the fields of law enforcement and criminal justice. These statements also reflected a deeply rooted collective belief in the legitimate exercise of *territorial sovereignty*. The now universally accepted claim to the legitimate exercise of territorial sovereignty can be traced back to the Treaty of Westphalia of 1648.¹⁷⁹ For the members of the

¹⁷⁸ March and Olsen (1989): *Rediscovering Institutions* [cf. footnote 55], p. 50. In a similar vein, David Garland described the semiotics of criminal justice as follows: "[An] act of punishment is [a] sign that the authorities are in control, that crime is an aberration, and that the conventions that govern social life retain their force and vitality – which is why policies of crime control and punishment can so often become metaphors for political strength and take on a political significance out of proportion to their penological effect." Garland, D. (1993): "Sociological Perspectives on Punishment," in: Duff, A. (ed.), *Punishment*, Aldershot: Dartmouth, pp. 453-503, here: p. 465. For further reading on the "sign-of-authority function" of criminal law, see Garland, D. (1990): *Punishment and Modern Society: A Study in Social Theory*, Oxford University Press.

¹⁷⁹ This accord put an end to one of the most violent episodes of early modern European history, namely the Thirty Years' War (1618-1648). The establishment and mutual recognition of territorial sovereignty was laid out in article 64 of the treaty. This legal provision reads as follows: "And to prevent for the future any Differences arising in the Politick State, all and every one of the Electors, Princes and States of the Roman Empire, are so establish'd and confirm'd in their antient, Prerogatives, Libertys, Privileges, free exercise of Territorial Right, as well Ecclesiastick, as Politick Lordships, Regales, by virtue of this present Transaction: that they never can or ought to be molested therein by any whomsoever upon any manner of pretence."

Schengen group, the emphatic affirmation of this remarkably robust institution implied a duty to impose “appropriate penalties on any person [who] assists or tries to assist an alien to enter or reside within the territory of one of the contracting parties in breach of that contracting party’s laws on the entry and residence of aliens” (article 27 of the Schengen Implementation Agreement of 1990; cf. *section 3.3.2* above). The “further development” of this provision following the incorporation of the intergovernmental Schengen regime into the institutional framework of the EU, i.e. the introduction of more or less harmonized criminal law sanctions against human smugglers throughout the Union, constituted a deliberate attempt to preserve the territorial integrity of the Member States in spite of the elimination of internal border controls within the Schengen area.

In order to understand the *territorial politics* of Schengen-related decision-making processes in the JHA Council, one should recall that the geographical scope of the so-called Area of Freedom does not always coincide with the jurisdictions of the EU Member States. This has not only led to complex legal arrangements like the extra-territorial application of EU criminal law in third countries like Norway. It has also allowed both Ireland and the UK to participate in Schengen-related EU criminal law measures like Framework Decision 2002/946/JHA in spite of upholding their border controls vis-à-vis

Bueno de Mesquita, B. (2000): “Popes, Kings, and Endogenous Institutions: The Concordat of Worms and the Origins of Sovereignty,” in: *International Studies Review*, Vol. 2, No. 2, pp. 93–118, here: p. 94. The Treaty of Westphalia signaled a major departure from the complex and overlapping jurisdictions of medieval feudal Europe. Alexander B. Murphy described the organizing principles of this earlier period in the following manner: “The frame of reference for most was the local commune or fief [which the tradable vassal or serf was not allowed to leave unless granted explicit permission], but the ruling elite thought in terms of (often non-contiguous) royal and/or ecclesiastical territories with fluid boundaries that could easily be changed through inheritance, warfare, or partition.” Murphy, A. B. (1996): “The Sovereign State System as Political-territorial Ideal: Historical and Contemporary Considerations,” in: Biersteker, T. J. / C. Weber (eds.), *State Sovereignty as Social Construct*, Cambridge University Press, pp. 81–120, here: p. 84. A distant echo of this past era could still be heard in the 20th century. The German Emperor Wilhelm II, for example, not only invented the idea of a *Nationalkaisertum* and subsequently steered the Imperialist German *Reich* into the First World War. As a member of the House of Hohenzollern family dynasty and son of Her Royal Highness Princess Victoria, the oldest daughter of Queen Victoria, Emperor Wilhelm II also maintained a love-hate relationship with the United Kingdom. See Mommsen, W. J. (2002): *War der Kaiser an allem schuld? Wilhelm II. und die preußisch-deutschen Machteliten*, München: Ullstein.

continental Europe. In light of the remarkable absence of “tear down this wall” speeches by leading British and Irish politicians, it is at least debatable whether the tragic deaths of the fifty-eight migrants in Dover can solely be attributed to the unlawful activities of human smugglers, as emphatically stated by the European Council in June 2000 and formally acknowledged by an English court in April 2001. If the UK would have eliminated its border controls vis-à-vis the Schengen countries in accordance with article 14 of the EC Treaty, the migrants would presumably not have traveled from the Netherlands to England in the back of a sealed truck in the first place.¹⁸⁰

The negotiation of the facilitators package in the Council has also shown that EU measures in the field of criminal law may not necessarily be compatible with the rules and norms of international human rights regimes. The institutional collision between the UNHCR and the JHA Council over the potential criminalization of asylum seekers and their helpers documented in sections 3.2 and 3.3.2 above is a case in point. The substantive outcome of this clash, i.e. the refusal of the Council of the EU to incorporate a

¹⁸⁰ Unfortunately, however, history cannot be reversed. On April 5, 2001, the Maidstone Crown Court in England thus sentenced the truck driver, Mr. Perry Wacker, to fourteen years of imprisonment. Mr. Wacker, an EU citizen of Dutch nationality, was convicted of conspiracy to facilitate the unauthorized entry of third country nationals into the UK (eight-year custodial sentence). He was also convicted of fifty-eight offences of manslaughter (six-year custodial sentence). While the English court apparently judged the facilitation of illegal entry into the UK to be a particularly severe criminal offence, it also acknowledged that Mr. Wacker did not drive from Rotterdam to Zeebrugge before boarding a ferry to Dover with the intention of murdering the migrants. His being found guilty of manslaughter derived from the fact that Mr. Wacker had at some point of this fateful journey turned off the truck’s ventilation system in order to avoid detection by British border control officials.

While passing the fourteen-year custodial sentence, the English judge, Mr. Alan Moses, reportedly told the felon that “people like you create a risk of greater prejudice against those people who quite legitimately come to this country seeking refuge as asylum seekers or whatever.” *BBC News* of April 5, 2001: “Driver jailed over immigrant deaths.” Judge Moses was apparently referring to the widespread hostility of the British public and mass media towards refugees and asylum seekers in general and to the physical attacks by local youths in Dover against Kosovo Albanians and Iraqi Kurds in particular. Cf. Hansen, R. / D. King (2000): “Illiberalism and the New Politics of Asylum: Liberalism’s Dark Side,” in: *The Political Quarterly*, Vol. 71, No. 4, pp. 396–403; and Information Centre about Asylum and Refugees in the UK (2004): *Attitudes towards Asylum Seekers, Refugees and Other Immigrants*, London: King’s College.

mandatory humanitarian clause into the legislative instruments at hand, attests to the relative autonomy of EU institutions vis-à-vis UN bodies. This observation casts doubts upon the empirical validity of Saskia Sassen's claim that the process of globalization not only leads to the institutionalization of "the global rights of capital," but also to the strengthening of "the human rights of all individuals regardless of nationality."¹⁸¹ As far as the human right "to seek and to enjoy in other countries asylum from persecution" as laid out in article 14 of the Universal Declaration of Human Rights and further specified by the Geneva Convention relating to the Status of Refugees is concerned, processes of regional political integration may very well undermine universal principles of international refugee law.¹⁸²

The human smuggling case also sheds light on the *institution of consensus* in the Council. I have provided a detailed account of the origins and effects of this informal set of supranational rules and procedures elsewhere.¹⁸³ Against this background, I would merely like to recall that the Swedish Presidency worked very hard to reach a compromise solution. In spite of the UNHCR's interventions, for example, the Swedish Presidency maintained the "exploitation" frame it had inherited from its French predecessor, thus both

¹⁸¹ Sassen, S. (2000): "Regulating Immigration in a Global Age: A New Policy Landscape," in: *The Annals of the American Academy of Political and Social Science*, No. 570 (July 2000), pp. 65-77, here: p. 73.

¹⁸² As a result of EU legislation on the approximation of national criminal laws in the domain of human smuggling, the Member States and Schengen-affiliated third countries find themselves in a legal limbo between EU "laws which criminalise border crossing of the kind which fulfils the definition of smuggling or trafficking, and the Member States' obligations under Article 31 (1) Geneva Convention not to penalise refugees for the manner in which they entered the state." Guild, E. (2006): "Conclusions: The Variable Political and Legal Geography of People Smuggling and Trafficking in Europe," in: Guild and Minderhoud (eds.), *Immigration and Criminal Law* [cf. footnote 72], pp. 407-14, here: p. 410. The treaty provision cited by Elspeth Guild above reads as follows: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who ... enter or are present in their territory without authorization...." On the origins of the institution of asylum and the establishment of the UNHCR in the context of unprecedented cross-border refugee movements triggered by World Wars I and II, see Carlier, J.-Y. (1995): "Völkerrechtliche Grundlagen des Flüchtlingsrechts," in: Basso-Sekretariat Berlin (ed.), *Festung Europa auf der Anklagebank*, Münster: Westfälisches Dampfboot, pp. 19-31; and Loescher, G. (2001): *The UNHCR and World Politics: A Perilous Path*, Oxford University Press.

¹⁸³ See Aus (2007a): "The Mechanisms of Consensus" [cf. footnote 35].

ensuring the continuity of the Council's deliberations and rendering unlikely a mandatory application of the so-called humanitarian clause (cf. sections 3.3.2 and 3.3.5 above). The Swedish Presidency also introduced an "opt out" clause allowing for derogations from an otherwise uniformly high level of penal sanctions in order to accommodate the views of all delegations. Taken together, these efforts enabled the informal JHA Counselors group and COREPER II to reach an inter-administrative agreement that was formally endorsed by the Council.

We have also learned that *national parliaments* can considerably delay the formal adoption of Third Pillar legislation. The decision of the British House of Commons not to allow the UK government to lift its parliamentary scrutiny reservation in the Council for nearly one and a half years is a case in point (cf. section 3.4 above). This course of national parliamentary behavior was not motivated by instrumentally rational considerations. Instead, the House of Commons, i.e. the institutional embodiment of the principle of parliamentary sovereignty at least since the Glorious Revolution of 1688, made a value-rational decision: It would passionately defend the political principle that Third Pillar measures must live up to appropriate national parliamentary scrutiny, and that gross executive violations of this rule can not be tolerated.¹⁸⁴ This principled stance not only suggests that national parliaments are particularly robust political institutions epitomizing the "inefficiency of history."¹⁸⁵ It also sheds light on the mindset of national parliamentarians like Fabio Evangelisiti, an Italian MP who once critically noted that "Europe's migration and security policies have been worked out

¹⁸⁴ The idea of executive accountability vis-à-vis citizens and their democratically elected representatives can be traced back to ancient Greece. Plato, for example, strongly advised his fellow Athenians to "take every possible precaution to prevent our Auxiliaries [from] behaving more like savage tyrants than partners and friends." Plato [ca. 375 B.C.] (2003): *The Republic*, London: Penguin, p. 118. This ancient idea was rediscovered by modern authors like James Madison, an American politician and later U.S. President who perceived of "the accumulation of all powers, legislative, executive, and judiciary, in the same hands [as] the very definition of tyranny." Madison, J. [1788] (1961): "The Federalist No. 47," in: Hamilton, A. *et al.*, *The Federalist Papers*, New York: Mentor, pp. 300-13, here: p. 301. For an excellent review of the history of this political idea, see Goldsworthy, J. (1999): *The Sovereignty of Parliament: History and Philosophy*, Oxford University Press.

¹⁸⁵ Cf. *inter alia* Benz, A. (2004): "Path-Dependent Institutions and Strategic Veto Players: National Parliaments in the European Union," in: *West European Politics*, Vol. 27, No. 5, pp. 875-900.

without any kind of effective democratic oversight.”¹⁸⁶ As one may infer from such statements and the European Parliament’s largely symbolic *en bloc* rejection of the facilitators package documented in *section 3.3.1* above, parliamentarians across Europe continually reinforce institutionalized structures of meaning that associate the concept of freedom with representative democracy. For better or worse, such an understanding of freedom may not necessarily be conducive to the efficient coordination of national crime control policies in the EU.¹⁸⁷

Last but not least, one may reasonably conclude that the ECJ did what it was supposed to do in passing its judgment in the *Commission vs. Council* case, namely to “ensure that in the interpretation and application of this Treaty the law is observed” (article 220 of the EC Treaty). Instead of offering a literal interpretation of the Treaties, the members of the Court took into account that “the jurisprudence of the Court of Justice is itself a source of law,” as former Judge Edward once accurately noted.¹⁸⁸ The judicial establishment of a limited EC criminal law competence, then, must be read against the backdrop of landmark decisions like *Van Gend en Loos* and *Costa vs. ENEL*. The Court’s legal adjudication in *Commission vs. Council*, in short, added yet another chapter to a judge-made “chain novel” teasing out the true nature of the Community legal order:

¹⁸⁶ Evangelisiti, F. (1999): “The Role of National Parliaments in the Creation of the Area of Freedom, Security and Justice: An Italian Point of View,” in: O’Keefe, D. / P. Twomey (eds.), *Legal Issues of the Amsterdam Treaty*, Oxford and Portland: Hart, pp. 323–28, here: p. 325.

¹⁸⁷ The apparent existence of institutional cleavages between national executives and legislatures, on the one hand, and between the Council of the EU and the European Parliament, on the other, fits well with Karen Orren and Stephen Skowronek’s description of politics “in which positive lawmaking, introduced in one [institutional] sphere, is likely of its own accord to expose and undermine contrary principles of governance operating elsewhere.” Orren and Skowronek (2004): *The Search* [cf. footnote 57], p. 182. Again, such institutional disputes over policy and procedure may lead to changes in the balance of power between EU institutions if the institutional design of the supranational polity is unsettled and highly contested (cf. *section 2.2* above).

¹⁸⁸ Edward, D. A. (2003): “Richterrecht in Community Law,” in: Schulze, R. / U. Seif (eds.), *Richterrecht und Rechtsfortbildung in der Europäischen Rechtsgemeinschaft*, Tübingen: Mohr Siebeck, pp. 75–80, here: p. 75. Justice Edward served as a member of the ECJ from 1992–2004.

[An ECJ judge] adds to the tradition he [or she] interprets; future judges confront a new tradition that includes what he [or she] has done. ... In this [chain novel] a group of novelists writes a novel *seriatim*; each novelist in the chain interprets the chapters he [or she] has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on. Each has the job of writing his [or her] chapter so as to make the novel being constructed the best it can be¹⁸⁹

Notwithstanding its readily apparent political connotations, the Court's judgment in case C-176/03 provided a viable and yet path-dependent solution to an intricate legal problem, namely to the possible infringement of EC rules by the "Third Pillar" of the EU in general and legislative measures like Council Framework Decision 2003/80/JHA in particular. It was the duty of the Court of Justice of the European Communities to resolve the thorny legal issue brought before it. The ECJ's verdict, in turn, may best be understood as a deliberate attempt to ensure the coherence, consistency and effective application of Community rules.¹⁹⁰

The arguably most controversial feature of the transition from a national to a supranational definition of crime and punishment in contemporary Europe, however, lies in the Court's teleological legal reasoning. The ECJ's unconditional devotion to the *telos* of environmental protection has not only been received as an expression of value-rational judicial activism (cf. the legal commentary cited in *section 4.1* above). It also suggests that the European Community's newly gained criminal law competence is essentially the by-product of the Court's pursuit of a highly contingent policy agenda.

5.3 The Politics of Criminal Law Approximation in the EU Revisited

If the research program of "Rational Choice Institutionalism" were not built on an oxymoron, there would be no need to delineate the domain of

¹⁸⁹ Dworkin, R. (1986): *Law's Empire*, Harvard University Press, p. 229.

¹⁹⁰ Again, there is nothing unusual about such an attempt from an Institutional point of view. Cf. Bengoetxea, J. *et al.* (2001): "Integration and Integrity in the Legal Reasoning of the European Court of Justice," in: de Búrca, G. / J. H. Weiler (eds.), *The European Court of Justice*, Oxford University Press, pp. 43-86; and Soriano, L. M. (2003): "A Modest Notion of Coherence in Legal Reasoning: A Model for the European Court of Justice," in: *Ratio Juris*, Vol. 16, No. 3, pp. 296-323.

application of logics of consequentiality and appropriateness, respectively, in any given decision-making process within or above the nation-state. In light of the distinctiveness of the two logics and the practical difficulty of “[fitting] different motivations and logics of action into a single framework,” however, one may reasonably proceed by “[examining] the conditions under which each logic is invoked.”¹⁹¹

The empirical evidence presented above suggests that decision-making processes in the field of EU criminal law may be characterized by a *sequential ordering* of logics of appropriateness and consequentiality if the relevant political actors and legislative items display certain properties.

With a view to the attributes of political actors adhering to a logic of appropriateness, it is important to recall that the drive towards the criminalization and punishment of human smugglers in the EU was instigated by the European Council in general, and its passionate and *ad hoc* reaction to the “Dover tragedy” of June 2000 in particular. In the eyes of the heads of state or government, the Dover incident constituted a “shocking” and “despicable” violation of institutionalized rules and structures of meaning. The unlawful, potentially life-threatening and thus totally inappropriate activities of human smugglers seemed to call for “severe sanctions” on the part of the EU and its Member States. The French Presidency’s hastily drawn up proposal for both an EC Directive and an EU Framework Decision was accordingly aimed at reaffirming the JHA Council’s collective will to combat the alleged exploitation of human beings by people smugglers, and the Schengen group’s political determination to exercise effective territorial sovereignty in spite of the elimination of internal border controls within the so-called Area of Freedom. This more or less emphatic invocation of EU punitive power by leading European politicians replicated a similar pattern of political agenda setting in the field of child abuse.

Once the French Presidency’s draft facilitators package had reached the JHA Council’s Working Party on Substantive Criminal Law and other preparatory

¹⁹¹ March, J. G. / J. P. Olsen (2006b): “The Logic of Appropriateness,” in: Moran, M. *et al.* (eds.), *The Oxford Handbook of Public Policy*, Oxford University Press, pp. 689–708, here: p. 702. Cf. *inter alia* Aus, J. P. (2007b): “Conjunctural Causation in Comparative Case-Oriented Research,” forthcoming in: *Quality & Quantity – International Journal of Methodology*; and Zürn, M. / J. T. Checkel (2005): “Getting Socialized to Build Bridges: Constructivism and Rationalism, Europe and the Nation-State,” in: *International Organization*, Vol. 59, pp. 1045–79.

intergovernmental bodies, the emphasis shifted towards a logic of consequentiality. The Member States' governments found themselves caught up in a weakest-link Stag Hunt game whose potentially Patero-superior solution had to be weighed against variable national interests and sovereignty-related costs. The ensuing inter-administrative exchanges in Brussels, however, overshadowed the fact that the Member States' officials were acting in a parametrically rational manner with respect to the substantive problem at hand.

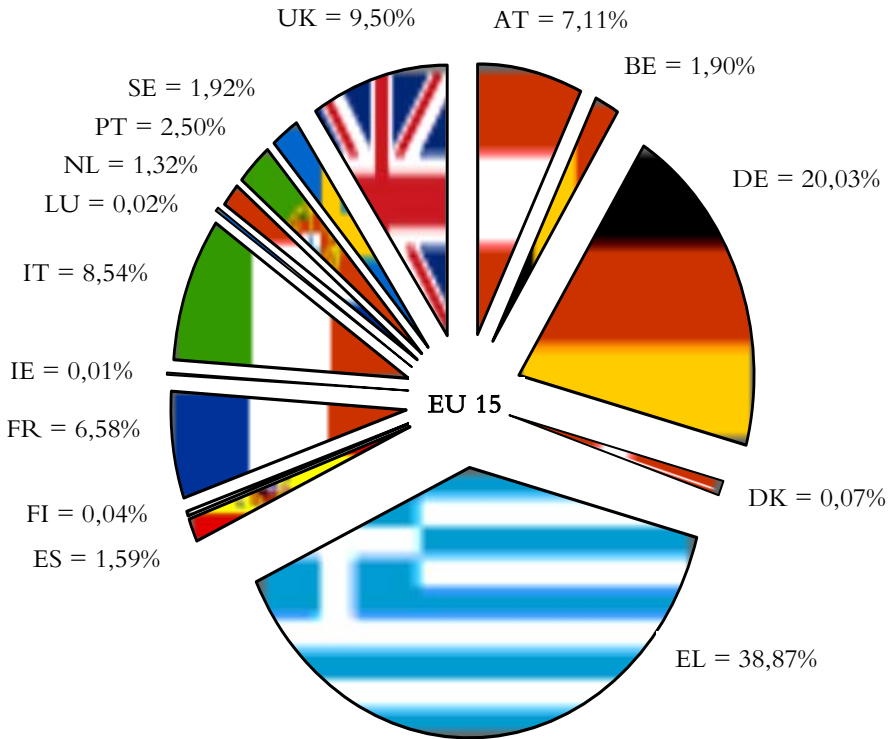
At the end of the Swedish Presidency's tenure, the intergovernmental negotiations within the Council's preparatory bodies were concluded by a value-rational adherence to Council-specific informal rules. The successful efforts by the JHA Counselors group and COREPER II to reach a timely compromise acceptable to all delegations paved the way for a political agreement on ministerial level. This course of events lends support to previous studies on the "consensus reflex" of the Council of Ministers and the insulation of the Council's working parties from domestic politics as an important scope condition thereof.¹⁹² If there is something to be added to this literature, then it is the European Council's ability to accelerate the speed of the JHA Council's legislative proceedings, and the capacity of national parliaments to delay the formal adoption of EU criminal law in case of a flagrant violation of the institutionalized rule of appropriate parliamentary scrutiny.

In light of the fact that the European Commission is going to present a legislative proposal for a Community Directive on harmonized criminal law sanctions against human smugglers in the course of 2007, EU citizens and students of European political integration alike will now have the chance to observe for themselves whether the sequential ordering of logics of appropriateness and consequentiality documented above will empirically hold under slightly modified institutional conditions.

¹⁹² Cf. Lewis, J. (2005): "The Janus Face of Brussels: Socialization and Everyday Decision Making in the European Union," in: *International Organization*, Vol. 59, pp. 937-71; Heisenberg, D. (2005): "The Institution of 'Consensus' in the European Union: Formal Versus Informal Decision-making in the Council," in: *European Journal of Political Research*, Vol. 44, pp. 65-90; Hayes-Renshaw, F. et al. (2006): "When and Why the EU Council of Ministers Votes Explicitly," in: *Journal of Common Market Studies*, Vol. 44, No. 1, pp. 161-94; and Aus (2007a): "The Mechanisms of Consensus" [cf. footnote 35].

Annex I:

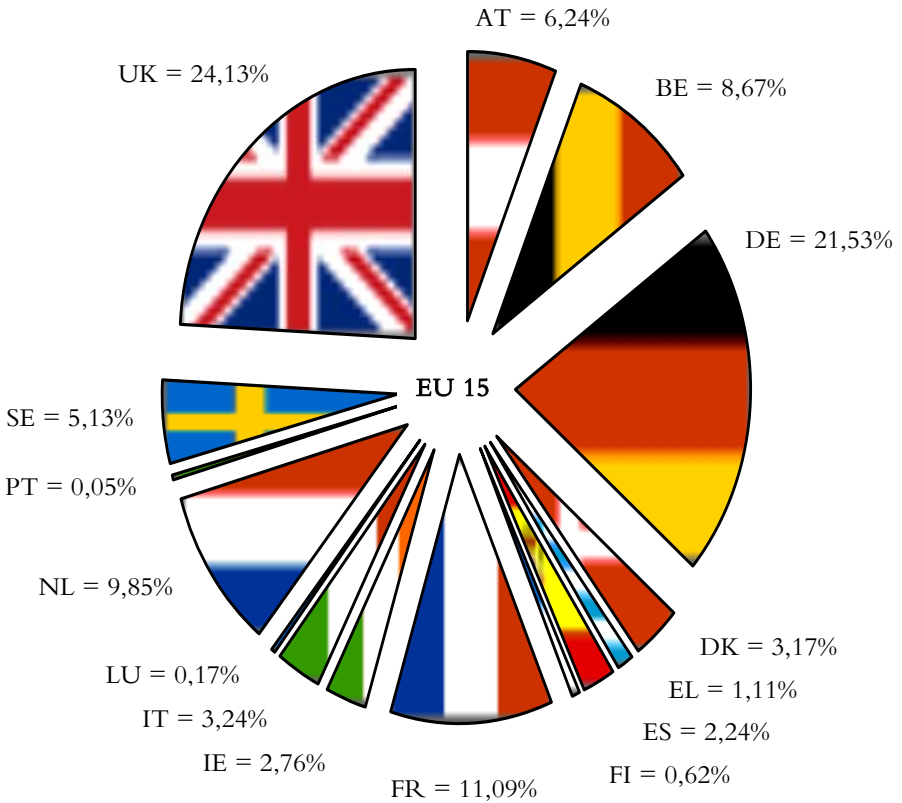
Distribution of Apprehended “Illegal Aliens” Between the Member States (EU 15), 2000-2001 (N = 1,232,429) ¹⁹³



¹⁹³ Groupe d'étude de Démographie Appliquée / Berlin Institute for Comparative Social Research (2006): *Migration and Asylum in Europe 2003*, Louvain-la-Neuve and Berlin [arena-web], p. 101. These data have been made available to the Council Secretariat by national governments in the framework of the former CIREFI working group of the JHA Council. (CIREFI is the French acronym for the Centre for Information, Discussion and Exchange on the Crossing of Borders and Immigration.) The members of CIREFI defined the category of “apprehended illegal aliens” as “persons other than those entitled under Community law who are officially found to be on the territory of a Member State without possessing border documents, were refused entry or are subject to an entry or residence prohibition, or have become liable to expulsion” (p. 93).

Annex 2:

Distribution of Asylum Applicants Between the Member States (EU 15), 2000-2001 (N = 775,990) ¹⁹⁴



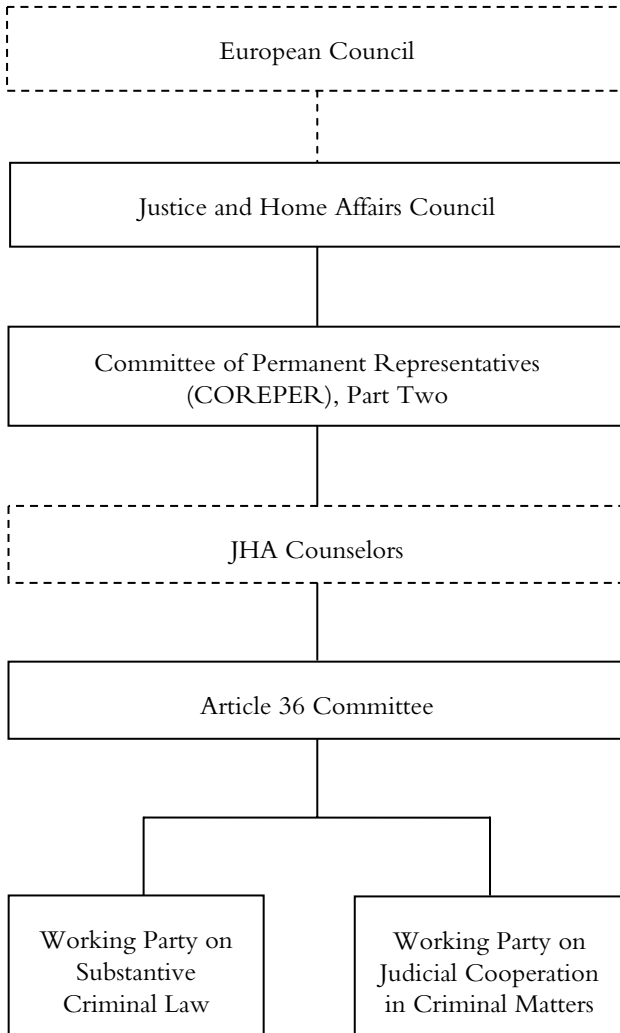
¹⁹⁴ United Nations High Commissioner for Refugees (2002): *Number of Asylum Applications Submitted in 30 Industrialized Countries, 1992-2001*, Geneva: UNHCR, Population Data Unit [[arena-web](#)].

Annex 3:

Geographical Scope of the “Area of Freedom” Following the Northern Enlargement of Schengen in 2001



Annex 4:

Working Structures of the Council in the Criminal Justice Domain, 1999-2004¹⁹⁵

¹⁹⁵ Cf. Nilsson (2004): “The Justice and Home Affairs Council” [cf. footnote 99], p. 133.