



**Supranational Governance in an
“Area of Freedom, Security and Justice”:
Eurodac and the Politics of
Biometric Control**

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Abstract

Students of Justice and Home Affairs policy-making in the European Union (EU) have so far been largely ignorant of the executive use of novel identification technologies and its political implications. This article illustrates how supranational measures such as Eurodac tend to strengthen the relative autonomy of executive actors vis-à-vis parliaments and courts, thereby further deepening the so-called “democratic deficit” of the EU.

Eurodac calls for the establishment of an Automated Fingerprint Identification System in the EU plus Norway and Iceland. The author explains why the scope of the Eurodac Regulation was extended from covering applicants for asylum to “illegal” immigrants, and why biometric identification procedures are currently “spilling over” to visa applicants and citizens of the Union. The article also analyses the impact of such novel identification procedures on data protection standards and the right to privacy.

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SUPRANATIONAL GOVERNANCE IN AN “AREA OF FREEDOM, SECURITY AND JUSTICE”: EURODAC AND THE POLITICS OF BIOMETRIC CONTROL

1. Introduction

In the wake of the terrorist attacks of September 11th, executive control over identity has emerged as a top priority on the international agenda. It has also become a priority objective for the supranational governance of migratory movements within the emerging *Area of Freedom, Security and Justice*. New technologies such as biometrics, offering executives the opportunity of controlling life (*bios* in Greek) via its exact measurement (*metron*), are rapidly changing the political landscape of contemporary European democracies.

This article will provide insights into the frequently ignored political and technological significance of the Eurodac project.¹ Eurodac is the first, but probably not the last application of biometric human identification technology within a supranational political entity. Under the influence of U.S. “homeland security” policy, a treatment that was initially limited to asylum seekers is now “spilling over” to other third country nationals and EU citizens. This phenomenon is worthy of further reflection in itself. Yet can the social-scientific analysis of specific legislative measures like Eurodac also contribute to a theoretical mapping of post-national modes of governance?

¹ For relevant secondary literature on Eurodac, see Brouwer, Evelien R. (2002): “Eurodac: Its Limitations and Temptations,” in: *European Journal of Migration and Law*, Vol. 4, pp. 231-247; and Van der Ploeg, Irma (1999): “The Illegal Body: ‘Eurodac’ and the Politics of Biometric Identification,” in: *Ethics and Information Technology*, Vol. 1, pp. 295-302. A short legal summary is provided by Schröder, Birgit (2001): “Das Fingerabdruckvergleichssystem EURODAC,” in: *Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR)*, No. 2, pp. 71-75. See also Peers, Steve (2001): “Key Legislative Developments on Migration in the European Union,” in: *European Journal of Migration and Law*, Vol. 3, pp. 231-255, especially pp. 235-236.

As far as the supranational governance of Justice and Home Affairs in Europe is concerned, I think it can. The establishment of an *Area of Freedom, Security and Justice* in the EU necessarily implies the de- and re-territorialization of politics formerly confined to the nation-state. In a first instance, this complex process leads to a disaggregation of the state and to changes in the traditional balance-of-power between domestic institutions. I will argue that the negotiation of the Eurodac Regulation, adopted by the JHA Council taking advantage of new political opportunity structures on Community level, ideal-typically resembles unique integrative dynamics stemming from the continuous cooperation and accommodation of increasingly interdependent and autonomous law enforcement agencies. Furthermore, I believe that the substantive profile of the Eurodac project illustrates how the integration process, under certain institutional conditions and within certain issue areas, tends to strengthen national and supranational executives vis-à-vis citizens, their parliamentary representatives, and courts.

This tendency, characterized by an “executive surplus” and increased executive autonomy at the price of effective democratic and judicial control, will first be illustrated by shedding light on the mainly Council-based negotiations of the Eurodac Regulation (section 2.). I will show that the “Securitization” of asylum and immigration policies in Europe was not brought about by an “external shock” like September 11th, but rather by internal institutional dynamics resulting in an imbalance between the principles of freedom, security, and justice. The extension of the Eurodac database to irregular border-crossing and illegal residence (section 2.1), creating a link between refugee protection and immigration control, not only reflects the relative power and negotiating skills of certain Member States’ governments, namely those of the German Presidency of the Council and Schengen group. It also illustrates how task expansion on European level and executive “fusion” may take place in practice.

In light of the technological significance of the Eurodac project and its profound impact on executive capabilities, I shall then enumerate some general features of Automated Fingerprint Identification Systems, i.e. of socio-technological tools that match with both the professional interests of the police and the commercial interests of the biometric industry (section 3.). Laying out the foundation for a future comparative study on the “Europeanization” of domestic politics and representative-

democratic bodies in this domain, I will also discuss predecessors of Eurodac within selected Member States (section 4.). Drawing on the notion of a “function creep” of new surveillance technologies, I will then enter into a discussion on alternative public uses of biometric technology in the post-“9/11” era (section 5.). I will demonstrate that the tragic events of September 11, 2001 provided an additional window of opportunity for supranational executives to push forward the use of biometric identification technologies.

Finally, I will argue that this EC Regulation and successive Community legislation in the domains of visa, asylum, and immigration raises serious questions concerning both the proportionality of supranational measures and their compatibility with international human rights and national constitutional provisions. This especially holds true for the right to privacy and informational self-determination (section 6.). If such normative collisions between universal human rights, supranational Community law, and national constitutional law indeed arise, this may result in further changes in the relative power and autonomy of executive forces.

2. The Negotiation of the Eurodac Regulation on EU Level

About one and a half years after the entry into force of the Treaty of Amsterdam, which calls for the establishment of an *Area of Freedom, Security and Justice*, the Council of the European Union passed the so-called Eurodac Regulation on December 11, 2000.² Given this timing, the decision-making process could not have been influenced by the events of September 11, 2001. Instead, the Eurodac Regulation was framed as a Dublin-related measure in the field of asylum and passed on the legal basis of art. 63 (1) (a) of the EC Treaty in its currently valid “Nice” version. This treaty provision authorizes the Justice and Home Affairs (JHA) Council to adopt Community legislation laying down “criteria and mechanisms for determining which Member State is responsible for considering an application for asylum” lodged in the European Union by a third country national fearing prosecution in his or her country

² Council of the European Union (2000a): “Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention,” in: *Official Journal of the European Communities* of December 15, 2000, Vol. L 316, pp. 1-10.

of origin on grounds of race, religion, nationality, membership of a particular social group, or political opinion.

From a legal point of view, Eurodac represents the first Community measure adopted under the newly inserted Title IV of the EC Treaty and succeeding the purely intergovernmental decision-making structures of the Schengen / Dublin regime and Maastricht's "Third Pillar," respectively. Accordingly, the Eurodac Regulation was formally drawn up on the basis of Commission proposals³ and adopted by the Council following consultations with a politically marginalized European Parliament.⁴ However, the formal adoption of Eurodac by the European Community was only insofar politically relevant as it provided Member States' executives with legitimacy and "hard" legal instruments.

Inter-executive deliberations on the technical feasibility of a central Eurodac database range back as far as December 1991.⁵ This clearly demonstrates the origin and substantive links of this project to the intergovernmental Schengen regime, set up in 1985 for eliminating internal border controls in continental Europe, and to the Dublin Convention on asylum of 1990. It also correlates with the introduction of Automated Fingerprint Identification Systems (AFIS) in the domain of asylum on Member State level (see section 4. below).

Substantive intergovernmental negotiations on Eurodac began in 1996 and lasted for more than two years.⁶ After an intergovernmental agreement had been reached

³ See initially Commission of the European Communities (1999): "Proposal for a Council Regulation (EC) concerning the establishment of 'Eurodac' for the comparison of the fingerprints of applicants for asylum and certain other aliens," Brussels, May 26, 1999, *COM (1999) 260 final*, www.europa.eu.int.

⁴ As regards supranational parliamentary involvement under the politically immaterial consultation procedure, see initially European Parliament (1999): "Report on the proposal for a Council regulation concerning the establishment of 'Eurodac' for the comparison of the fingerprints of applicants for asylum and certain other aliens," Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Rapporteur: Hubert Pirker, November 11, 1999, *A5-0059/1999 final*, www.europarl.eu.int.

⁵ See Council of the European Union (1992): "EURODAC – Progress Report to Ministers by the Ad Hoc Group on Immigration," Ad Hoc Group on Immigration, November 16, 1992, document reference: *SN 4683/92 WGI 1271, CONFIDENTIAL*; reprinted in: Statewatch (1997): *Key Texts on Justice and Home Affairs in the European Union, Volume 1 (1976-1993) – From TREVI to Maastricht*, edited by Tony Bunyan, London: Statewatch, pp. 73-74.

⁶ See Council of the European Union (1996): "1909th Council meeting – Justice and Home Affairs, Brussels, 19 March 1996," *Press Release No. 5727/96 (Presse 63)*, <http://ue.eu.int/newsroom/>.

under the Austrian Presidency, the text of the draft Eurodac Convention, negotiated within the institutional framework of Maastricht's old "Third Pillar" of the EU, was temporarily "frozen" or "locked in" in December 1998.⁷ This "freezing" of an inter-executive agreement was the only chance for the JHA Council to take action before the partial "Communitization" of asylum policies, agreed upon by the heads of state or government during the intergovernmental conference of 1996/97 and strengthening the role of the Commission in particular, could be felt. At least as far as Community asylum policy as of May 2004 based on article 63 (1) of the EC Treaty is concerned, this purely intergovernmental mode of supranational governance is merely of historical relevance since the entry into force of the Treaty of Nice.⁸

During the "freezing winter" of 1998, particularly sensitive provisions of the Eurodac project on irregular border-crossing and illegal residence were still the object of heated multilateral diplomacy (see section 2.1 below). Following a successive intergovernmental compromise on these outstanding subject matters under the German Presidency, a separate draft Protocol was also "locked in" by the JHA Council in March 1999.⁹ Having found a common position on the entire Eurodac agenda in due time, the Council of Ministers asked the Commission to present an agreeable draft EC Regulation as soon as the new Treaty of Amsterdam would formally allow it to do so.

The Eurodac Regulation proposed by former JHA Commissioner Anita Gradin immediately after the entry into force of the Treaty of Amsterdam in May 1999, benevolently drafted according to the Austrian and German Presidencies' political guidelines, was first discussed by the Council's *Working Party on Asylum (Eurodac)* on July 27-28, 1999. Since the Commission had loyally adhered to the fundamental

⁷ Cf. Council of the European Union (1998a): "2116th Council meeting – Justice and Home Affairs, Brussels, 24 September 1998," *Press Release No. 11282/98 (Presse 302)*, <http://ue.eu.int/newsroom/>; see also Commission (1999): "Proposal for a Council Regulation (EC) concerning the establishment of 'Eurodac,'" p. 3 [fn. 3].

⁸ This is of course good news for the European Parliament, now fully involved in Community legislation on asylum under the co-decision procedure. See European Union (2002): "Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community," in: *Official Journal of the European Communities* of December 24, 2002, Vol. C 325, pp. 1-184, and especially article 67 (5) of the amended EC Treaty on a full-fledged "Communitization" of European asylum policy as of May 1, 2004.

⁹ Cf. Commission (1999): "Proposal for a Council Regulation (EC)," p. 4 [fn. 3].

principles laid out in the JHA Council's "frozen" Eurodac Convention of December 1998 and its Protocol on irregular border-crossing and illegal residence of March 1999, respectively, Member States' representatives could focus their attention on various technical details and subordinate political issues. The latter included the question of transferring implementing powers to the Commission and when which "comitology procedure" should apply;¹⁰ the territorial scope of the Eurodac Regulation (an issue linked to the seemingly never-ending dispute between Great Britain and Spain over Gibraltar);¹¹ and ways and means to associate Denmark with the new EC Regulation via supplementary international arrangements.¹² Following fruitful discussions on these unresolved and more or less technical subject matters on working group level, a compromise text was presented to the JHA Council's *Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)* by the General Secretariat of the Council in order to reach a definite intergovernmental settlement by the end of 1999.¹³

¹⁰ Somewhat too exclusively, Steve Peers holds that "the most controversial aspect of the Regulation within the EU institutions proved not to be its substance, but the issue of which institution has the power to adopt implementing measures"; Peers (2001): "Key Legislative Developments," p. 236 [fn. 1]. To learn more about intergovernmental deliberations on the most appropriate "Comitology" procedure, cf. Council of the European Union (1999a): "Note from the French delegation to the Asylum Working Party (Eurodac), Subject: Draft Council Regulation concerning the establishment of Eurodac for the comparison of fingerprints of applicants for asylum and certain other aliens," Brussels: General Secretariat of the Council (DG H I), September 20, 1999, document reference: 11091/99 EURODAC 8, LIMITE, <http://register.consilium.eu.int>.

¹¹ Without further explanations, article 26 of the final legal act simply states that "the provisions of this Regulation shall not be applicable to any territory to which the Dublin Convention does not apply." For further information on the issue of Gibraltar, see Council of the European Union (2000b): "Copy of letter from Mr. Javier Solana, Secretary General of the Council of the European Union, dated 19 April 2000, to the Permanent Representatives of the Member States and to other institutions of the European Union, Subject: Gibraltar authorities in the context of EU and EC instruments and related treaties," Brussels: General Secretariat of the Council, April 19, 2000, document reference: 7998/00 JAI 45 MI 73, LIMITE, <http://register.consilium.eu.int>.

¹² As regards the "Danish problem," see Council of the European Union (1999b): "Outcome of Proceedings, From: Working Party on Asylum (Eurodac), dated: 27-28 July 1999, Subject: Proposal for a Council Regulation concerning the establishment of 'Eurodac' for the comparison of applicants for asylum and certain other aliens," Brussels: General Secretariat of the Council (DG H I), August 2, 1999, document reference: 10530/99 EURODAC 7, LIMITE, <http://register.consilium.eu.int>. For most recent negotiations, see Council of the European Union (2003a): "Envisaged Agreements between the Community and Denmark extending to Denmark the application of the provisions of Regulations 44/2001 and 1348/2000 and the future 'Dublin II' and Eurodac Regulations," Brussels: General Secretariat of the Council (Legal Service), January 28, 2003, document reference: 5810/03 JUR 36 ASILE 6 JUSTCIV 9, <http://register.consilium.eu.int>, and fn. 20.

¹³ Council of the European Union (1999c): "Introductory note from the General Secretariat to the Strategic Committee on Immigration, Frontiers and Asylum, Subject: Proposal for a Council Regulation concerning the establishment of 'Eurodac' for the comparison of applicants for asylum and certain other aliens," Brussels: General Secretariat of the Council (DG H I), November 5, 1999, document reference: 12582/99 EURODAC 19, LIMITE, <http://register.consilium.eu.int>.

The Commission, now represented by President Romano Prodi and JHA Commissioner António Vitorino, subsequently put forward its revised proposal for a Eurodac Regulation in March 2000.¹⁴ The European Parliament's *Committee on Citizens' Freedoms and Rights, Justice and Home Affairs'* modest amendments of November 11, 1999, shaped by Hubert Pirker MEP, an Austrian national and member of the Conservative *European People's Party (EEP-ED)* strongly in favor of the Eurodac project, had formally been "taken into account" by the Commission's services. Intergovernmental agreement on the Commission's amended proposal was reported on May 10, 2000 within the *Permanent Representatives Committee (COREPER II)*. The Member States ambassadors' authoritative approval paved the way for the formal adoption of the Eurodac Regulation without further debate by the Council approximately seven months later.¹⁵

The Eurodac Regulation was also the first test case for the peculiar "opt in" and "opt out" arrangements under Title IV of the EC Treaty.¹⁶ Even though both countries

¹⁴ Commission of the European Communities (2000): "Amended proposal for a Council Regulation concerning the establishment of 'Eurodac' for the comparison of the fingerprints of applicants for asylum and certain other third-country nationals to facilitate the implementation of the Dublin Convention," Brussels, March 15, 2000, *COM (2000) 100 final*, www.europa.eu.int.

¹⁵ The relatively large time gap between COREPER's decision and final adoption can be explained by the Council's formal need to re-consult the European Parliament (opinion delivered on September 21, 2000) as regards the question of "Comitology." See Council of the European Union (2000c): "Note from General Secretariat, Subject: Proposal for a Council Regulation concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention," Brussels: DG H I, May 11, 2000, document reference: *8417/00 EURODAC 2, LIMITE*, <http://register.consilium.eu.int>; European Parliament (2000): "Report on the proposal for a Council Regulation concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention," Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Rapporteur: Hubert Pirker, September 1, 2000, *A5-0219/2000 final*, www.europarl.eu.int; and Council of the European Union (2000d): "I/A item note from the General Secretariat to the Permanent Representatives Committee / Council, Subject: Adoption of a Council Regulation concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention," Brussels: DG H I, November 15, 2000, document reference: *12314/44 EURODAC 4, LIMITE*, <http://register.consilium.eu.int>.

¹⁶ For appropriate institutional analyses, see Monar, Jörg (1998): "Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation," in: *European Law Review*, Vol. 23, No. 4, pp. 320-335; and Peers, Steve (2000): "Justice and Home Affairs: Decision-making After Amsterdam," in: *European Law Review*, Vol. 25, No. 2, pp. 183-191. For practitioners' readings on current options for institutional reform in the context of the "Convention on the Future of Europe," see Vitorino, António (2003): "Models of Cooperation within an enlarged European Union," Brussels, January 28, 2003, speech before the Royal Institute for International Affairs and the National Bank of Belgium, document reference: *SPEECH/03/31*, www.europa.eu.int; Nilsson, Hans G. (2002): *Decision-making in EU Justice and Home Affairs: Current Shortcomings and Reform Possibilities*, University of Sussex: Sussex European Institute, SEI Working Paper No. 57 (November 2002), www.sussex.ac.uk/Units/SEI/; and Curtin, Deirdre / Steve Peers (eds.) (2002): *Joint Submissions by the Standing Committee of Experts on International Immigration, Refugee and Criminal Law*,

firmly uphold their border controls vis-à-vis other Member States, the *United Kingdom* and *Ireland* voluntarily “opted in” to the Eurodac Regulation.¹⁷ As indicated above, the relationship between the Community and *Denmark* is obviously more complicated due to Denmark’s categorical “opt out” of Title IV of the EC Treaty. Irrespective of domestic constraints based on the Danish citizens’ firm “*Nej*” to Maastricht and Amsterdam’s provisions for a Community asylum policy, the Danish government, represented at the JHA Council meeting of October 29, 1999 by ambassador Poul Skytte Christoffersen, nevertheless announced its wish to take part in the Eurodac project by other means.¹⁸ It thus appears probable that the Community will sign a supplementary international treaty with Denmark in order to associate this Nordic Member State (alongside Norway and Iceland) with the operation of the Eurodac system.¹⁹ In May 2003, the Council provided the Commission with an appropriate mandate for parallel negotiations with Denmark, Norway, and Iceland on the geographical scope of the Eurodac and Dublin II Regulations – most likely resulting in *de facto* Community policies incorporated into the legal systems of these three Nordic states as a matter of international public law.²⁰

the Immigration Law Practitioners Association, Statewatch, and the European Council of Refugees and Exiles to Working Group X (“Freedom, Security and Justice”) of the Convention on the Future of Europe, Utrecht and London, November 14, 2002, www.europa.eu.int/futurum/.

¹⁷ As regards the politically decisive UK’s “opt in,” see Council of the European Union (1999d): “Note from the General Secretariat, Subject: Notification from the United Kingdom concerning its intention to take part in the adoption of the Council Regulation (EC) concerning the establishment of ‘EURODAC’ for the comparison of fingerprints of applicants for asylum and certain other aliens,” Brussels: General Secretariat of the Council (DG H I), October 18, 1999, document reference: 11870/1/99 REV 1 EURODAC 16, LIMITE, <http://register.consilium.eu.int>.

¹⁸ Cf. Council of the European Union (1999e): “2211th Council meeting – Justice and Home Affairs, Luxemburg, October 29, 1999,” *Press Release No. 12123/99 (Presse 320)*, <http://ue.eu.int/newsroom/>.

¹⁹ See Council of the European Union (2000e): “Corrigendum to Addendum to ‘I/A’ item note,” Brussels: General Secretariat of the Council (DG H I), November 15, 2000, document reference: 12314/00 ADD 1 COR 1 EURODAC 4, LIMITE, <http://register.consilium.eu.int>.

²⁰ See Council of the European Union (2003b): “Legislative Acts and Other Instruments, Subject: Council Decision authorizing the Commission to negotiate with Denmark the conclusion of an Agreement concerning the criteria and mechanisms for establishing the state responsible for examining a request for asylum lodged in Denmark or any other EU Member State, and to negotiate with Iceland and Norway the conclusion of a Protocol pursuant to Article 12 of the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway,” Brussels, May 6, 2003, document reference: 8314/03 ASILE 24, <http://register.consilium.eu.int>.

2.1 Explaining the Extension of Eurodac to Irregular Border-Crossing and Illegal Residence

As a Community instrument for the effective application of the “Dublin II” Regulation on asylum, Eurodac is first and foremost directed at potential *refugees* in the meaning of the Geneva Refugee Convention, i.e. persecuted third country nationals applying for political asylum in one of the Member States.²¹ However, the Eurodac project theoretically also affects all *illegal immigrants*, i.e. every third country national of at least 14 years of age apprehended while trying to cross the external borders in an irregular fashion²² and/or residing illegally within a Member State.²³ The extension of the Eurodac database to irregular border-crossing and illegal residence is a striking incident of policy “spill-over” and provides one of the theoretical “puzzles” of this seemingly asylum-centered project. Beyond its relevance to the narrowly defined domain of Community asylum policy shaped by the Dublin Convention system, the Eurodac Regulation thus *de facto* also functions as a – potentially deterring – instrument of immigration control and for the maintenance of “law and order” within the *AFSJ*.

But how did this substantive shift come about? It was the former German interior minister, Manfred Kanther (CDU), supported by his Secretary of State, Kurt Schelter (CDU), who pressed his colleagues in the JHA Council to extend the Eurodac database to irregular border-crossing and illegal residence. The political will of the EU, first expressed in the name of the UK Presidency in May 1998, to allow for such an extension was domestically presented as a victory for the German federal government under chancellor Kohl.²⁴ Underlining the continuity of the policies pursued by the new German federal government under Gerhard Schröder as of late 1998, Kanther’s successor Otto Schily (SPD) continued to promote a “law and order”

²¹ See Chapter II of the Eurodac Regulation of 2000 on “Applicants for Asylum.”

²² See Chapter III on “Aliens Apprehended in Connection with the Irregular Crossing of an External Border.”

²³ See Chapter IV on “Aliens Found Illegally Present in a Member State.”

²⁴ See Council of the European Union (1998b): “2099th Council meeting – Justice and Home Affairs, Brussels, 28 May 1998,” *Press Release No. 8856/98 (Presse 170)*, <http://ue.eu.int/newsroom/>; and Bundesministerium des Innern (1998a): “Deutschland hat sich in Brüssel durchgesetzt. Fingerabdrücke auch illegal Einreisender sollen erfaßt werden!“ Berlin, *Press Release* of May 29, 1998, www.bmi.bund.de.

approach on European level.²⁵ To be sure, Schily's position also reflected the domestic constraints placed upon the "Red-Green" coalition government in Berlin by a Conservative majority in the "Länder" chamber, the "Bundesrat" – which, for constitutional reasons, is particularly relevant to the analysis of national preference formation in the JHA domain.²⁶

The security driven logic of the revised Eurodac Regulation, i.e. its new focus on questions of biometric evidence concerning *illegal entry and residence*, may be illustrated by the following statement made by the former "Staatssekretär" of Germany's ministry of the interior, Kurt Schelter (CDU). Schelter represented the German federal government within the JHA Council until September 1998 – alongside justice minister Edzard Schmidt-Jortzig and, on more important occasions, the interior minister Manfred Kanther himself. Reflecting upon the asylum policy agenda of the German Presidency of the Schengen group, Schelter commented upon the malfunctioning of the Dublin Convention mechanism and the "added value" of Eurodac as follows:

Our practical experience has shown that many applicants for asylum cross the external border yet do not lodge their application within the first Member State they have entered. Instead, they travel further to the receiving country of their personal choice. Once they arrive there, it cannot be proven any more which part of the external border they actually crossed. In contrast to the provisions of the Dublin Convention and due to a lack of evidence concerning the responsibility of other Member States, the receiving country chosen by the applicant is thus responsible for considering the asylum claim. For these reasons, Germany has demanded not only collecting the fingerprints of asylum seekers, but also those of aliens who have entered illegally. Only by these means will it be possible to identify the state where the asylum seeker initially crossed the external border.²⁷

²⁵ See Bundesministerium des Innern (1998b): "Ratstreffen der EU-Innen- und Justizminister in Brüssel," Berlin, *Press Release* of December 4, 1998, www.bmi.bund.de.

²⁶ For a typical example of political pressure exerted upon an otherwise center-left federal government by the CDU/CSU-dominated "Länder" chamber, see Deutscher Bundesrat (2000): "Entschließung des Bundesrates zur Verbesserung der Bekämpfung der Schleuserkriminalität," 754th session of the "Bundesrat" of September 29, 2000, document reference: *Bundesrats-Drucksache 471/00 (Beschluss)*, www.bundesrat.de. This particular "law and order" resolution was initiated by the government of Baden-Württemberg.

²⁷ Bundesministerium des Innern (1998c): "Deutsche Schengen-Präsidentschaft," *Schengen-Info Nr. 3* of August 12, 1998, www.bmi.bund.de; translation JPA.

Due to objective geographical reasons, other Member States' governments entered into the Eurodac negotiations on EU level sketched out above with a different set of preferences. However, they were not nearly as influential as the German Presidency of the Council during the first half of 1999. Referring to the politically marginalized southern Member States, Sandra Lavenex described the reluctance of these delegations towards the German Presidency's proposals as follows: "Fearing to be negatively affected by the planned Convention, the former tried to oppose the extension of the fingerprint system to include apart from asylum applications also illegal immigrants."²⁸ In fact, the Council-based negotiations during the second half of 1998, i.e. still under the Austrian Presidency of the Council and the German Presidency of the Schengen group, had proven very difficult indeed. The German delegation, led by the Christian Democrat Kurt Schelker, tried to convince the other delegations that the category "illegal immigrants" should not only comprise those apprehended at or close to the external border, but also every third country national found illegally present in a Member State.²⁹

In the end, the German delegation merely achieved that every Member State *may* take the fingerprints of illegal residents in order to check whether the templates of this person match with an entry in the Eurodac database. Certainly agreeable to this compromise solution, the German Presidency, headed by the newly elected interior minister Otto Schily (SPD), "froze in" this Protocol in March 1999 as well – until its subsequent "melting" following the entry into force of the Treaty of Amsterdam.³⁰

The main reason for these contradictory national positions, temporarily blocking intergovernmental negotiations in the Council, lies in the uneven domestic impact of the Dublin Convention system. With a view to future Member States with external land borders in the East like Poland and old Mediterranean EU countries such as Italy, i.e. the new "guardians of the gate" following EU enlargement, Steve Peers adequately questioned the "willingness of border officials to take fingerprints of all

²⁸ Lavenex, Sandra (2001): *The Europeanisation of Refugee Policies. Between Human Rights and Internal Security*, Aldershot etc.: Ashgate, p. 117.

²⁹ Council (1998a): "2116th Council meeting – Justice and Home Affairs" [fn. 7].

³⁰ Cf. Council of the European Union (1999f): "2166th Council meeting – Justice and Home Affairs, Brussels, 12 March 1999," *Press Release No. 6545/99 (Presse 70)*, <http://ue.eu.int/newsroom/>.

persons who cross the border irregularly – quite apart from the large number of persons who cross the border irregularly without being caught – given that such fingerprinting can never result in the removal of asylum-seekers from that Member State, but only in their subsequent return.”³¹ Evelien Brouwer supports this perfectly rational line of reasoning: “As this fingerprinting can only have as a result that the person concerned, who is found later in another Member State, will be sent back to the former Member State, one can reasonably doubt if the authorities of the first State will be very willing to execute the Eurodac Regulation.”³² Only time can tell what certain Member States’ authorities will make out of this new legislative framework. On the other hand, EU enlargement implies that former peripheral countries like Germany and Austria will achieve the beneficial status of “core countries” and will thus be eager to implement Eurodac to the greatest possible extent. Bearing this in mind, the German Presidency, satisfied with the compromise solution laid out above, was primarily interested in an additional European justification (based on article 11 of the final Eurodac Regulation) for the systematic fingerprinting and subsequent removal of third country nationals found illegally present on its territory.

Unfortunately, such administrative practices in the distinct issue area of migration may be interpreted as highly discriminatory and disproportionate by sending and transit countries – a perception which may ultimately poison the relationship between the EU and neighboring states. Reflecting upon the unchanged Italian geographical and political position, Ferruccio Pastore noted that “as a border country, Italy cannot afford to take a purely confrontational attitude towards non-EU sending and transit countries in the field of migration management. No country is potentially more interested than Italy in giving a concrete meaning to expressions such as ‘partnership with countries of origin,’ ‘regional migration management,’

³¹ Peers (2001): “Key Legislative Developments,” p. 236 [fn. 1]. One should note, however, that this argument certainly holds true for continental European countries but not necessarily for the UK and Ireland since the latter non-Schengen countries maintain unilateral external border controls.

³² Brouwer (2002): “Eurodac,” p. 244 [fn. 1]. For a similar argument, see AGIT – Academic Group on [Im]migration – Tampere (1999): “Efficient, Effective and Encompassing Approaches to a European Immigration and Asylum Policy,” in: *International Journal of Refugee Law*, Vol. 11, No. 2, pp. 338-374.

‘*co-développement*,’ etc.”³³ Indeed, no one in the EU has an interest in immigration-related interstate conflicts like the dispute between Spain and Morocco over deserted rocks and readmission obligations.³⁴

Against the strategic background of “burden shifting” via EU enlargement it also becomes clear why the German federal government is currently urging other Member States’ executives in the JHA Council to establish a *Common European Border Guard* for the joint control of the new external borders. This new integrative project is not only designed to justify the ongoing existence and continued financial support of the German “Bundesgrenzschutz” (BGS) after EU enlargement to Central and Eastern Europe. Its main function rather seems to be to enforce German control standards in administrative practice throughout Europe – by means of German authorities operating on “foreign soil.”

Following a German-Italian feasibility study presented in Rome, the European Commission issued an appropriate Communication on the “integrated management of the external borders” in May 2002. The staff of the Commission’s DG JHA in Brussels sketched out the short-term goals for, and main obstacles to, this new integrative venture as follows: “At the first stage [the European Corps of Border Guards] could exercise real surveillance functions at the external borders by joint multinational teams. ... The main difficulty to be overcome in establishing a European Corps of Border Guards is connected with conferring the prerogatives of public authority on staff of the European Corps who do not have the nationality of the Member State where they are deployed. This is a fundamental question on constitutional grounds.”³⁵ Beyond that, it also demonstrates how visible political integration and police cooperation in Europe may become in the very near future.

³³ Pastore, Ferruccio (2002): *Border Countries in an Enlarging Union: Some Reflections based on the Italian Experience*, Brussels: Centre for European Policy Studies, CEPS Policy Brief No. 14, March 2002, www.ceps.be, p. 3.

³⁴ See Monar, Jörg (2003): “The CFSP and the Leila/Perejil Island Incident: The Nemesis of Solidarity and Leadership,” in: *European Foreign Affairs Review*, Vol. 7, No. 3, pp. 251-255. For a more recent contribution of the Commission to the overall debate on external relations in the JHA domain, see Commission of the European Communities (2002a): “Communication from the Commission to the Council and the European Parliament – Integrating Migration Issues in the European Union’s Relations with Third Countries,” Brussels, December 3, 2002, *COM (2002) 703 final*, www.europa.eu.int.

³⁵ See Commission of the European Communities (2002b): “Communication from the Commission to the Council and the European Parliament – Towards Integrated Management of the External Borders of

Only a few weeks after the Commission had presented its Communication, the Seville European Council acknowledged the need for a “coordinated, integrated management of external borders” and urged the Member States to initiate relevant pilot projects and joint operations.³⁶ The first multinational patrol of the current external borders of the EU took place on December 4–13, 2002, quite unsurprisingly at the German-Polish border. On this occasion, the BGS practiced “integrating” and building up mutual trust with visiting colleagues from Italy, Greece, and the United Kingdom. For the time being, “foreign nationals” performing police and border surveillance functions on “German soil” were still required to wear their national uniforms.³⁷

3. Eurodac and the Coupling of IT with Biometrics

The Eurodac Regulation of December 11, 2000 provides the legal basis for the establishment of an IT-based *European dactylographic* system (hence the acronym *Eurodac*). The highly innovative combination of biometric identification technology and information technology (IT) is the cutting edge of contemporary technological development.³⁸ As Irma van der Ploeg notes, the use of biometrics transforming individual body characteristics into machine-readable digital codes is “the next big

the Member States of the European Union,” Brussels, May 7, 2002, *COM (2002) 233 final*, www.europa.eu.int, pp. 20-21. For the Commission’s most recent contribution in this context, see Commission of the European Communities (2003a): “Communication from the Commission to the European Parliament and the Council in view of the European Council of Thessaloniki on the Development of a Common Policy on Illegal Immigration, Smuggling and Trafficking of Human Beings, External Borders and the Return of Illegal Residents,” Brussels, June 3, 2003, *COM (2003) 323 final*, www.europa.eu.int.

³⁶ European Council (2002): “Presidency Conclusions – Seville European Council,” *SN 200/02*, www.europa.eu.int, no. 31-32.

³⁷ Cf. Bundesministerium des Innern (2002): “Vorbereitung auf eine Europäische Grenzpolizei: Erste multinationale Streife an EU-Außengrenze,” Berlin, *Press Release* of December 4, 2002, www.bmi.bund.de.

³⁸ Recent publications on biometric identification technology include Woodward, John D. / Nicholas M. Orlans / Peter T. Higgins (2002): *Biometrics – Identity Assurance in the Information Age*, Berkeley, CA: McGraw-Hill/Osborne Media; and Nanavati, Samir / Michael Thieme / Raj Nanavati (2002): *Biometrics – Identity Verification in a Networked World*, New York: John Wiley & Sons (Wiley Tech Brief Series). For relevant German literature, see Petermann, Thomas / Arnold Sauter (2002): *Biometrische Identifikationssysteme – Sachstandsbericht*, Berlin: Büro für Technikfolgen-Abschätzung beim Deutschen Bundestag (TAB), TAB Arbeitsbericht Nr. 76, Februar 2002, www.tab.fzk.de; Nolde, Veronika / Lothar Leger (eds.) (2002): *Biometrische Verfahren – Körpermerkmale als Passwort. Grundlagen, Sicherheit und Einsatzgebiete biometrischer Identifikation*, Neuwied: Fachverlag Deutscher Wirtschaftsdienst; and Behrens, Michael / Richard Roth (eds.) (2001): *Biometrische Identifikation. Grundlagen, Verfahren, Perspektiven*, Wiesbaden: Vieweg.

thing in information technology.”³⁹ The *MIT Technology Review* of January 2000 identified biometrics as one of the “top ten emerging technologies that will change the world.”⁴⁰ Born in an era of information-technological revolution and non-linear biotechnological development, such novel systems allow for the exact digital representation and online comparison of unique physiological features such as an individual’s iris, face, or, as in the case of Eurodac, of a human being’s fingerprints. Specialists on “human authentication security technologies and applications” and representatives of business interests like the *International Biometric Industry Association (IBIA)* naturally celebrate and promote these novel biometric control-devices which allegedly guarantee “a conviction rate of 100% for offences all based on identity fraud, presenting aliases and other false identity information.”⁴¹

The fact that biometric identifiers *actually work* and may be combined with IT applications justifies relating the Eurodac project to the politically explosive notion of total control in a “brave new world.”⁴² The political concept of total executive surveillance and discretion not only has extremely negative connotations for the citizens of the formerly Communist accession countries in Central and Eastern Europe

³⁹ Van der Ploeg (1999): “The Illegal Body,” p. 295 [fn. 1]. For an earlier critical assessment, see Davies, Simon (1994): “Touching Big Brother: How Biometric Technology will Fuse Flesh and Machine,” in: *Information Technology and People*, Vol. 7, No. 4, www.privacy.org/pi/reports/biometric.html.

⁴⁰ Cited according to Woodward, John D. (2001): *Biometrics – Facing Up to Terrorism*, United States Army: RAND Arroyo Center, Army Research Division, October 2001, www.rand.org/publications/IP/IP218/, pp. 3-4. One should note that the author is a former CIA operations officer. To learn more about the military dimension of biometric technology as employed by the U.S. Department of Defense’s “Biometric Management Office” (BMO) set up in 2000, see www.c3i.osd.mil/biometrics/.

⁴¹ Bunney, Calum (2002): “Combating Identity Fraud in Immigration and Asylum Systems – The Advancing Use of ID Technologies,” in: *Fraud Intelligence*, Vol. 49, No. 10, August 2002, pp. 1-4, here: p. 4. The author is the director of “International Biometric and Authentication Consulting” (IBAC). For further insights into the biometric industry, see www.ibia.org.

⁴² One should note, however, that there is always a “random error factor” involved with contemporary biometric applications. During the “Fingerprint Verification Competition 2002,” for example, the best performer, *Bioscript*, achieved an equal error rate (EER) of 0,19% - whereas the year 2000 competition’s winner and Eurodac provider *Sagem* merely scored an EER of 1,18%. Of course, one may reasonably expect the development of more advanced and precise technologies over time – which does not rule out that appropriate counter-technologies will be developed as well. The vulnerability of allegedly safe computer networks to so-called “hacker invasions” is a case in point. See *Biometric Technology Today* (2002a): “FVC 2002 entrants set new high verification standards,” October 2002, p. 2; Busch, Christoph (2000): *Aspekte der Sicherheit von biometrischen Identifikationssystemen*, Darmstadt: Fraunhofer-Institut für Graphische Datenverarbeitung, statement of February 9, 2000, www.igd.fhg.de/idg-a8/projects/biois/statements/busch.pdf; and Rejman-Greene, Marek (2002): “Secure Authentication Using Biometric Methods,” in: *Information Security Technical Report*, Vol. 7, No. 3, pp. 30-40.

still struggling with their Stalinist “big brother” heritage, but also for the citizens of the Federal Republic of Germany, the successor state of the “Third Reich.”⁴³

As regards multi-level governance and administrative cooperation in the European Community more than half a century later, the Eurodac system comprises the locally enforced collection, Commission-based central processing and storage, and real-time comparison of fingerprint data of third country nationals throughout the EU – with the partial exception of Denmark. Let us now consider each stage in somewhat more detail.

The system can only achieve its control-driven objectives if the fingerprint data of asylum seekers, irregular border-crossers and illegal residents will be de-centrally *collected* via the relevant authorities (i.e. border guards, police forces, etc.) of each and every Member State. I have already illustrated why this requirement may not be adhered to in administrative practice, especially in the “old South” and “new East” of the enlarged EU (see section 2.1 above). Yet under normal circumstances, fingerprint data collected by national authorities in conformity with the Eurodac Regulation will be *transmitted* to the Central Unit run by the Commission for means of *comparison* with previously submitted and centrally stored templates (“one-to-many check” or database search against multiple templates). Very similar to the functioning of the (extended) *Schengen Information System (SIS and/or SIS II)*, a common European database which also stores the personal data of “unwanted” third country nationals who are not allowed to enter “Schengenland,” this comparative procedure will either result in a positive or negative outcome (“hit”/“no hit”). As indicated above, a “hit” identifying a third country national as a multiple and/or already known applicant for asylum can logically only occur if relevant national authorities have previously collected the fingerprints of this person and have submitted his or her templates to the Central Unit. Last but not least, individual fingerprint data will be *stored* within the central database for a period of up to two years (irregular border-crossers) or ten years

⁴³ As a matter of historical fact, the Nazi crimes against humanity could only reach such an unimaginable scale because the victims of the Hitler regime were administratively identified and classified before their systematic murder. For more in-depth discussions, see Aly, Götz / Karl Heinz Roth (2000): *Die restlose Erfassung – Volkszählen, Identifizieren, Aussondern im Nationalsozialismus*, Frankfurt am Main: Fischer Taschenbuchverlag (new and edited version); and Arendt, Hannah (1973): *The Origins of Totalitarianism*, San Diego and New York: A Harvest Book (new edition with added prefaces).

(applicants for asylum) – unless the migrant or asylum seeker in question has acquired the citizenship of a Member State. The fingerprints of illegal residents may *not* be stored in the central European database.

The Eurodac Regulation of December 2000 only created the legal basis for the envisioned systematic collection and comparison of biometric data. Another legal act on European level was needed to make the system technically *operational*. The first Eurodac Regulation was thus followed by a second Community Regulation of February 2002. This “Eurodac II” Regulation lays down specific rules for the administrative maintenance and enforcement of the system.⁴⁴ The entire operation was finally launched on January 15, 2003. Fingerprint templates of asylum seekers and other third country nationals have officially been transmitted to the Central Unit from that day onward.⁴⁵

Unsurprisingly in light of the relative unpopularity of the German federal government during the beginning of the second term of chancellor Gerhard Schröder (SPD), his right leaning Social Democratic interior minister, Otto Schily, falsely claimed victory for having initiated the Eurodac project on Community level – and immediately added that the German federal government was aiming to open up the Eurodac database for *general police purposes*.⁴⁶ Other Member States’ governments merely celebrated the launch of the first European *Automated Fingerprint Identification System (AFIS)* based on latest biometric and information technology as a major step forward in the fight against the alleged abuse of seemingly overburdened

⁴⁴ Council of the European Union (2002a): “Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention,” in: *Official Journal of the European Communities*, Vol. L 62 of March 5, 2002, pp. 1-5. The actual fingerprint form is contained in an annex of this second Eurodac Regulation. It provides detailed technical specifications for the collection of both the rolled and plain impressions of all ten fingers of the third country national in question.

⁴⁵ See Commission of the European Communities (2003b): “Identification of asylum seekers – EURODAC operational tomorrow,” Brussels, January 14, 2003, *Press Release IP/03/37*, www.europa.eu.int. According to article 24 of the “Eurodac I” Regulation, the Commission will draw up an evaluation report on the Central Unit, including quantitative data, by January 2004.

⁴⁶ The interior minister declared the following: “Zudem drängen wir innerhalb der Gemeinschaft darauf, EURODAC für polizeiliche Zwecke zu öffnen. Dann können die zentral registrierten Daten mit denen des Bundeskriminalamtes abgeglichen werden. Hierbei ist mit einer hohen Trefferquote bei der Ermittlung potentieller Straftäter zu rechnen. Wir sind zuversichtlich, diese Öffnung in absehbarer Zeit zu erreichen.” Cited according to the Bundesministerium des Innern (2003a): “Schily: Asylmissbrauch mit EURODAC wirksam unterbinden,” Berlin, *Press Release* of January 14, 2003, www.bmi.bund.de.

national asylum systems. For example, Beverly Hughes, UK Home Office “Minister of State for Citizenship, Immigration and Community Cohesion” under Home Secretary David Blunkett (Labour), declared that “this database, in time, will provide us with a valuable resource to tackle multiple asylum applications and deter asylum shopping.”⁴⁷ Only three weeks later, Tony Blair publicly announced that “New Labour” intended to cut the increasing number of asylum seekers in Britain by 50% within the following six months.⁴⁸ Reiterating his “firm commitment” in light of possible electoral losses in the future, the British Prime Minister further declared that he would introduce new national legislation, which would fundamentally “redefine the application” of both the Geneva Refugee Convention and the ECHR in the United Kingdom.⁴⁹

* * *

After having indicated who is *politically* responsible for the launch of the Eurodac project, we may also ask who is in charge of its implementation in a more *technical* sense. Important Eurodac components were developed by the *Steria Group*, a multinational, Paris-based IT company specialized in “security solutions” in the public domain. Except for Denmark, all EU Member States plus Iceland, Norway, and Switzerland purchased *Steria*’s “Fingerprint Image Transmission” (FIT) devices. One of the reasons for the Member States’ decision to choose *Steria* as their principal contractor seems to be that the patents for iris recognition technology are held by *Iridian Technologies, Inc.*, a U.S. based company.⁵⁰

⁴⁷ Home Office (2003): “EU asylum fingerprint database begins operating today,” *Press Release* of January 15, 2003, www.homeoffice.gov.uk.

⁴⁸ Blair set this quantitative target in an interview for “Newsnight” on BBC 2 television of February 7, 2003. Referring to the rising number of asylum claims in Britain, the Prime Minister announced the following: “I would like to see us reduce it by 30 per cent to 40 per cent in the next few months and I think by September of this year we should have it halved. ... I think we can get below that then, in the years to come.” His right-wing opponent, Tory leader Iain Duncan Smith, responded to Blair’s televised statement by requesting that “what he has to do is say that we will only take certain quotas. When he does that, that will be about taking real action. Right now, it is promises and targets and the Government has failed endlessly to meet any of its targets.” Both statements cited according to *The Independent* (UK edition) of February 8, 2003, p. 1.

⁴⁹ See *The Sunday Times* (London) of February 16, 2003, p. 32.

⁵⁰ Commission of the European Communities (2003c): “[Combined] Proposal for a Council Regulation amending Regulation (EC) 1683/95 laying down a uniform format for visas, and for a Council Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country



Image 1: An Austrian fingerprint scanner connected to the Eurodac database in operation;
Source: www.bmi.gv.at

Steria FIT's are compatible with all national AFIS and will connect these national databases to the central Eurodac database. In terms of guaranteeing the "interoperability" of different national systems, this is an important technical feature. The French multi-national expects that the central database will contain approximately two million entries by the year 2004. *Steria* representatives have also claimed that the

Eurodac system will operate with a precision rate above 99,9% and that it has the capacity to compare 500,000 fingerprint templates per second.⁵¹ Again, it needs to be underlined at this point that qualitative technological changes may fundamentally alter the relative political influence of the executive branch within contemporary representative-democratic polities. Beyond that and equally important in light of the new transatlantic security agenda, Eurodac may technically be linked to other international databases, including the SIS-related SIRENE network (Supplementary Information Request at the National Entry), those of Interpol, and the American Federal Bureau of Investigation (FBI).⁵²

As the political motivation of the current German interior minister to open up Eurodac for general police purposes laid out above clearly indicates, the technical possibility of using this supranational database for purposes other than those rather narrowly defined by the "Dublin II" Regulation is a constant temptation for popularity-focused center-left to far-right politicians. In practice, these populist ambitions match with the professional interests of the police and counter-terrorism bureaucracies. Supporting this expansionist trend for commercial reasons,

nationals," Brussels, September 24, 2003, *COM (2003) 558 final*, www.europa.eu.int, p.5 ("Explanatory Memorandum").

⁵¹ Steria Group (2003): "The European Commission chooses Steria's biometrics know-how to process asylum requests and fight illegal immigration," Paris, January 14, 2003, *Press Release*, www.steria.com.

⁵² On international police cooperation in general and for a comparative analysis of developments in West Germany, the Netherlands, the United Kingdom, and Spain, see Busch, Heiner (1995): *Grenzenlose Polizei? Neue Grenzen und polizeiliche Zusammenarbeit in Europa*, Münster: Westfälisches Dampfboot, pp. 157-350. See also Bigo, Didier (1996): *Polices en réseaux. L'expérience européenne*, Paris: Presses de la Fondation nationale des sciences politiques. For further "links," see <http://policeinternational.com>.

the *Steria Group* promotes its services as follows: “The FIT solution, which is part of Steria’s global ‘biometrics’ offer, can also be applied in fields such as electronic voting, authentication and verification in sensitive areas such as airports (passengers and personnel), nuclear power stations, research laboratories or e-commerce, Internet kiosks, etc.”⁵³

I shall not enter into a more detailed discussion of the financial impact of the interaction between government officials and the so-called “military industrial complex” at this point. One should note, however, that according to article 21 of the Eurodac Regulation of 2000, the costs connected with the operation and maintenance of the Central Unit will be covered by the Community budget, whereas Member States need to finance their national AFIS and appropriate connections to the central database themselves. The financial impact of installing the Central Unit has been estimated by the Commission at approximately 8.5 million Euro for the year 2000, whereas the running costs as of 2001 were estimated at ca. 800,000 Euro per year (including a permanent Eurodac staff of five people).⁵⁴ In regard to the considerably more expensive introduction of biometric identifiers into visa, residence permits, and EU citizens’ passports, the Commission openly acknowledged that “it is rather difficult to specify the exact financial impact of these legislative measures, as the exact requirements are not yet known...,”⁵⁵ and later added that these measures would require “large investments.”⁵⁶

4. Automated Fingerprint Identification Systems on National Level: The Case of Germany and the United Kingdom

The biometric control of asylum seekers and “illegal” immigrants in the European Community as envisaged by the Eurodac Regulations, a treatment to be extended to all third country nationals and EU citizens attempting to enter or leave the *Area of Freedom, Security and Justice* in the near future, is very similar to police

⁵³ Steria Group (2002): “Security, Police and Immigration: Switzerland chooses Steria’s system for the secure transmission of fingerprints. A solution already adopted by 16 European countries,” Paris, October 4, 2002, *Press Release*, www.steria.com.

⁵⁴ See Commission (2000): “Amended proposal,” pp. 30-36 (“Financial Statement”), based on budget line B5-801 [fn. 14].

⁵⁵ Commission (2003c): “[Combined] Proposal,” p. 11 (“Financial Impact”) [fn. 50].

⁵⁶ Commission (2003a): “Communication,” p. 6 [fn. 35].

practices previously employed on nation-state level vis-à-vis ordinary *criminals*. As an alternative to high resolution photographs, voice-recordings and, more recently, genetic information gained via DNA-analysis (“DNA fingerprinting”), the collection of fingerprint data is and has always been highly relevant for investigative police work. Law enforcement agencies naturally have a vital interest in “hard evidence” like fingerprints gathered at the “scene of the crime.”

However, this practice still relates to the concept of *reactive* police work according to the classical sequence “if action A, then reaction B.” In contrast to the traditional concept of repression, contemporary police strategies – especially in the context of the new anti-terrorist security agenda after September 11th – are based on the intelligence concept, i.e. the *preemptive* collection of biometric and other personal data, preferably of the entire population, for the prevention of terrorist attacks or criminal offences in the future.⁵⁷

Fingerprints are ordinarily collected by specifically trained members of police records departments in the course of identification procedures imposed upon criminal suspects and/or convicted criminals. The more fingerprints of potential and actual offenders can be collected and centrally stored, the better for the police. For example, Germany’s institutional equivalent to the FBI and the role model for Europol, the *Bundeskriminalamt (BKA)*, currently stores the fingerprint data of more than three million persons, including those of asylum seekers and ordinary criminals, within its INPOL system.⁵⁸ If manually collected fingerprint sheets can technically be transformed into digital binary codes, these templates can also be fed into national, supranational or international *Automated Fingerprint Identification Systems (AFIS)*.

⁵⁷ For further insights into the concept of *preventive repression* and its repercussions for fundamental rights, especially in the context of the state’s response to perceived terrorist threats, see Narr, Wolf-Dieter (1998): “‘Wir Bürger als Sicherheitsrisiko’ – Rückblick und Ausblick,” in: *Bürgerrechte und Polizei / CILIP*, Vol. 60, No. 2, pp. 52-59, www.cilip.de/ausgabe/60/narr60.htm. Cf. also Weichert, Thilo (2002): *Kriminalitätsbekämpfung oder lückenlose Überwachung? Die Vorratsdatenspeicherungs-Debatte*, Bonn: Deutsche Vereinigung für Datenschutz e.V., December 2002, www.aktiv.org/DVD; Cavoukian, Ann (1999): *Biometrics and Policing: Comments from a Privacy Perspective*, Toronto: Information and Privacy Commissioner/ Ontario, August 1999, www.ipc.on.ca; Pütter, Norbert (1998): *Der OK-Komplex. Organisierte Kriminalität und ihre Folgen für die Polizei in Deutschland*, Münster: Westfälisches Dampfboot; and Martin, Kate (2002): “Intelligence, Terrorism, and Civil Liberties,” in: *Human Rights - Journal of the American Bar Association*, Vol. 29, No. 1, www.abanet.org/jrr/hr/winter02/martin.html.

⁵⁸ Bundeskriminalamt (2002): *Das Bundeskriminalamt – Fakten und Zahlen*, www.bka.de, p. 9.

Britain's national AFIS, for example, became fully operational in 2001. This "new generation" database contained about 4.6 million entries in 2001 and is now connecting all 43 formally independent local police forces in Britain (excluding Scotland and the "Royal Ulster Constabulary" in Northern Ireland).⁵⁹

With the introduction of more restrictive asylum legislation in *Germany* initiated by the CDU/CSU-F.D.P. coalition government under chancellor Helmut Kohl, the general requirement of an "erkennungsdienstliche Behandlung" and the subsequent processing and storage of these biometric data within the German AFIS was extended to all applicants for political asylum – a police practice informally exercised by old-fashioned technological means since 1965. The legalization of this administrative practice via appropriate amendments of the asylum procedure act ("Asylverfahrensgesetz") was justified in Conservative circles by the need to fight the alleged abuse of the German asylum system for immigration purposes, especially as far as asylum applicants' potential eligibility for welfare payments, a public health insurance, and other state benefits was concerned.⁶⁰ The German AFIS, created in December 1992 and institutionally embedded within the "Bundeskriminalamt" (BKA), can thus be seen as a predecessor of Eurodac.⁶¹ In combination with the ASYLON ("Asyl Online") system, set up as early as June 1990 and linked to the "Ausländerzentralregister" (AZR), German institutions like the former "Bundesamt für die Anerkennung ausländischer Flüchtlinge" were, with the administrative assistance of the BKA, systematically checking whether an asylum seeker had issued an application for asylum before under a false identify and/or whether the claimant was possibly filing multiple applications on regional or "Länder" level.

⁵⁹ See *Biometric Technology Today* (2001a): "NAFIS system is now fully operational across the UK," June 2001, p. 3.

⁶⁰ Thilo Weichert of the "Deutsche Vereinigung für Datenschutz e.V." commented upon these early legislative amendments as follows: "Unter Verletzung des verfassungsrechtlichen Erforderlichkeitsprinzips werden nunmehr alle Asylsuchenden einer ED-Maßnahme unterzogen. ... Die Konsequenz: Die Wahrnehmung eines Grundrechts wird informationsrechtlich als kriminelle Tat behandelt und gespeichert." Weichert, Thilo (1993): "Ausländererfassung in der Bundesrepublik – Die informationelle Sonderbehandlung von ImmigrantInnen und Flüchtlingen," in: *Bürgerrechte und Polizei /CILIP*, Vol. 45, No. 2, pp. 30-39, here: p. 36, www.cilip.de/ausgabe/45/erfass.htm.

⁶¹ Other Member States operating an AFIS in 1992 included the Netherlands, Belgium, and Denmark (provided by *Printrak*), Spain (*NEC*), and France (*Sagem Morpho*); see Busch (1995): *Grenzenlose Polizei*, pp. 115-116 [fn. 52].

A very similar development occurred in the *United Kingdom*. In 1991/92, the Conservative government under former Prime Minister John Major initiated the British “Immigration and Asylum Fingerprinting” (IAF) program. About ten years later, i.e. in January 2002, Home Secretary David Blunkett (Labour) announced the introduction of a biometric “Applicant’s Registration Card” for asylum seekers as part of the second phase of the IAF program. This registration card is a so-called *smart card* containing – in addition to the applicant’s photograph, name, date of birth, etc. – a memory chip with his or her fingerprint templates.

Shortly before Blunkett’s more recent announcement, the UK had its asylum and immigration-related AFIS in place, administratively managed by the “Immigration Fingerprinting Bureau” situated at Croydon, London. In order to apply the system effectively, the British executive purchased a number of high-tech devices from *Sagem*, including 154 hand-held units with GSM coverage (Global System for Mobile communications) for official use at ports of entry throughout Britain.⁶² Martin Giles, project manager at the IAF program, commented upon the executive’s special interest in biometric identification technology as follows: “Biometrics has enabled us to quickly identify an individual claiming asylum. ... We haven’t lost a single case yet. We hope that this will lead to the use of biometrics as a deterrent as well as a means of identifying people and detecting offenders.”⁶³ The overall approach of the IAF program is obviously a major departure from the classical British model of local reactive policing – and moves closer to concepts based on centralized intelligence or preemptive policing, i.e. surveillance strategies employed *inter alia* by Scotland Yard’s Criminal Investigation Department’s “Special Branch” and the British counterintelligence agency “MI5” (Military Intelligence, department 5).⁶⁴

The prospect of becoming the object of biometric identification procedures in EU-Europe, i.e. of being treated like an ordinary criminal by Member States’ border guards or police forces, may indeed have a deterring effect on third country nationals in need of international protection. At least from a sociological point of view,

⁶² *Biometric Technology Today* (2001b): “Immigration issues,” September 2001, p. 11.

⁶³ Cited according to *Biometric Technology Today* (2001b): “Immigration issues,” p. 9 [fn. 62].

⁶⁴ Cf. Busch (1995): *Grenzenlose Polizei*, p. 205 [fn. 52].

the universal validity of human rights, i.e. one of the constitutional foundations of the emerging *Area of Freedom, Security and Justice*, collides with the “special treatment” of asylum seekers in the European Community as of 2003.⁶⁵

5. Possible Alternative Public Uses of the Eurodac Database and the Impact of September 11th

Technically speaking, biometric and IT applications may not necessarily be based on digitalized fingerprints.⁶⁶ In the Netherlands, for example, the Aliens Police in Rotterdam is currently testing *iris recognition* technology on 250 asylum seekers – formally on a voluntary basis.⁶⁷ Ironically, the commercial provider of this high-tech product, *Joh. Enschedé*, employed the same technology for its “Automated Border Crossing” system at Amsterdam’s Schipol airport.⁶⁸ In sharp contrast to the former pilot’s political ambition to control the physical movement of asylum seekers, the latter project aims at eliminating all barriers to the free movement of persons (i.e. “frequent flyers” like business people, government officials, etc.) across borders. In effect, privileged passengers or voluntary “users” of biometric identification technology can be completely exempted from lengthy immigration control procedures.

Let me now briefly touch upon more problematic public uses and extensions of biometric databases like Eurodac. Biometric identification technology is already

⁶⁵ For further reflections on this motif, see Habermas, Jürgen (1998): “Zur Legitimation durch Menschenrechte,” in: *Die postnationale Konstellation. Politische Essays*, Frankfurt am Main: Suhrkamp, pp. 170-192. For more focused discussions on the asylum issue in Europe, see Boswell, Christina (2000): “European Values and the Asylum Crisis,” in: *International Affairs*, Vol. 76, No. 3, pp. 537-557; Harvey, Colin J. (2000): “Dissident Voices: Refugees, Human Rights and Asylum in Europe,” in: *Social & Legal Studies*, Vol. 9, No. 3, pp. 367-396; Ucarer, Emek M. (2001): “Managing Asylum and European Integration: Expanding Spheres of Exclusion?” in: *International Studies Perspectives*, Vol. 2, pp. 288-304; Steiner, Niklaus (2001): *Arguing about Asylum: The Complexity of Refugee Debates in Europe*, Geneva: UNHCR, New Issues in Refugee Research, Working Paper No. 48 (October 2001), www.unhcr.ch; and Kjærum, Morten (2002): “Refugee Protection Between State Interests and Human Rights: Where is Europe Heading?” in: *Human Rights Quarterly*, Vol. 24, pp. 513-536.

⁶⁶ Cf. TeleTrust Deutschland e.V. (2002): *Bewertungskriterien zur Vergleichbarkeit biometrischer Verfahren, Version 2.0*, Stand: 10. Juli 2002, Erfurt: Teletrust Deutschland e.V., Arbeitsgruppe 6: Biometrische Identifikationsverfahren, www.teletrust.de.

⁶⁷ Bunney (2002): “Combating Identity Fraud” [fn. 41].

⁶⁸ *Biometric Technology Today* (2002b): “Iris technology gets the green light in Holland,” January 2002, p. 4. See also *Biometric Technology Today* (2001c): “Immigration officials say aye to eyes at Heathrow,” September 2001, p. 3. For further illustrations, see www.eyeticket.com.

employed in some Member States in order to prevent “double dipping” in national *welfare systems*, i.e. the collection of multiple state benefits by the same person issuing various applications under false identities.⁶⁹ Under these circumstances, the welfare state appears first and foremost as the welfare *state* in its authoritarian Prussian ideal type. As sketched out above, the alleged threat of “forum shopping” and identity fraud was used earlier to legitimize the systematic fingerprinting of asylum seekers in Germany, Britain, etc. Preparatory deliberations among local governments in the Netherlands to introduce so-called “citizen cards” (which are supposed to control the distribution of social benefits via “electronic benefits transfer systems”) are based on a similar logic.⁷⁰ In fact, Belgium is about to launch the first nation-wide biometric “citizen card” in the Western World. This card will contain details of every Belgian citizen’s social security entitlements, health insurance, etc.⁷¹ In the UK, “citizen entitlement card” legislation is expected for November 2003.⁷² The last time British authorities had issued identity papers or “internal passports” to their citizens was during the Second World War.

The company *Sagem*, providing the know-how for the British IAF program and managing the AFIS of Germany, Austria, and France,⁷³ has already expanded its lucrative biometric and IT business into the emerging African market for *election and population control*. Possibly the world’s first democratic election based on the systematic use of biometric human identification technology was held in Mauritania between October 19-26, 2001. Every single Mauritanian citizen had to submit his or her fingerprints to authorized business representatives and was later provided with a

⁶⁹ For a comparative view of U.S. developments, see the United States General Accounting Office (1995): *Electronic Benefits Transfer. Use of Biometrics to Deter Fraud in the Nationwide EBT Program*, Report to the Honorable Kenneth E. Bentsen, Jr., House of Representatives, September 1995, document reference: GAO/OSI-95-20, Washington, D.C, www.biometrics.org/REPORTS/OSI-95-20.pdf.

⁷⁰ See Van der Ploeg (1999): “The Illegal Body,” p. 296 [fn. 1].

⁷¹ *Biometric Technology Today* (2001d): “Belgium considers smart ID cards,” January 2001, p.11. See also *BBC News* of October 4, 2002: “Belgium plans digital ID cards,” <http://news.bbc.co.uk/1/hi/technology/2295433.stm>.

⁷² See *Biometric Technology Today* (2002c): “UK entitlement cards on the way?” April 2002, p.12; and *BBC News* of June 19, 2003: “Public oppose ID card scheme,” <http://news.bbc.co.uk/1/hi/technology/3004376.stm>.

⁷³ Cf. Sagem Group (2003): “SAGEM: The major player in the Eurodac system,” *Press Release* of January 22, 2003, www.sagem.com. Agreement on common technological standards is obviously a precondition for enhanced international police cooperation.

biometric *smart card* – allegedly in order to prevent “voter fraud” and thus to guarantee fair and equal national elections. Indicating that this large-scale operation not only served the purpose of holding fair elections in Mauritania, a spokesperson of *Sagem* concluded that “Mauritania now has two advantages. First it has a complete and coherent national database of the population. Second, all the adult citizens now have an ID card secured via a fingerprint.”⁷⁴ In August 2001, the *Sagem Group* signed an even more profitable contract with the Nigerian government. According to this project’s ambitious master plan, a total of approximately 60 million Nigerians, already stigmatized for their alleged involvement in transnational “organized crime” in Africa and beyond, will be systematically fingerprinted and subsequently provided with a biometric identity card.⁷⁵

* * *

With a view to asylum and immigration control policies in industrialized countries, the trend towards the public use of ever more sophisticated human identification technologies gained considerable momentum after “9/11” and the subsequent establishment of a “Department of Homeland Security” in the U.S.A. The latter ministry was recently set up in order to prevent further terrorist attacks in America and merges institutions such as the Immigration and Naturalization Service (INS), the U.S. Coast Guard, and the U.S. Customs Service.⁷⁶

Stock markets immediately responded to “9/11” by revaluing the biometric industry.⁷⁷ It seems that these economic analysts’ predictions were indeed correct.

⁷⁴ *Biometric Technology Today* (2002d): “Voting success in Mauritania,” February 2002, p. 1.

⁷⁵ *Biometric Technology Today* (2002e): “60 million voters are registered in Nigeria,” September 2002, pp. 12-13.

⁷⁶ United States of America, 107th Congress (2002a): “Act to Establish the Department of Homeland Security, and for Other Purposes (Homeland Security Act of 2002),” *H.R. 5005*, Washington, D.C., January 23, 2002, www.usa.gov.

⁷⁷ See *Biometric Technology Today* (2001e): “Biometrics stock rises following US attacks,” November/December 2001, p. 6. As regards pre-“9/11” commercial prospects, see Lockie, Mark (2000): *Market Developments and Application Examples of Biometric Systems*, Statement at the “BioIS Technikfolgen-Abschätzungs-Symposium,” Darmstadt: Fraunhofer Institut für Graphische Datenverarbeitung, February 9, 2000, www.igd.fhg.de/igd-a8/projects/biois/statements/lockie.pdf. The author is the editor of the journal “Biometric Technology Today.” For current outlooks, see Lockie, Mark (2002): *The Biometric Industry Report. Forecasts and Analysis to 2006*, second edition (November 1, 2002), Elsevier Science; and International Biometric Group (2002): *Biometrics Market*

For example, the U.S. Department of Homeland Security has recently introduced a new border control system by the name of “U.S. VISIT” (United States Visitor and Immigrant Status Indication Technology). As of January 1, 2004, every alien entering U.S. territory by air or sea with a traditional travel document such as a visa will systematically be photographed and fingerprinted. These biometric data will then be compared with previously stored biometric data of convicted criminals and terrorist suspects.⁷⁸ Beyond that, the U.S. government has recently placed pressure on 27 privileged visa waiver countries – i.e. the European Union minus Greece; Switzerland; Norway; and other U.S. allies – to introduce biometric identifiers into their national passports as soon as possible.⁷⁹ Meeting the objectives of the “USA Patriot Act” of October 2001,⁸⁰ domestic U.S. initiatives to amend the “Enhanced Border Security and Visa Entry Reform Act of 2002” indicate that holders of foreign passports must be able to present biometric and machine-readable identifiers by October 26, 2004 to U.S. immigration authorities – otherwise the foreign national in question will be required to obtain a regular biometric visa before entering U.S. territory.⁸¹

With the introduction of biometric identifiers into newly issued German passports, for example, the federal government in Berlin, disliked by the Bush administration for its refusal to support an attack against Iraq, has quickly responded to the new U.S. preferences.⁸² Building on the German reaction and in line with the

Report 2003-2007, September 30, 2002, not accessible to me and to be purchased exclusively via www.biometricgroup.com.

⁷⁸ See *Der Tagesspiegel* (Berlin) of May 21, 2003, p. 5.

⁷⁹ *Biometric Technology Today* (2002f): “Visa waiver countries set tight deadline by USA,” May 2002, p. 2.

⁸⁰ See United States of America, 107th Congress (2001): “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act) of 2001,” *H.R. 3162*, Washington, D.C., October 24, 2001, www.usa.gov.

⁸¹ United States of America, 107th Congress (2002b): “Act to Enhance the Border Security of the United States, and for Other Purposes (Enhanced Border Security and Visa Entry Reform Act of 2002),” *H.R. 3525*, Washington, D.C., May 14, 2002, www.usa.gov. See also United States General Accounting Office (2002): “Border Security: Implications of Eliminating the Visa Waiver Program,” Report to the Chairman, Subcommittee on National Security, Veterans Affairs, and International Relations, Committee on Government Reform, House of Representatives, November 2002, document reference: *GAO-03-38*, www.gao.gov.

⁸² See Deutscher Bundestag und Bundesrat (2002): “Gesetz zur Bekämpfung des internationalen Terrorismus (Terrorismusbekämpfungsgesetz),” Berlin, January 9, 2002, in: *Bundesgesetzblatt*, Vol. 2002, Part I, No. 3, pp. 361-395, and especially art. 7 thereof. One should note, however,

biometric policy objectives agreed upon by the Justice and Home Affairs ministers of the G8 regime in May 2003,⁸³ the Thessaloniki European Council of June 2003 called for “a coherent approach ... in the EU on biometric identifiers or biometric data, which would result in harmonised solutions for documents for third country nationals, EU citizens’ passports and information systems (VIS and SIS II).”⁸⁴ By September 2003, the Commission had adopted two draft EC Regulations requiring Member States’ authorities to integrate biometric identifiers (including fingerprint templates allowing for database searches) into every visa and residence permit granted to a third country national.⁸⁵ Commission proposals concerning the introduction of biometric identifiers into EU citizens’ passports will most likely be presented by the end of 2003 in order to meet the deadlines unilaterally determined by the U.S. government.⁸⁶

Yet what kind of “background checks” can be performed on the basis of machine-readable biometric data? One of the European Commission’s immediate reactions to the Conservative U.S. administration’s new anti-terrorist political and military agenda was to propose the “possible use of biometric data ... for identifying those suspected of terrorist involvement at an early stage,” a proposal based on the assumption that “Europol, Eurodac and the SIS can also substantially assist in the identification of

that a central database containing the biometric data of all German citizens will *not* be established. For additional critical reading, see the statements documented under the following URL: www.cilip.de/terror/stellung.htm.

⁸³ G8 (2003): *Justice and Home Affairs Ministerial Meeting – Paris, 5 May 2003: Final Official Statement*, www.g8.fr/evian/english/home.html. The G8 group consists of Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States. The EU is participating in the G8 summit meetings via the president of the European Council and the President of the European Commission. For further information on this international regime, see the University of Toronto’s “G8 Information Centre” at www.g7.utoronto.ca.

⁸⁴ European Council (2003): “Presidency Conclusions – Thessaloniki European Council, 19 and 20 June 2003,” www.europa.eu.int, no. 11. The acronym “VIS” stands for the envisioned common European “Visa Information System,” whereas “SIS II” refers to the second generation “Schengen Information System.”

⁸⁵ Commission (2003c): “[Combined] Proposal” [fn. 50]. Cf. also Commission of the European Communities (2003d): “Commission’s proposal on biometric identifiers for visa and residence permit for third country nationals,” Brussels, September 24, 2003, Press Release, document reference: *IP/03/1289*, www.europa.eu.int.

⁸⁶ See *Financial Times Europe* of October 30, 2003, p. 5 (“US and EU move closer on anti-terror plan for passports”); and Bundesministerium des Innern (2003b): “Schily und Ridge stärken deutsch-amerikanische Zusammenarbeit in der Terrorismusbekämpfung,” Berlin, *Press Release* of October 29, 2003, www.bmi.bund.de.

terrorist suspects.”⁸⁷ In other words, the Commission signaled the use of the Eurodac database for fighting terrorism and related police and intelligence purposes before Eurodac had even become operational. Certain Member States’ governments have already taken appropriate unilateral steps.⁸⁸ Referring to a recent proposal by the German delegation to the JHA Council to permit *Europol* unlimited access to the personal data stored in Eurodac, Evelien Brouwer concluded that “most problematic about Eurodac is maybe the fact that the existence of a large database remains an everlasting temptation to enlarge its use for other goals.”⁸⁹ This especially holds true in light of the ongoing “war against terror” led by the Anglo-Saxon alliance.⁹⁰ The agreement between Europol and the U.S.A. on the exchange of personal data, for example, provides federal, state, and even local U.S. authorities with full access to sensitive personal data (such as racial origin, political opinion, and religious belief) processed by Europol – in spite of the comparatively weak U.S.’ data protection

⁸⁷ Commission of the European Communities (2001): “Commission Working Document – The relationship between safeguarding internal security and complying with international protection obligations and instruments,” Brussels, 5 December 2001, *COM (2001) 743 final*, www.europa.eu.int, p. 6. For a genuinely European reading of “9/11” and its political implications, see Cameron, Fraser (2002): “Utilitarian Multilateralism: The Implications of 11 September 2001 for US Foreign Policy,” in: *Politics*, Vol. 22, No. 2, pp. 68-75. See also Lodge, Juliet (2002): “Sustaining Freedom, Security and Justice – From Terrorism to Immigration,” in: *Liverpool Law Review*, Vol. 24, pp. 41-71. This overall development has also been analyzed by Anderson, Malcolm / Joanna Apap (2002): *Changing Conceptions of Security and their Implications for EU Justice and Home Affairs Cooperation*, Brussels: Centre for European Policy Studies, CEPS Policy Brief No. 26 (October 2002), www.ceps.be. For further analyses, see Dubois, D. (2002): “The Attacks of 11 September: EU–US Cooperation Against Terrorism in the Field of Justice and Home Affairs,” in: *European Foreign Affairs Review*, Vol. 7, No. 3, pp. 317-335; Den Boer, Monica (2003): *9/11 and the Europeanisation of Anti-Terrorism Policy: A Critical Assessment*, Paris: Notre Europe, Policy Paper No. 6, 11 September 2003, www.notre-europe.asso.fr/fichiers/Polycypaper6.pdf; and Guild, Elspeth (2003): “International Terrorism and EU Immigration, Asylum and Borders Policy: The Unexpected Victims of 11 September 2001,” in: *European Foreign Affairs Review*, Vol. 8, No. 3, pp. 331-346.

⁸⁸ For example, the German “Bundeskriminalamt” was permitted unlimited access to various national databases such as the “Ausländerzentralregister” (AZR) until January 11, 2007; see Deutscher Bundestag und Bundesrat (2002): “Gesetz zur Bekämpfung des internationalen Terrorismus,” articles 10 (2) and 13 (6). See initially Ständige Konferenz der Innenminister und –senatoren der Länder (2001): *Sammlung der zur Veröffentlichung freigegebenen Beschlüsse der 169. Sitzung der Ständigen Konferenz der Innenminister und –senatoren der Länder am 7./8. November 2001 in Meisdorf*, Berlin: Geschäftsstelle der IMK, November 12, 2001, www1.mi.sachsen-anhalt.de/imk/download/ink2001_nov.pdf.

⁸⁹ Brouwer (2002): “Eurodac,” p. 246 [fn. 1]. On transatlantic exchange of personal data and the role of Europol, see Mitsilegas, Valsamis (2003): “EU-US Cooperation in Criminal Matters Post 9/11: Extradition, Mutual Legal Assistance and the Exchange of Police Data,” forthcoming in: *European Foreign Affairs Review*, Vol. 8, No. 4; and Lavranos, Nikolaos (2003): “Europol and the Fight Against Terrorism,” in: *European Foreign Affairs Review*, Vol. 8, No. 2, pp. 259-275.

⁹⁰ Cf. *BBC News* of January 23, 2003: “Outrage at ‘old Europe’ remarks,” <http://news.bbc.co.uk>; and *CNN World* of January 24, 2003: “‘Old Europe’ hits back at Rumsfeld,” www.cnn.com.

regime.⁹¹ Nevertheless, the Europol-U.S. agreement, signed in December 2002, was presented to national parliaments in Europe as a *fait accompli*.⁹²

6. Eurodac and Informational Self-Determination

One of the sensitive political issues surrounding biometric identification technologies in general and the Eurodac project in particular is the problem of *data protection*. Fingerprint templates stored in Eurodac must be qualified as personal data because all entries in the Central Unit are equipped with a reference number, which allows the “uploading” Member State to trace back these templates to the personal data of an individual.⁹³

Against this background, the processing of fingerprint templates within Eurodac falls under the provisions of the Community *Data Protection Directive* of 1995 and the *Data Protection Regulation* of 2000 on the establishment of an independent supervisory authority, the *European Data Protection Supervisor*.⁹⁴ Fundamental principles of modern data protection were laid down in article 6 (1) of Directive 95/46/EC mentioned above. These principles include *inter alia* that personal data must be “collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes.” Beyond that, the quality and quantity of these data must be “adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed.” All administrative activities and legislative measures of the European Community and/or its

⁹¹ See Council of the European Union (2002b): “Note from Europol to the Article 36 Committee/COREPER/Council: Draft supplemental agreement between the United States of America and the European Police Office on the exchange of personal data and related information,” Brussels, November 4, 2002, document reference: 13689/02 LIMITE EUROPOL 82, <http://register.consilium.eu.int>.

⁹² See Lavranos (2003): “Europol and the Fight Against Terrorism,” p. 264 [fn. 89].

⁹³ See Van der Ploeg (1999): “The Illegal Body,” p. 299 [fn. 1].

⁹⁴ See European Parliament and Council of the European Union (1995): “Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data,” in: *Official Journal of the European Communities*, Vol. L 281 of November 23, 1995, p. 31. On the history of the implementation of this Directive in the Member States, see www.europa.eu.int/comm/internal_market/en/dataprot/law/impl.htm. Cf. also European Parliament / Council of the European Union (2000): “Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data,” in: *Official Journal of the European Communities* of January 12, 2001, Vol. L 8, pp. 1-22. The “European Data Protection Supervisor” has not yet been appointed.

Member States (including Eurodac) must, as a matter of legal obligation, comply with these high protection standards.⁹⁵

To be sure, the public and academic debate on the impact of biometrics on effective data protection is still in its infancy.⁹⁶ Probably not aware of the Eurodac project in Europe and long before the terrorist attacks of September 11, 2001, Ann Cavoukian of Toronto pointed to a typical “function creep” of new technologies such as biometrics from one issue area into another. According to this independent Canadian data protection supervisor, a functional “spill-over” could take place as follows: “The first applications of biometric technologies are for very limited, clearly specific and, for the most part, sensible purposes. ... But the greatest danger would be the expansion of such use for well-meaning purposes to other that went beyond the original purposes and failed to address the limitations of the original collection activity.”⁹⁷ The extension of an initially asylum-centered biometric database like Eurodac first to irregular border-crossing and illegal residence, and subsequently, at least as far as current executive ambitions are concerned, to general police and counter-terrorism purposes is a point in case.

With a comparative view to the draft Eurodac Convention of 1998 and its Community successor of 2000, Steve Peers noted that “the provisions on data protection, data security and rights of the data subject have, however, been improved as compared to the intergovernmental versions.”⁹⁸ This may very well hold true (see chapter VI of the Regulation). As laid out above in relation to the Europol-U.S.A. agreement of December 2002, however, this does not rule out that the Eurodac database will be opened up for police and intelligence purposes in the near future.

⁹⁵ For an example of relatively “progressive” national data protection legislation implementing Directive 95/46/EC, see the German “Bundesdatenschutzgesetz” (BDSG) of 2001 and especially §3a thereof; www.bfd.bund.de and www.datenschutz.de. For a comparative view to data protection within Schengen and as regards the SIS, see Gemeinsame Kontrollinstanz Schengen (2002): *Fünfter Jahresbericht (März 2000 - Dezember 2001)*, Brussels, www.bfd.bund.de/information/schengen0001.pdf.

⁹⁶ For a comprehensive review of the debate so far, see Bäumler, Helmut / Lukas Gundermann / Thomas Probst (2001): *Stand der nationalen und internationalen Diskussion zum Thema Datenschutz bei biometrischen Systemen*, Kiel: Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein, www.datenschutzzentrum.de.

⁹⁷ Cavoukian (1999): *Biometrics and Policing*, p. 14 [fn. 57].

⁹⁸ Peers (2001): “Key Legislative Developments,” p. 236 [fn. 1].

6.1 Eurodac and the Question of Proportionality

Irrespective of such a likely scenario, Eurodac already poses a great challenge to the protection of personal data in the European Community. For example, Evelien Brouwer claims that the systematic fingerprinting of both irregular border-crossers and illegal residents can hardly be based on the Dublin Convention.⁹⁹ This administrative practice seems to collide with the principle of proportionality indeed since the sole purpose of the Eurodac project is to facilitate the effective application of the Dublin Convention of 1990 and/or the “Dublin II” Regulation of 2003. From a purely formal point of view, the supranational database’s *only* aim is thus to check whether the alien in question has already applied for asylum in another Member State (in order to prevent “asylum shopping” in the EU) and/or to identify and unambiguously prove the applicant’s point of entry into the *Area of Freedom, Security and Justice* (with a view to the “authorization principle”).

In light of the principles of modern data protection laid out above, the “Dublin II”-related proportionality of systematically fingerprinting illegal residents may thus be questioned. If illegally resident third country nationals have never lodged an application for asylum in any Member State and do not intend to do so, there is no “specified, explicit and legitimate” reason why their biometric data should be collected and subsequently compared with those stored in the Central Unit. In other words, the aim of determining Member States’ responsibilities for processing asylum claims does not justify the fingerprinting of illegal residents within the *AFSJ* - a distinct social group that may very well be larger than the number of people seeking asylum in the EU.¹⁰⁰

As regards the systematic and obligatory fingerprinting of would-be applicants for asylum apprehended while crossing the external borders of “Schengenland” and/or the EU in an irregular fashion, the question whether this treatment may be qualified as proportionate is slightly more difficult to answer. The Dublin Convention system is

⁹⁹ Brouwer (2002): “Eurodac,” p. 236 [fn. 1].

¹⁰⁰ For indications of the number of illegal residents in the EU based on regularization data, see De Bruycker, Philippe (ed.) (2000): *Regularisations of Illegal Immigrants in the European Union*, Brussels: Bruylant. This study was compiled by the “Academic network for legal studies on immigration and asylum in Europe,” a network financially supported by the Commission’s “Odysseus” program.

clearly based on the “authorization principle,” creating a substantive link between European asylum policy and external border control. The “authorization principle” thus ultimately frames the asylum problem along immigration control parameters.

Against this background, the *Immigration Law Practitioners’ Association (ILPA)* and the *Migration Policy Group (MPG)* suggested a fairly simple rule for determining state responsibility within a future “Dublin II” Regulation or Directive based on article 63 (1) EC. ILPA and MPG recommended that “an application for recognition of the right to asylum shall be examined by the first Member State with which such an application is lodged.”¹⁰¹ By these means, the systematic fingerprinting of irregular border crossers under the Eurodac Regulation could have been avoided. Likewise, the *European Council for Refugees and Exiles (ECRE)*, representing the NGO sector vis-à-vis the EU institutions, warned that the “Dublin II” Regulation would be “based on the very same flawed principles [as its predecessor, the Dublin Convention], i.e. that responsibility for examining an asylum application lies with the Member State bearing responsibility for the asylum applicant’s entry to or stay in the European Union.”¹⁰²

The JHA Council obviously did not share this critical approach. Instead, the Council opted for the enmeshment of asylum and immigration control policies and for the administrative enforcement of the “authorization principle” by all possible technological means, including biometrics. The same policy had been introduced in Germany about a decade earlier – allegedly in order to prevent “asylum shopping” between the German “Länder” (see section 4. above). Since the border guards of a given Member State cannot know in advance whether a third country national apprehended while trying to cross the external borders in an irregular fashion will eventually lodge an application for asylum in another Member State, these authorities

¹⁰¹ ILPA / MPG (2000): “Proposed Directive 2000/01a on Determination of Responsibility for Applications for Asylum,” in: *The Amsterdam Proposals. The ILPA/MPG Proposed Directives on Immigration and Asylum*, London and Brussels, pp. 55-64, here: p. 58 (article 9).

¹⁰² European Council for Refugees and Exiles (2001): *The Promise of Protection: Progress Towards a European Asylum Policy since the Tampere Summit 1999*, London and Brussels: ECRE Secretariat and ECRE European Union Office, November 2001, www.ecre.org, p. 10. See also Amnesty International (2000): *A Common Asylum System for the EU: The International Regime for the Protection of Refugees at Stake?* Brussels: Amnesty International EU Office, December 2000; and Amnesty International (2002): *Missing: A Common Asylum Policy that is Ambitious, Coherent and Protection-centred - Amnesty International Open Letter to the Justice and Home Affairs Council, 28-29 November 2002*, Brussels: Amnesty International EU Office, November 2002, www.amnesty-eu.org.

are now obliged under Community law to collect this person's fingerprints and to submit his or her templates to the central European database. The same procedures obviously also apply to "normal" asylum seekers and national police forces. As we will find out shortly, these systematically applied administrative practices not only violate the principle of proportionality. They also tend to undermine Member States' obligations for the protection of human rights, namely the right to privacy and informational self-determination.

6.2 Informational Self-determination as a Constitutional Safeguard of Freedom and Democracy

By its very nature, the Eurodac system affects the fundamental right to "informational self-determination" – a wording employed by the highest German constitutional court in its famous "census judgment" of December 15, 1983.¹⁰³ This judgment occurred in the political context of large-scale civil disobedience against systematic population control in West Germany and West Berlin during the early 1980's.¹⁰⁴ In the contemporary era of the so-called "information society," the effective protection of privacy rights becomes more important than ever. Building a bridge between the positive constitutional vision of a democracy of free and equal citizens and the negative constitutional requirement of effective data protection, the "Bundesverfassungsgericht" reasoned as follows:

The right to informational self-determination is incompatible with a social and legal order in which citizens cannot know any more who knows what, when, and under which circumstances about them. Anyone who is unsure whether deviant behaviour will be permanently stored, used, or circulated, will shy away from such deviant behaviour. ... Informational self-determination is a basic functional requirement of a free and democratic social order based on the ability of its citizens to take action and participate.¹⁰⁵

¹⁰³ Bundesverfassungsgericht (1983): "Urteil des Ersten Senats vom 15. Dezember 1983 auf die mündliche Verhandlung vom 18. und 19. Oktober 1983 – 1 BvR 209, 269, 362, 420, 440, 484/83 ('Volkszählungsurteil')," Karlsruhe: BVerfG, document reference: *BverfGE* 65, 1, unofficial reproduction at www.oefre.unibe.ch/law/dfr/bv065001.html.

¹⁰⁴ As regards the position of the current "Red-Green" federal government in Germany on the issue of data protection, see Bundesregierung (1999): "Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Petra Pau und der Fraktion der PDS (Drucksache 14/1447) – Die neue Bundesregierung und der Datenschutz," Berlin: Deutscher Bundestag, 14. Wahlperiode, document reference: *Drucksache 14/1527* of September 1, 1999, www.bundestag.de.

¹⁰⁵ Bundesverfassungsgericht (1983): "Volkszählungsurteil," no. 154 [fn. 103]; translation JPA.

The highest German constitutional court, whose judgments are binding for all other state organs, further argued that the right to informational self-determination flows directly from the human rights laid down in article 2 (1) GG [“freie Entfaltung der Persönlichkeit”] in combination with article 1 (1) GG [“Menschenwürde”]. *De jure*, no derogation from this absolute constitutional guarantee is possible. But what happens if such derogations nevertheless occur in administrative practice?

In its later jurisprudence drawing on the concept of informational self-determination in the context of novel identification technologies, the “Bundesverfassungsgericht” consequently ruled out the constitutionality of systematic “DNA-fingerprinting” of convicted criminals, drug dealers, child abusers, and other “unwanted elements” on exactly the same grounds.¹⁰⁶ Since “DNA-fingerprinting” and biometric fingerprinting technologies are certainly comparable in terms of the central processing and storage of individual body characteristics (similar to genetic information, raw fingerprint data may, under certain conditions, reveal highly sensitive information about an individual’s body size, genetic disposition, state of health, etc.),¹⁰⁷ one may reasonably conclude that equally restrictive normative standards and human rights safeguards should be applied to the Eurodac project.¹⁰⁸ To be sure, these kinds of objections have not prevented the spread of national DNA databases across Europe as of the mid-1990’s, starting in the United Kingdom in 1995.¹⁰⁹ In fact, most Member States’ police forces have good reasons for envying their British colleagues. In March 2003, for example, following persistent police lobbying led by the deputy commissioner of the Metropolitan police, the UK Home Office minister announced far-reaching amendments to the criminal justice bill

¹⁰⁶ BVerfG, 2 BvR 1841/00 of March 15, 2001, and BVerfG, 2 BvR 429/01 of December 20, 2001, www.bverfg.de.

¹⁰⁷ Cf. Hamburgischer Datenschutzbeauftragter (2002): 18. *Tätigkeitsbericht des Hamburgischen Datenschutzbeauftragten 2000/2001*, Hamburg, February 2002, www.hamburg.datenschutz.de, pp. 17-18.

¹⁰⁸ Independent German data protection supervisors summarize this argument as follows: “Die flächendeckende Erfassung einer bestimmten Gruppe in einem staatlichen Verfahren wirft im Hinblick auf die oben dargelegten grundrechtlichen Positionen, die auch den Asylsuchenden und Ausländern zustehen, erhebliche Bedenken auf. Gerade das als Würdeverstoß diskutierte Szenario einer umfassenden staatlichen Registrierung der Persönlichkeit der Betroffenen scheint hier ein ganzes Stück näher gerückt zu sein.“ Bäumlner *et al.* (2001): *Stand der nationalen und internationalen Diskussion*, p. 43 [fn. 96].

¹⁰⁹ See Nogala, Detlef (1998): “Der ‘genetische Fingerabdruck’ – eine erstaunliche Karriere,” in: *Bürgerrechte und Polizei/CILIP*, Vol. 61, No. 3/1998, pp. 1-8, www.cilip.de/ausgabe/61/dna.htm.

allowing for the systematic collection and storage of DNA samples of arrested suspects. The UK's DNA database already contains approximately 1.8 million entries.¹¹⁰

6.3 *The Right to Privacy in European and International Law*

As far as data protection-related human rights provisions in the emerging *Area of Justice* are concerned, article 8 of the *Charter of Fundamental Rights of the EU* holds that “everyone has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law.” Assuming that most third country nationals would not voluntarily consent to the systematic collection, central processing and storage of their biometric data (especially in regard to third country nationals fleeing from political persecution who fear nothing more than that their personal data will ultimately fall into the hands of their former oppressors), the decisive question in terms of Eurodac is whether the “authorization principle,” i.e. the political foundation of the entire Dublin Convention system, may be interpreted as a sufficiently “legitimate” aim in the sense of article 8 of the Charter. Under the given circumstances, one may doubt whether an affirmative assessment is possible: the systematic collection, central processing and storage of the biometric data of asylum seekers and other third country nationals in the *AFSJ* merely serves the purpose of determining which Member State is responsible for considering applications for asylum. In other words, Eurodac is only required for the effective enforcement of some sort of normatively clearly subordinate inter-administrative arrangement, namely the Dublin Convention and/or the “Dublin II” Regulation.

The EU Charter is not yet legally binding. For the time being, we must therefore look for appropriate data protection provisions within the Council of Europe's *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*.¹¹¹ Very similar to the wording of article 12 of the United Nations' *Universal Declaration of Human Rights* of 1948, article 8 ECHR specifies the

¹¹⁰ Cf. *Financial Times* (UK edition), March 27, 2003, p. 8.

¹¹¹ Note that the member countries of the Council of Europe have already passed more specific legal instruments such as the “Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data” of 1981; <http://conventions.coe.int> (ETS no. 108).

right to privacy as follows: “Everyone has the right to respect for his private and family life, his home and his correspondence.” It is needless to say that this human right is also a right of asylum seekers and “illegal” immigrants.

In its “Hatton” judgment of 2001, the European Court of Human Rights underlined the importance of paying due respect to the principle of proportionality while evaluating the potentially damaging impact of article 8 ECHR-related projects such as Eurodac:

[The Court] considers that States are required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best possible solution which will, in reality, strike the right balance should precede the relevant project.¹¹²

It appears that the Court’s requirements have not been met in case of the Eurodac Regulation. All relevant feasibility studies and intergovernmental negotiations on the substance of the Eurodac project were worked out behind closed doors by members of the executive without parliamentary or judicial control. Irrespective of all power-related considerations, the question which Member State should be held responsible for considering asylum claims lodged within the *AFSJ* could have easily been answered without referring to the “authorization principle” and biometric identification procedures imposed upon all asylum seekers and other third country nationals.

¹¹² European Court of Human Rights (2001): *Judgment of the Court in the Case of Hatton and Others vs. the United Kingdom (Application no. 36022/97)*, Strasbourg, October 2, 2001, no. 97, www.echr.coe.int. This parallel was first underlined by Brouwer (2002): “Eurodac,” pp. 244-245 [fn. 1].

7. Conclusion

The introduction of biometric human identification technology, its combination with IT, and its Community-law based imposition on asylum seekers and other third country nationals have left a lasting imprint on the face of supranational governance in Europe. Executive solutions to perceived security problems have taken precedence over the democratic control of police practices.¹¹³ While it is perfectly legitimate that executives have interests of their own, it is certainly not compatible with the principles of democratic governance that executive actors autonomously define the “common good” and the substantive profile of public laws. This would undermine the very foundations of the *Area of Freedom, Security and Justice*.

As we have seen in regard to biometric “citizen cards” regulating the distribution of social benefits, the introduction of biometric identifiers into EU citizens’ passports, etc., there is a clear tendency to extend these kinds of high-tech controls to other social groups. In the eyes of the police and counter-terrorism agencies taking advantage of new political opportunity structures on Community level, all of us are worthy of suspicion and distrust, and are potentially deviant. As John Crowley adequately concludes, “the ultimate model is one of a fortress without walls. Perhaps no one would explicitly defend such a thing, and it is certainly in many ways deeply uncomfortable: the society of perfect surveillance, the fortress without walls par excellence, is a recurrent science-fiction nightmare.”¹¹⁴ In the post-September 11th era, the combination of IT and biometrics may very well turn this fiction into reality.

¹¹³ For further reflections on this motif, see Ocqueteau, Frédéric (1998): “Freiheit oder Sicherheit? Demokratische Kontrolle polizeilicher Überwachung – ein Beitrag aus französischer Sicht,” in: *Bürgerrechte und Polizei/CILIP*, Vol. 61, No. 3, www.cilip.de/ausgabe/61/freiheit.htm.

¹¹⁴ Crowley, John (2001): “Differential Free Movement and the Sociology of the ‘Internal Border,’” in: Guild, Elspeth / Carol Harlow (eds.), *Implementing Amsterdam. Immigration and Asylum Rights in EC Law*, Oxford and Portland, Oregon: Hart, pp. 13-33, here: p. 33. See also Foucault, Michel (1977): *Discipline and Punish: The Birth of the Prison*, translated from the French original (“Surveiller et punir”) by Alan Sheridan, New York: Vintage.

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